Family Law for the 21st Century®
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SAME-SEX MARRIAGE FAQ

Q: I am confused as to which marriages are recognized in California and which are not. Did Prop 8 invalidate same-sex marriages entered during the window in 2008 when same-sex couples could marry in California? If so, are those marriages now valid again?

A: Assuming that a same-sex couple properly followed marital procedure of obtaining a marriage license, having a ceremony, and recording the certificate afterward, their California marriage entered before November 5, 2008 has continued to be a valid, recognized marriage from the date of marriage until now. Proposition 8 only prevented same-sex couples from marrying *prospectively, beginning November 5, 2008.* The California Supreme Court decision upholding Prop 8 also held that validly-entered California marriages entered *before* Prop 8 was passed by the voters remained valid and recognized marriages. And after the California Supreme Court's Prop 8 opinion, the California Legislature enacted Family Code section 308 to state that same-sex marriages legally performed *anywhere* before November 5, 2008 would be legally recognized as marriages in California.

In case you are unfamiliar with the history, in May 2008, the California Supreme Court issued its opinion that California's Defense of Marriage Act (DOMA), enacted as a statutory voter initiative in 2000 (then called Prop 22), violated the California constitution. In mid-June 2008, the opinion became effective, and County Clerks began issuing marriage licenses to same-sex couples. On November 4, 2008, California voters passed Prop 8 as a constitutional amendment by a majority vote. Now officially called Article I, Section 7.5 of the California Constitution, and codified at Family Code section 308.5, Prop 8 says, in its entirety, "Only marriage between a man and a woman is valid or recognized in California." Prop 8 became effective the next day, November 5, 2008, and California County Clerks stopped issuing marriage licenses to same-sex couples, although some couples have continued to marry in other jurisdictions, as discussed below.

After the California Supreme Court upheld the validity of Prop 8 under California law, a federal district judge in San Francisco found Prop 8 to violate the federal constitutional right to equal protection, and that decision was upheld by the United States Court of Appeal for the 9th Circuit. Proponents of Prop 8 appealed to the United States Supreme Court. On June 26, 2013 the U.S. Supreme Court issued its decision in the Prop 8 case (*Perry*). The *Perry* decision held that, after the state of California refused to appeal the district court's decision that Prop 8 was unconstitutional, no appeals should have been permitted because no appellant had legal standing to represent the state's interests on appeal. Practically speaking, that reinstated the district court decision as the final decision. Only two days later, on June 28, 2013, the Ninth Circuit lifted its stay of the district court opinion, and the state of California directed all county clerks to begin issuing marriage certificates to same-sex couples.

The Prop 8 proponents are not finished challenging the rights of same-sex couples to marry, so we will see how this plays out. So far, after the Ninth Circuit dissolved the stay of the district court decision, Prop 8 proponents asked the California Supreme Court to issue emergency orders staying the issuance of marriage licensed to same-sex couples while the proponents advance their arguments that the *Perry* decision should not apply to all counties or all persons in California, but instead merely to the two counties and two individual couples who were parties to the lawsuit. The California Supreme Court denied the request for an emergency stay, but the substantive question of the scope of the Prop 8 ruling remains pending. I do not believe that the proponents are likely to succeed in restricting marriages in California at this point, given that the State of California was a party to the *Perry* lawsuit, but we shall see what happens. As this FAQ goes to press, every county in California is issuing marriage licenses and certificates to same-sex couples.

Q: My partner and I live in California, and we married in Massachusetts in 2009. Is our Massachusetts marriage recognized here in California, or do we need to marry again here?

A: You are already married. While it is possible that some county clerk might issue a license if you said you already were married to the person you want to marry here, it would be technically improper for you to marry again. Marriage applications specifically ask if you are already married, because only persons who are not already married can legally marry. Even before the Prop 8 decision was issued by the U.S. Supreme Court, your Massachusetts marriage was recognized in California as providing all rights and obligations of marriage – we just couldn't refer to it as a "marriage." Family Code section 308(c) states that marriages between members of the same-sex performed outside of California on or after November 5, 2008, when Prop 8 went into effect, are recognized as legal unions conferring all rights and benefits of marriage, "with the sole exception of the designation of 'marriage.'" Practically speaking, this means that California has consistently recognized all marriages, domestic partnerships and civil unions from other states and foreign countries as conferring all spousal rights and obligations under California law regardless of Prop 8, although the nomenclature has varied. And now that the *Perry* decision has become final, we expect that Section 308 will be amended to provide simply that all marriages validly performed in other jurisdictions will be recognized in California regardless of gender, and regardless of where and when the marriage was performed.

Q. My partner and I married in California in the fall of 2008. Is our marriage recognized by the federal government?

Yes, although the details are still being worked out. The U.S. Supreme Court held in the *Windsor* decision in June 2013 that Section 3 of the federal Defense of Marriage Act, which restricted federal benefits of marriage to different sex married couples, was unconstitutional. That means that for couples living in states that recognize marriages of same-sex couples, their marriages now are fully recognized both on a state and a federal level. For couples that got married either in California or in another jurisdiction that permits same-sex marriage, but who live in states that do not recognize their marriages, we still do not know the scope of what benefits will be available to you. Eligibility for some federal benefits will depend on whether the marriage was valid where celebrated, rather than on validity where the parties reside. For example, for immigration purposes, the government recognizes applicants as married if the marriage was legal where celebrated, *regardless of where they live.* The same is true for

military benefits. But other federal benefits follow a "place of residence" rule. Further guidance should be coming from the various federal agencies within the next few months, to help us figure out which agencies will follow which rules. In light of the decision overturning DOMA, though, and given that California recognizes marriages by same-sex couples, we can say with certainty that same-sex married couples living in California now have the same rights that different sex married couples have, on both a state and a federal level.

Q: Six months after my long-term partner and I finally were married in Iowa in 2010, she told me that she wanted out of the relationship. Can we get a divorce in California?

A: To dissolve a marriage, you need a judgment of dissolution by a court with appropriate jurisdiction. If you live in California, California has jurisdiction to dissolve your marriage regardless of where you married, and you can file your dissolution action in the county where you live. If you do *not* live in California, California only has jurisdiction to dissolve your marriage if you married in California – and you must file your dissolution action in the county where you married. You also must comply with all laws regarding dissolution of your marriage; in other words, you must go through the same divorce process that heterosexual married couples go through to obtain a judgment of dissolution of the marriage. Especially now that Prop 8 has been invalidated and marriages again are being performed for same-sex couples in California, same-sex couples who live in California should not encounter any discrimination in the process of divorce, regardless of when or where they married. Exactly the same rules that apply to different sex married couples will now apply to same-sex-married couples.

Q: My partner and I are ending our relationship. We married in September 2008, but we had registered our domestic partnership with the state in 2002. Does our domestic partnership registration in addition to our marriage change the situation?

A: You are both married and registered domestic partners, and you will need a judgment dissolving both relationships. Because California grants the same basic rights and responsibilities of marriage to domestic partners, the two overlapping relationships impose the same obligations. Whichever occurred earlier, however, will be considered the date California marital laws began to apply. So even though your domestic partnership was not equivalent to a marriage when you registered in 2002, your registration date will be treated as the "date of marriage" for purposes of your dissolution. The Judicial Council of California recently revised the divorce forms for same-sex couples to consolidate the domestic partnership and marriage forms into a single form. Since California has residency restrictions for dissolution of marriage, couples that have to dissolve both a marriage and a domestic partnership should bring their divorce action in the county that meets the jurisdictional requirement for dissolution of their marriage.

Q: Isn't there something we can do *other* than a full divorce action in Court to dissolve our domestic partnership and marriage?

A: For a small minority of couples who meet a very restrictive set of conditions – e.g., marriage/domestic partnership of less than 5 years, no children, no real property, very low debt threshold, etc. – there is a Summary Dissolution procedure available for marriages and a Summary Termination procedure available for domestic partnerships. The restrictions are discussed in more detail in our Domestic Partnership FAQ, so if you think you might qualify, please see the discussion there for more details. However, the summary termination procedures still require complete financial disclosures and a written property agreement, so anyone terminating a marriage or domestic partnership with this more limited procedure would be well advised to consult an attorney to make sure they are doing it correctly.

Q: My husband and I live in Arkansas (or any other state that doesn't recognize same-sex marriages), where we have lived together for many years. We came to California on vacation for the July 4th 2008 weekend and we got married at San Francisco City Hall. Now we are breaking up. Am I legally married? How can I divorce him?

A: California imposes no residency restriction on getting married. People can travel to California for their weddings from anywhere in the world. California issued marriage licenses to same-sex couples during the six month window in 2008 before Prop 8 passed, and those marriages have been affirmed as valid marriages. Since the *Perry* decision in June 2013, California again has started marrying same-sex couples. Marriage is big business, and California businesses market California as a wedding destination. People who travel here from out of state and get married are entering valid marriages. This is the same for out-of-state and in-state residents. But this question presents another layer of problems, because the parties reside in a state that doesn't recognize their relationship. Most people get divorced in the state where they reside, and every state imposes some residency restriction on divorce. For same-sex couples who live in states that don't recognize their marriages, that is a big problem, and they can be stuck in a legal relationship that they are not able to dissolve. To help with this problem, California amended its Family Code to retain jurisdiction to dissolve marriages legally performed in California that are not recognized where the parties to the marriage live. The section provides that if you live in a state that does not recognize the marriage (like Arkansas), then you can divorce in California. The action must be filed in the county where the marriage license was issued, and the statute provides that California community property law will apply to the dissolution. The first step for anyone who lives out of state and was legally married in California is to check the law of the state where you live. If your home state doesn't have a DOMA, then you may very well be able to get divorced in your home state. However, most states still don't recognize marriages between same-sex couples. I know of several situations where couples have been unable to change their spousal survivorship provisions on retirement plans to identify new partners because they live in states that will not recognized their marriages even for purposes of divorce. If they married in California, we now can take jurisdiction to dissolve those marriages in the county where the marriage license was issued.

Q. My partner and I got married in 2008 in Los Angeles. Now I'm pregnant with our child. Are we both automatically parents, or does my partner need to adopt the baby?

A. Under California law, when a child is born into a marriage or a state registered domestic partnership, the child is legally presumed to be the child of both spouses/partners regardless of the sex of the parents. What this means, as a practical matter, is that both of you will be automatically recognized as your child's parents – and you will be able to put both of your names on your baby's original birth certificate – *as long as you remain in California.* However, every state – and every country – has its own rules about who is legally recognized as a parent, and California's marital presumption only applies *in California.* Therefore, in order to be sure that your partner is your child's other parent regardless of where she is standing when the question is asked, she needs to complete an adoption of the child.

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