

## BENEFITS AND BURDENS OF MARRIAGE UNDER MARYLAND LAW: AN EQUAL OPPORTUNITY STUDY League of Women Voters of Maryland

### INTRODUCTION

In light of the increasingly controversial public debate about marriage, the 2005 State Convention of the Maryland League of Women Voters approved a two-year study “of legal disparities between married and unmarried partners under state laws,” with an outlook for work that would include but not be limited to laws relating to family, support, death, real estate, and health. As such, the study is to include both unmarried heterosexual partners and same-sex partners. The controversy in Maryland, as well as at the federal level and in other states, has dealt almost entirely with same-sex partners, and very little or not at all with unmarried heterosexuals who live together as a family. As explained in this “fact sheet,” however, the legal status of an unmarried heterosexual couple is identical to that of a homosexual couple. Although a heterosexual couple may choose to marry, they have no rights or duties as a couple until they do so.

Maryland’s 2005 debate centered on a state law defining marriage as between a man and a woman, seemingly prohibiting any recognition of same-sex relationships. By 2005, several counties and a large number of employers had decided to extend health insurance or similar benefits to the “domestic partners” of their employees. A lawsuit was brought on behalf of several same-sex couples who asserted that the statute limiting legal recognition of marriage to opposite-sex unions violated a provision of the Maryland constitution prohibiting discrimination based on sex. A judge of the Baltimore City Circuit Court ruled in favor of the plaintiffs. The court found that a person married to someone of the opposite sex was allowed benefits that were not provided to a person whose partner was of the same sex, thus creating discrimination based on the sex of the partner. This ruling is now on appeal to Maryland’s highest court. Even before the Baltimore ruling, efforts were made in the General Assembly to amend the Maryland Constitution to prohibit both same-sex marriage and civil unions. Expressly prohibiting same-sex marriage would have nullified the court decision from Baltimore, but prohibiting the legal recognition of civil unions would also have cast doubt on the status of the employee benefit programs offered by private employers and local governments. When the proposed constitutional amendment was changed to allow legal recognition of civil unions, the amendment’s sponsors objected to the change, and the bill was defeated in committee. Thus, the current controversy involves both the definition of marriage and the legal status of civil unions.

Although the controversy about marriage is rooted in differing views about the moral and religious meaning of marriage, this study focuses on the practical effects that the marriage laws have on the individuals involved and the communities in which they live. We recognize that many same-sex couples desire legal recognition of their marriages as a symbol of social approval and that there are other citizens who want to withhold such recognition in order to signal disapproval. Often overlooked are those widows and widowers who are dependent on survivorship benefits from their former spouse and are deterred from remarrying by the loss of those benefits. These people are also affected by the definition of marriage under Maryland law. Although the current debate is concerned with whether or not to extend to same-sex couples the legal rights and duties of marriage, the study committee did not attempt to reach an agreement on that question. Knowing that the advocates and opponents of same-sex marriage would be presenting arguments for and against such a change in the law, and that a great deal of passion would be generated by both sides, the study committee chose to describe as clearly as possible the benefits and obligations that Maryland law creates for married people. Our goal is to present the facts in a neutral style in order to contribute to an informed debate on this issue.

Because this study focuses on the marriage laws of Maryland, we will not address the many federal laws that also affect marriage. The most familiar is the federal income tax, as the rules for married people filing jointly are different from those applied to single persons or married persons who file separately. Many federal programs, such as Social Security and veteran’s benefits, provide separate benefits for the spouse of the insured person. The recent immigration debate has also brought attention to federal laws that grant automatic entry for the spouse of a United States citizen but provide no status to a domestic partner. The interaction of state marriage laws and the

federal laws can be complex. For example, there are advantages to an employer providing benefits to spouses of employees but that spouse may also have a tax liability based on the value of those benefits. Similarly, some federal benefits for a widow or widower are terminated if the person remarries, so that the state's legal recognition of the new marriage results in the end of the federal recognition of the earlier marriage.

Many business and other private organizations provide benefits based on marriage. These include pensions and health insurance for the spouses of employees, discounted membership fees for married couples, and tuition benefits at many colleges. Many companies and clubs now grant the same or similar benefits to same-sex partners of employees, but some will not extend the benefits to an unmarried heterosexual couple on the theory that those couples have the option of legal marriage. In any dispute over such benefits, the availability of legal records recognizing a marriage makes it easy to prove coverage for a traditionally married couple. Partners who establish a civil union may be able to create documents to provide legal proof of their marriage, but the effectiveness of these documents is much less clear than the standard marriage license. That is why some states, such as Vermont and Connecticut, have created a public registry for the recording of civil unions. A bill to create a similar registry for health care decisions in the state of Maryland was passed by the legislature, but vetoed by the governor in 2006.

At the heart of the current debate about marriage is an assumption that legal recognition leads to social acceptance. Many people on both sides of this debate believe that if the laws of Maryland are amended to recognize same-sex relationships - whether that legal recognition is called "marriage," "civil union," or "domestic partnership" - same-sex couples will be accorded greater respect than they currently receive. Members may want to discuss what is the proper role of government in shaping society or in reflecting widely-held views and values. This study paper will help to anchor that discussion in an understanding of the specific benefits and burdens created by the marriage laws of Maryland.

## **MARRIAGE AND THE LAWS OF MARYLAND**

Marriage was not created by the law of Maryland, as people were marrying one another long before the government of Maryland was established. As we reviewed laws of Maryland that govern marriage, it became obvious that the institution of marriage has changed over the past several hundred years. When Maryland was established as a colony in 1632, married couples who arrived on Saint Clements Island assumed that their marriages would be governed by both English common law and the canon law of the Roman Catholic Church. Under English common law in the colonial era, the husband controlled all property and a wife could not own property in her own name. The law changed as social attitudes changed, however, and Maryland law now provides that a married woman may hold, use, and dispose of property as if she were unmarried. In 1664, Maryland adopted a law prohibiting interracial marriage, reflecting the attitudes of that time - including concern that there would be legal controversy over whether the children of an interracial marriage would be slave or free. That law was not repealed until 1967, the same year that the United States Supreme Court threw out a Virginia court conviction of an interracial couple decision in *Loving v. Virginia*.

Perhaps the most important point about Maryland's marriage law is that only those who have a marriage license are recognized as married. There is no "common law" marriage in Maryland, so it is no longer possible to form a legally-recognized marriage by simply living together for a certain number of years. The law of Maryland once required that a marriage ceremony be performed by a Christian minister. That was later changed to permit a ceremony to be conducted by anyone authorized to do so by a religious organization and in 1964 the law was amended again to permit court clerks and their designated deputy clerks to preside at marriage ceremonies.

Other provisions in Maryland laws relating to marriage reflect the vast changes from the agricultural economy of the colonial era, transition first to the industrial economy and then to a mix of information technology, service, and manufacturing in the modern era. For example, employers who provide group health insurance for employees must also cover the spouse and children of an employee. Under current law, an employer is not required to provide insurance to a same-sex partner or the children in that family, but a growing number of firms choose to do so.

In discussions about marriage law, many people focus on the benefits that the married couple receives as a result of the legal recognition of their relationship. Of equal importance are the advantages that a society gains from the committed relationships of marriage. People would almost certainly choose to marry one another even if there were no legal advantages because of their own desire for a companion as well as the moral commitment to care for one's spouse. There can be little doubt that the state's decision to grant legal rights to married couples is based, in part, on a desire to formalize the religious and cultural customs supporting marriage. Nonetheless, the government grants those rights in part because the community enjoys the benefits produced by couples committed to caring for each other.

### **FINANCIAL SECURITY OF THE PARTNERS**

The most obvious benefit that marriage provides to the community is that marriage can prevent an individual from falling into poverty and becoming a burden on the welfare system. Even the most skilled and hard-working person can suffer a disabling injury or illness that prevents him or her from earning a living. A person who has a spouse who can provide basic medical care, prepare food, and earn an income sufficient to maintain a minimal standard of living is far less likely to turn to public assistance than a single individual in the same circumstances.

This expectation of mutual support is reinforced by Maryland law that provides that a spouse may not willfully refuse to provide support to the other, and a spouse who refuses to provide support may be fined \$100, imprisoned for up to 3 years, or both. While the statute is phrased in the negative (it authorizes punishment for a person who refuses to support her or his spouse rather than stating a positive requirement to provide support), it reflects an assumption that Maryland law makes about marriage: the partners in a marriage will support each other. Many other provisions of the code reflect the assumption that a person will support his or her spouse. For example, Maryland law provides: a special rule for a spouse to carry on a real estate business if the owner dies; requirement for the consent of a spouse for a person to assign a share of his or her wages to satisfy a debt; authority to award alimony to a spouse in the event of a divorce; authority to award an ownership interest in a pension, retirement, profit-sharing, or deferred compensation plan in the event of a divorce; the right of a person to bring a wrongful death action on behalf of a spouse; and that a spouse is automatically considered appropriate for appointment as guardian of a disabled person. Each of these statutes reflects an assumption that a person will be supported by her or his spouse and, if divorce ends the marriage, benefits are allocated between former partners.

Maryland laws also recognize that death ends the support furnished by a spouse and so provides a legal means to obtain financial support or (through ownership of a business) the means of financial support. Prior to the industrial age, nearly all people made their living by farming. Much of Maryland's law affecting property rights of married couples is designed to ensure that the survivor has a means of obtaining a living by ensuring continuing ownership of property that was held jointly. For example, married persons automatically inherit from the estate of a deceased spouse if the deceased person did not have a will, while the estate of the deceased partner of a non-married childless couple reverts to his parents, if alive, or siblings. Other provisions of Maryland law reflect the same principle applied to modern circumstances. For example, a spouse succeeds to any right to compensation from an employer on the death of an employee.

The right to own property, particularly a home, is also affected by marriage. Although two unmarried persons can purchase property as joint owners, with the survivor owning the entire property, only a married couple can have "tenancy by the entirety," which prohibits either partner from selling his or her interest in the property without the consent of the other partner. In a related area, when a married couple leases a property, the landlord can claim the property of either partner in the event of a failure to pay rent. If a renter has an unmarried partner, however, the landlord can levy only on the property of the person who signed the lease and thus has less security.

Maryland law also provides protection for people who are unable to manage their own property, whether due to physical or mental disability, by making it a crime to exploit a vulnerable adult in the management of his or her property. That provision does not apply, however, when a person makes a good faith effort to assist a vulnerable

adult at the request of that person's family. Because unmarried partners are not recognized as family, a person who manages the property of a disabled partner may face liability if a dissatisfied relative accuses him or her of mismanagement.

### **LAWS SUPPORTING THE RELATIONSHIP BETWEEN PARTNERS**

Some provisions of law are designed to protect the marriage relationship from outside pressures. For example, married individuals may not be compelled to testify against their spouses and are not considered permitted to disclose confidential communications that occurred between the spouses during the marriage. A spouse cannot be compelled to testify against a defendant spouse as an adverse witness unless the charge involves child abuse or assault in which the spouse is a victim. These provisions appear to be intended to encourage open communication between spouses. While such communication can be seen primarily as a benefit to the quality of marital relationship, it may also have benefits for the community - a partner who is trusted with your deepest feelings may be able to discourage you from engaging in crime or other harmful behavior. Thus, the society gains from the greater emotional stability of the individuals in the partnership.

Maryland law also provides that when spouses are both hospitalized they should be permitted to share a room. This provision reflects awareness that the emotional well-being of a patient depends in large measure on the support of a partner.

### **HEALTH CARE**

Maryland law has many provisions that assume that spouses will care for one another's health. Prior to the 2006 amendments that eased the requirements for obtaining an absentee ballot, for example, a person who was caring for an ill spouse was automatically qualified to obtain an absentee ballot. If a person is enrolled in the Maryland program to provide medical care and prescription drugs for the indigent, the spouse is obligated to pay the program's healthcare costs to the extent of his or her ability.

Maryland law also authorizes a spouse to make certain decisions about medical care when the other spouse is unable to do so. If a person is unconscious, decisions regarding life-sustaining medical treatment may be made by a surrogate, and under Maryland law a spouse has priority over other family members. Each hospital in the state is required to establish an advisory committee to assist in making decisions regarding life-threatening illnesses and end-of-life medical care, and the spouse of a patient may file a petition to raise an issue regarding treatment for that patient. A spouse may be authorized by the court to approve medical procedures for a disabled person even when those procedures pose a substantial risk to the life of the person. Although an adult child, adult brother or sister, or parent of a person could also make these types of decisions, this may prove difficult if family members live in another state. These provisions of Maryland law not only provide legal rights to spouses, but also provide guidance to doctors and other medical professionals and protect them from legal liability for difficult decisions regarding treatment for patients who are unable to communicate their wishes.

Organ transplants have become an increasingly important part of health care decisions, and Maryland law has several provisions protecting the rights of spouses to participate in these highly personal decisions. A spouse or an adult son or daughter of a person may donate organs for transplant to other patients. A hospital or doctor who receives a gift of a transplanted organ may not bill the estate of the donor or any family members of the donor for the costs of the removal of the donated organ. By providing clear legal authority to spouses and other family members, these laws facilitate prompt decisions regarding time-sensitive organ donations. While these laws can be seen as benefiting marriage in that married people have assurance that their spouses will be able to carry out an intention to help others after their deaths, it may be that the receiving patients and the community are the main beneficiaries of these laws. Where a person has a domestic partner in a relationship not recognized by Maryland's marriage law, transplanting of organs will be more difficult as officials will be required to take time to locate other family members to make this decision.

Health insurance plans are regulated by state law, which sets minimum standards for the types of coverage that must be offered by any insurer through the "comprehensive standard health benefit plan." Such plans must

include family planning and infertility services, though *in vitro* fertilization is not covered. To the extent that eligibility for these and other insurance benefits is determined by marital status, an insurer would be expected to rely on Maryland law to determine what type of coverage was required.

## **HOUSING**

Housing is another area of business activity that is regulated by the state. Any program that receives state funds must not discriminate based on marital status. An apartment or other housing complex that received no state funds, however, could exclude unmarried couples.

## **PROTECTIONS FOR CHILDREN**

Maryland law states that each parent has an equal duty to provide for a child's support, care, nurturing, and general welfare, and these protections are extended whether the child is born to those parents or is adopted by them. A child who is born or conceived (naturally or by artificial insemination) during a marriage is presumed to be the legitimate child of both spouses. To facilitate health care decisions, the medical records of a minor child must be made available to an adoptive parent. Under current law, unmarried partners do not have the same obligations toward their children. Although it may be possible for one parent to adopt the children of the other partner, the state's interest in ensuring support for children is jeopardized if such an adoption has not been arranged and the legal parent becomes disabled or dies. The child would then be left with no one who had a legal obligation to provide care and support.

Other laws protecting children in the event of a divorce are also limited to situations involving a marriage recognized under Maryland law. For example, a court may exercise its power to ensure that children can continue to live in the environment that is familiar to them in the event that their parents divorce. The court may provide for the continued occupancy of the family home and the possession and use of personal property (for example, a family car) to the custodial parent. This right does not adhere to the children of unmarried partnerships if the non-custodial parent is sole owner of the home.

Maryland has established programs to assist lower income families in difficult emotional and financial times, including counseling, health care referrals, and instruction in household management and budgeting. Unmarried couples are not eligible for these services because they are not included within the law's definition of "family." For services provided to adults and their children, the children must be legally adopted by the adult. Similarly, children and spouses of active duty military personnel may pay in-state tuition for Maryland state schools, but non-married partners and children not legally adopted by the armed forces member are not eligible for these benefits, which are intended both to protect the children of soldiers and sailors and to serve as an incentive for military service.

Although parents' authority over their children is generally protected from interference by others, Maryland law recognizes exceptions when a child's health or safety is endangered. Thus, although a person is prohibited from removing a child from his or her lawful custodian, a parent or other relative of the child may file a petition stating that a clear and present danger to the child exists. If the unmarried partner of a parent witnessed abuse or another danger to a child, however, the partner would not have a legal right to protect the child because he or she is not recognized as a "relative" of the child.

In Maryland, issues relating to family law (such as divorce, juvenile delinquency, child custody, adoption, etc.) are assigned to the circuit courts. The courts use special procedures in these cases in order to protect the interests of children and to encourage mediated settlements rather than hard-fought litigation. Increasingly, the courts rely upon the Department of Family Administration of the Administrative Office of the Courts, a state agency, to secure counseling services to assist families to resolve problems amicably. Maryland courts have approved two-parent adoptions even where the partners are not married.

## **PROTECTING THE COMMUNITY FROM RISKS ARISING FROM MARRIAGE**

Although most of the marriage laws clearly relate to benefits that the partners or the community receive from the legal status of the marriage relationship, other laws recognize that the obligations of partners to one another can be in conflict with their obligations to others. For example, a cemetery trustee is not allowed to use funds from the cemetery trust to purchase anything from his or her spouse or to invest the trust funds in any business controlled by the spouse. There are also special rules to protect debtors where loan paperwork is sold for less than fair market value to a spouse or other relative. A hospital may have a lien (a claim based on debt) on any amounts recovered in a lawsuit, even if the injured person has died and the money from the lawsuit would be paid to a spouse or other relative. Other provisions of law protect organizations from a concentration of power in the hands of a married couple – where a husband and wife are joint members of a cooperative, only one may serve as an elected director. Each of these provisions of law recognizes that a married couple often acts as a single entity to serve the mutual interests of the spouses, potentially to the disadvantage of others who deal with them. Under current law, there is no such protection from the shared interests of an unmarried couple, whether both partners are the same sex or of opposite sexes.

Some laws prevent married partners from taking unfair advantage of state benefit programs. For example, Maryland charges fees to realtors to create a “Guaranty Fund” to protect people who may be defrauded by a licensed realtor, but the law prohibits the spouse of an accused realtor from making a claim. The domestic partner of a realtor could make such a claim, however, without violating the law.

Maryland law prohibits nepotism, the practice of favoring family members for employment or other benefits, and also prohibits government officials and employees from participating in decisions that may affect the business or other financial interest of a spouse or other family member. Consistent with that principle, the spouse of a teacher or school administrator cannot be elected to a board of education. This principle is reinforced by requiring state government officers and employees to file financial disclosure forms each year that list the financial interests of the filer’s spouse and other family members. As Maryland law does not recognize marriages between persons of the same sex, these laws would not apply to the same-sex partner of an official or employee, even though the public might be concerned about the risk that the employee would engage in favoritism toward that partner’s business interests.

Laws and court decisions establish rules for dissolving a marriage, including determination of ownership of joint property (including pension benefits in which a spouse may have the right to claim a share), responsibility for debts jointly incurred, and child custody and support. It is no longer assumed that a woman automatically receives custody of the children and alimony payments from her former husband. Instead, the court is required to consider the best interests of the children in awarding custody and will consider the relative incomes of both partners and any evidence of their expectations in deciding whether to award alimony. While these principles are well-settled for married couples, there is much less certainty about the rights of non-married partners, whether of the same sex or opposite sexes.

## **COMPARISON TO OTHER STATES**

According to the website of the National Center for State Legislatures, there were 41 states with laws defining marriage, 20 states with a constitutional provision defining marriage, six states with neither, and eight states with constitutional measures on the ballot for 2006. Seven of those ballot measures, including the one in neighboring Virginia, were approved by the voters. The state of Massachusetts now recognizes marriage between same-sex partners while Vermont and Connecticut recognize domestic partnerships but not marriage for same-sex couples. The supreme court of New Jersey has ruled that the legislature must grant to same-sex couples the same rights available to married couples, but the legislature had not met at the time of this report. The District of Columbia recognizes limited rights (primarily health care decision-making) for domestic partners.

## **CONCLUSION**

The current debate about marriage has focused on the benefits gained by the partners, but under Maryland law, marriage is a bundle tying together rights and responsibilities. These rights and responsibilities govern not just the relationship of the partners, but also affect dependent children, medical care providers, employers, and the community at large. By linking these rights and responsibilities, the law of marriage ensures that a person who wants to claim the rights of marriage is also bound by its responsibilities. It is possible for individuals to take on some of these rights and responsibilities through separate legal documents relating to health care, financial interests, and other matters, but securing these arrangements is somewhat complicated. The current debate focuses on whether the people of Maryland would be better served by authorizing some form of domestic partnership or an expansion of eligibility for marriage to ensure that the combination of rights and responsibilities serves the needs of both the individual and the community.

On the question of legal status leading to social approval, an important principle of democratic government is that the government should not control all aspects of life. Although many other nations have established a particular religion, in our society we have the freedom to choose our own religious beliefs and to organize churches, synagogues, mosques, schools, and other entities to carry on those beliefs. Similarly, artists and authors are free to create their works without obtaining licenses from the government. We have chosen to create a government with limited powers that intervenes only when one person's conduct affects the ability of others to enjoy the same freedoms. While other governments have the power to regulate personal morality and to determine the types of music, movies, poetry, or books that people may hear and see, government in America focuses on the practical questions of how one person's behavior may affect other citizens. For example, no one says that you cannot eat pork, but you cannot allow pigs to run free in the streets. You may personally dislike people of another race or religion, but once you enter the marketplace to buy or sell products, you must treat all potential customers without discrimination. Perhaps this perspective would help to ensure that the debate about marriage will generate as much light as it has already generated political heat.

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### **Additional Resources**

*Marriage, a History: from Obedience to Intimacy or How Love Conquered Marriage*, Stephanie Coontz, Viking 2005

*Living Together: A Legal Guide for Unmarried Couples*, Toni Ihara, Ralph Warner, and Frederick Hertz, Nolo Press 1999

### **Consensus Questions**

1. Should the legal status of marriage be more clearly distinguished from the religious institution of marriage so that it is more consistent with the principle of separation of church and state? If so, how?
2. Should the League of Women Voters support legislation to permit unmarried couples (whether same-sex or heterosexual) to choose a status of domestic partnership or civil union that includes legal rights and benefits similar to those now applicable to marriage? Why or why not?
3. Should Maryland recognize the civil unions and same-sex marriages of other states (such as Vermont, Massachusetts, or New Jersey)?