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NATIONAL CENTER FOR LESBIAN RIGHTS

Divorce for Same-Sex Couples Who Live in Non-Recognition States: A Guide For Attorneys

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BACKGROUND

A growing number of states recognize marriages between same-sex spouses, or comprehensive registered domestic partnerships or civil unions that provide the rights and responsibilities of marriage under state law. For information about which states recognize marriages or other unions between same-sex couples, see *Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples Within the United States*.

As with other couples, some same-sex couples break up and decide to divorce. However, many same-sex couples who are married or in civil unions or registered domestic partnerships may not be able to get divorced. All states have some residency requirement for divorce: with some exceptions outlined below, at least one spouse must be a resident of a state that recognizes their union in order to dissolve it. Same-sex couples who live in states that do not recognize their relationships may not be able to divorce.

Being unable to divorce leads to many legal challenges for these couples. First, they continue to be recognized as married or in a civil union or registered domestic partnership in many states, so if they travel in or move to these states, their marriage or other union will be recognized in those states, where they will continue to have the rights and responsibilities of married spouses. For example, if a married but separated couple lives in Ohio and one of them is in an accident while traveling in Iowa, his or her ex-partner may be the only one who is able to make medical decisions for him or her. Second, the spouses or partners will be unable to marry or enter a union with a new partner: in those states that recognize the first union, their second marriage or union will be void and they could even be subject to criminal bigamy charges. Finally, the law is

constantly changing and if the state where they live begins recognizing their marriage or other union, they will suddenly have all the rights and responsibilities of marriage in their home state.[1]

In recognition of this problem, a number of jurisdictions have passed laws allowing courts to take jurisdiction, under certain circumstances, over dissolution proceedings for non-resident same-sex couples who have entered into a marriage, civil union, or registered domestic partnership in that state. **This publication outlines those laws for couples who entered into a marriage, civil union, or registered domestic partnership in California, Colorado, Delaware, Hawaii, Illinois, Minnesota, Oregon, Vermont, or Washington D.C. and now live elsewhere.** Because a significant number of same-sex couples in the U.S. married in Canada, this publication also outlines **recent changes in the law of Canada**. For other couples who cannot dissolve their unions in the state where they live, there may be creative solutions to end their relationships. Please contact NCLR for technical assistance and more information.

IMPORTANT: Same-sex couples often have more than one recognized relationship status,[2] and when they separate, it is very important to dissolve all these statuses. Dissolving one status does not automatically dissolve the others unless it is included in the order. Depending on the circumstances, a court may be able to dissolve marriages, registered domestic partnerships, and civil unions in one proceeding. Other relationship statuses, such as limited domestic partnerships, reciprocal beneficiaries, and designated beneficiaries, should also be terminated, but typically only require filing a form with the appropriate state or local agency.

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[1] If they meet the requirements that would legally recognize them as separated in their home state, they may cease to accrue property rights to each other as of the date of separation, but other legal issues may still remain.

[2] For example, California expressly allows couples to be registered domestic partners and married to each other. Cal. Fam. Code § 297(b)(1).

STATES THAT ALLOW NON-RESIDENT SAME-SEX COUPLES TO DIVORCE

I. California (Marriage and Registered Domestic Partnership)

A. Marriage entered into in California

In general, California requires that at least one of the spouses be a resident of California for at least six months prior to filing a petition for dissolution.[3] However, California also allows non-resident same-sex married spouses to dissolve their marriage if 1) they married in California, and 2) neither spouse now lives in a state that will dissolve their marriage.[4] The couple must file for dissolution in the county where they married.[5] Couples in this situation can use form FL-103 to petition for a dissolution.

B. Registered Domestic Partnership entered into in California

Couples residing outside California may dissolve their California registered domestic partnership, which has all the rights and responsibilities of a marriage under California law,[6] in a California court. When a couple enters into a registered domestic partnership in California, they consent to California courts' jurisdiction over their registered domestic partnership even if neither partner resides in the state.[7] Couples in this situation can use form FL-103 to petition for a dissolution, available online at http://www.courts.ca.gov/documents/fl103.pdf.

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[3] Cal. Fam. Code § 2320(a).

[4] Cal. Fam. Code § 2320(b) states:

> (1) A judgment for dissolution, nullity, or legal separation of a marriage between persons of the same sex may be entered, even if neither spouse is a resident of, or maintains a domicile in, this state at the time the proceedings are filed, if the following apply:
> (A) The marriage was entered in California.
> (B) Neither party to the marriage resides in a jurisdiction that will dissolve the marriage. If the jurisdiction does not recognize the marriage, there shall be a rebuttable presumption that the jurisdiction will not dissolve the marriage.
> (2) For the purposes of this subdivision, the superior court in the county where the marriage was entered shall be the proper court for the proceeding. The dissolution, nullity, or legal separation shall be adjudicated in accordance with California law.

[5] *Id*.

[6] Cal. Fam. Code § 297.5(a) ("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.").

[7] Cal. Fam. Code § 299(d) (". . . in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state may be filed in the superior courts of this state even if neither

II. Colorado (Civil Union only)

In general, Colorado requires at least one spouse or civil union partner to have been domiciled in Colorado for ninety-one days prior to filing for divorce.[8] However, any person who enters into a civil union in Colorado consents to the jurisdiction of the Colorado courts for the purpose of any action relating to the civil union (such as dissolution), even if one or both of the parties to the civil union no longer lives in Colorado.[9]

III. Delaware (Marriage and Civil Union)

In general, Delaware requires that one spouse/partner be a resident of the state for at least six months prior to petitioning for dissolution of a marriage or civil union.[10] However, the Delaware Family Court may dissolve a marriage or civil union entered into in Delaware if both partners live in a state where the courts will not dissolve their marriage or civil union.[11] If the marriage or civil

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domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed."). See also Cal. Fam. Code § 2320(b).

[8] C.R.S.A. § 14-10-106.

[9] C.R.S.A. § 14-15-115 ("(1) Any person who enters into a civil union in Colorado consents to the jurisdiction of the courts of Colorado for the purpose of any action relating to a civil union even if one or both parties cease to reside in this state.(2) The district court has jurisdiction over all proceedings relating to the dissolution of a civil union, legal separation of a civil union, or the declaration of invalidity of a civil union, regardless of the jurisdiction where the civil union was entered into. The court shall follow the procedures specified in article 10 of this title, including the same domicile requirements for a dissolution, legal separation, or declaration of invalidity for such proceedings.(3) A proceeding relating to the dissolution of a civil union, legal separation of a civil union, or the declaration of invalidity of a civil union may be held in the county where the petitioner or respondent resides or where the parties' civil union certificate was issued; except that process may be directed to any county in the state. A respondent's objection to venue is waived if not made within such time as the respondent's response is due.").

[10] Del. Code Ann. Tit. 13, § 1504.

[11] Del. Code Ann. tit. 13, § 216:

> A civil union entered into or otherwise recognized under this chapter may be dissolved in the same form and manner as marriages entered into or otherwise recognized under Chapter 1 of this title; provided, however, notwithstanding §§ 1504 and 1505(d) of this title, the Family Court of this State shall have, in addition to any other basis for jurisdiction it would otherwise have, jurisdiction over all proceedings for divorce and annulment of civil unions that are solemnized in this State under this chapter notwithstanding that the domicile or residency of the petitioner and the respondent are not in this State, if the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction. All persons who enter into a civil union solemnized in this State consent to the nonexclusive jurisdiction of the Family Court for all proceedings for divorce and annulment of such civil union, even if 1 or both parties no longer reside in this State. If neither of the parties to a civil union solemnized in this State reside in this State, any petition for divorce or annulment of such civil union shall be filed in the county in which 1 or both of such parties last resided in this State.

union was not solemnized in the state, the couple should file the petition for dissolution in the county where one or both of them last resided in Delaware.[12] Note that as of July 1, 2013, Delaware will no longer issue licenses for civil unions.[13] The following year, on July 1, 2014, all existing civil unions entered into in Delaware will be converted by law into marriages, unless a dissolution, annulment, or legal separation proceeding had commenced prior to and was ongoing as of July 1, 2014.[14] NOTE: Delaware appears to impose a residency requirement for those seeking to enter a civil union in Delaware.[15]

IV. Hawaii (Marriage and Civil Union)

In general, Hawaii requires that one spouse or civil union partner have been domiciled or been physically present in the state for at least six months prior to applying for a divorce.[16] However, where a couple married or entered into a civil union in Hawaii, and neither spouse or partner lives in a jurisdiction that will divorce them because their marriage is not recognized there, they may divorce in Hawaii.[17] Couples must commence a divorce action of this kind in the circuit where the marriage was solemnized.[18] NOTE: If a couple entered into a civil union or reciprocal beneficiary relationship, and subsequently marry each other in Hawaii, that marriage dissolves the earlier civil union or reciprocal beneficiary relationship.[19]

V. Illinois (Marriage and Civil Union)

In general, Illinois requires that one spouse be a resident of the state for at least 90 days prior to petitioning for dissolution of a marriage.[20] When partners enter into a civil union in Illinois, however, they consent to Illinois courts' jurisdiction over any action relating to the civil union

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Del. Code Ann. tit. 13, § 1504 (effective July 1, 2013):

> . . . the Family Court of this State has jurisdiction over all proceedings for divorce and annulment of same-gender marriages that are solemnized in this State or created by conversion of civil unions pursuant to the laws of this State, notwithstanding that the domicile or residency of the petitioner and the respondent are not in this State, if the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction. If neither of the parties to a same-gender marriage solemnized in this State or created by conversion of a civil union pursuant to the laws of this State reside in this State, any petition for divorce or annulment of such marriage shall be filed in the county in which one or both of such parties last resided in this State.

[12] Del. Code Ann. tit. 13, § 216; Del. Code Ann. tit. 13, § 1504 (effective July 1, 2013)
[13] Del. Code Ann. tit. 13 § 218(a).
[14] Del. Code Ann. tit. 13 § 218.
[15] Del. Code Ann. tit. 13, § 106.
[16] Haw. Rev. Stat. § 580-1(a)
[17] S.B. 1, 27th Leg., 2nd Sp. Sess. (2013) to be codified at Haw. Rev. Stat. § 580-1(b)
[18] S.B. 1, 27th Leg., 2nd Sp. Sess. (2013) to be codified at Haw. Rev. Stat. § 580-1(c)
[19] S.B. 1, 27th Leg., 2nd Sp. Sess. (2013) to be codified at Haw. Rev. Stat. § 572-A(b)
[20] 750 ILCS 5/401(a).

even if neither partner resides in the state.[21] Similarly, when the new Illinois marriage law takes effect on June 1, 2014, same-sex couples who marry in Illinois will also be deemed to consent to the jurisdiction of the Illinois courts for any action relating to the marriage, even if one or both spouses resides outside the state, so that non-resident spouses may seek dissolution of the marriage in Illinois.[22]

VI. Minnesota (Marriage only)

Same-sex couples may marry in Minnesota beginning August 1, 2013.[23]

In general, Minnesota requires that one spouse have resided in, served in the armed forces in, or been a domiciliary of the state for 180 days prior to filing for divorce.[24] However, Minnesota courts may dissolve a marriage of a same-sex couple who are not residents of Minnesota if they married in Minnesota and neither spouse lives in a state that permits them to dissolve their marriage.[25]

VII. Oregon (Registered Domestic Partnership only)

In general, Oregon requires that one spouse be a resident of the state at the time a petition for dissolution of marriage is filed if the marriage was entered in Oregon, or a resident for at least six months if the marriage was entered elsewhere.[26] However, when a couple enters into a registered domestic partnership in Oregon, they consent to Oregon courts' jurisdiction over a dissolution of their registered domestic partnership even if they both no longer reside in the state.[27] If both parties no longer reside in Oregon, the petition for dissolution of the registered domestic partnership may be filed in the county where either the petitioner or the respondent

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[21] "Any person who enters into a civil union in Illinois consents to the jurisdiction of the courts of Illinois for the purpose of any action relating to a civil union even if one or both parties cease to reside in this State. . . ." 750 ILCS 75/45.

[22] 750 ILCS 5/220 (effective June 1, 2014).

[23] 2013 Minn. Laws ch. 74, § 2 (to be codified at Minn. Stat. § 517.01).

[24] Minn. Stat. § 518.07.

[25] 2013 Minn. Laws. ch. 74, § 8 (to be codified at Minn. Stat. § 518.07).

[26] Or. Rev. Stat. § 107.075.

[27] Or. Rev. Stat. § 106.325(4) ("Each individual signing a Declaration of Domestic Partnership consents to the jurisdiction of the circuit courts of Oregon for the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership, for legal separation of the partners in the domestic partnership or for any other proceeding related to the partners' rights and obligations, even if one or both partners cease to reside in, or to maintain a domicile in, this state.").

last resided.[28] Registered domestic partnerships have all the rights and responsibilities of marriage under Oregon law.[29]

VIII. Vermont (Marriage and Civil Union)

A. Marriage entered into in Vermont

In general, Vermont requires that at least one spouse have resided in the state for at least six months prior to filing a complaint for dissolution, and that at least one spouse has resided in the state for a year before the final hearing.[30] However, non-resident same-sex spouses may divorce in Vermont if 1) they married in Vermont, 2) neither spouse resides in a state which will allow them to divorce, 3) the couple has no minor children of the marriage, 4) neither spouse has a protective order against the other, and 5) the parties file a stipulation that resolves all issues in the divorce and contains all the statutorily required elements.[31]

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[28] *Id*. ("…a petition for dissolution or annulment of the domestic partnership, for legal separation of the partners in the domestic partnership or for any other proceeding related to the partners' rights and obligations may be filed in the county in which either the petitioner or respondent last resided.")

[29] Or. Rev. Stat. § 106.340.

[30] Vt. Stat. Ann. tit. 15, § 592(a) states:

> A complaint for divorce or annulment of civil marriage may be brought if either party to the marriage has resided within the state for a period of six months or more, but a divorce shall not be decreed for any cause, unless the plaintiff or the defendant has resided in the state one year next preceding the date of final hearing. Temporary absence from the state because of illness, employment without the state, service as a member of the armed forces of the United States, or other legitimate and bona fide cause shall not affect the six months' period or the one-year period specified in the preceding sentence, provided the person has otherwise retained residence in this state.

[31] Vt. Stat. Ann. tit. 15, § 592(b)-(c) states:

> (b) Notwithstanding provisions to the contrary, a complaint for divorce may be filed in the family division of superior court in the county in which the marriage certificate was filed by parties who are not residents of Vermont provided all of the following criteria are met:
> (1) The marriage was established in Vermont.
> (2) Neither party's state of legal residence recognizes the couple's Vermont marriage for purposes of divorce.
> (3) There are no minor children who were born or adopted during the marriage.
> (4) The parties file a stipulation together with a complaint that resolves all issues in the divorce action. The stipulation shall be signed by both parties and shall include the following terms:
> (A) An agreement that the terms and conditions of the stipulation may be incorporated into a final order of divorce.
> (B) The facts upon which the court may base a decree of divorce and that bring the matter before the court's jurisdiction.
> (C) An acknowledgment that:
> (i) each party understands that if he or she wishes to litigate any issue related to the divorce before a Vermont court, one of the parties must meet the residency requirement set forth in subsection (a) of this section. (ii) neither party is the subject of an abuse prevention order in a

B. Civil Union entered into in Vermont

Similar to married spouses, non-resident civil union partners may dissolve their civil union in Vermont if 1) they entered a civil union in Vermont, 2) neither partner resides in a state which will allow them to dissolve their union, 3) the couple has no minor children of the civil union, 4) neither partner has a protective order against the other, and 5) the parties file a stipulation that resolves all issues in the dissolution and contains all the statutorily required elements.[32] The complaint must be filed in the county where the civil union certificate was filed.[33]

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proceeding between the parties. (iii) there are no minor children who were born or adopted during the marriage. (iv) neither party's state of legal residence recognizes the couple's Vermont marriage for purposes of divorce. (v) each party has entered into the stipulation freely and voluntarily. (vi) the parties have exchanged all financial information, including income, assets, and liabilities.

(c) The court shall waive a final hearing on any divorce action filed pursuant to subsection (b) of this section unless the court determines upon review of the complaint and stipulation that the filing is incomplete or that a hearing is warranted for the purpose of clarifying a provision of the stipulation. Final uncontested hearings in a nonresident divorce action shall be conducted by telephone unless one or both of the parties choose to appear in person.

[32] Vt. Stat. Ann. tit. 15, § 1206(b) states:

… a complaint for civil union dissolution may be filed in the family division of superior court in the county in which the civil union certificate was filed by parties who are not residents of Vermont provided all of the following criteria are met:

(1) The civil union of the parties was established in Vermont.

(2) Neither party's state of legal residence recognizes the couple's Vermont civil union for purposes of dissolution.

(3) There are no minor children who were born or adopted during the civil union.

(4) The parties file a stipulation together with a complaint that resolves all issues in the dissolution action. The stipulation shall be signed by both parties and shall include the following terms:

(A) An agreement that the terms and conditions of the stipulation may be incorporated into a final order of dissolution.

(B) The facts upon which the court may base a decree of dissolution of a civil union and that bring the matter before the court's jurisdiction.

(C) An acknowledgment that: (i) each party understands that if he or she wishes to litigate any issue related to the dissolution before a Vermont court, one of the parties must meet the residency requirement set forth in section 592 of this title. (ii) neither party is the subject of an abuse prevention order in a proceeding between the parties. (iii) there are no minor children who were born or adopted during the civil union. (iv) neither party's state of legal residence recognizes the couple's Vermont civil union for purposes of dissolution. (v) each party has entered into the stipulation freely and voluntarily. (vi) the parties have exchanged all financial information, including income, assets, and liabilities.

[33] *Id*.

IX. Washington D.C. (Marriage only)

In general, D.C. requires that at least one spouse be a bona fide resident for at least six months before commencing a divorce action.[34] However, non-resident same-sex spouses may dissolve their marriages in D.C. if 1) they married in D.C. and 2) neither spouse now lives in a state that will dissolve their marriage. [35]

X. Canada (Marriage only)

In general, Canada requires that at least one spouse reside in the province where the divorce is filed for at least one year before commencing a divorce proceeding.[36] However, a recent change in the law that went into effect on August 16, 2013 means that non-resident spouses may obtain a divorce in the province where their marriage was performed if a) the spouses have lived separate and apart for at least one year, b) neither spouse resides in Canada when applying for divorce, and c) both spouses reside, and have resided for at least one year immediately preceding the application, in a state that will not grant them a divorce because that state does not recognize their marriage.[37] The spouses may apply for the divorce jointly, or one spouse

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[34] D.C. Code § 16-902(a).

[35] D.C. Code § 16-902(b) states:

> (1) An action for divorce by persons of the same gender, even if neither party to the marriage is a bona fide resident of the District of Columbia at the time the action is commenced, shall be maintainable if the following apply:
> (A) The marriage was performed in the District of Columbia; and
> (B) Neither party to the marriage resides in a jurisdiction that will maintain an action for divorce.
> (2) It shall be a rebuttable presumption that a jurisdiction will not maintain an action for divorce if the jurisdiction does not recognize the marriage.
> (3) Any action for divorce as provided by this subsection shall be adjudicated in accordance with the laws of the District of Columbia.

[36] Canada's *Divorce Act* states that "[a] court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding." *Divorce Act*, RSC 1985, c 3, s 3.

[37] The *Civil Marriage of Non-residents Act*, assented to on 26th June, 2013, will amend the *Civil Marriage Act* to state that:

> (1) The court of the province where the marriage was performed may, on application, grant the spouses a divorce if
> (a) there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application;
> (b) neither spouse resides in Canada at the time the application is made; and
> (c) each of the spouses is residing — and for at least one year immediately before the application is made, has resided — in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.
> . . .
> (2) The application may be made by both spouses jointly or by one of the spouses with the other spouse's consent or, in the absence of that consent, on presentation of an order from the court or a court located in the state where one of the spouses resides that declares that the other spouse
> (a) is incapable of making decisions about his or her civil status because of a mental disability;

may apply for the divorce with the consent of the other spouse, unless a court, whether in Canada or in the state where one of the parties resides, declares that one of a limited number of exceptions applies.[38] Note that for non-resident couples, a court may only terminate the status of marriage, and will not order spousal support or divide property.[39]

(b) is unreasonably withholding consent; or

(c) cannot be found.

. . .

(3) Despite paragraph (2)(c), the other spouse's consent is required if that spouse is found in connection with the service of the application.

Civil Marriage Act, SC 2005, c 33, s 7.

Text of the *Civil Marriage of Non-residents Act* can be found online at http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6249899&File=36#4

[38] *Civil Marriage Act*, SC 2005, c 33, s 7.

[39] *Civil Marriage Act*, SC 2005, c 33, s 8.