

Same-Sex Dissolution Residency Requirements (as of March 2014)

By: Jenna Westby

Sixteen states and the District of Columbia currently issue marriage licenses to same-sex couples. Illinois will sanction same-sex marriage on June 1, 2014. Utah issued marriage licenses to same-sex couples between the *Kitchen v. Herbert*¹ decision on December 20, 2013, and a stay being granted by the U.S. Supreme Court on January 6, 2014. Some counties in Michigan issued marriage licenses to same-sex couples on March 22, 2014, following the *DeBoer v. Snyder* decision before a stay was issued by the U.S. Court of Appeals for the 6th Circuit. Canada has national legislation granting same-sex couples the right to marry. Whether by judicial decision or legislation, same-sex couples have options on where to marry, if they choose to do so.

Few people plan for divorce when they enter a marriage. Some do, however, and consider financial aspects of divorce and death and elect to enter a prenuptial agreement. A second important pre-marriage decision for same-sex couples exists: the decision on where to marry.

Of the sixteen jurisdictions that allow same-sex marriage, only six have made exceptions to their divorce residency requirements for same-sex couples who cannot otherwise divorce. The exceptions allow a same-sex couple to divorce in the state where they married. A same-sex couple married in a state that does not have residency exceptions can only get divorced if they live in a state or district that recognizes same-sex marriage.

While this may sound like a far-fetched concern, consider the practical application: a same-sex couple living in Missouri wants to marry. Because Missouri does not recognize same-sex marriage they travel to Iowa, marry, and return to Missouri. If the couple later wants to divorce, their only option is for one party to move to a state/district that recognizes same-sex marriage and wait until they satisfy the residency requirement. This was the case for many Minnesota couples prior to Minnesota's recognition of same-sex marriage. These couples were able to divide assets if they agreed, live separately, and change their names. They were not able to divorce.

Minnesota, and five other jurisdictions, have statutes that specifically allow same-sex couples to divorce without meeting residency requirements. Minn. Stat. § 518.07, subd. 2, provides:

Action for dissolution by certain nonresidents.

- (a) If neither party to the civil marriage is a resident of this state at the commencement of the proceeding, a court of this state has jurisdiction over the dissolution if: (1) the civil marriage was performed in this state; and (2) neither party to the civil marriage resides in a jurisdiction that will maintain an action for dissolution by the parties because of the sex or sexual orientation of the spouses.
- (b) There is a rebuttable presumption that a jurisdiction will not maintain an action for dissolution if the jurisdiction does not recognize the civil marriage.

(c) An action for dissolution authorized by this subdivision must be adjudicated in accordance with the laws of this state.

California, Hawaii, and the District of Columbia all have statutes substantially the same as Minnesota's, which provide for jurisdiction if neither party resides in a state/district that recognizes same-sex marriage. Delaware's statute confers jurisdiction if *either* party resides in a state that does not recognize same-sex marriage. All of them require that the couple got married in the state in which they are seeking the divorce.

Vermont has a residency exception for same-sex couples that includes several requirements not found in the other five statutes. Vermont's statute allows same-sex couples to divorce in Vermont without meeting the residency requirement if the couple: was married in Vermont; lives in a jurisdiction that does not recognize same-sex marriage; has no minor children; files a stipulation that resolves all issues after exchanging all financial information; and there is no abuse prevention order between the parties.

Of the jurisdictions that have residency exceptions only California granted same-sex marriage as a result of a court case.¹¹ The other five jurisdictions all enacted legislation granting same-sex couples the right to marry.

Conferring jurisdiction for dissolution does not necessarily resolve all problems. Jurisdiction over the dissolution does not automatically grant jurisdiction over: child custody, parenting time, assets, debts, or support. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted in all U.S. jurisdictions except Massachusetts and Puerto Rico, governs child custody jurisdiction. Same-sex couples with children should consider adoption – two-parent or second parent – even if they are married. Married couples living in a state that does not recognize their marriage may not have the same rights to their children without the adoption establishing a legal parent-child relationship. Even a Minnesota couple should consider solidifying the parent-child relationship legally in case of a potential move or future question of law.

Legislation allowing dissolution without satisfying the residency requirement is a positive facet in protecting the rights of spouses in a same-sex marriage. In the event that the parties to a divorce agree, it is possible that the door is open for jurisdiction on substantive issues. The court with jurisdiction over the dissolution may accept the parties' agreement to decide additional issues. Those married in a state without a residency exception and living in a jurisdiction that does not recognize same-sex marriage will continue to be prevented from having their marriage dissolved unless one party moves. Truly contentious parties may be able to prevent a court from exercising jurisdiction over a divorce. This may be done if the party objecting to jurisdiction can show that the other party established residency only for the purpose of obtaining a dissolution.

Jurisdiction over dissolution of same-sex marriages will continue to be problematic until all jurisdictions recognize same-sex marriages. Same-sex couples, desiring to wed, should consider a destination wedding location of California, Delaware, Hawaii, Minnesota, or the

District of Columbia to ensure that there will be a jurisdiction to dissolve their marriage if they so desire in the future.

Jurisdictions Recognizing Same-Sex Marriage	Residency Exception for Same-Sex Couples	Statute
California	Yes	Cal. Fam. Code § 2320
Connecticut	No	Conn. Gen. Stat. § 46b-44
Delaware	Yes	Del. Code Ann. Tit. 13 § 1504
Hawaii	Yes	Haw. Rev. Stat. § 580-1
Illinois (June 1, 2014)	No	750 Ill. Comp. Stat. 5/401
Iowa	No	Iowa Code §§ 598.5, 598.9
Maine	No	Me. Rev. Stat. Ann. Tit. 19-A § 901
Maryland	No	Md. Code. Ann. Fam. L. §§ 7-101 – 103
Massachusetts	No	Mass. Gen. Laws. ch. 208 §§ 4, 5
Minnesota	Yes	Minn. Stat. § 518.07
New Hampshire	No	N.H. Rev. Stat. § 458.5
New Jersey	No	N.J. Stat. Ann. §§ 2A:34-8 – 2A:34-10
New Mexico	No	N.M. Stat. Ann §§ 40-4-1
New York	No	N.Y. Dom. Rel. § 230
Rhode Island	No	R.I. Gen. Laws § 15-5-12
Utah (pending)	No	Utah Code Ann. § 30-3-1
Vermont	Yes (limited)	Vt. Stat. Ann. Tit 15 § 592
Washington	No	Wash. Rev. Code § 26.09.030
Washington DC	Yes	D.C. Code § 16-902

^I *Kitchen v. Herbert*, No. 2: 13-cv-217 (D. Utah Dec. 23, 2013).

^{II} *In re Marriage cases*, 43 Cal. 4th 757, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008).

About the Author

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