

SURVEY OF INTERSTATE RECOGNITION OF QUASI-MARITAL STATUSES

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INTRODUCTION

The question of legal recognition of same-sex unions consumes an ever-increasing amount of attention in the legal literature and case law. Much of this attention will now be directed to the novel decision of the Massachusetts Supreme Judicial Court in announcing a new definition of marriage: “the voluntary union of two persons as spouses, to the exclusion of all others.”¹ There is, however, another important issue receiving less attention, but which may be significant in a number of future cases: the effect that states will give to quasi-marital statuses created by other states.

There is a long-standing practice of interstate marriage recognition; a marriage valid where contracted will be treated as valid everywhere. However, there is no similar practice of recognizing statuses created to provide the legal rights of marriage to same-sex couples under a different name.² A quasi-marital status is a legal category that specifically disassociates itself from the legal concept of marriage but which has the same, or largely similar, effect as a marriage. Courts hearing a claim for recognition of a quasi-marital status contracted in another state are thus often faced with a matter of first impression.

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1. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

2. See generally Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996) (collecting and analyzing information on the marriage validation statutes, marriage evasion statutes, choice-of-law theory, prior marriage recognition cases, and full faith and credit clauses from thirty-two states and concluding that the public policy exception is rarely used and that where marriage evasion statutes exist, many courts are not consistent in using those statutes).

The impetus of this development was a Vermont Supreme Court decision issued in 1999.³ In that decision, the court divined a “principle of inclusion” in the state constitution, which was violated by the failure of the state to provide the benefits of marriage to same-sex couples.⁴ Reserving the power to decide whether the legislature was sufficiently responsive to the court’s concerns, the decision included an order that the Vermont legislature extend marriage benefits to same-sex couples in some way.⁵ In response, the legislature created a new status of civil unions defined as “two eligible persons [who] have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.”⁶ To be eligible, parties must “[b]e of the same sex and therefore excluded from the marriage laws of this state.”⁷ Those who contract a civil union “shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage” and “shall be included in any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship, as those terms are used throughout the law.”⁸

The Vermont legislature rejected a proposal to include a residency requirement for couples contracting civil unions.⁹ As a result, when the law went into effect in July 2000,¹⁰ many of the people contracting civil unions were from out-of-state. The Vermont Secretary of State reports that in 2002, 1707 civil unions were contracted in the state,¹¹ ninety percent of which were contracted by couples from outside of Vermont (up three percent from 2001).¹² These couples represent

3. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

4. *Id.* at 875.

5. *Id.* at 886-87.

6. VT. STAT. ANN. tit. 15, § 1201 (2002).

7. VT. STAT. ANN. tit. 15, § 1202 (2002).

8. VT. STAT. ANN. tit. 15, § 1204(a)-(b) (2002).

9. See William C. Duncan, *The Many Questions of Civil Unions: An Introduction to a Symposium Addressing the Impact of Civil Unions*, 11 WIDENER J. PUB. L. 361, 367 (2002) (summarizing debate and proposals from the Vermont House of Representatives).

10. *Id.* at 368.

11. Vermont Department of Health, State of Vermont 2002 Vital Statistics, *Civil Unions* (2002), <http://www.healthyvermonters.info/hs/stats/VSB2002/toc.shtml> (on file with the Ave Maria Law Review).

12. *Id.*

forth-seven states, as well as Washington, D.C. and Canada.¹³ As of June 25, 2004, there have been 6945 civil unions contracted in Vermont, with only 998 of these occurring between Vermont residents (fourteen percent).¹⁴

Although the Vermont law has been the focus of the developments discussed in this article, other states have enacted significant provisions that are analogous to Vermont civil unions. For instance, the California legislature recently created a new status of domestic partners defined as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring” which must involve persons of the same-sex or persons over sixty-two.¹⁵ California law also provides:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.¹⁶

The New Jersey legislature also created a domestic partnership statute. This law allows same-sex couples older than eighteen years old and opposite-sex couples older than sixty-two years old to register as partners.¹⁷ The legislative findings of the New Jersey bill say:

All persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including: statutory protection through the “Law Against Discrimination,” . . . ; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption

13. Vermont Department of Health, State of Vermont 2002 Vital Statistics, *Table I-1: 2002 Vermont Civil Unions* (2002), <http://www.healthyvermonters.info/hs/stats/VSB2002/toc.shtml> (on file with the Ave Maria Law Review).

14. E-mail from Richard McCoy, Vermont Secretary of State’s Office, to Margaret Nell, Assistant to William C. Duncan (July 7, 2004, 5:02 MST) (on file with the Ave Maria Law Review).

15. CAL. FAM. CODE § 297 (West 2004).

16. CAL. FAM. CODE § 297.5(a) (West Supp. 2005).

17. N.J. STAT. ANN. § 26:8A-4(b)(5), 4(b)(7) (West Supp. 2004).

from the personal income tax and the transfer inheritance tax on the same basis as a spouse.¹⁸

Given the creation of quasi-marital statuses in various jurisdictions and the mobile nature of Americans, the effect given to these statuses will be an important issue in future cases. Couples contracting a status such as a civil union or domestic partnership could find themselves in jurisdictions that provide no such status; thus the effect of the status in the new state will inevitably become a legal issue. The resolution of these cases will be important not only to settle the matter at hand, but also for what the disposition may mean for marriage recognition and state family policy.

This article will discuss the recognition of same-sex unions in jurisdictions other than those in which they are contracted. To do so, it will first describe the handful of cases that have addressed the effect of Vermont civil unions in other states. (There is not yet any case law related to the statuses created by California or New Jersey.) The article will then comment on state statutes and constitutional amendments that have addressed the effect of out-of-state quasi-marital statuses in those states. Section III will then analyze questions related to the recognition of Vermont civil unions and domestic partnership statuses recognized in other jurisdictions.

I. LITIGATION

The reported cases weighing the effect a state will give to a quasi-marital status contracted in another state are mixed with prominent examples of non-recognition, full recognition or partial recognition. These cases are summarized here.

The first case to involve the extraterritorial effect of a Vermont civil union arose in Georgia.¹⁹ That case centered on a consent decree following divorce. In the decree, the parties agreed that neither party could exercise visitation "during any time the party being visited cohabited with or had overnight stays with any adult to whom that party was not legally married or related within the second degree."²⁰ Two days after Vermont's civil unions law went into effect, one of the parties contracted a civil union with her same-sex partner.²¹

18. N.J. STAT. ANN. § 26:8A-2(d) (West Supp. 2004).

19. *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

20. *Id.* at 48.

21. *Id.*

Subsequently, the ex-husband filed a motion for contempt against his ex-wife alleging she had exercised visitation while living with her partner.²² The ex-wife defended herself by arguing that her civil union satisfied the decree's requirement that she only exercise visitation while living with someone to whom she is married.²³ The court of appeals rejected this argument, concluding that a civil union was not a marriage based on the legislative history of the Vermont statute.²⁴ The court added that "even if" Vermont had redefined marriage to include same-sex couples, such a marriage would not be recognized in Georgia because of an express statutory prohibition in state law.²⁵ Further, the court cited to the federal Defense of Marriage Act²⁶ to support the proposition that Georgia courts are not required to recognize same-sex marriages from other states.²⁷ The Georgia case is probably the most significant example of non-recognition of a quasi-marital status.

A similar example is provided in a Connecticut case. In that case, one of the parties to a Vermont civil union petitioned a Connecticut court for dissolution of the union; the other partner did not file an appearance.²⁸ The trial court dismissed the case for lack of subject matter jurisdiction.²⁹ On appeal, the plaintiff argued that the trial court could exercise jurisdiction under a statutory provision granting jurisdiction for matters of family relations.³⁰ The court of appeals noted the lack of explicit statutory authorization for treating a civil union as a "family matter" for jurisdictional purposes as well as the lack of any legislative history supporting that proposition.³¹ The court further found that Connecticut public policy does not favor recognition of civil unions.³²

22. *Id.*

23. *Id.*

24. *Id.* at 48-49.

25. *Id.* at 49.

26. 28 U.S.C. § 1738C (2000).

27. *Burns*, 560 S.E.2d at 49.

28. *Rosengarten v. Downes*, 802 A.2d 170, 172-73 (Conn. App. Ct. 2002); see also Diana G. McShea, Casenote, *Rosengarten v. Downes: Connecticut Refuses to Dissolve Vermont Civil Union*, 22 QUINNIPIAC L. REV. 523 (2004).

29. *Rosengarten*, 802 A.2d at 172.

30. *Id.*

31. *Id.* at 177-79.

32. *Id.* at 177.

A decision taking the contrary position is pending on appeal in New York.³³ The decision arose from an action for wrongful death and medical malpractice brought by one member of a civil union whose partner had died while being treated in a hospital.³⁴ The court limited its holding to whether the plaintiff could be “considered a spouse for purposes of the wrongful death statute.”³⁵ The court held that New York public policy did not preclude recognition of the Vermont civil union for this purpose, noting (1) the absence of a specific statutory prohibition on same-sex marriage recognition, (2) case law recognizing same-sex couples in other contexts, (3) judicial recognition of second-parent adoptions involving same-sex couples, (4) the provision of benefits to same-sex partners of 9/11 victims, and (5) New York City’s domestic partner registry.³⁶ The court then noted that a Vermont civil union “is distinguishable from marriage only in title.”³⁷ Because the court decided that “[s]pouse is a gender neutral word” which “is applied to plaintiff under the Vermont civil union,” it concluded that the plaintiff is a “spouse” for purposes of the wrongful death law.³⁸ The court added that a “civil union is indistinguishable for societal purposes from the nuclear family and marriage.”³⁹ New York thus provides an example of partial recognition of a non-marital status.

The most recent case discussing the out-of-state effect of a Vermont civil union arose in Massachusetts.⁴⁰ It involved two male residents of Massachusetts and Arkansas who contracted a civil union in Vermont in 2002.⁴¹ Four days after entering into a civil union, the parties separated and a few months later the plaintiff sought a decree of dissolution in a Massachusetts Superior Court; the defendant did not make an appearance in court.⁴² In a memorandum opinion, the trial court dissolved the union. The opinion noted that the civil union status “confers the couple with the same rights, and obligations as

33. *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003), *appeal pending*, *Langan v. St. Vincent’s Hosp.*, No. 2003-04702 (N.Y. App. Div. filed Apr. 10, 2003).

34. *Id.* at 412.

35. *Id.* at 415.

36. *Id.* at 415-16.

37. *Id.* at 417.

38. *Id.* at 420.

39. *Id.* at 421.

40. *Salucco v. Alldredge*, 17 Mass. L. Rptr. 498, No. 02E0087GC1, 2004 WL 864459, at *1 (Super. Ct. Mar. 19, 2004).

41. *Id.*

42. *Id.*

created by marriage and provides the same legal standards and remedies for dissolution."⁴³ The court recognized that "neither party has any contact" with Vermont and therefore could not obtain a dissolution there or a divorce anywhere else since, although "the substantial equivalent of marriage," a civil union is not a marriage.⁴⁴ The plaintiff put forward two theories for the Massachusetts court to assert jurisdiction to dissolve the union: a constitutional claim based on the full faith and credit clause and an assertion that the court's equity jurisdiction gives it authority to grant a dissolution.⁴⁵ The court concluded that since the parties were not married and Massachusetts law does not provide for civil union dissolution "the application of the full faith and credit clause is not certain in this action."⁴⁶ The court then noted recent decisions of the Massachusetts Supreme Judicial Court and concluded that "[r]easoning follows therefrom that same-sex couples who enter into legal relationships should also be allowed to dissolve their legal relationships."⁴⁷ Relying on these precedents, the court concluded that the parties "should be afforded all of the responsibilities and rights that flow from a civil union, including a legal remedy for the dissolution of their legal relationship."⁴⁸ The court applied the standard for analyzing separation agreements for married couples to the parties.⁴⁹ So far, this case is the only example of full recognition of a quasi-marital status.

Future cases are likely to fall into these general categories for recognition.

II. STATUTES AND CONSTITUTIONAL PROVISIONS

Current statutes and constitutional provisions also address the effect of quasi-marital statuses in other states. Like the reported cases surveyed above, they take a mixed approach to recognition but are more appropriately divided into provisions that prevent recognition and those that allow recognition.

43. *Id.* at *2 (citing VT. STAT. ANN. tit. 15, § 1206 (2002)).

44. *Id.*

45. *Id.*

46. *Id.* at *3.

47. *Id.* at *4 (following *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004)).

48. *Id.*

49. *Id.*

For obvious reasons, prior to the creation of civil unions in Vermont, no state had enacted legislation addressing interstate recognition of quasi-marital statuses. However, at least two statutes enacted to address interstate recognition of same-sex marriages included language that might be applicable to such statuses. Alaska's law provides that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."⁵⁰ Thus, the provision could be read to prohibit the recognition of a relationship that provides marital benefits under a different name. Florida's law provides that not only same-sex marriages but also "relationships between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state."⁵¹ The law further specifies that the state "may not give effect to any public act, record, or judicial proceeding of any state . . . respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship."⁵² For the Florida statute to apply to Vermont civil unions, the language "relationships between persons of the same sex which are treated as marriages in any jurisdiction" would have to be construed to include Vermont civil unions by arguing that the equivalence between marriage and civil unions amounts to treating the unions as marriages in Vermont.

In the wake of the civil unions law and the heavy influx of non-Vermonters into the state to take advantage of the law, a number of states added recognition provisions to their laws. Two states did so as part of bills addressing same-sex marriage recognition. Texas law, for instance, specifically forbids recognition of "civil unions," which are defined as "any relationship status other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabiting persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage."⁵³ Ohio law does not use specific terminology but precludes recognition of any other state's law that "extends the specific benefits of legal marriage to non-marital relationships."⁵⁴

Two other states enacted stand-alone provisions to address out-of-state marriage-like laws. Utah's law provides, "this state will not

50. ALASKA STAT. § 25.05.013 (Michie 2004).

51. FLA. STAT. ANN. § 741.212(1) (West Supp. 2005).

52. FLA. STAT. ANN. § 741.212(2) (West Supp. 2005).

53. TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004-2005).

54. 2004 Ohio Legis. Serv. 61 (Banks-Baldwin).

recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.”⁵⁵ The law goes on to specify that it does not “impair[] any contract or other rights, benefits, or duties that are enforceable independently of this section.”⁵⁶ Virginia’s law mentions civil unions and creates a new term, “partnership contract,” and provides that either status

between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.⁵⁷

Also in response to Vermont’s civil unions law, one state amended its state constitution to address, in addition to marriage recognition, recognition of quasi-marital statuses. The Nebraska Constitution prohibits recognition of “civil union[s], domestic partnership[s], or other similar same-sex relationship[s].”⁵⁸ In the spate of state constitutional amendments addressing the creation of same-sex marriage in Massachusetts, other states have addressed this issue. The Utah amendment prevents recognition of a “domestic union” as a marriage and prohibits giving it “the same or substantially equivalent legal effect” as a marriage.⁵⁹ Kentucky and Wisconsin have amendments with identical language that prohibit recognition of a “legal status identical or substantially similar” to marriage.⁶⁰ The Louisiana amendment provides: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”⁶¹ The Oklahoma amendment says that neither the state constitution “nor *any other provision of law* shall be construed to require that marital status or *the legal incidents*

55. UTAH CODE ANN. § 30-1-4.1 (Supp. 2004).

56. *Id.*

57. VA. CODE ANN. § 20-45.3 (Michie 2004).

58. NEB. CONST. art. I, § 29, *invalidated by* Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (holding that the ban on civil unions was overly broad and in violation of the United States Constitution’s guarantee of equal protection).

59. UTAH CONST. art. I, § 29.

60. KY. CONST. § 233a; 2003 Wis. A.J.R. 66 (proposed constitutional amendment).

61. LA. CONST. art. XII, § 15.

thereof be conferred upon unmarried couples or groups.”⁶² If the reference to “other provisions of law” includes conflicts law, it could be argued that this provision prohibits recognition of out-of-state quasi-marital statuses.

Two states have specific recognition provisions that take a markedly different approach. Interestingly, both were enacted as part of creating quasi-marital statuses in those states. The New Jersey domestic partnership law provides that a “domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State.”⁶³ California’s approach is to treat quasi-marital statuses as domestic partnerships:

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.⁶⁴

Thus, the statutory picture is dominated by provisions preventing recognition of quasi-marital statuses. However, there are some important exceptions that suggest that the future of the recognition question will depend largely on the state in which a claim for recognition is brought.

III. ANALYSIS

The creation of quasi-marital statuses and the resulting litigation and statutory enactments raise a number of important questions that are as yet unsettled.

A. *Effect in States Without Specific Recognition Provisions*

An obvious question raised by the cases and statutes described above is whether states without specific provisions barring recognition of civil unions or similar statuses will have to recognize them. As we have seen, the Georgia Court of Appeals concluded that

62. OKLA. CONST. art. II, § 35 (emphasis added).

63. N.J. STAT. ANN. § 26:8A-6(c) (West Supp. 2004).

64. CAL. FAM. CODE § 299.2 (West 2004).

the answer is “no” for that state.⁶⁵ Similarly, an Alabama attorney general opinion issued before Vermont’s civil union law went into effect reached the same conclusion.⁶⁶ The opinion was addressed to the question of whether Alabama would have to recognize a Vermont civil union under either state or federal law.⁶⁷ The opinion examined the Full Faith and Credit Clause and noted the recognition of a public policy exception to the general principle of recognition in United States Supreme Court jurisprudence.⁶⁸ Relying on the federal Defense of Marriage Act (“DOMA”) and a specific statutory non-recognition policy, the opinion concluded that a same-sex “marriage” would not have to be recognized “whether that relationship were legally styled a ‘marriage,’ a ‘civil union,’ or a ‘domestic partnership.’”⁶⁹ The opinion also noted that the purpose of the Vermont statute (to provide same-sex couples the benefits of marriage) “is directly contrary to the purposes of the Alabama Marriage Protection Act, which was intended to conserve the legal status, benefits and protections of marriage for heterosexual couples.”⁷⁰ It further argues that the civil unions law “treat[s] a homosexual civil-union relationship ‘as a marriage’ in all respects but name” and, thus DOMA would prevent Alabama being required to recognize it even in the absence of a specific statutory policy.⁷¹ A later Illinois attorney general opinion addressed the same question.⁷² It also noted the Supreme Court’s public policy exception to recognition of out-of-state law.⁷³ The opinion relied on the second sentence of DOMA and Illinois law prohibiting recognition of same-sex marriages.⁷⁴ The opinion characterized civil unions as “clearly a relationship between persons of the same sex that is treated as a marriage under the laws of that State.”⁷⁵ It also concluded that the “difference between a civil union in Vermont and a same-sex marriage, however, is merely a matter of

65. *See supra* notes 19-27 and accompanying text.

66. *Marriages-Marriage Licenses*, Op. Ala. Att’y Gen. No. 129 (Apr. 20, 2000).

67. *Id.* at 1-2.

68. *Id.* at 6.

69. *Id.* at 11.

70. *Id.* at 11 n.1.

71. *Id.* at 12.

72. *Recognition of Vermont Same-Sex Civil Unions by Illinois*, Op. Ill. Att’y Gen. No. 00-017 (Dec. 29, 2000).

73. *Id.* at 4.

74. *Id.* at 5-9.

75. *Id.* at 6.

nomenclature.”⁷⁶ Thus, civil unions “are equivalent to same-sex marriages, for purposes of Illinois law” and need not be recognized.⁷⁷ The Connecticut decision took the same position even in the absence of a specific statutory policy (although some legislative intent is relied on).⁷⁸

There is, however, countervailing authority. The New York decision noted above cited to a lack of specific authority on same-sex marriage recognition (among other things) for the proposition that a civil union might be entitled to recognition, even if only for limited purposes.⁷⁹ This seems to be in keeping with a recent New York attorney general informal opinion that suggested an out-of-state same-sex marriage would be recognized in New York absent specific legislative pronouncements to the contrary.⁸⁰ It cannot be assumed, however, that this conclusion is inevitable where a state has no specific marriage recognition policy because the failure to enact a statute may be based on a reason other than a desire to have the state recognize foreign same-sex marriages, such as a belief among legislators that a statute would be unnecessary since current law would be expected to achieve the same result.⁸¹

B. *Similarity to Marriage*

An important factor in the decisions and attorney general opinions noted so far has been that Vermont civil unions are virtually identical to marriage. The question of how other similar arrangements would be recognized out-of-state has not yet resulted in a significant amount of case law. The one relevant case that has arisen involves California’s domestic partnership law.⁸² In March 2000, the people of California overwhelmingly approved Proposition 22,⁸³

76. *Id.* at 9.

77. *Id.*

78. *See supra* notes 28-32 and accompanying text.

79. *See supra* notes 33-39 and accompanying text.

80. Informal Opinion from Caitlin Halligan, Solicitor General, to Darrin Derosia, Corporate Counsel, City of Cohoes, and Peter Graham, Town Attorney, Town of Olive (Mar. 3, 2004), available at http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf (on file with the Ave Maria Law Review).

81. *See* *Rosengarten v. Downes*, 802 A.2d 170, 182 (Conn. App. Ct. 2002).

82. *Knight v. Schwarzenegger*, Nos. 03AS05284, 03AS07035, 2004 WL 2011407, at *1 (Cal. Super. Ct. Sept. 8, 2004).

83. Nancy Vogel, *Bill Advancing Rights of Same-Sex Couples Moves Forward*, L.A. TIMES, Apr. 2, 2003, at B7.

which stated, "Only marriage between a man and a woman is valid or recognized in California."⁸⁴ During the public debate over Proposition 22, the California legislature approved Assembly Bill ("AB") 26 which established a registry under which same-sex couples or couples over 62 could register as domestic partners.⁸⁵ Like most municipal domestic partnership ordinances, this new registry had a largely symbolic effect—extending only hospital visitation privileges and health benefits for partners of state employees.⁸⁶ However, in 2001, the legislature extended these benefits with the passage of AB 25, which granted a dozen new benefits to registered domestic partners.⁸⁷ Three new benefits were added in 2002 with the passage of AB 2216, Senate Bill ("SB") 1575 and SB 1661.⁸⁸ The legislature attempted to dramatically enlarge the scope of the legal benefits extended to same-sex couples by creating civil unions (patterned after the status mandated by the Vermont Supreme Court), but the legislation was tabled in January of 2002.⁸⁹ The concept lingered, though, and came to fruition in 2003 with the passage of AB 205. AB 205 creates a de-facto marital status for same-sex couples and couples over 62.⁹⁰

The challenge to AB 205 was premised on the argument that the new law amends Proposition 22 in violation of the state constitution which provides: "The Legislature . . . may amend or repeal an initiative statute by another statute *that becomes effective only when approved by the electors* unless the initiative statute permits amendment or repeal without their approval."⁹¹ Thus, if the domestic partnership law is close enough to marriage to be understood as an

84. CAL. FAM. CODE § 308.5 (West 2004).

85. A.B. No. 26, 1999 Cal. Legis. Serv. 588 (West) (codified in relevant part in Section 297 of the Family Code).

86. *Id.*; see also William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961.

87. A.B. No. 25, 2001 Cal. Legis. Serv. 893 (West) (codified as amended in scattered sections of the California Code).

88. A.B. No. 2216, 2002 Cal. Legis. Serv. 447 (West) (codified as amended in Sections 6401 and 6402 of the Probate Code); S.B. No. 1575, 2002 Cal. Legis. Serv. 412 (West) (codified as amended in Section 21351 of the Probate Code); S.B. No. 1661, 2002 Cal. Legis. Serv. 901 (West) (codified as amended in scattered sections of the Unemployment Insurance Code).

89. Cheryl Wetzstein, *California Gay-Union Bill Pulled*, WASH. TIMES, Jan. 17, 2002, at A10.

90. A.B. 205, 2003 Cal. Legis. Serv. 421 (West) (codified as amended in scattered sections of the California Code); see Megan E. Callan, Comment, *The More, the Not Marry-Er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 SAN DIEGO L. REV. 427, 452-55 (2003).

91. CAL. CONST. art. II, § 10(c) (emphasis added).

amendment or repeal of Proposition 22, it will be unconstitutional. There is a strong argument that domestic partnership is merely same-sex marriage by another name. The newly supplemented domestic partnership status closely follows California's marriage law in a number of ways. First, the rules on capacity are almost identical: both domestic partnerships and marriages can involve only two people, and the partners must be unmarried, unrelated by blood in a way that would invalidate a marriage, eighteen years of age, and capable of giving consent.⁹² Second, the law specifically incorporates marital benefits by reference: "Registered domestic partners shall have the same rights, protections, and benefits . . . as are granted to and imposed on spouses."⁹³ The provision relating to superior court dissolution of domestic partnerships also incorporates marriage by reference: "The dissolution of a domestic partnership . . . shall follow the same procedures, and the partners" have the same rights and duties "as apply to the dissolution of marriage."⁹⁴ The law also requires state agencies to modify forms that "use the terms spouse, husband, wife, father, mother, marriage, or marital status" to include "appropriate references to domestic partner, parent, or domestic partnership."⁹⁵ The section on construction calls for a liberal interpretation of the law so as to "secure to eligible couples who register as domestic partners" the benefits and duties which "the laws of California extend to and impose upon spouses."⁹⁶

Proponents of the bill tried to distinguish AB 205 from marriage in order to escape the charge that the new law conflicts with Proposition 22. One approach used in the debate over past legislation was to argue that "[s]o long as the word marriage is not used" domestic partnerships do not conflict with Proposition 22.⁹⁷ A second approach is to note the differences between the statuses of marriage and domestic partnership: (1) domestic partners cannot file jointly on their income tax returns, (2) the laws provide different entry and exit (before five years or children involved) procedures, (3) domestic

92. See CAL. FAM. CODE § 297 (West 2004).

93. CAL. FAM. CODE § 297.5(a) (West Supp. 2005).

94. CAL. FAM. CODE § 299(d) (West Supp. 2005).

95. CAL. GOV'T CODE § 14771(a)(14) (West Supp. 2005).

96. A.B. 205, 2003 Cal. Legis. Serv. 421 (West) (codified as amended in scattered sections of the California Code).

97. Ed Fletcher, *Same-Sex Unions OK, Expert Says*, SACRAMENTO BEE, Oct. 25, 2001, available at <http://democrats.assembly.ca.gov/members/a42/arcnewsroom/n422001004.htm> (quoting Erwin Chemerinsky).

partnerships are not guaranteed interstate recognition, (4) the law does not secure federal benefits for domestic partners, and (5) the law does not secure access to benefits controlled specifically by state constitutional provisions.⁹⁸ Interestingly enough, these differences seem somewhat analogous to the covenant marriage legislation in Louisiana, Arkansas, and Arizona, which also has different entry and exit requirements and is not guaranteed out-of-state recognition.⁹⁹ The other differences are unavailing. Of course, a statute cannot change California constitutional requirements, the laws of other states, or federal law. The only substantive difference between marriage and domestic partnership is joint income tax filing. Other than that, AB 205 borrows from marriage anything that is not nailed down.

However, a California court held that a domestic partnership is not a marriage because marriage is more than benefits.¹⁰⁰ The court also noted that Proposition 22 did not specifically mention domestic partnerships and that AB 205 does not change the definition of marriage.¹⁰¹ Thus, the plaintiffs' claim that AB 205 amended Proposition 22 was without merit.¹⁰²

The most remarkable passage in the opinion came when the court suggested that Proposition 22 would be unconstitutional if it prevented the creation of domestic partnerships since California policy disfavors "sexual orientation" discrimination.¹⁰³ The court said,

If, as Plaintiffs urge, the Legislature is powerless to grant those rights embodied in AB 25 and AB 205 without returning to the voters for approval, Proposition 22 would likely violate Article 1 sections 1 and 7 of the California Constitution because it would deprive to a class of

98. See Equality California, *AB 205 Fact Sheet* (Aug. 18, 2003), at http://www.eqca.org/atf/cf/{687DF34F-6480-4BCD-9C2B-1F33FD8E1294}/factsheet_ab205.pdf (on file with the Ave Maria Law Review).

99. See ARIZ. REV. STAT. §§ 25-901 to -906 (West 2000); ARK. CODE ANN. §§ 9-11-801 to -811 (Michie 2002); LA. REV. STAT. ANN. §§ 9:272 to :275.1, :307 to :309 (West 2000).

100. Knight v. Schwarzenegger, Nos. 03AS05284, 03AS07035, 2004 WL 2011407, at *1 (Cal. Super. Ct. Sept. 8, 2004).

101. *Id.* at *7.

102. *Id.*

103. *Id.* at *8.

citizens rights, privileges and immunities accorded another class of citizens solely on the ground of gender and/or sexual orientation.¹⁰⁴

C. *Statutory Language*

The statutes that specifically address quasi-marital statuses contain a range of approaches to recognition. Some states, such as Texas, Virginia, Nebraska and Utah (the constitutional amendment), specifically enumerate the kind of statuses that will not be recognized.¹⁰⁵ This approach has an inherent weakness since states have been creative in the naming of the quasi-marital statuses. The most important example is Vermont where the term “civil unions” was minted. Thus, while the Texas recognition statute uses the term civil unions, it also includes a definition that would include statuses given another name.¹⁰⁶ The Virginia law and the Utah amendment try to avoid this problem by using generic terms: “partnership contract” in Virginia and “domestic union” in Utah.¹⁰⁷ Both, however, also include some descriptive language referencing the statuses’ similarity to marriage as a way to include other possible terms.¹⁰⁸ Nebraska notes the two existing terms, civil unions and domestic partnerships, and uses these as a reference point for gauging the permissibility of other possibilities. The other provisions specify a legally recognized status such as marriage and use it as a comparison for determining whether another state’s statuses will be recognized. These states include Ohio, Utah, Kentucky, Wisconsin, and Louisiana.¹⁰⁹

Some general observations about the statutes are also possible. First, most prohibit quasi-marital statuses involving both opposite-sex and same-sex couples. The Texas law, for instance, references “cohabiting persons,” Ohio uses “non-marital relationships,” Louisiana references “unmarried individuals,” and Utah, Kentucky,

104. *Id.*

105. NEB. CONST. art. I, § 29, *invalidated by* Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (holding that the ban on civil unions was overly broad and in violation of the United States Constitution’s guarantee of equal protection); UTAH CONST. art. I, § 29; TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004-2005); VA. CODE ANN. § 20-4 5.3 (Michie 2004).

106. TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004-2005).

107. UTAH CONST. art. I, § 29; VA. CODE ANN. § 20-45.3 (Michie 2004).

108. *Id.*

109. LA. CONST. art. 12, § 15; 2004 Ohio Legis. Serv. 61 (Banks-Baldwin); UTAH CODE ANN. § 30-1-4.1 (Supp. 2004); KY. CONST. § 233a; 2003 Wis. A.J.R. 66 (proposed constitutional amendment).

and Wisconsin use gender-neutral terms.¹¹⁰ All of the new laws apply to public statuses rather than private arrangements such as employment benefits or powers of attorney. Utah's statute specifically includes a provision noting that the law has no effect on "rights, benefits or duties" not created by a formal status in another state.¹¹¹ Ohio specifies that the non-recognized status must be created by a "public act, record, or judicial proceeding."¹¹² Other states include a reference to "legal status" or "legal effect" which would preclude an effect on private arrangements.¹¹³ The references to state-created statuses such as civil unions in Nebraska and Virginia law make clear that those provisions also address public statuses.¹¹⁴ As a result, while the statutes would allow for individual benefits to extend to unmarried persons, they prohibit doing so by creating a new status.

D. *Constitutionality*

In some litigation, the constitutionality of non-recognition has been raised, but not addressed at any length.¹¹⁵ The two attorney general opinions make a careful case for the constitutionality of statutory prohibitions of same-sex marriage recognition.¹¹⁶ As has been noted elsewhere, though, while the case for the constitutionality of such laws is strong, it is far from airtight because of the possibility of a novel judicial decision to the contrary.¹¹⁷ An example of this has arisen in the context of the Nebraska amendment cited above.¹¹⁸ In this case, the plaintiffs are organizations that lobby the state

110. KY. CONST. § 233a; LA. CONST. art. 12, § 15; UTAH CONST. art. I, § 29; 2004 Ohio Legis. Serv. 61 (Banks-Baldwin); TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004-2005); 2003 Wis. A.J.R. 66 (proposed constitutional amendment).

111. UTAH CODE ANN. § 30-1-4.1 (Supp. 2004).

112. 2004 Ohio Legis. Serv. 61 (Banks-Baldwin).

113. KY. CONST. § 233a; LA. CONST. art. 12, § 15; UTAH CONST. art. I, § 29; TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004-2005); 2003 Wis. A.J.R. 66 (proposed constitutional amendment).

114. NEB. CONST. art. I, § 29, *invalidated* by *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (holding that the ban on civil unions was overly broad and in violation of the United States Constitution's guarantee of equal protection); VA. CODE ANN. § 20-45.3 (Michie 2004).

115. *See infra* notes 118-22 and accompanying text.

116. *See supra* notes 66-77 and accompanying text.

117. *See* William C. Duncan, *The Case for a Federal Marriage Amendment*, 30 T. MARSHALL L. REV. (forthcoming 2005).

118. *See* *Citizens for Equal Prot., Inc. v. Bruning*, 290 F. Supp.2d 1004 (D. Neb. 2003).

legislature on gay rights issues.¹¹⁹ They argue in their suit that the amendment constitutes an unconstitutional Bill of Attainder (among other claims).¹²⁰ In a ruling on the state's motion to dismiss, the district court made the improbable holding that the legislation may attain a cognizable group (in the court language, the group is "civil unions" and "domestic partners") and punishes them by "prohibit[ing] [the plaintiffs'] political ability to effectuate changes proposed by the majority."¹²¹ The decision has been criticized elsewhere,¹²² but it can hardly be denied that this is a novel decision.

E. *Proposed Federal Marriage Amendment*

A final open question is raised by the proposed federal marriage amendment. It provides: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."¹²³ It has been suggested that the second sentence of the amendment might affect the validity of quasi-marital statuses.¹²⁴ This is not a plausible reading of the sentence. As currently drafted, the second sentence would only prevent a status from being created as the result of a decision that a state or federal constitution can be construed to mandate such a result. This would preclude the Vermont decision that led to the creation of civil unions but would not affect a state legislature's ability to offer some benefits traditionally associated with marriage to unmarried persons.

CONCLUSION

This survey of interstate recognition questions raised by quasi-marital statuses is, of necessity, tentative. There are still many unsettled questions such as how other states will treat the statuses. Flowing from this question is a series of others such as the effect state non-recognition statutes will have on the decision of how courts should treat the status. As answers to these questions develop, family

119. *Id.* at 1005-06.

120. *Id.* at 1008.

121. *Id.* at 1010.

122. *See* Duncan, *supra* note 117.

123. H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003).

124. *See* 150 CONG. REC. S7956 (daily ed. July 13, 2004) (statement of Sen. Boxer).

law may be changed dramatically and marriage policy is sure to be affected.

Recent decades have seen a shift in family law “away from aspirational morality” to a system which “hesitates to set standards that cannot readily be enforced or that go beyond the minimal responsibility expressed in the cant phrase, ‘Do your own thing, as long as you don’t hurt anybody else.’”¹²⁵ Partly as a result, “family law now reflects less confidence in the value of marriage- and kinship-based models of family form.”¹²⁶ Thus, family law increasingly seems to be willing to see marriage and the family in contractual terms based on a primacy of the individual interests of the parties involved rather than the intrinsic value of the status of marriage or family.¹²⁷

A practical implication of these larger trends is an increasing diversity in family arrangements and an accompanying increase in pressures to grant legal recognition to the variety of structures. This creates a period of challenge when governmental entities struggle to respond. It is particularly difficult when some states outpace others in accepting novel arrangements. At these times conflict between the laws of different jurisdictions is inevitable. This kind of conflict is almost sure to produce significant controversy in the future. The result of these controversies will shape family law in the future to a great extent.

125. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1820 (1985) (internal footnote omitted).

126. Bruce C. Hafen, *Individualism in Family Law*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 161, 162 (David Blankenhorn et al. eds., 1990).

127. See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 24-25.