

New York Marriage Equality Frequently Asked Questions (FAQ)

FAQ #1; DATED JULY 18, 2011



***Produced by the New York State Bar Association in
cooperation with its Committee on LGBT People and the Law***

This FAQ, based on New York law, is intended to inform, not advise. No one should attempt to interpret or apply any law without the help of an attorney.

The decision whether to marry is of course highly personal. But it also gives rise to many legal rights and obligations, and affects tax treatment and other financial arrangements.

There are numerous substantial legal and financial issues arising from a same-sex marriage in New York. There also are unanswered questions about how the law will be applied in New York. There are many jurisdictions which will not recognize a New York same-sex marriage, or will recognize the marriage only for certain purposes.

IT IS HIGHLY RECOMMENDED THAT YOU CONSULT AN ATTORNEY AND A TAX PROFESSIONAL.

➔ **What is the effective date of the new legislation and what does that mean?**

The effective date of the marriage equality legislation known as the Marriage Equality Act is July 24, 2011 – thirty (30) days after it was signed by the governor. However, because July 24 is a Sunday, marriage licenses for same-sex couples may not be available at many locations until Monday, July 25, although some town and city clerks have indicated that they may open on July 24 to issue licenses. New York town and city clerks will then begin issuing marriage licenses to same-sex couples.

➔ **Where can I find a copy of the Marriage Equality Act?**

www.nysba.org/MarriageEqualityAct

➔ **What does the Marriage Equality Act do?**

The Marriage Equality Act amends New York State's Domestic Relations Law (known as the "DRL") to grant same-sex couples the ability to enter into civil marriages.

➔ **Does the Marriage Equality Act change New York's definition of marriage?**

The Marriage Equality Act amends the state's Domestic Relations Law to state that, "[n]o application for a marriage license shall be denied on the ground that the parties are of the same, or a different, sex." All other qualifications, rights and responsibilities of civil marriage in New York remain unchanged.

➔ **How do couples get married in New York?**

A couple wanting to marry in New York State must apply in person for a marriage license at the office of any town or city clerk in the state. The application for a license must be signed by both parties in the presence of the town or city clerk. A representative cannot apply for the license. This applies even if the representative has been given a Power of Attorney. If the couple meets the requirements for issuance of a marriage license under New York State law, the clerk will issue the license upon payment of the required fee. Once the marriage license is issued, it must be delivered, within sixty days, to a clergyperson or official who is authorized to solemnize the marriage in New York (DRL § 13). A marriage license issued in New York State can be used anywhere within the state.

➔ **What are the requirements for issuance of a marriage license?**

In order to qualify for a New York marriage license, an applicant must be 18 years of age or older, unmarried and have proper documentation to prove age and identity. There are additional requirements for persons under the age of 18. Information regarding previous marriages must be furnished in the application for a marriage license. This includes whether the former spouse or spouses are living, and whether the applicants are divorced and, if so, when, where and against whom the divorce or divorces were granted. A certified copy of the Decree of Divorce or a Certificate of Dissolution of Marriage may be required by the clerk issuing the marriage license.

New York State does not permit marriage licenses to be issued to a parent and child or grandparent and grandchild, brothers and/or sisters of either full or half blood, or an uncle/aunt and niece/nephew, regardless of whether or not these persons are legitimate or illegitimate offspring.

Additional information and a list of acceptable forms of identification can be obtained from the New York State Department of State at http://www.health.state.ny.us/vital_records/married.htm and the New York City Clerk's website at http://www.cityclerk.nyc.gov/html/marriage/marriage_bureau.shtml.

➔ **Is there a residency requirement?**

New York State has no residency requirement for marriages.

➔ **Is there a waiting period?**

Yes. Although the marriage license is issued immediately, the marriage ceremony may not take place until 24 hours after the exact time that the license was issued. When both applicants are 16 years of age or older, the 24-hour waiting period may be waived by an order of a justice of the Supreme Court or a judge of the County Court of the county in which either spouse resides. If either person is under 16 years of age, the order must be from the Family Court judge of the county in which the person under 16 years of age resides.

➔ **How long is the license valid?**

A New York State marriage license is valid for 60 days (except for active duty military personnel, for whom the validity may be longer).

➔ **Are all town and city clerks in New York State required to issue marriage licenses to same-sex couples?**

Yes. If a couple meets the legal qualifications for the issuance of a marriage license (e.g., proper identification, age, marital status, etc.), no application for a marriage license may be denied on the ground that the parties are of the same sex. A clerk does not have discretion to deny a license to otherwise qualified applicants.

➔ **What should I do if a town or city clerk refuses to grant a marriage license to a same-sex couple?**

As a practical matter, you might travel to the next town and obtain a marriage license from that town's or city's clerk. You also may be entitled to pursue legal action against the clerk who refused to issue the license and the town or city.

➔ **Once a license is issued, who may solemnize a marriage in New York State?**

In addition to authorized members of the clergy, New York law (DRL § 11, 11-a-c) authorizes certain public officials to solemnize marriages, for example, mayors, county executives, judges, magistrates, justices of the peace, municipal marriage officers and others.

➔ **Is a particular form of solemnization required?**

No particular form of solemnization is required or mandated. However, the parties must solemnly declare, in the presence of the officiating person and at least one witness, that they take each other as spouses (DRL § 12).

➔ **Can a same-sex couple get married in a church?**

Yes, as long as the person solemnizing the marriage is authorized by law. Each religious institution may decide for itself which marriages it will solemnize. Many churches welcome same-sex couples, others do not.

➔ **Do all churches have to perform marriage ceremonies under the Marriage Equality Act?**

No. A clergyman or minister (as defined under the law) is not required to solemnize any marriage when acting in his or her capacity under DRL § 11.

➔ **If we were previously married in another state or country, do we need to get married again to be legally married in New York?**

No. Marriages between individuals of the same sex legally performed in other jurisdictions are recognized in New York.

➔ **If we were previously married in another state or country, can we get married again in New York?**

Yes, if you are marrying the same person.

➔ **What if I was previously married to someone else?**

Information regarding previous marriages must be furnished in the application for a marriage license. This includes whether the former spouse or spouses are living, and whether the applicants are divorced and, if so, when, where and against whom the divorce or divorces were granted. A certified copy of the Decree of Divorce or a Certificate of Dissolution of Marriage may be required by the clerk issuing the marriage license. If you remain married to a person who is living, you cannot marry someone else until you are divorced from your spouse.

➔ **What if we are already registered domestic partners?**

The New York City Administrative Code provides that if “you or your domestic partner get married to each other or to another person, your domestic partnership is automatically terminated.” If you registered as domestic partners elsewhere, the law of the state or municipality that issued your domestic partnership will likely contain provisions for terminating the domestic partnership.

➔ **What if we entered into a civil union or domestic partnership in another state or country?**

The law of the state that issued your civil union or domestic partnership may contain limitations on any subsequent marriage. Although New York law permits a married couple to remarry each other, it is unclear whether New York would authorize a marriage where the couple previously entered into another type of relationship sanctioned by another state, or whether New York would require you to follow the laws of the state that sanctioned your domestic partnership or civil union. It is recommended that you disclose your prior civil union or domestic partnership on the application for the marriage license.

➔ **What if I am a registered domestic partner with someone else?**

The New York City Administrative Code provides that if “you or your domestic partner get married to each other or to another person, your domestic partnership is automatically terminated.” If you want a record of the termination, you can file a Termination Statement in person at one of the office locations of the New York City Clerk, or you may submit a Termination Statement online (<https://www.nyc.gov/portal/site/cityclerkformsonline>) and then visit one of the City Clerk offices during regular business hours to complete it. If the Termination Statement has not been signed by both partners, you must notify the other partner of the termination by registered mail, return receipt requested. The fee for Domestic Partnership Termination is \$27 by credit card or money order payable to the City Clerk. You must show a valid form of identification. A copy of a Termination Statement can be obtained at: http://www.cityclerk.nyc.gov/downloads/pdf/domestic_partner_termination.pdf.

➔ **What if I entered into a civil union or domestic partnership in another jurisdiction with someone else?**

The law of the state that issued your union or partnership may contain limitations on any subsequent marriage, and it is unclear whether New York would treat the prior civil union or domestic partnership as an impediment to a marriage in New York. It is recommended that you dissolve the prior union or partnership. It may be possible to do so in New York courts, but you may have to obtain the dissolution in the state that issued it. If you are married in New York at the same time you still have a civil union or domestic partnership with someone else, it is unclear whether your marriage could be voided.



➔ **Can I change my name if I get married in New York?**

One or both parties to a marriage may elect to change the surname by which he or she wishes to be known after the marriage by entering the new name in the appropriate space provided on the marriage license. The new name must consist of one of the following options:

- the surname of the other spouse;
- any former surname of either spouse;
- a name combining into a single surname all or a segment of the premarriage surname or any former surname of each spouse;
- a combination name separated by a hyphen, provided that each part of such combination surname is the premarriage surname, or any former surname, of each of the spouses.

The use of this option will provide a record of your change of name. The marriage certificate, containing the new name, if any, is proof that the use of the new name, or the retention of the former name, is lawful. The local Social Security Administration office should be contacted so that its records and your Social Security identification card reflect the name change.

➔ **What is the Defense of Marriage Act?**

The Defense of Marriage Act, known as “DOMA” is a 1996 federal law that permits states to disregard the marital status of same-gender couples legally married in other jurisdictions. This means that when same-sex couples travel to another state, their marriage rights may be reduced, or eliminated completely, depending on the laws of the particular state. DOMA also prohibits the federal government from recognizing legal same-sex marriages. Therefore, same-sex spouses are excluded from all federal benefits and protections available to other married couples, including Social Security survivor benefits, the right to file joint tax returns, the right to take family leave, the right to petition for permanent residence for a foreign spouse and more. The Respect for Marriage Act, introduced in the United States Congress, would repeal DOMA and require the federal government to treat all married couples equally and to honor all state definitions of marriage.

➔ **Are New York same-sex marriages valid in other jurisdictions?**

The federal Defense of Marriage Act (DOMA) creates an exception to the full-faith and credit clause of the U.S. Constitution by permitting states to disregard the marital status of same-sex couples legally married in another state. Several states also have so-called “mini-DOMAs” that dictate that the state not recognize same-sex marriages from other jurisdictions. Therefore, legally married same-sex couples who travel to states that do not recognize same-sex unions may be considered legal strangers in those jurisdictions.

Is it recommended that same-sex couples travel with copies of health care proxies, powers of attorney and hospital visitation authorization forms for use in the event of an emergency. However, even these documents may not protect same-sex couples if the laws of a particular jurisdiction do not recognize their validity.

➔ **What are the general rights and obligations that come with marriage?**

There are a host of legal rights and obligations that come with marriage, and the information provided here is an overview; and it is not exhaustive.

Once legally married, each spouse will have all the rights that New York law provides to a spouse, including without limitation: the right to inherit even in the absence of a will; the right to sue for wrongful death; and the spousal privilege against being compelled to testify against your spouse.

Spouses also have legal obligations to each other, including a general duty to support the other spouse. Upon a divorce, a spouse may have a duty to pay maintenance (formerly called alimony) to the other spouse, and all property obtained during the marriage, regardless of whose name it is in, will be divided equitably by a Court. Similarly, upon a divorce, all debt accrued during the marriage, regardless of whose name the debt is in, will be allocated equitably by the Court, usually in the same proportion as the assets are divided. If however, one party incurs debt during the marriage for clearly non-marital purposes, the party who incurred that debt will generally be responsible for that debt.

During the marriage, a spouse is generally not responsible for debts of the other spouse that were incurred prior to the marriage; nor is a spouse responsible for debts incurred solely by the other spouse (although in other states that are “community property” states, spouses will be liable for such debts). However, creditors of the debtor spouse may try to collect the debt by levying upon jointly owned accounts or property.

There are also numerous significant tax and other financial implications that arise from a marriage. Those issues are beyond the scope of this FAQ.

➔ **Should we execute a prenuptial agreement?**

A prenuptial agreement is not required, but a couple may execute one if they wish. A prenuptial agreement can provide for virtually any ownership and division of assets and allocation of debt upon a divorce; and can provide for no maintenance, or a set amount of maintenance, upon a divorce. A prenuptial agreement can also help to shield one spouse from the debt of the other spouse. While a prenuptial agreement can set forth the parties’ desired arrangements with respect to custody and child support, the Court has the duty to make sure that such arrangements are in “the best interest of the child”, and a Court will not enforce any child custody or support agreement that it finds is not in the child’s best interests.

Prenuptial agreements must be in writing, signed, and acknowledged in a specified manner.

➔ **What if we have children?**

It is unclear whether New York law will recognize the biological child of one spouse born during the marriage as the legal child of both spouses. Even if New York law does recognize both spouses as the legal parents of the child, other states may not extend the same recognition. A child born prior to the marriage will not be considered the child of the non-biological spouse. Because of the uncertainties surrounding these issues, it is recommended that the non-biological parent obtain a second parent adoption. As with marriage, legal adoption of a child has substantial obligations and rights. In brief, the biological parent is giving up his/her right to be the sole legal decision maker (meaning that, in the event of a divorce, both parties have equal rights to seek custody and visitation), and the adopting parent is taking on the obligation to financially support the child.

➔ Where can additional information be obtained?

Information regarding marriage licenses can be obtained from the New York State Department of State at http://www.health.state.ny.us/vital_records/married.htm. The New York City Clerk's Office can be reached at (212) 669-2400 or via their website at http://www.cityclerk.nyc.gov/html/marriage/marriage_bureau.shtml.

You may also visit the New York State Bar Association website at: www.nysba.org; and the Association's Committee on LGBT People and the Law website at: www.nysba.org/LGBTCommittee.



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