

**STATE OF NEW HAMPSHIRE**

**SB 427 STUDY COMMISSION  
TO STUDY ALL ASPECTS OF SAME SEX CIVIL MARRIAGE  
AND THE LEGAL EQUIVALENTS THEREOF,  
WHETHER REFERRED TO AS CIVIL UNIONS,  
DOMESTIC PARTNERSHIPS, OR OTHERWISE**

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In Support of Marriage Rights for Same-Sex Couples

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My name is Michele Granda. I am a staff attorney at New England's Gay & Lesbian Advocates & Defenders (GLAD) and submit this testimony in support of marriage rights for same-sex couples in New Hampshire. GLAD supports marriage equality for New Hampshire's gay and lesbian couples because it would bring New Hampshire's gay and lesbian citizens closer to the equality under law that is the birthright of all state residents.<sup>1</sup>

I want to talk with you today about New Hampshire's statutory scheme with respect to the protections and responsibilities New Hampshire laws afford married couples and explain why only marriage can provide New Hampshire's gay and lesbian couples with the basic equality and fairness they deserve under law.

**Marriage as a gateway to protections and obligations**

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<sup>1</sup> See Romer v. Evans, 517 U.S. 620, 623 (1996) (striking down anti-gay state constitutional amendment; "the constitution 'neither knows nor tolerates classes among citizens,' Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)").

Same-sex couples want to marry for the same reasons as other couples. Marriage is unparalleled in its ability to communicate to the world the unique and exclusive relationship two people share. Further, marriage provides a couple with the universal understanding that they have the right to be by each other's side in every circumstance, from the most mundane to the most critical. For many, marriage is our society's ultimate expression of love, trust, sharing and commitment, and gay and lesbian couples seek the opportunity to communicate those values to each other, to friends and family, and to the community at large, and to participate in this fundamental cultural institution.

But marriage is not just about ideals of love, commitment, and personal responsibility. It's an enormous legal institution -- it is our major legal institution for recognizing and protecting families. As a legal matter, marriage provides hundreds of rights and responsibilities. At the federal level, there are at least 1,138 laws that tie rights, protections, and obligations to married persons.<sup>2</sup>

That raises the question, how do the laws of the State of New Hampshire regulate the rights and obligations of married and non-married persons? GLAD, working together with New Hampshire Freedom to Marry, has undertaken a comprehensive study of New Hampshire statutes to analyze how the State of New Hampshire treats married people different from single people. This study involved the identification and compilation of the state statutory provisions in which rights and responsibilities are contingent on marital status or in which marital status is a factor.<sup>3</sup>

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<sup>2</sup> A report issued by the United States General Accounting Office on January 23, 2004 reported "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges." See GAO-04-353R, Defense of Marriage Act, at <http://www.gao.gov/>.

<sup>3</sup> To identify these laws, we conducted word searches in the Westlaw electronic database that contains the text of the New Hampshire Revised Statutes, searching for various words chosen to elicit marital status: "marriage," "spouse,"

GLAD’s study identified a total of 399 New Hampshire statutory provisions in which rights and responsibilities are contingent on marital status or in which marital status is a factor in the allocation of rights, benefits and responsibilities under state law. I would be glad to share the compilation of these 399 laws with the Study Commission at the conclusion of my testimony today. The most important conclusion to draw about this study of New Hampshire laws is that the vast majority of New Hampshire’s statutory protections and obligations are simply off limits to gay and lesbian couples and their children absent marriage, even though these same protections and responsibilities are good for all families.

### **New Hampshire law’s focus on marital status harms unmarried persons**

While the full range of these protections is beyond the scope of this testimony, the ways in which New Hampshire law treats married people different from single people breaks down into three basic categories. First, many protections recognize that people who marry form deep emotional attachments to one another that make it inappropriate to treat them as acquaintances or strangers. Examples of these types of protections include:

- A spouse has priority in determining how to dispose of the remains of a deceased spouse.<sup>4</sup>
- The right of a married person to bring a suit for loss of consortium against a person who has wrongfully injured his or her spouse for the loss of his or her companionship.<sup>5</sup>
- The right of a married couple, if both spouses are in the same nursing home facility, to share a room (unless medically contraindicated).<sup>6</sup>
- The right to a spouse to learn of the circumstances of a fatal motor vehicle accident involving his or her spouse.<sup>7</sup>

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“marital status,” “husband,” “wife,” “dependent,” “family,” “next of kin,” “widow,” and “widower.” The resulting statutes were then subjected to an individual review to weed out any repealed or irrelevant statutory provisions.

<sup>4</sup> NH Rev. Stat. Ann. §§290:11, 16. If a person had contracted for disposal of his remains before death, or if a guardian or conservator had been appointed before death, then that contract or appointment would take precedence over the surviving spouse. NH Rev. Stat. Ann. §290:17.

<sup>5</sup> NH Rev. Stat. Ann. §507:8(a)

<sup>6</sup> NH Rev. Stat. Ann. §151:21.

<sup>7</sup> NH Rev. Stat. Ann. §264:26.

- The right of a surviving spouse to receive mental health services at the expense of the criminal defendant responsible for the spouse's death.<sup>8</sup>
- A surviving spouse's place as first in priority in a list of persons who can decide to make an anatomical gift, recognizing both that the surviving spouse is the person having the strongest claim to the remains of the deceased and that the surviving spouse is the person most likely to know what the deceased would have wanted if she had expressed her wishes during her lifetime.<sup>9</sup>

The second category of protections is those acknowledging that people who marry form integrated economic units that make it inappropriate to treat them as separate. Examples of these protections include:

- The ability of state employees to ensure that pension and disability payments will continue for their spouses following the employees' deaths.<sup>10</sup>
- The right of spouses of employees injured or killed on the job to receive dependency benefits from the worker's compensation system.<sup>11</sup>
- The ability of a married spouse to remain in the home following his or her spouse's death and to protect his or her spousal interest in the home from creditors.<sup>12</sup>
- The duty that husbands and wives owe to third parties for the necessary expenses for food, shelter, and medical care.<sup>13</sup>
- The multitude of protections a surviving spouse receives upon his or her loved one's death, including that a surviving spouse is entitled to receive wages due deceased at time of death automatically;<sup>14</sup> that a surviving spouse may receive support from the estate if the assets are sufficient to so provide;<sup>15</sup> that after estate debts and obligations are paid, if any surplus remains in the estate, the surviving spouse is entitled to receive an automatic share of the real and personal estate of the deceased spouse including one-third of the total estate if there are children and up to \$20,000 plus one-half of the remainder if there are no children.<sup>16</sup>
- The divorce laws' recognition of both the intermingled financial relationships of married couples and the financial dependencies that often arise during marriage, including the

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<sup>8</sup> N.H. Rev. Stat. Ann. §651:62.

<sup>9</sup> NH Rev. Stat. Ann. §291-a:4.

<sup>10</sup> N.H. Rev. Stat. Ann. §§ 100-a:1 *et seq.*

<sup>11</sup> N.H. Rev. Stat. Ann. §281-a:2 *et seq.*

<sup>12</sup> NH Rev. Stat. Ann. §§480:1-9, 477:27-29, 44.

<sup>13</sup> N.H. Rev. Stat. Ann. §§126-A:36, 165:19, 167:2, 167:28; 546-A:2, 639:4.

<sup>14</sup> N.H. Rev. Stat. Ann. §560:20

<sup>15</sup> N.H. Rev. Stat. Ann. §§554:19, 560:1.

<sup>16</sup> N.H. Rev. Stat. Ann. §560:10.

requirement of equitable property division,<sup>17</sup> and the provision of alimony when a spouse lacks sufficient income to provide for reasonable needs.<sup>18</sup>

Finally, the state's marital protections appreciate that marriage is often the setting in which children are raised, and that the law should take account of that to assure the well being of children. While many of the benefits and responsibilities of parenting turn not on a person being a married parent but simply on being a biological or adoptive parent whether or not the person is married, it is through marriage that spouses may secure their legal status as parents to a child.<sup>19</sup> In addition, there are a number of laws that do provide differing treatment for children in marital families. These protections include a married stepparent's ability to adopt a spouse's child from a prior relationship,<sup>20</sup> which allows a legal relationship to form between the child and step-parent with concomitant protections to the child in the event of the death or disability of the stepparent, or in the event of divorce. It is not at all clear that New Hampshire law allows an unmarried partner of a parent to do the same thing, even if they jointly decided to bring a child into their family together.<sup>21</sup> Absent such an adoption, the child is a "legal stranger" to his or her second parent, and thus the non-legal parent has no right to obtain emergency medical care for the child, no right to participate in the child's schooling, no right to obtain medical insurance for the child through his or her employer.

While gay and lesbian families can protect themselves in limited ways by creating wills and durable powers of attorney, this does not come close to emulating the automatic protections

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<sup>17</sup> N.H. Rev. Stat. Ann. §458:16-a.

<sup>18</sup> N.H. Rev. Stat. Ann. §458:19, 19-a, 21.

<sup>19</sup> N.H. Rev. Stat. Ann. §168-b:3, 4 and 9.

<sup>20</sup> N.H. Rev. Stat. Ann. §170-B:4. The same provision requires that when a married person petitions to adopt a child, the spouse must also consent to the petition. This provision appears to be designed to protect both the child (by making sure both adults in the home are welcoming) and the other spouse (to ensure obligations are not imposed upon him or her unwillingly).

<sup>21</sup> This protection does exist in a number of states. See, e.g. Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368 (1993); Adoption of Tammy, 416 Mass. 420 (1993).

and peace of mind that marriage confers. People cannot contract their way into pension laws, survivorship rights, worker's compensation dependency protection, or the tax system, to name just a few. It is only through marriage that New Hampshire citizens can secure critical economic and legal protections for their families.

If marriage is a good thing for families, then it is good for gay and lesbian families for all of the same reasons. Same-sex couples take on the same responsibilities as other couples, but they are denied the same rights provided marital families under New Hampshire's present statutory scheme. Experience tells us that same-sex families need the same legal protections, the same legal framework and the same responsibilities as other families. The denial of marriage rights to same-sex couples hurts families and children and advantages no one.

### **Marriage is the Most Fair and Equitable Answer**

Marriage and civil unions are not interchangeable. Civil unions -- a legal status created by the Vermont legislature in 2000 -- offer far broader protection than presently afforded same-sex couples in New Hampshire but they will provide gay men and lesbians far less protections than marriage and they will further marginalize the gay and lesbian couples of this state and their children.

If New Hampshire were to adopt a civil union legal status parallel to marriage for purposes of state laws, such a civil union proposal would include "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." Spouses joined in civil union would be considered "family," "dependent[s]," and "next-of-kin" to each other. Civil unions would be a significant step forward for couples legally, and just as importantly, would provide enormous comfort, security and peace of mind. It would provide access to the probate system and its web of protections for families grieving the death of a

spouse or parent. It would provide access to causes of action dependent on spousal status for tragedies which befall a family. It would provide access to the multitude of laws which recognize that a married couple is an economic unit and which eases their way financially. It would provide access to domestic relations law, including divorce, child custody, and support rules. It would transform the family relationships of gay people from that of “legal strangers” to legal next of kin.

Yet, as good as civil unions are, we should not allow ourselves the complacency of thinking that gay men and lesbians in New Hampshire will be treated fairly or equally if civil unions are enacted. There are three reasons for this.

First, civil unions are a separate institution from marriage with a separate name. Marriage provides a universal language that everyone understands and respects. It crosses state lines. It crosses international lines. Everyone understands and respects the family relationship and responsibility that come with marriage. Because the word “marriage” itself conveys more than the sum of its legal parts, denying same-sex couples the ability to participate in the institution of marriage itself denies them full equality. Very few married couples would trade in their marriage license for a civil union. So long as marriage remains exclusive to different-sex couples, gay men and lesbians will continue to fall short of the status of full citizenship, marking them and their children with a stamp of inferiority. That’s not just about symbolism; it’s about citizenship. When Mildred Jeter and Richard Loving, an interracial couple from Virginia, challenged that state’s ban on interracial marriage in the late 1960’s, no one told them, “We’ll give you the state benefits of marriage. Just don’t call it marriage.” Instead, the United States Supreme Court told them that marriage is “vital to personal happiness” and an essential liberty

for a free people. Loving v. Virginia, 388 U.S. 1, 12 (1967). New Hampshire has never before created a separate family status for one group of people and it should not start now.

Second, as a practical matter, civil unions forever slam the door on access to bread and butter federal protections. The myriad federal benefits of marriage will remain largely off limits to couples joined in civil union.<sup>22</sup> As previously noted, there are 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.<sup>23</sup> A few examples include social security survivor benefits, fifty-seven provisions of the income tax code, protections for the families of veterans, and immigration laws which are aimed at keeping families together. Even if New Hampshire were to amend its marriage laws to allow same-gender couples to marry, those federal benefits will not become available immediately because of a discriminatory law at the federal level.<sup>24</sup> Amending New Hampshire's marriage laws would allow the possibility for a challenge to this odious federal law.

Third, civil unions are not equal because they stop at the state line. Families cannot move or travel and still be protected. Marriages which are legal where celebrated are overwhelmingly recognized from state to state. That same body of law which supports recognition of marriages (based on both a-constitutional and constitutional principles) should apply to civil unions as well. For example, although few states permit common law marriage, many states will recognize as valid a common law marriage from a sister state. Despite this legal and common sense support

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<sup>22</sup> Some federal programs and laws which do not use the term "spouse" as a qualification may still be available to qualified same-gender couples.

<sup>23</sup> See GAO-04-353R, Defense of Marriage Act, at <http://www.gao.gov/>.

<sup>24</sup> This discriminatory marriage law, known as the "Federal Defense of Marriage Act," is now codified at 1 U.S.C. § 7 (definition of "marriage" and "spouse") and 29 U.S.C. § 1738C (purporting to exempt states from obligations under full faith and credit clause of U.S. Constitution). Many people believe that the federal law is unconstitutional and vastly exceeded the powers of Congress.

for equal treatment of civil unions by other states, experience has shown that states are not readily willing to provide civil unions with the same respect they provide for marriages. Providing marriage may not eliminate discrimination by other states, but at least with marriage there is a vast body of precedent supporting interstate recognition. The people of New Hampshire deserve that security and peace of mind.

The truth is that while civil unions do offer immediate refuge to New Hampshire families, they are a leaky boat that can never reach shore and deliver the full protections and equality that only flow from marriage. This Study Commission does not need to compromise on what is right and fair – it can and should recommend the passage of a civil marriage bill because marriage is the best and only fair way to fully provide for thousands of New Hampshire’s families and couples.

### **Conclusion**

Marriage is no trifle, legally or otherwise, and New Hampshire law reflects the deep understanding that no relationship is more essential to our human nature than the relationship we form when we become one of a couple in love and commitment. The breadth of the protections and responsibilities of married couples under New Hampshire law serves to demonstrate the breathtaking degree to which loving couples who cannot marry are consigned to second class citizenship, as well as the way in which their exclusion fails to perceive the human joy, the human tragedy and the human contentment that are the life of two people committed to each other. That basic humanity is what all people share.

The New Hampshire Legislature has an opportunity to bring the gay and lesbian citizens of New Hampshire into the fold of full citizenship by recognizing their right to marry the person of their choice. It is time that New Hampshire fully embraces lesbian and gay couples as part of

our common humanity. This Study Commission can and should recommend that the New Hampshire Legislature pass a civil marriage bill to provide all the rights and protections that go along with marriage in a way that does not discriminate against one group of people.