



New Hampshire

Civil Unions

November 2009

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

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Introduction

In 2008 New Hampshire joined Vermont, Connecticut and New Jersey as the fourth state to allow same-sex couples to enter into a civil union, which provides all the rights, obligations and responsibilities that are granted to a spouse under state law.¹ In Vermont, the status of civil union was created for the very first time by the Vermont legislature in 2001 in response to a ruling by the Vermont Supreme Court that the exclusion of same-sex couples from marriage violated the Vermont state constitution. In New Jersey, civil unions were also created by the legislature in response to a New Jersey Supreme Court decision in October, 2006. In Connecticut, a civil union statute was adopted after GLAD's marriage lawsuit was filed. In New Hampshire, without any court order or even the existence of a marriage lawsuit, the state legislature passed a law, "An Act Permitting Same Gender Couples to Enter Civil Unions and Have the Same Rights, Responsibilities, and Obligations as Married Couples," that was signed by the Governor on May 31, 2007 and took effect January 1, 2008 (See the House Bill: HB437-FN-LOCAL).

Although this was a constructive first step toward addressing the legal void in which same-sex couples lived their lives, GLAD continued working with the New Hampshire LGBT community to achieve marriage equality in New Hampshire.

On June 3, 2009, the New Hampshire General Court approved and Governor Lynch signed a marriage equality bill (House Bill 436, "An Act Relative to Civil Marriage and Civil Unions"²) that extends the right to marry to same-sex couples effective January 1, 2010. At the insistence of the Governor, the legislature also passed two other bills (HB 73³ and HB 310⁴) which affirm religious freedom protections with regard to marriage. **In addition, the legislation ends the ability of same-sex couples to enter into New Hampshire civil unions on the**

¹ California, Washington and Nevada provide a registered domestic partnership system which is nearly as comprehensive.

² See <http://www.gencourt.state.nh.us/legislation/2009/HB0436.html>.

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

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

same effective date and will automatically convert any existing New Hampshire civil unions into marriages effective January 1, 2011.

While civil unions provide state-based legal rights similar to those of marriage, couples joined in them are more likely to face discrimination against their relationships by other states, and cannot make any claim to the 1138 federal rights associated with marriage.

Whether you should enter a New Hampshire civil union, and what it all means, are questions this publication is meant to address. Inevitably you will have questions to which there are simply no definitive answers at this time. In a moment of social change like the present, there are no guarantees; and those who come forward and participate in the civil union process will be “pioneers” of a sort.

This document is intended to provide general information only and cannot provide guidance or legal advice as to one’s specific situation. Moreover, this is a rapidly evolving area of the law; and, therefore, these questions and answers are based upon the information that is known to us as of this printing and that can change at any time. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. You may call the GLAD Legal InfoLine at (800) 455-GLAD (4523) or check our website www.glad.org for more information and to obtain lawyer referrals.

What Is A Civil Union?

A New Hampshire civil union is not a marriage. It is a legal status in which the parties to the civil union “shall be entitled to all the rights and subject to all the obligations and responsibilities provided for in [New Hampshire] law that apply to parties who are joined together [in a marriage].” (Civil Union Law, N.H. Revised Statutes, Chapter 457-A, §6).

What Is The Difference Between Marriage And Civil Unions?

Civil unions will provide state-based legal rights that normally come along with marriage, and that is a tremendous advance over where things stood previously in New Hampshire.

However, civil unions are not marriage and keep in place existing discrimination against committed same-sex couples regarding marriage.

The differences are significant. Because marriage is a social, cultural and legal institution, access to marriage provides protections to the married family on each of those levels. In addition, marriage is more than the sum of its legal parts. Civil unions do not bestow the dignity and respect by society that marriage does. Marriage tells the community that two people are committed to each other as a family. Since others understand and respect this, it makes being married something important and something that protects us in daily life as well as in times of crisis. Civil unions cannot come close to conferring these broader protections of marriage.

Beyond the practical protections that accompany this known and respected status, same-sex couples in civil unions have no claim to the 1138 federal protections afforded married couples. While those protections are presently withheld from married couples of the same-sex because of the 1996 federal Defense of Marriage Act (DOMA), we do not believe that discrimination will stand the test of time.

On March 3, 2009, GLAD filed a federal lawsuit, *Gill et al. v. OPM et al.*, to challenge Section 3 of DOMA (see www.glad.org/doma for detailed information). Should GLAD succeed in this lawsuit, or should Congress repeal DOMA Section 3, some or all of the federal laws where marriage is relevant will be applicable to married same-sex couples who live in states where their marriage is respected, but under current law civil union couples will not have access to these federal laws.

At the New Hampshire state law level, under the new Civil Union Law, you must be at least 18 years of age to join in a civil union whereas males of 14 and females of 13 can obtain permission to marry a

different-sex person in New Hampshire (even when same-sex couples will be able to legally marry beginning January 1, 2010, both members of the couple must be at least 18 years of age). In addition, no person can enter into a civil union with his or her grandparent, a prohibition not expressly declared for marriages in New Hampshire. There are also almost certainly important details to be worked out particularly where state law interacts, or works in tandem, with federal law.

Finally, it will be harder to gain respect for one's civil union in many other states – in whole or in part – than it would be for a marriage. While marriages of same-sex couples will face discrimination in some places, marriages are advantaged over civil unions because all states have a marriage-system (with rich histories of respect for marriages validly licensed elsewhere).

Who Can Get A New Hampshire Civil Union?

Until January 1, 2010, a person is eligible to enter into a New Hampshire civil union if that person:

1. is unmarried and is not a party to another civil union;
2. is of the same sex as the other party to the civil union;
3. is at least 18 years of age⁵; and
4. is not closely related by blood to the other party to the civil union (matching essentially the same restrictions applicable to marriage in New Hampshire)⁶.

(Civil Union Law, N.H. Revised Statutes, Chapter 457-A, §§2-4).

Do We Have To Be New Hampshire Residents?

Currently, there is no simple answer to this question. New Hampshire state officials have allowed out-of-state couples to obtain civil unions as it generally has for marriage. However, this fact does not guarantee that the resulting union would be immune to legal challenge at some point in the future.

⁵ This is different than the New Hampshire law governing marriage. Males under age 18 and at least 14 and females under age 18 and at least 13 may receive court permission to marry if at least one of the parties is a resident of New Hampshire. (N.H. Revised Statutes, 457: 4-7).

⁶ The one difference is that the Civil Union Law expressly extends the prohibitions to grandparents, who are not mentioned in the marriage prohibitions. (Compare N.H. Revised Statutes 457-A: 3-4 with N.H. Revised Statutes 457: 1-2).

There is no residency requirement for marriage in New Hampshire and, by clear implication, no residency requirement for a New Hampshire civil union. Yet, a complexity is created by a 1979 New Hampshire law that provides that non-residents may not marry in New Hampshire “if such marriage would be void if contracted in [their home state].” (N.H. Revised Statutes 457:44). Although this statute speaks only of marriages, the new Civil Union Law says that “parties entering into a civil union shall be subject to the same requirements and conditions as contained in [N.H. Revised Statutes, Chapter] 457,” which includes the restriction quoted above. If the bar to out-of-state couples could be interpreted as a “requirement” or “condition,” then it is possible that same-sex couples could not enter into a New Hampshire civil union if they reside in – and plan to continue to reside in – a state that expressly provides that a civil union would be void in that state. At the same time, this type of restriction – which exists in only a handful of states – has often not been enforced and may not be enforced in New Hampshire.

Until there is more clarity on this question, non-residents may well prefer to either marry in Massachusetts, Connecticut, Vermont, Iowa or Canada or obtain a civil union in Connecticut (new civil unions will not be issued in Connecticut after September 30, 2010) or New Jersey where this question will not arise. If, for some reason – such as location of family – New Hampshire is the desired location for a civil union, non-residents are advised to consult an attorney as to whether they are likely to encounter any difficulty in obtaining a New Hampshire civil union because of the terms of their home state’s laws.

Can We Get Or Do We Need A New Hampshire Civil Union If We Are Already Married Or Have A Civil Union Or Have A Comprehensive Domestic Partnership From California, Oregon, Washington or Nevada?

The new New Hampshire Civil Union Law says parties are eligible to enter a civil union if they are unmarried and “not in another civil union.” (Civil Union Law, N.H. Revised Statutes, Chapter 457-A, §2).

In addition, the New Hampshire marriage licensing process, applicable to civil unions, requires information about number of

marriages and the status of previous marriages, including, if relevant, submission of final divorce decrees or death records. (N.H. Revised Statutes 457:22-23; see also 5-C:41). Presumably therefore, New Hampshire will require the applicants for a civil union license to indicate if they are currently married or in a civil union from another jurisdiction.

With this background, the question arises as to whether a couple can get a New Hampshire civil union license if they are already married or have a civil union or have a comprehensive domestic partnership.

With the Same Person

Assuming a couple's desire to re-affirm their status in New Hampshire by obtaining a New Hampshire civil union, there is probably a clear answer to this question. While some states allow couples to remarry each other, New Hampshire expressly prohibits remarriage unless the validity of the marriage has been questioned by a court, law enforcement or state registrars outside New Hampshire. (N.H. Revised Statutes 5-C: 50-51)⁷. The Civil Union law says that civil unions shall be "entered into pursuant to the analogous provisions of [Revised Statutes] 5-C: 41-61," thereby encompassing the remarriage prohibition.

Therefore, couples who are already married or who already have entered a civil union may not get a New Hampshire civil union license.

At the same time, the Civil Union Law expressly provides that "[a] civil union or a marriage between a man and another man or a woman and another woman legally contracted outside of New Hampshire shall be recognized as a civil union in this state, provided that the relationship does not violate the prohibitions of this chapter." (Civil Union Law, N.H. Revised Statutes, Chapter 457-A, §8)⁸.

As a result, it is not necessary (as well as not possible) to enter into a New Hampshire civil union if you are already married or already in a

⁷ By contrast, New Jersey expressly allows couples to obtain a license for "remarriage or reaffirming a civil union." (N.J. Revised Statutes 37: 1-7). The Connecticut Attorney General has taken the position that couples with a civil union from another state or a California registered domestic partnership cannot enter into a Connecticut civil union while couples with an out-of-state marriage can enter into a Connecticut civil union.

⁸ The most obvious prohibition under New Hampshire law that might negate respect for an out-of-state marriage or civil union would be New Hampshire's prohibition against either marriages or civil unions between first cousins. (N.H. Revised Statutes 457-A: 3-4; see also 457: 1-2).

civil union. Although the Civil Union Law does not speak to comprehensive registered domestic partnerships (like those of California, Oregon, Washington or Nevada), it is GLAD's position that New Hampshire is more likely than not to recognize comprehensive registered domestic partnerships as civil unions as well.⁹

A complicated question could arise if, for some reason - such as varying age requirements or restrictions on first cousin marriages and civil unions - your out-of-state marriage or civil union would violate New Hampshire's laws such that it would not be recognized as a civil union by New Hampshire.¹⁰ In such circumstances, you need to consult an attorney.

With a Different Person

It should be clear that a person cannot enter a New Hampshire civil union if he or she is currently married to, or has a civil union or comprehensive domestic partnership with, a different person.

The prior existing marriage or civil union or comprehensive domestic partnership must be ended before entering a New Hampshire civil union. You should consult an attorney as to where and how this can be accomplished.

New Hampshire residents with a marriage or civil union can dissolve that union in a New Hampshire court. That process takes a period of time.

Termination of a California domestic partnership can take different forms and, in some cases, does not require a court proceeding. You should seek advice and consult California's informative brochure at www.ss.ca.gov/dpregistry/forms/sf-dp_termbrochure.pdf. For information about terminating an Oregon, Washington or Nevada domestic partnership contact Lambda Legal (www.lambdalegal.org, 212-809-8585).

⁹ In this regard, it is worth noting that both the Connecticut Attorney General and the New Jersey Attorney General have issued opinions taking the position that California registered domestic partnerships should be treated the same as their own state's civil unions. (Opinion of CT Attorney General Richard Blumenthal, Sept. 20, 2005; Opinion of NJ Attorney General Stuart Rabner, February 16, 2007).

¹⁰ N.H. Revised Statutes 457:3.

Failure to end the prior marriage or civil union or comprehensive domestic partnership before entering into a New Hampshire civil union could result in criminal charges of bigamy.

Can We Get A New Hampshire Civil Union License If We Have Already Registered As A Domestic Partnership In Some Municipality Or State Other Than California, Oregon, Washington Or Nevada?

With the Same Person

It is GLAD's position that any non-comprehensive governmental domestic partnership status you currently have should probably pose no problem to entering a New Hampshire civil union. Out-of-state domestic partnerships, e.g., from Maine, Wisconsin, Maryland, Colorado, the District of Columbia or Hawaii are unlikely to be recognized as the equivalent of a civil union in New Hampshire, and thus, it is more likely than not that a couple with such an out-of-state domestic partnership would be allowed to enter into a New Hampshire civil union. Because New Hampshire officials have not given specific guidance as to any particular state or municipal domestic partnership, you should seek advice from an attorney.

With a Different Person

If you intend to enter a New Hampshire civil union with someone other than the person with whom you presently have a state or municipal domestic partnership, GLAD recommends that you terminate your pre-existing domestic partnership before entering a New Hampshire civil union with another person. You should consult an attorney if you are unable to dissolve your pre-existing domestic partnership first.

How Do We Get A New Hampshire Civil Union?

Except as noted, this entire process is an exact mirror of the process for marriage in New Hampshire. That is the clear intent of the new Civil Union Law which expressly refers to and incorporates the New Hampshire laws on marriage in Revised Statutes Chapters 5-C and 457. Therefore, the following text sets out the New Hampshire marriage licensing process and assumes that civil union licensing forms and practices will be identical.

Application for a License

In order to obtain a New Hampshire civil union license, both parties must appear in person¹¹ and complete a “[civil union] application worksheet” with the clerk of any city or town in New Hampshire. (N.H. Revised Statutes 457:22; see also 5-C:41 I and 5-C:42 II).¹² One party may initiate the process of applying for a civil union license; however, the license shall not be issued until signatures have been obtained from both parties. (see N.H. Revised Statutes 5-C:42 VI). **The last day to obtain a New Hampshire civil union license is December 31, 2009.**

The applicants must provide the following information on the application worksheet:

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

(N.H. Revised Statutes 5-C:41 II).¹³

¹¹ Members of the armed forces are excused from this requirement of personal appearance, N.H. Revised Statutes 5-C:42 IV, and use an alternative procedure detailed in N.H. Revised Statutes 5-C:42 V.

¹² A marriage license in New Hampshire is “issued for a marriage ceremony to be performed in any city or town in the state of New Hampshire.” (N.H. Revised Statutes 4-C:42 II).

¹³ No marriage license can be issued in New Hampshire without “the applicants hav[ing] each provided for inspection the following documents: (a) Proof of age.” (N.H. Revised Statutes 457:23 I).

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

the number which represents of the currently intended marriage; if previously married, whether a civil annulment occurred or the marriage ended by death or divorce; the date of civil annulment or that the last marriage ended; their race and ancestry; their level of education; any waivers presented by the groom or the bride, either for time or age pursuant to RSA 457:4 through RSA 457:9¹⁴ or RSA 457:26 and RSA 457:27¹⁵; whether proof of age of the bride and groom was demonstrated using identification with photograph¹⁶; if applicable, the divorce decree; and, if applicable, the death record of the former spouse.

(N.H. Revised Statutes 5-C:41 III).¹⁷ (In addition, the clerk will be required to inquire about prior civil unions as well.)

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

the date and the city or town where the marriage is intended to take place, if known; the name and address of the officiant for the marriage ceremony, if known; the groom’s mailing address and phone number; the bride’s mailing address and phone number; the groom’s signature and date signed; the bride’s signature and date signed; and certification that the information provided

¹⁴ N.H. Revised Statutes 457:4 through 457:9 are addressed to marriages that are allowable, with permission, for parties under 18 years of age. As noted above, civil unions in New Hampshire are only available to parties who are at least 18 years of age without exception. (Civil Union Law, N.H. Revised Statutes, Chapter 457-A, §2).

¹⁵ New Hampshire law historically required a 3-day waiting period between the date marriage application worksheet is filed and the issuance of the marriage license. However, that provision was repealed effective July 4, 2006. (2006 Session Laws, Chapter 86:5). Therefore, under current law, no time waivers are necessary.

¹⁶ “An applicant for a marriage license shall provide positive identification consisting of a certified copy of a birth certificate or a driver’s license or a passport or other license or identification that contains a photograph of the applicant and the applicant’s name and date of birth.” (N.H. Revised Statutes 5-C:42 VII).

¹⁷ New Hampshire law provides that each applicant must provide for inspection: (1) “a copy of the final divorce decree, if either or both parties are divorced”; and (2) “a copy of the death record of spouse, if either or both parties are widowed.” (N.H. Revised Statutes 457:23 I(b)-(c)). Those copies must be certified. (N.H. Revised Statutes 5-C:42 IX). If a former marriage has been civilly annulled, the clerk must review a certified copy of the civil annulment decree before a marriage license can be issued. (N.H. Revised Statutes 5-C:42 X).

is correct to the best of his or her knowledge and belief and that he or she is free to marry under the laws of New Hampshire.

(N.H. Revised Statutes 5-C:41 IV).

When all of the foregoing information has been obtained, the city or town clerk prepares the civil union license, which is valid for not more than 90 days from the date of filing.” (N.H. Revised Statutes 457:26).

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

The fee for obtaining a civil union license is currently \$45, payable to the clerk of the city or town. (N.H. Revised Statutes 457:29; see also 5-C:42 XIII).

Celebration of the Civil Union

Measured from the date of application¹⁸, the marriage or civil union license is valid “for not more than 90 days from the date of filing.” **The celebration should take place before the civil union law is repealed on January 1, 2010.** (N.H. Revised Statutes 457:26).

Persons who are authorized to solemnize the civil union include: New Hampshire justices of the peace; any New Hampshire ordained “minister of the gospel” in good standing within the denomination; any New Hampshire non-ordained clergy serving a religious body “after being licensed by the secretary of state”; any non-resident minister with a “pastoral charge wholly or partly” in New Hampshire (but only within his or her parish); any federal judges or magistrate judges (receiving a special license from the secretary of state). (N.H. Revised Statutes 457:31, 31-a and 32-a).

¹⁸ If the parties appear separately before the clerk and therefore the marriage application worksheet is signed and sworn to on two separate dates, the earlier date “shall be used by the clerk of the town or city to indicate when the intention of marriage was received and recorded and the date to be used to establish the beginning of the time period during which the license shall be valid.” (N.H. Revised Statutes 5-C:42 XIV).

In addition, the secretary of state may issue a special license, for a fee of \$25, to out-of-state “ordained or non-ordained ministers” or to out-of-state individuals authorized or licensed to perform marriages in their home state “authorizing him or her in a special case to marry a couple within the state.” (N.H. Revised Statutes 457:32).

“The persons joined in marriage [or a civil union] by a minister or justice of the peace shall pay the minister or justice of the peace a minimum of \$5.” (N.H. Revised Statutes 457:33).

The Civil Union Certificate

The authorized officiant records the following on the civil union license after the ceremony has taken place:

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

(N.H. Revised Statutes 5-C:41 XV).

The officiant is required to return the civil union certificate within 6 days to the clerk of the city or town that issued the license, **but before the civil union law is repealed on January 1, 2010** (N.H. Revised Statutes 5-C:49 I). The officiant must do so if the civil union has taken place even if the parties “have a change of mind” and ask the officiant not to report. (N.H. Revised Statutes 5-C:49 VI).

“The date the marriage [or civil union] license is received by the clerk of the town or city from the officiant shall be recorded on the marriage [or civil union] certificate as the date the marriage [or civil union]

registration is filed.” (N.H. Revised Statutes 5-C:41 XVI). It shall be signed by the clerk and include the name of the city or town. (N.H. Revised Statutes 5-C:41 XVII).

What Are Some Of The Legal Issues If We Are Already Married or Want To Get Married?

If We Married While Living In New Hampshire, Doesn't New Hampshire's "Evasion Law" Invalidate Our Marriage?

No, although the matter is not free from doubt. As noted above, you can only enter into a civil union in New Hampshire if the validity of your out-of-state marriage has been questioned by a court, law enforcement or state registrars outside New Hampshire (See N.H. Revised Statutes 5-C: 50-51).

Those New Hampshire couples that have married in Massachusetts while the so-called “1913 law” was still valid (before July 31, 2008) are, in fact, married and “should for all legal purposes be treated as [having] a valid marriage” by Massachusetts until the marriage is annulled or declared invalid by a court.¹⁹ This is true even if the couple promised to relocate to Massachusetts (which most non-Massachusetts residents were required to certify before the so-called “1913 law” was repealed in Massachusetts on July 31, 2008) and did not or even if they were not truthful in stating their intentions to relocate to Massachusetts in the first place.²⁰ (See GLAD’s publication, *Legal Issues for Non-Massachusetts Same-Sex Couples Who Married in Massachusetts* at <http://www.glad.org/uploads/docs/publications/married-non-ma-couples.pdf>, for a more detailed discussion of why the marriages of already-married New Hampshire couples are presumed to be valid in Massachusetts.) For this reason, couples married in Massachusetts are not having their marriages questioned by Massachusetts in a way that would allow them to enter into a civil union (*i.e.*, to re-enter a union with the same spouse in New Hampshire).

¹⁹ *Cote-Whitacre v. Dept. of Pub. Health*, 446 Mass. 350, 361 n. 10 and 362 n. 11 (2006).

²⁰ See *Cote-Whitacre v. Dept. of Pub. Health*, 446 Mass. 350, 361 n. 10 (2006) (“[F]raud that goes to the essence of a marriage contract renders a marriage ‘voidable.’”) (citation omitted). The Court’s footnote also discusses what the term “voidable” means in this context.

Couples who married elsewhere or in Massachusetts after July 31, 2008 have valid marriages and so will not be able to enter into a New Hampshire civil union but will have their marriage recognized in New Hampshire as equivalent to a civil union.

Another legal complication arises from New Hampshire's so-called "evasion law" which expressly refuses recognition to marriages entered by its residents outside of New Hampshire if the marriage would have been "void" if entered within New Hampshire.²¹ Yet, this "evasion" law should not bring the out-of-state marriage of New Hampshire residents into question within New Hampshire because New Hampshire law, as amended in 2004, does not declare "void" the marriages of same-sex couples, even though same-sex couples are not permitted to marry within New Hampshire. See N.H. Revised States 457:1-3.

Thus, it is likely that same-sex couples who married while New Hampshire residents need not (and possibly cannot) enter into a civil union with each other in New Hampshire, despite the impression that many non-lawyers may have about the validity of your marriage.

Absent specific instructions from New Hampshire officials on this question, it is likely that, based on the information solicited from applicants on the marriage license application, town clerks will deny licenses to couples who have an existing marriage to each other.

Why Shouldn't We Just Go Elsewhere And Get Married?

You could – but we think you should get a New Hampshire civil union first.

The reason for this is New Hampshire's evasion law (N.H. Revised Statutes 457:43).²² This law expressly refuses recognition of marriages entered into by New Hampshire residents outside of New Hampshire if

²¹ New Hampshire Revised Statutes 457:43 provides: "If any person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state, with the same effect as though such prohibited marriage had been entered into in this state." See also N.H. Revised Statutes 457:3.

²² This law is implicated because the civil union law subjects civil unions to the requirements and conditions of the marriage statutes as a whole. (N.H. Revised Statutes 457-A:2).

the marriage would have been “void” if it had been entered into within New Hampshire.

On the one hand, as stated in the answer to the previous question, GLAD believes that this “evasion” law should not cause others to question the validity of an out-of-state marriage entered into by a New Hampshire same-sex couple.²³

On the other hand, others could interpret this law differently. If the marriage of a New Hampshire same-sex couple were deemed to violate New Hampshire’s evasion law, then the civil union law itself might not guarantee this couple access to the civil union law’s protections.²⁴ It would be particularly troublesome for a couple to learn that their marriage would not be respected at a time when they most needed its protections – for example, in the event of a death or separation, when it would be too late to enter into a civil union.

As previously discussed, marrying and then entering into a civil union in New Hampshire may not be possible (due to the pre-existing marriage and New Hampshire’s prohibition on marrying couples already married). Even if a clerk were to allow a same-sex couple who had married to enter into a civil union in New Hampshire, that does not necessarily mean that no one will ever challenge the couple’s spousal rights.

It is always better for couples to minimize the legal obstacles that their relationships may face. Getting a civil union first will allow couples to avoid any legal cloud over their marriage that in theory could develop as a result of the evasion law. Thus, the cautious approach would be to obtain a civil union in New Hampshire before marrying elsewhere.

²³ The reason for this is twofold. First, by its terms, the New Hampshire evasion law would not invalidate an out-of-state marriage of a same-sex couple because no New Hampshire statute declares the marriage of a same-sex couple entered in New Hampshire to be “void.” Second, even if New Hampshire did declare such marriages to be “void” when entered within New Hampshire, that designation would not render the marriage illegal in Canada. Given that the civil union law recognizes -- as civil unions -- marriages *legally contracted* outside of New Hampshire, the most likely answer is that the evasion law should not stand in the way of having out-of-state marriages entered by New Hampshire residents respected as civil unions, even if the couple could not have married within New Hampshire.

²⁴ That’s because the civil union law expressly provides that a marriage of a same-sex couple legally contracted outside of New Hampshire will be recognized as a civil union within New Hampshire only if “the relationship does not violate the prohibitions of [the civil union law].” (N.H. Revised Statutes 457-A: 8). Thus, if the marriage were deemed to violate the evasion law, it arguably could violate the prohibitions of the civil union law, which, in turn, might deprive the couple of respect for their legal relationship within New Hampshire.

Can We Still Get Married If We Have A New Hampshire Civil Union?

Couples who enter a civil union in New Hampshire may still wish to marry for a number of reasons. For example, other states may not give civil unions the same respect that they would give to a same-sex couple's marriage. For some couples, the dignity and respect that marriage confers may be of paramount importance. Having a civil union in New Hampshire should not preclude the same couple from marrying elsewhere, provided it is to the same person. If you have a civil union with one person and wish to marry another person, you must dissolve the civil union first or you could be guilty of bigamy.

Effective January 1, 2010, same-sex couples who are otherwise qualified will be able to marry in New Hampshire and this includes couples who are currently in a civil union. Also, if the couple is in a New Hampshire civil union then, between January 1, 2010 and December 31, 2011, they can go to the town clerk where their civil union is registered and request that the civil union be recorded as a marriage without any additional fees and without needing to have a wedding ceremony.²⁵

On January 1, 2011, any New Hampshire civil unions that have not already been dissolved or annulled or changed into a marriage will automatically be merged into a marriage by operation of law. Civil unions from outside New Hampshire will remain a civil union and will be respected as equivalent to a marriage under New Hampshire law.²⁶

What Are Some Things We Should Consider Before Entering Into A New Hampshire Civil Union?

A civil union is an important commitment and should be considered carefully. Since a New Hampshire civil union is designed to confer all of the state law-based benefits, protections and responsibilities of marriage, entering into that status can affect many aspects of your public and private life. Moreover, because only a minority of states have any sort of comprehensive relationship recognition for same-sex couples, it is

²⁵ N.H. Revised Statutes 457:46.

²⁶ N.H. Revised Statutes 457:45.

important to plan for the worst, (i.e., that entities in other states will not respect the civil union) while hoping for the best.

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

In preparing to consult with an attorney, here are a few issues to consider:

- It may be very difficult, or in some states, impossible, to terminate the civil union. Under New Hampshire law, a civil union can be dissolved in New Hampshire only if certain residency requirements are satisfied (see question “*How Do I Get Out Of A New Hampshire Civil Union?*” below). Also, other states may or may not allow you to dissolve your civil union under those states’ laws. With divorce in New Hampshire, the court will determine property division, alimony, child custody and child support if the parties cannot agree on these issues themselves. Under New Hampshire law, the court can consider any property owned by either or both of the parties as marital property subject to distribution in a dissolution unless the parties enter into an otherwise valid pre-nuptial agreement addressing the question. (See N.H. Revised Statutes 458:16-a, 52). New Hampshire civil union spouses will divorce under the same legal system.
- Entering into a New Hampshire civil union may complicate matters if you are in the process of adopting a child or considering adoption in the future. Some foreign countries welcome single-parent adoptions but do not allow same-sex couples to adopt. This might also be true for some states in the United States.

- Being in a civil union could disqualify you from certain state government programs because your spouse's income and assets may be included with your own.
- The military provides that an "attempted marriage" to a person of the same sex is grounds for discharge under "Don't Ask, Don't Tell." The military may view a New Hampshire civil union as the equivalent of a marriage for these purposes.
- Under New Hampshire law, married persons are in many circumstances responsible for the support of their spouses, including such things as medical bills. New Hampshire civil union spouses would undertake these same responsibilities.
- Under New Hampshire law, a spouse generally cannot completely disinherit a spouse by leaving the spouse out of her or his will unless the couple signed a valid prenuptial agreement that demonstrates such a mutual intent. As a result, a spouse is entitled to a share of your estate. (See N.H. Revised Statutes 560:10; 561:1). New Hampshire civil union spouses would be subject to these same legal rules.
- An employer-sponsored domestic partnership plan may require you to be "single" in order to qualify. This could raise questions as to whether an employee in a civil union can participate. (If the plan only requires the employee to be "unmarried," an employee in a New Hampshire civil union can forthrightly state that she or he is not married.)
- Once you are in a civil union, you have assumed a legal status that will have to be disclosed on forms and records in a variety of public and private contexts.

What Protections Do We Gain From A New Hampshire Civil Union?

A New Hampshire civil union gives you automatic inclusion within and under hundreds of New Hampshire state laws that apply to couples that are married.

This is what the new law says:

457-A:6 Rights, Obligations and Responsibilities.

Notwithstanding any other law to the contrary, the parties who enter into a civil union pursuant to this chapter shall be entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together [in a marriage] pursuant to RSA 457.

(N.H. Revised Statutes, Chapter 457-A, §6).

Other than indicating that the dissolution of a civil union shall be done according to the same statute that governs annulment, divorce and separation vis a vis a marriage (N.H. Revised Statutes 458), the Civil Union Law does not spell out any specific benefits and responsibilities under those hundreds of New Hampshire laws that will now include civil union couples. However, these are some of the categories of state laws that will undoubtedly include civil union couples:

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

Many private parties – e.g., businesses, employers, public accommodations, insurance companies, etc. – are subject to the state law

prohibiting discrimination based on marital status, which as of January 1, 2008 will apply to the status of civil union as well as the status of marriage.²⁷ (See, e.g., N.H. Revised Statutes 354-A:1,7,10 and 17; 417:4 VIII; 417-A:3; 417-B:2). Of course, the non-discrimination law already prohibits sexual orientation discrimination and that will continue. (Employers with fewer than six employees are exempt from the nondiscrimination law as are “exclusively social clubs” and “fraternal or religious associations or corporations” if “such club is not organized for private profit.” (N.H. Revised Statutes 354-A:2 VII).

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

Are There Any Limitations On New Hampshire Civil Unions?

Yes. Although civil unions in New Hampshire have been created to be essentially completely parallel to marriage for purposes of New Hampshire state law, a New Hampshire civil union is still not the same as a marriage and there are many benefits and rights that are available to married couples in New Hampshire that same-sex couples joined in civil union will not be able to access.

The Federal Defense of Marriage Act (DOMA)

First and foremost, because of the so-called federal Defense of Marriage Act (DOMA) and because the federal government has a marriage-based system for benefits, the current federal government almost certainly will take the position that it is not obligated to recognize New Hampshire civil unions and therefore is not required to extend to

²⁷ In many instances, the non-discrimination law will mean equal treatment for civil unions and marriages. However, because of federal law, there may be circumstances in which this non-discrimination protection will not be available to civil union spouses. For examples of where federal law may direct different treatment for civil union spouses, see employment-related health insurance below.

New Hampshire civil union spouses the more than 1138 federal benefits, protections and responsibilities applicable to spouses in a different-sex marriage. This includes federal taxes, Social Security, immigration, veterans' benefits and many, many more.

While married couples will have a claim to end the federal government's discrimination against their marriages, couples in civil unions will not.

Interactions Between New Hampshire Law and Federal Law

In addition, federal law interacts with New Hampshire state law in many ways that have yet to be catalogued and considered in light of this new New Hampshire Civil Union Law. Some of these will almost certainly treat same-sex couples differently than New Hampshire married couples until corrective action is taken.

Respect for New Hampshire Civil Unions Outside New Hampshire

There is uncertainty as to how other states will treat a New Hampshire civil union – when couples joined in a New Hampshire civil union relocate, or simply travel outside of New Hampshire, or when non-resident couples, if allowed, enter a New Hampshire civil union and then return home.

It is GLAD's position that the legal status of New Hampshire civil unions should be respected in all other states just as marriages enjoy a strong presumption of respect, but this will not happen immediately and a civil union is not a marriage.

Other civil union states (Vermont, Connecticut and New Jersey) will recognize a New Hampshire civil union as equivalent to their own. Although it is GLAD's position that every state should respect a New Hampshire civil union, it is reasonable to assume that respect might be more readily forthcoming in states which also extend a legal status to same-sex couples.

Social Respect

As a longstanding cultural and legal institution, marriage is a unique marker of family and commitment and enjoys a presumption of respect. As a new institution created only for same-sex couples, civil unions will not likely enjoy the same level of respect.

How Will A New Hampshire Civil Union Affect My Children?

There is no more important action you can take concerning your children than establishing *legal* parenthood. This document provides general information, and we urge strongly that you consult an attorney about undertaking co-parent adoption for your children and without delay.

There are a number of ways in which the civil union law does and does not aid in establishing the legal status of parenthood.

First, if both parties to the New Hampshire civil union were parents before the civil union (e.g., through joint or second-parent adoption in New Hampshire or from some other state), both parties remain parents.

If one party to the civil union was not a parent before the civil union, the civil union will not change that. The sure way to become a legal parent in this situation is for the non-legal parent to adopt the child. The good news is that the civil union law will help couples throughout New Hampshire in securing adoptions because New Hampshire allows stepparent adoptions, and this should apply equally to civil union spouses. (N.H. Revised Statutes 170-B:4 IV). Thus, the civil union law will now enable a civil union spouse to become a legal parent through a stepparent adoption. Couples who already have children and are contemplating joining in civil union should consult an attorney about adopting before joining in civil union. Adoption judgments based purely on the state adoption laws as opposed to the civil union law are the least vulnerable to being questioned in other states.

With or without a civil union, it is important for couples to pursue adoption decrees from a court because an adoption decree is a legal judgment that should be recognized broadly outside of New Hampshire and has legal significance independent of the civil union.

If two people joined in a New Hampshire civil union later have a child, both parties may be legally presumed to be the legal parents of a child born to either of them. In New Hampshire, a child born into a marriage is presumed to be the child of both the wife and the husband. By virtue of the Civil Union Law, that same presumption should extend to a child born into a civil union. At the same time, it is prudent to adopt in this situation because the “presumption of parentage” does not have the same conclusive effect as a court judgment like adoption. It is subject to being challenged and overturned.

In addition, the civil union could encounter a lack of respect in some states, so relying on the fact of the civil union alone to protect your children is not the best approach. Therefore, GLAD strongly recommends that you consult a lawyer and continue the practice of securing, where possible, an adoption in order to obtain a decree of legal parenthood that should be recognized broadly outside of New Hampshire, independent of the civil union.

- *Miller-Jenkins Sidebar*

Relying on a partner’s good will, or even on the fact that a child was born into a civil union, is not the best way to ensure ongoing parental rights of both parents if a couple later separates. A case in point is *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt.,2006), cert. denied, 127 S.Ct. 2130 (2007); *Miller-Jenkins v. Miller-Jenkins*, 49 Va.App. 88 (2006), cert. denied, 128 S. Ct. 1127 (2008). This case has been in litigation since 2004, has involved two state Supreme Courts (Vermont and Virginia), and has already made several trips to the U.S. Supreme Court. Proceedings are ongoing.

In that case, Janet and Lisa had a child while they were in a civil union. Janet did not adopt. After the couple separated, Lisa moved to Virginia and used both the lack of an adoption, and Virginia’s laws hostile to same-sex relationships to thwart Janet’s contact

with their daughter. While Virginia is currently deferring to Vermont's order of visitation for Janet, legal maneuvering in Virginia continues and threatens to reopen the issues. For more information, see the GLAD website on *Miller-Jenkins*. GLAD and local counsel represent Janet in the Vermont proceedings.

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

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

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

If you are employed by the federal government, the so-called federal Defense of Marriage Act (DOMA) means that health plans offered through the Federal Employees Health Benefits Program do not cover same-sex spouses of federal employees. It seems almost certain that the federal government will not provide spousal health insurance coverage to an employee in a New Hampshire civil union.

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

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

Assuming your employer provides individual, spousal and family coverage, your employer is certainly permitted to extend coverage to

civil union spouses. The issue is whether a private employer can be required to extend such coverage.

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

Insured plans are regulated by state insurance laws. An insured plan in New Hampshire, governed by New Hampshire law, must provide coverage to spouses of civil union employees if coverage is extended to spouses of married employees.²⁸

It is generally believed that self-insured plans can choose whether to extend or exclude coverage for same-sex civil union spouses. GLAD is exploring avenues for challenging employers with self-insured plans that refuse to extend health coverage equally to same-sex spouses whether in civil unions or marriages.

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

However, under a state continuation law, a “mini-COBRA law,” fully insured plans must provide continuing coverage to civil union partners and spouses alike, regardless of the size of the group. Governmental plans should also provide this continuation coverage to civil union partners. Yet, this state continuation law does not apply to self-insured health plans. Even with self-insured companies, however, employers are free to extend these benefits voluntarily if available in the insurance marketplace.

²⁸ See State of New Hampshire Insurance Department Bulletin INS 07-088-AB dated December 18, 2007 at <http://www.nh.gov/insurance/media/bulletins/2007/documents/ins07-088ab.pdf>. Also, this position is supported by the equality mandate infused throughout the whole of New Hampshire law by virtue of the new Civil Union law as well as by the New Hampshire Unfair Insurance Trade Practices Act. (See N.H. Revised Statutes 417:4 VIII (b), (c), (d) and (e)).

Another federal law with a major impact on health insurance is HIPAA. HIPAA allows dependents of a covered employee to enroll outside of the normal open enrollment period. Because of DOMA, employers in New Hampshire almost certainly will not be required to grant this federal right to the spouses of civil union employees. However, if employers cover same-sex spouses, they may do this voluntarily.

For insurance coverage purposes, the New Hampshire Insurance Department has stated that civil unions, comprehensive domestic partnerships (California, Oregon, Washington and Nevada) and legal marriages of same-sex couples should be recognized as equivalent to New Hampshire civil unions for insurance purposes. It has also stated that same-sex couples who have entered into non-comprehensive legally recognized relationships (Maine, Colorado, Maryland, Wisconsin, District of Columbia, Hawaii) will be recognized on a case-by-case basis so long as they are same-sex partners and comply with New Hampshire law.²⁹ If your government or insured plan refuses to recognize these non-New Hampshire relationships, please contact GLAD.

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

Finally, complicated issues arise if New Hampshire residents work in New Hampshire or in other states for companies based in other states. The obligation to extend coverage to civil union spouses may depend on a variety of factors and is currently being evaluated by GLAD. Similar complicated issues arise for non-residents who obtain a New Hampshire

²⁹ See <http://www.nh.gov/insurance/media/bulletins/2007/documents/ins07-088ab.pdf>.

civil union and return home and seek spousal health insurance benefits from their non-New Hampshire employer.

Can A New Hampshire Civil Union Couple File A Joint Tax Return?

It seems clear that the IRS will not accept a joint federal income tax return filed by a same-sex couple whether they are married or joined in a civil union. Although a same-sex married couple will need to file as “single” on the federal income tax return, GLAD recommends that each member of the couple indicate the marriage in some way on his or her federal return. This can be done either by attaching a sheet that explains this or by putting an asterisk after single and indicate that he or she is in a same-sex marriage and provide the date of the marriage. This way no one can later claim that you fraudulently indicated your marital status. This is especially important since income tax returns are often used for other purposes, such as to qualify for a mortgage, etc.

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

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

How Do I Get Out Of A New Hampshire Civil Union?

The New Hampshire Civil Union Law expressly provides that “parties who have entered into a civil union who wish to dissolve the civil union shall do so pursuant to RSA 458,” the New Hampshire statute that governs annulment, divorce and separation. (N.H. Revised Statutes, Chapter 457-A, §7). Therefore, in New Hampshire, existing divorce law applies to a civil union dissolution.

Although there is no residency requirement to enter a New Hampshire civil union or marriage, there are residency requirements for obtaining a dissolution of a civil union or a marriage in New Hampshire.

Specifically, in order to dissolve a civil union in a New Hampshire court, you must satisfy one of the following requirements:

1. where both parties were domiciled in the state when the action was commenced; or
2. where the plaintiff was so domiciled and the defendant was personally served with process within the state; or
3. where the plaintiff was domiciled in the state for one year next preceding the time when the action was commenced.

(N.H. Revised Statutes 458:5 I-III).

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

Satisfying the residency requirement gives the New Hampshire court jurisdiction over the parties. In addition, New Hampshire law requires the court also to have jurisdiction "of the alleged cause," which means that "jurisdiction of the cause for dissolution exists when it wholly arose or accrued while the plaintiff was domiciled in the state, and not otherwise." (N.H. Revised Statutes 458:4 & 6). You will need to consult an attorney to determine whether and/or how you might satisfy this requirement of New Hampshire law.

If you live outside New Hampshire in a state that has civil unions, you should be able to dissolve a New Hampshire Civil Union there, provided you meet that state's residency requirement.

Finally, there may be additional states that will simply allow access to their courts for the purpose of dissolving civil unions (e.g. Maine and Massachusetts). If your residence is outside of New England and you have questions about the dissolution of a civil union, you should contact Lambda Legal (www.lambdalegal.org, 212-809-8585).

What Legal Protections Can Same-Sex Couples In New Hampshire Acquire Without Entering Into A New Hampshire Civil Union?

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

- 1. Relationship Agreement or Contract:** Agreements regarding property and finances should be respected and honored according to ordinary rules of contract law, but it is important to note that the New Hampshire Supreme Court has not yet ruled on the subject. A number of other states have found such agreements enforceable, including Massachusetts.
- 2. Durable General Power of Attorney:** Any competent person may appoint another person as his or her “attorney-in-fact” for money, property and/or other matters in the event the one becomes incapacitated or disabled. (N.H. Revised Statutes 506:6). If no such appointment is made, then a “family” member will be empowered to make decisions for the disabled or incapacitated individual. A power of attorney must be signed and notarized.
- 3. Durable Power of Attorney for Health Care:** Since medical care providers look to next-of-kin to make health care decisions for an incapacitated individual, an unmarried person must create a durable power of attorney for health care if he or she wishes a person other than immediate family to make those medical decisions when he or she lacks either the temporary or

permanent capacity to do so for herself or himself. Under New Hampshire law, a person may appoint a health care “agent” to make those decisions for him or her upon incompetence, i.e., when the person no longer is able to do so. (N.H. Revised Statutes 137-J). People should give a copy of the durable power of attorney for health care to their doctors and should also consider giving it to family members.

Within this document, a person can also deal with end-of-life issues. New Hampshire law permits a person to make advance decisions about medically-administered nutrition and hydration as well as life sustaining treatments without which the person would die. (See N.H. Revised Statutes 137-J:1 I(b) and 137-J:2 XIV (defining “living will”)).

The durable power of attorney for health care must be signed by the person giving the power of attorney and two witnesses.³⁰ Neither of the witnesses can be the agent, the person’s spouse or heir, a beneficiary under the person’s will or trust, the attending physician or nurse practitioner (or any person acting under the direction or control of either of these). No more than one witness can be the person’s health or residential care provider or such provider’s employee. (N.H. Revised Statutes 137-J:14). Alternatively, the durable power can be signed in the presence of a notary public or justice of the peace. (N.H. Revised Statutes 137-J:14 I(b)).

As of January 1, 2007, New Hampshire law has provided a form that has two parts: (1) a durable power of attorney for health care; and (2) a living will. (N.H. Revised Statutes 137-J:20). A person can complete either part or both, but an “advance directive,” as these documents are called, must be “substantially in the form set forth” by statute. (N.H. Revised Statutes 137-J:13 II).

Revocation is governed by statute. (N.H. Revised Statutes 137-J:15).

³⁰ If physically unable to sign, the person’s name may be signed by another in the person’s presence and at her or his “express direction.” (N.H. Revised Statutes 137-J:1 II).

If a guardian is later appointed for a person, the Court presumes the power of attorney for health care remains in the best interests of the person who gave it unless there is clear and convincing evidence to the contrary. (N.H. Revised Statutes 137-J:21).

4. **Appointment of Guardian:** New Hampshire's broad guardianship laws allow, among other things, an individual to nominate another person as the guardian of their person, estate, or both. (N.H. Revised Statutes 464-A:10). There is a rebuttable presumption that the nominated person shall be appointed. The advantages of nominating a guardian in advance is that you are selecting the person to take over all aspects of your financial matters. Under New Hampshire law, an individual can also name any persons he or she wishes to exclude from consideration as guardian; and a court cannot appoint any person so excluded.

5. **Will:** Without a will, a deceased unmarried person's property passes to: (1) his or her children; (2) if no children, to his or her family, as carefully delineated by statute; and (3) if no family as provided by statute, to the state of New Hampshire. (N.H. Revised Statutes 561:1 II). If the unmarried person wishes to provide for others, such as his or her partner, a will is essential. Even if a person has few possessions, he or she can name in the will who will administer his or her estate. If a person has children, she or he can nominate the future guardian of a child in a will.

6. **Funeral Planning Documents:** Upon death, under New Hampshire law in the absence of instructions, a person's body is given to their next-of-kin, carefully delineated by statute in order of priority, beginning with the spouse and passing to various blood relations. (N.H. Revised Statutes 290:17 II; see also 290:16 IV (defining "next of kin"). This means that a person's own partner has no automatic right to remove the body, write an obituary, or make plans for a final resting place. To avoid that problem, you should create a written, signed document (witnessed and notarized) which designates the person you want to be able to have custody and control of your remains. (N.H.

Revised Statutes 290:17). (Some people include these instructions as part of a will, but since a will may not be found for days after death, it is preferable to give the instructions to the person you want to take care of matters as well as to family).

In the absence of written instructions, a surviving partner can petition the New Hampshire probate court for the residence of the deceased for an award of custody and control if she or he establishes: (1) a “closer personal relationship to the subject than the next of kind”; (2) he or she “lived with the subject”; and (3) was “not in the employ of the subject or the subject’s family.” (N.H. Revised Statutes 290:19 III).

Finally, a person can, before death, file a petition in the probate court regarding custody and control of one’s remains. (N.H. Revised Statutes 290:19 I). (This may be an important avenue to pursue if conflict is anticipated.

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

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

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