MARRIAGE AND DIVORCE

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I. INTRODUCTION

Though many see marriage as private, religious, and sacred, marriage is a legal relationship regulated by the state. State regulation of the formation and dissolution of marriage must continually respond to changes in societal objectives, cultural diversity, and a shared understanding of marriage as both a legal and spiritual construct. This Article will focus on the evolving role of state supervision and federal oversight in relation to marriage and divorce. Part II examines

Obergefell v. Hodges, the 2015 Supreme Court case that upheld same-sex marriage as valid throughout the nation and its implication on related areas of law, as well as implementation challenges since the legalization of same-sex marriage. Part III considers the regulation of marriage, including restrictions on child marriage, and the economic and societal benefits derived from marriage. Part IV discusses recent developments in divorce law, including the rise of no-fault divorce statutes, uses of tort law and alternative dispute resolution for remedies, the dissolution of same-sex marriages, and issues surrounding non-traditional family structures. Part V introduces the issue of forum shopping as it pertains to state marriage and divorce laws.

II. SAME-SEX MARRIAGE

A. BACKGROUND

The first case demanding equal treatment with regard to marriage for same-sex couples was litigated in the early 1970s; the petitioners were unsuccessful.[1] Between that time and 2015, same-sex couples continually challenged the concept that marriage was between a man and a woman in an effort to gain the same recognition and benefits for their relationships as those conferred upon opposite-sex couples. Both individual states and Congress resisted those challenges, initiating efforts to restrict marriage to opposite-sex couples with varying degrees of success.

In 2013, the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), which had restricted the federal definition of marriage to include only those unions between a man and a woman, and limited the term "spouse" to refer only to a person of the opposite sex.[2] The Court held that DOMA was unconstitutional because it deprived same-sex couples of equal liberty, which is protected by the Fifth Amendment.[3] DOMA's definition of marriage controlled over 1,000 federal laws in which marital or spousal status is addressed; as such, Section 3 of DOMA had effectively restricted same-sex couples' access to federal benefits, even if they were legally married according to state law.[4]

Although *Obergefell* made DOMA unenforceable, the law's validity could easily be revived. If the Supreme Court were to overturn *Obergefell*, the legality of same-sex marriages would fall back to preexisting state laws[5]—a probability Justice Thomas made clear in his concurring opinion in *Dobbs v. Jackson Women's Health*.[6] Faced with this prospect, the House of Representatives passed the Respect for Marriage Act (RFMA) on July 19, 2022.[7] The Act promises legal

1. *See* Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).
2. 1 U.S.C. § 7 (West, Westlaw through Pub. L. No. 117-262).
3. *See* United States v. Windsor, 570 U.S. 744, 775 (2013).
4. *Id.* at 772.
5. *State Same-Sex Marriage Laws Without* Obergefell, NAT'L CONF. OF STATE LEGISLATURES (July 2022), https://perma.cc/VGW9-WPT3.
6. Sheryl Gay Stolberg, *Thomas's Concurring Opinion Raises Questions about What Rights Might be Next*, N.Y. TIMES (June 24, 2022), https://perma.cc/AS4X-Q4HS.
7. Respect for Marriage Act, H.R. 8404, 117th Cong. (2022).

protections for marriage equality.[8] The RFMA would repeal and replace DOMA provisions that define marriage as only between a man and a woman. Moreover, the Act would prohibit states from denying full faith and credit to an out-of-state marriage based on sex, race, ethnicity or national origin, create a private right of action for any individual harmed by a violation of the Act, and grant the Attorney General the authority to pursue enforcement actions.[9] Notably, the RFMA would not "codify" *Obergefell* since it does not require every state to license same-sex marriages.[10] Practically, the RFMA ensures that every same-sex and interracial couple remains protected even if their own state nullifies their marriage.[11]

B. THE *OBERGEFELL* HOLDING

In 2015, the Supreme Court decided *Obergefell v. Hodges*, a case that would fundamentally change the landscape of marriage equality for same-sex couples across the nation. When James Obergefell's long-time partner, John Arthur, was diagnosed with ALS, the two resolved to marry before Arthur died.[12] They travelled from Ohio to Maryland, where same-sex marriage was legal, to fulfill their mutual promise.[13] Three months later, Arthur passed away.[14] Ohio law did not recognize the marriage and refused to list Obergefell as the surviving spouse on Arthur's death certificate.[15] Obergefell brought suit to be shown as the surviving spouse and took his case all the way to the Supreme Court.[16] In a 5-4 majority opinion, the Court held that "same-sex couples may exercise the fundamental right to marry in all States . . . [and] there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State."[17] This decision nullified state bans on same-sex marriage as well as state bans on official recognition of out-of-state same-sex marriages.[18]

The first issue that the Court considered was whether the Fourteenth Amendment required a state to grant a marriage license between two people of the same sex.[19] The Court examined the Due Process Clause of the Fourteenth Amendment, which provides that no state "shall deprive any person of life,

8. *Bipartisan Group Leads Introduction of Respect for Marriage Act*, HOUSE COMM. ON THE JUDICIARY (July 18, 2022), https://perma.cc/5T9Q-5HXD.

9. *Bill to Protect Same-Sex and Interracial Marriage Passes Overwhelmingly in the House*, NPR (July 19, 2022, 6:58 PM), https://perma.cc/D5Q4-GB2S.

10. Mark Joseph Stern, *The New Marriage Equality Bill Doesn't Just Repeal DOMA. It Does Something Better*, SLATE (July 21, 2022, 1:51 PM), https://perma.cc/EQN5-TBMJ.

11. *Id.*

12. Obergefell v. Hodges, 576 U.S. 644, 658 (2015).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 681.

18. Lyle Denniston, *Opinion Analysis: Marriage Now Open to Same-Sex Couples*, SCOTUSBLOG (June 26, 2015, 3:01 PM), https://perma.cc/7E3V-885A.

19. *Obergefell*, 576 U.S. at 656.

liberty, or property, without due process of law."[20] The Court noted that, in addition to the rights enumerated in the Bill of Rights, "liberty" also included those "personal choices central to individual dignity and autonomy."[21] The Court further reasoned that it is always the Court's judicial duty to exercise reasonable judgment to identify and protect the fundamental rights of individuals and to address a new claim of liberty with new insight.[22]

The Court acknowledged that it has long recognized that the right to marry is a fundamental liberty.[23] First, the personal choice to get married is inherent in the concept of individual autonomy.[24] Getting married to another person is the most intimate decision one can make, meriting respect from the Court.[25] Second, marriage is important for the committing individuals in that it promotes the two-person union.[26] Prisoners' right to marriage further demonstrates that the right to marriage is fundamental.[27] Third, the right to marry has a bearing on the rights of childrearing, procreation, and education.[28] Finally, marriage serves as an important foundation of family and of society in the United States (U.S.).[29] For all these reasons, the Court concluded that the principles of equal protection and due process render the fundamental right to marry equally applicable to same-sex couples.[30] Furthermore, prohibiting same-sex couples from getting married epitomizes inequality because it denies same-sex couples the benefits to which opposite-sex couples are entitled and prevents same-sex couples from exercising a fundamental right.[31]

The second issue the Court considered was whether the Fourteenth Amendment requires a state to recognize a same-sex marriage performed in another state.[32] The Court declared that being married in one state and not being recognized in another "is one of the most perplexing and distressing complications in the law of domestic relations."[33] In addition, non-recognition of out-of-state marriages creates instability and uncertainty in marriages.[34] Most importantly, given the Court's holding that states are required to issue marriage licenses to same-sex couples, there could be no justification for refusing to recognize same-sex marriages performed in other states.[35]

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20. U.S. CONST. amend. XIV, § 1.
21. *Obergefell*, 576 U.S. at 663.
22. *Id.* at 664.
23. *Id.*; *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) and Maynard v. Hill, 125 U.S. 190, 211 (1888)).
24. *Obergefell*, 576 U.S. at 665.
25. *Id.* at 666.
26. *Id.*
27. *Id.* at 667 (citing Turner v. Safley, 482 U.S. 78, 95–96 (1987)).
28. *Id.*
29. *Id.* at 669.
30. *Id.* at 675.
31. *Id.*
32. *Id.* at 656.
33. *Id.* at 681 (citing Williams v. North Carolina, 317 U.S. 287, 299 (1942)).
34. *Id.*
35. *Id.* at 680–81.

C. IMPLEMENTATION AND ENFORCEMENT CHALLENGES SINCE *OBERGEFELL*

After Congress passed DOMA in 1996, several states adopted their own "mini-DOMAs," which banned same-sex marriage in family codes and state laws.[36] In addition, after DOMA was passed, about thirty states amended their constitutions to prohibit same-sex marriage.[37] Although the *Obergefell* decision overrides all of these bans, many states have yet to repeal their outdated laws and constitutional amendments.[38] In Indiana, the Republican-controlled legislature rejected an attempt to remove its same-sex marriage ban in January 2020.[39] Democrats in Florida have also been unsuccessful in repealing the definition of marriage as "only a legal union between one man and one woman as husband and wife."[40] As of August 2022, thirty-five states are still clinging to same-sex marriage bans in their constitution, state law, or both—even though they are currently not enforceable under *Obergefell*.[41] Should the Supreme Court overturn *Obergefell* and rule that same-sex marriage is not a constitutionally protected right, most state bans would take effect immediately,[42] and states could resume denying same-sex marriage licenses.[43]

There have also been compliance issues in a number of states where local officials have refused to issue marriage licenses to same-sex couples.[44] Kentucky court clerk Kim Davis received national attention in 2015 for refusing to issue marriage licenses.[45] Davis ultimately spent five days in jail for her refusal and lost a re-election campaign in 2018. She was later sued by two couples for refusing to issue their marriage licenses.[46] In response, Davis claimed qualified immunity and took her appeal to the Supreme Court, which turned aside the case.[47] In 2016, then-Chief Justice of Alabama's highest court, Roy Moore, was suspended after prohibiting probate judges from issuing marriage licenses to same-sex couples.[48] In 2019, the Texas Commission on Judicial Misconduct publicly reprimanded a Waco-based Justice of the Peace for refusing to perform same-sex weddings.[49]

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36. Julie Moreau, *States Across U.S. Still Cling to Outdated Gay Marriage Bans*, NBC NEWS (Feb. 18, 2020, 10:44 AM), https://perma.cc/WXK7-HFB8.

37. Mark Strasser, *The Possible Lingering Effects of Mini-DOMAs*, 47 CAP. U. L. REV. 679, 679 (2019).

38. Moreau, *supra* note 36.

39. *Id.*

40. *Id.*

41. Brooke Migdon, *What Your State Constitution Says About Same-Sex Marriage*, THE HILL (July 20, 2022), https://perma.cc/V6TX-WXG7.

42. Elaine S. Povich, *Without* Obergefell*, Most States Would Have Same-Sex Marriage Bans*, PEW CHARITABLE TRUSTS (July 7, 2022), https://perma.cc/X4DQ-PNVN.

43. Stern, *supra* note 10.

44. *Id.*

45. *Id.*

46. Robert Barnes, *Supreme Court will not hear Kim Davis same-sex marriage case*, WASH. POST (Oct. 5, 2020), https://perma.cc/CY9S-WQ6F.

47. *Id.*

48. Emma Margolin, *Roy Moore Suspended From Alabama Supreme Court for Anti-Gay Marriage Order*, NBC NEWS (Sept. 30, 2016, 1:20 PM), https://perma.cc/HHE2-AHA3.

49. Tim Fitzsimons, *Texas Judge Warned for Refusal to Perform Gay Marriages*, NBC NEWS (Dec. 4, 2019, 2:04 PM), https://perma.cc/VJQ2-M6T3.

A ruling overturning *Obergefell* would not reverse state laws allowing same-sex marriage, and accordingly, some states have taken action since the landmark decision to codify equality.[50] Virginia repealed a same-sex marriage ban in 2020.[51] Nevada voters overwhelmingly approved the Marriage Regardless of Gender Amendment in 2020, which recognizes a marriage between couples regardless of gender.[52] In 2022, New Jersey enshrined marriage equality in law by requiring all marriage and civil union laws be read with gender-neutral intent.[53]

Bills allowing for religious exemptions to performing marriages and providing marriage-related services are still on the rise, and many state laws still lack explicit protections for LGBTQ+ families.[54] In addition, at least seven states have introduced bills to undermine marriage equality by limiting rights of same-sex couples to marry or adopt children.[55] Colorado House Bill 1272 proposed that existing state law defining marriage as a heterosexual union between one man and one woman should be enforced despite *Obergefell* or any subsequent rulings from the Supreme Court.[56] The bill also included a provision to limit adoption to heterosexual couples.[57] Similarly, Missouri House Bill 2173 proposed replacing all same-sex marriage licenses with domestic union contracts.[58] Despite the continued controversy around same-sex marriage in some states and uncertainty about *Obergefell*'s fate post-*Dobbs*, support for same-sex marriage has risen steadily since 1996, reaching an all-time high of 71% in 2022.[59] In addition, a majority of Republicans now support same-sex marriage for the first time.[60]

III. STATE REGULATION OF MARRIAGE

Part III considers how the U.S. regulates marriage and the differences between federal and state regulation. Section A surveys how requirements and prohibitions on marriage vary from state to state. Section B discusses the rights and privileges a marital relationship provides. Section C explores polygamy: marriages of more than two individuals. Section D covers the concept of

50. Povich, *supra* note 42.

51. *Id.*

52. *Nevada Question 2, Marriage Regardless of Gender Amendment (2020)*, BALLOTPEDIA (2020), https://perma.cc/BW99-UYSN (last visited Mar. 1, 2023).

53. *Governor Murphy Signs Legislation to Enshrine Marriage Equality into State Law,* OFF. SITE OF THE STATE OF N.J. (Jan. 10, 2022), https://perma.cc/Q8EQ-JR5B.

54. *Family,* EQUAL. FED'N (2022), https://perma.cc/Y424-X2G5 (last visited Mar. 1, 2023).

55. *See* Moreau, *supra* note 36 (noting that lawmakers in Colorado, Iowa, Kansas, Massachusetts, Missouri, South Dakota, and Tennessee have introduced bills to limit the definition of marriage to be between one man and a woman).

56. H.R. 1272, 72nd Gen. Assemb. (Reg. Sess. (Colo. 2020)).

57. *Id.*

58. H.R. 2173, 100th Gen. Assemb., (Reg. Sess. (Mo. 2020)).

59. Justin McCarthy, *Same-Sex Marriage Support Inches up to New High of 71%*, GALLUP (June 1, 2022), https://perma.cc/LG5A-2CNG.

60. *Id.*

covenant marriages and their ability to reduce divorce rates. Section E examines the legal status of civil unions and partnerships. Finally, Section F addresses state variations in prohibitions on child marriage, including the age of consent.

A. JURISDICTION AND RECOGNITION

Although the Supreme Court has established the right to marry as fundamental[61] and individuals often view marriage as a sacred relationship based on private choice,[62] marriage is nevertheless considered a contractual relationship subject to state regulation under the state's police power reserved by the Tenth Amendment, subject to other Constitutional limitations.[63] Interestingly, most states do not have a residency requirement in order to form a legal marriage within the state, but those that will provide marriage licenses to non-residents require that the marriage ceremony take place within the state if the marriage license is issued by the state.[64] For additional examples of marriage regulations by jurisdiction, see Appendix A.

The federal government retains complete authority under the Federal District Clause[65] and the Territories Clause[66] to legislate not only in the states, but also in non-state U.S. territories. Congress has enacted legislation in all non-state areas[67]

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61. *Obergefell*, 576 U.S. at 646; *see also Loving*, 388 U.S. at 12 (holding that interracial couples have the right to marry); *Turner*, 482 U.S. at 96 (holding that prisoners have a right to marry); Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (holding that forced sterilization of criminals is unconstitutional because "marriage and procreation are fundamental to the very existence and survival of the race"); Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136, 141 (N.Y. App. Div. 2006) (holding the New York constitution does not require the state of New York to allow same-sex marriage). *But see* Brown v. Buhman, 947 F. Supp. 2d 1170, 1194–95 (D. Utah 2013) (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)) (finding that no fundamental right to a polygamous marriage exists, using the *Glucksberg* analysis).

62. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (stating that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" and marriage encompasses a fundamental privacy right). *But see* Doe v. Del Rio, 241 F.R.D. 154, 161 (S.D. N.Y. 2006) ("The marital relationship is not, in itself, a matter of 'utmost intimacy,' . . . warranting the grant of pseudonymity." (internal citations omitted)).

63. *Loving*, 388 U.S. at 7 (holding that while the appeals court found that "marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment," such state regulation is not unlimited and must not interfere with the equal protection and due process requirements of the Fourteenth Amendment).

64. *See*, *e.g.*, IND. CODE § 31-11-4-3 (West, Westlaw through 2022 Reg. Sess. of 122nd Gen. Assemb.) ("Individuals who intend to marry must obtain a marriage license from the clerk of the circuit court of the county of residence of either of the individuals. If neither of the individuals who intends to marry is a resident of Indiana, the individuals must obtain the marriage license from the clerk of the circuit court of the county in which the marriage is to be solemnized.").

65. U.S. CONST. art. I, § 8, cl. 17.

66. U.S. CONST. art. IV, § 3, cl. 2.

67. These non-state areas include one federal district (D.C.), five unincorporated territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and U.S. Virgin Islands), and "U.S. soil" areas, such as embassies and military facilities, located within the borders of other nations.

that both establishes a local government and delegates at least some federal authority to those local bodies, including the police power to directly regulate marriage.[68] Indigenous nations possess limited inherent powers arising under treaties with the U.S. and federal law and are generally considered sovereigns akin to states.[69] Thus, indigenous nations' right to self-governance includes the power to regulate marriage.[70]

Under the Full Faith and Credit Clause,[71] states usually must recognize marriages that have been validly executed in other states.[72] Treaty obligations and U.S. federal law require states, in most cases, to also recognize legal marriages performed in other nations, including indigenous nations within the U.S.[73] However, this is not true in the case of polygamy; state courts are left to decide whether polygamous marriages that have taken place outside in the U.S are recognized, and generally reject the legality of polygamous marriages in the name of public policy.[74] Interestingly, states are typically willing to treat polygamous partners as legal spouses when it comes to the distribution of property and benefits.[75]

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68. *See, e.g.*, District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 102(a) (1973) ("Subject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia."); *id.* § 302 ("Legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution.").

69. Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, 12 COMPLEAT LAW. 14 (1995), https://perma.cc/UU8L-7D33; *see also Frequently Asked Questions*, BUREAU OF INDIAN AFF., https://perma.cc/H7TB-CBYE (last visited Feb. 11, 2022).

70. *See generally Frequently Asked Questions*, *supra* note 69.

71. U.S. CONST. art. IV, § 1.

72. Note that U.S. CONST. art. IV, §1 also includes a provision that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof," and thus Congress retains the ability to give "effect" to the actions of one state in another state through the enactment of federal legislation. Congress enacted the Full Faith and Credit Act (28 U.S.C. § 1738) to effectuate its authority under the Clause. *See* Cote-Whitacre v. Dep't of Pub. Health, 844 N. E.2d 623, 642 (Mass. 2006) ("Interstate comity [arising under the Full Faith and Credit Clause] is 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.'" (quoting Perkins v. Perkins, 113 N.E. 841, 843 (1916))); *see also* Williams v. North Carolina, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."); Sosna v. Iowa, 419 U.S. 393, 407 (1975) (concluding that a residency requirement for initiation of divorce did not violate the Full Faith and Credit Clause of the Constitution).

73. *Marriage Abroad*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS. https://perma.cc/P6UA-BMMP (last visited Mar. 4, 2023) ("Marriages performed overseas are considered valid in the country where they take place if they are entered into in accordance with local law. Recognition of the validity of marriages performed abroad depends on the laws of the place in which the marriage is to be recognized.")

74. Alan Reed, *Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choices of Law*, 20 N.Y. L. SCH. J. INT'L & COMP. L. 387, 406 (2000).

75. *See* Restatement (First) of Conflict of Laws § 134.

Under the Privileges and Immunities Clause of Article IV,[76] a state usually must extend rights associated with its own marriage to all recognized out-of-state marriages.[77] A state may refuse, however, to recognize particular marriage types that are prohibited in that state, even if other states or nations permit those types, under a theory that such marriages are not judicial orders and would be against the public policy of that state.[78] Such non-recognizable types include plural (polygamous),[79] affinity (particularly adopted relationships such as stepfather-stepdaughter),[80] consanguinity (individuals related by blood),[81] incestuous,[82] capacity-deficient (particularly mental[83] and age[84]), physical-deficient (particularly impotence),[85] and common law marriages.[86]

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76. U.S. CONST. art. IV, § 2, cl. 1.

77. *See* Toomer v. Witsell, 334 U.S. 385, 396–97 (1948) (holding that the privileges and immunities clause prohibits "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."). *But see* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978) ("A State [need not] always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do.").

78. *See* Adar v. Smith, 639 F.3d 146, 151–52 (5th Cir. 2011) (citing Mills v. Duryee, 11 U.S. 481, 485 (1813)) (finding that the Supreme Court has consistently held that Full Faith and Credit under Article IV of the Constitution is limited to "binding adjudications from one state court or tribunal when litigation is pursued in another state or federal court"); Cote-Whitacre v. Dep't of Pub. Health, 844 N. E.2d 623, 642 (Mass. 2006) (Spina, J., concurring) (citing Hilton v. Guyot, 159 U.S. 113, 163, 164 (1895)) ("Principles of comity permit the voluntary recognition and enforcement of the judicial proceedings of another State . . ., provided that a State's own citizens are not unfairly prejudiced thereby, and a State's public policies are not impaired."). *But see* Adar, 639 F.3d at 176–79 (Wiener, J., dissenting) (citing Baker v. Carr, 369 U.S. 186, 233 (1962)) (noting that "there is no roving public policy exception to the full faith and credit that is owed to out-of-state judgments").

79. *See, e.g.*, IND. CODE § 31-11-1-3 (West, Westlaw through 2022 2nd Reg. Sess. of 122nd Gen. Assemb.) ("Two (2) individuals may not marry each other if either individual has a husband or wife who is alive.").

80. Affinity is "the relation that one spouse has to the blood relatives of the other spouse." *Affinity*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See, e.g.*, OKLA. STAT. tit. 43, § 2 (West, Westlaw through the 2nd Reg. Sess. & the 2nd & 3rd Extra. Sess. of the 58th Leg. (2022)) (prohibiting relationships between a stepmother and stepson or a stepfather and stepdaughter).

81. Consanguinity is "the relationship of persons of the same blood or origin." *Consanguinity*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/212(a)(2) (West, Westlaw through P.A. 102-1107 of the 2022 Reg. Sess.) (prohibiting "a marriage between an ancestor and a descendant or between siblings, whether the relationship is by the half or the whole blood or by adoption").

82. 750 ILL. COMP. STAT. ANN. 5/212(a)(2) (West, Westlaw through P.A. 102-1107 of the 2022 Reg. Sess.).

83. *See, e.g.*, IND. CODE § 31-11-4-11(1) (West, Westlaw through 2022 2nd Reg. Sess. of 122nd Assemb.) (prohibiting the issuance of a marriage license to a person who "has been adjudged to be mentally incompetent unless the clerk finds that the adjudication is no longer in effect"); KY. REV. STAT. ANN. § 402.020 (West, Westlaw through 2022 Reg. Sess.) (prohibiting marriage "with a person who has been adjudged mentally disabled by a court of competent jurisdiction").

84. *See, e.g.*, ALASKA STAT. ANN. § 25.05.011(a)(1) (West, Westlaw through 2022 2nd Reg. Sess. of 32nd Leg.) (requiring a party to a marriage to be "18 years of age or older and otherwise capable"); CAL. FAM. CODE § 301 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.) ("Two unmarried persons 18 years of age or older, who are not otherwise disqualified, are capable of consenting to and consummating marriage.").

85. *See, e.g.*, W. VA. CODE § 48-3-103(3)(c) (West, Westlaw through 2022 Reg. Sess.) (allowing marriages to be voidable if either party "was incapable, because of natural or incurable impotency of the body, of entering into the marriage state.").

B. RIGHTS RESULTING FROM FORMATION

Legislation has traditionally defined marriage as either a civil contract[87] or as a state-conferred legal status[88] creating rights and obligations.[89] Statutes defining marriage as a civil contract delineate marriage as an arrangement governed by civil law rather than by ecclesiastical law.[90] The legal protections and benefits gained through civil marriage enhance quality of life for those who have access to civil marriage licenses.[91]

Marriage is regulated by statute; however, any marriage regulation is subject to constitutional scrutiny.[92] Various marriage regulations have been challenged on due process grounds, with varying degrees of success.[93] Marriage regulations have similarly been challenged on equal protection grounds.[94] Courts have upheld most of these regulations as long as they serve a legitimate purpose that is not arbitrary or discriminatory, finding the imposition of reasonable regulations that do not bear on the decision to enter into the marital relationship to be legitimate.[95]

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86. *See, e.g.*, ALASKA STAT. ANN. § 25.05.061 (West, Westlaw through 2022 2nd Reg. Sess. of 32nd Leg.) (prohibiting the recognition of common law marriage created under Alaska law by requiring that "[a] marriage contracted after January 1, 1964, is void unless a license has first been obtained as provided in this chapter."); *see also* Schneider v. Picano, No. CV106001607S, 2011 WL 5120460, at *5 (Conn. Super. Ct. Oct. 6, 2011) (refusing to recognize an out-of-state common law marriage because no evidence was offered that the other jurisdiction officially recognized the marriage as valid).

87. *See, e.g.*, Carabetta v. Carabetta, 438 A.2d 109, 111 (Conn. 1980) ("[A] marital relationship is in its origins contractual, depending . . . upon the consent of the parties."); Dolan v. Dolan, 259 A.2d 32, 38 (Me. 1969) ("[M]arriage is a civil contract."); Tice v. Tice, 672 P.2d 1168, 1170–71 (Okla. 1983) ("Marriage . . . requires the voluntary consent of parties who have the legal capacity to contract."); Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 (Pa. 1998) ("Marriage in Pennsylvania is a civil contract.").

88. *See, e.g.*, Chapman v. Chapman, 498 S.W.2d 134, 135 (Ky. 1973) ("A marriage covenant is not a contract in the usual sense . . . [but] a status or relation created by contract.").

89. *See, e.g.*, Dematteo v. Dematteo, 762 N.E.2d 797, 809 (Mass. 2002).

90. Ecclesiastical law is "the body of law derived largely from canon and civil law and administered by the ecclesiastical courts." *Ecclesiastical Law*, BLACK'S LAW DICTIONARY (11th ed. 2019); Wash. Statewide Org. of Stepparents v. Smith, 536 P.2d 1202, 1206 (Wash. 1975) ("[The purpose of the marital contract] was to make it clear that marriage is governed by civil law rather than by ecclesiastical law.").

91. *See* Baker v. State, 744 A.2d 864, 883 (Vt. 1999) (stating that legal and other benefits of civil marriage license access enhance quality of life).

92. *Obergefell*, 576 U.S. at 645–46.

93. Some due process challenges have been successful while others have failed. *See, e.g.*, *In re* Ops. of the Justs. to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (holding that a bill preventing same-sex couples from entering into marriage violated the Massachusetts Constitution due process clause); Kirkpatrick v. Eighth Jud. Dist. Ct. *ex rel.* Clark, 64 P.3d 1056, 1062–63 (Nev. 2003) (finding that a father's substantive and procedural due process rights were not violated by a statute authorizing the marriage of his underage daughter only upon the other parent's consent).

94. *See, e.g.*, *In re* Ops. of the Justs. to the Senate, 802 N.E.2d at 572 (holding that a ban on same-sex marriages violates the state constitution's equal protection clause because it relegates same-sex couples to an inferior status); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that a ban on same-sex marriage violated the equal protection clause of the Massachusetts state constitution).

95. *See* Boynton v. Kusper, 494 N.E.2d 135, 140–41 (Ill. 1986) (finding that the imposition of a state tax on marriage licenses poses an arbitrary barrier to access to the fundamental right to marriage); *see*

Certain regulations, such as those based on race[96] and gender,[97] were eventually deemed unconstitutional. Nonetheless, jurisdictions still maintain wide latitude in setting marriage license requirements, including regulations related to evasion,[98] age of consent,[99] mental capacity (wherein the person with compromised mental capacity must understand the nature of the marriage contract),[100] physical capacity,[101] consanguinity (relation by blood),[102] affinity (relation by marriage or

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also Nicpon by Urbanski v. Nicpon, 495 N.E.2d 1193, 1196 (Ill. App. Ct. 1986) (finding that the Illinois interspousal immunity statute is not arbitrary nor discriminatory and does not unnecessarily burden the fundamental right to marry). *But see Goodridge*, 798 N.E.2d at 968 (a Massachusetts marriage law limiting marriage to opposite-sex couples violated the state constitution's due process clause).

96. *See, e.g.*, *Loving*, 388 U.S. at 12 (holding a state prohibition on interracial marriages unconstitutional). However, prior to 1967, courts consistently upheld statutes that forbid interracial marriages between whites and non-whites. *See, e.g.*, Naim v. Naim, 87 S.E.2d 749, 755–56 (Va. 1955) (finding that prohibitions against interracial marriages are not arbitrary and therefore do not violate the Fourteenth Amendment's Due Process or Equal Protection Clauses); Jackson v. Denver, 124 P.2d 240, 241–42 (Colo. 1942) (finding a statute prohibiting interracial marriages is constitutional because it is not arbitrary); Baker v. Carter, 68 P.2d 85, 86 (Okla. 1937) (holding that the Oklahoma statute nullified interracial marriage); Follansbee v. Wilbur, 44 P. 262, 263 (Wash. 1896) (nullifying an interracial marriage); Dodson v. State, 31 S.W. 977, 977–78 (Ark. 1895) (nullifying an interracial marriage); Scott v. State, 39 Ga. 321, 323 (Ga. 1869) ("The Code of Georgia . . . forever prohibits the marriage relation between the two races, and declares all such marriages null and void.").

97. *See Obergefell*, 576 U.S. at 644.

98. *See, e.g.*, W. VA. CODE § 48-2-602 (West, Westlaw through 2021 3rd Spec. Sess.) ("If a resident of this state marries in another state or country, the marriage is governed by the same law, in all respects, as if it had been solemnized in this state if, at the time of the marriage: (1) The marriage would have been in violation of section 3-103 [Voidable Marriages] if performed in this state; (2) The person intended to evade the law of this state; and (3) The person intended to return and reside in this state.").

99. *See* State v. Wade, 766 P.2d 811, 815 (Kan. 1989) ("A kindergarten wedding would be a ceremony of the absurd. It is a legal impossibility for a five-year-old to be married in Kansas."); *see also* Kingery v. Hintz, 124 S.W.3d 875, 878 (Tex. App. 2003) (holding that a person under eighteen may not be a party to a Texas common-law marriage) (*See* Appendix A).

100. *See, e.g.*, Pape v. Byrd, 582 N.E.2d 164, 168 (Ill. 1991) (holding that a person lacks capacity to marry if unable to understand nature, effect, duties, and obligations of marriage); *In re* Est. of Hendrickson, 805 P.2d 20, 23 (Kan. 1991) (holding that a party must be capable of understanding the nature of the contract to enter into marriage); Edmunds v. Edwards, 287 N.W.2d 420, 426 (Neb. 1980) ("A marriage is valid if the party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates."); MONT. CODE ANN. § 40-1-210 (West, Westlaw through 2021 Sess.) (prohibiting the issuance of a marriage license to an applicant who is "under the influence of intoxicating liquor or narcotic drug").

101. *See, e.g.*, W. VA. CODE § 48-3-103(3)(c) (West, Westlaw through 2021 3rd Spec. Sess.) (Marriage is voidable if either party "was incapable, because of natural or incurable impotency of the body, of entering into the marriage state."); MONT. CODE ANN. § 40-1-402(1)(b) (West, Westlaw through 2021 Sess.) (Marriage is invalid if "a party lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time that the marriage was entered into, the other party did not know of the incapacity.").

102. *See, e.g.*, Weeks v. Weeks, 654 So. 2d 33, 34 (Miss. 1995) (nullifying a marriage between an uncle and a niece related by blood); Singh v. Singh, 569 A.2d 1112, 1120–21 (Conn. 1990) (prohibition against marrying relatives extends to half-blood relatives); *In re* Stiles Est., 391 N.E.2d 1026, 1026–27 (Ohio 1979) (marriage between blood related uncle and niece is forbidden by state); (*See* Appendix A).

adoption including stepchild/stepparent relationships),[103] waiting periods,[104] residency status,[105] and blood tests[106] for disease screening.[107]

One possible explanation for the depth and breadth of these regulations is that marriage imposes a variety of obligations, protections, and benefits that are prescribed, not by the individual marriage contract, but by the general law of the state.[108] Married individuals have access to each other's financial resources[109] and are often entitled to many of their spouse's employer-provided benefits, including health, accident, disability and life insurance,[110] retirement and pension rights,[111] and workers' compensation survivor benefits.[112] Spouses can even be entitled to disability insurance proceeds after the marriage ends if the premiums have been paid by the former spouse's employer[113] or if the premiums are paid

103. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 207, § 1 (West, Westlaw through Ch. 116 of 2021 1st Ann. Sess.) ("No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, or mother's sister."); Rhodes v. McAfee, 457 S.W.2d 522, 524 (Tenn. 1970) (holding that the stepfather's marriage to stepdaughter was still void despite stepfather's divorce of his wife). *But see* Back v. Back, 125 N.W. 1009, 1012 (Iowa 1910) (finding that stepfather may legally marry stepdaughter once affinity relationship is terminated).

104. *See, e.g.*, TEX. FAM. CODE ANN. § 2.204 (West, Westlaw through 2021 Reg. & 2nd Called Sess. of the 87th Leg.) (requiring a seventy-two hour waiting period following the issuance of a marriage license before a marriage ceremony may be performed).

105. *See, e.g.*, MONT. CODE ANN. § 40-1-201 (West, Westlaw through 2021 Sess.) ("No particular specifications for county residents, but if an applicant for a marriage license is a nonresident of the county where the license is to issue, the nonresident applicant's part of the application may be completed and sworn to or affirmed before the person authorized to accept license applications in the county and state in which the nonresident applicant resides.").

106. *See* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 304, 314 (2010).

107. NAVAJO NATION CODE, tit. 9, § 6 (2010), https://perma.cc/8B6H-9MAZ (requiring marriage license applicants to have a blood test).

108. *See* Baker v. State, 744 A.2d 864, 883 (Vt. 1999).

109. *See* Myers v. Myers, 764 P.2d 1237, 1244 (Haw. 1988) (quoting Cassiday v. Cassiday, 716 P.2d 1133, 1136 (Haw. 1986)) ("[M]arriage is a partnership to which both parties bring their financial resources as well as their individual energies and efforts.").

110. *See, e.g.*, Russell v. Russell, 740 P.2d 127, 130 (N.M. Ct. App. 1987) (entitling spouse to health insurance policy purchased with community assets); Seaman v. Seaman, 756 S.W.2d 56, 58 (Tex. App. 1988) (holding life insurance policy that is incident of employment during the marriage given to employee as added compensation is community property).

111. *See, e.g.*, Egelhoff v. Egelhoff *ex rel*. Breiner, 532 U.S. 141, 143 (2001) (holding that a state statute which automatically revoked a spouse's right to an employee benefit plan upon divorce was nullified by the Employee Retirement Income Security Act of 1974 (ERISA)); Boggs v. Boggs, 520 U.S. 833, 843 (1997) ("[ERISA's objection is] to ensure a stream of income to surviving spouses."); Diffenderfer v. Diffenderfer, 491 So. 2d 265, 268 (Fla. 1986) (stating it may be preferable to deal with pension rights as marital assets); Day v. Day, 663 S.W.2d 719, 719 (Ark. 1984) (husband's interest in retirement plan is a marital asset subject to division).

112. *See, e.g.*, MICH. COMP. LAWS ANN. § 418.321 (West, Westlaw through P.A. 2022, No. 4 of the 2022 Reg. Sess., 101st Leg.) (providing that surviving dependents be compensated if a worker's death resulted from occupation-related injury); VT. STAT. ANN. tit. 21, § 632 (West, Westlaw through the Reg. 1st Sess. of 2021–2022 Vt. Gen. Assemb.) (providing spouse with the right to workers' compensation if death results from work-related injury).

113. *See* Guy v. Guy, 560 P.2d 876, 878–79 (Idaho 1977).

from community funds.[114] A married individual also has certain rights during their spouse's illness or medical condition, including the right to take unpaid leave from work,[115] the ability to make medical decisions, and access to hospital visitations.[116] Upon the death of a spouse, certain entitlements arise, including the right to inheritance.[117] Some states allow a spouse to inherit even if they are specifically excluded from the will.[118] Entitlements upon the death of a spouse also include the right to sue for loss of consortium, which is generally considered to be the loss of benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations.[119] A claim for loss of consortium is limited to a married individual[120] and is intended only to compensate a spouse for loss of these specific marital benefits.[121] Additionally, married individuals have advantages when they bring tort claims while both spouses are alive. For example, an individual who witnesses an accident that causes injury to the other spouse can more easily recover for emotional distress than persons involved in other committed relationships.[122] However, some states

114. *See* Douglas v. Douglas, 686 P.2d 260, 260 (N.M. Ct. App. 1984).

115. *See* Family and Medical Leave Act (2012) (codified at 29 U.S.C. § 2601(b)(2) (2012) (allowing individuals to take time off from work to care for a sick spouse).

116. *See* Langbehn v. Pub. Health Tr. of Miami-Dade Cnty., 661 F. Supp. 2d 1326, 1335–38 (S.D. Fla. 2009) (explaining that persons who are "legally able to make medical decisions on [behalf of a patient include] . . . a spouse" but holding that such medical decisions do not necessarily ensure patient visitation to the spouse and thus doctors may restrict visitation without creating tort liability); Baker v. State, 744 A.2d 864, 884 (Vt. 1999) (stating that hospital visitation privileges are among certain rights available to married couples); *see also* Garrett Riou, *Hospital Visitation and Medical Decision Making for Same-Sex Couples*, CTR. FOR AM. PROGRESS (Apr. 15, 2014), https://perma.cc/85U2-D5VT (summarizing recent changes to medical visitation rights resulting from Presidential and Executive Department directives).

117. *See, e.g.*, ALA. CODE ANN. § 43-8-41 (West, Westlaw through the end of the 2022 Reg. & 1st Spec. Sess.); ALASKA STAT. ANN. § 13.12.102 (West, Westlaw through amendments received through the 2022 2nd Reg. Sess. of the 32nd Leg.); MINN. STAT. ANN. § 524.2-102 (West, Westlaw through legislation effective through Feb. 22, 2023 from the 2023 Reg. Sess.).

118. *See, e.g.*, Becraft v. Becraft, 628 So. 2d 404, 406-407 (Ala. 1993).

119. *Loss of Consortium*, BLACK'S LAW DICTIONARY (11th ed. 2019).

120. *See, e.g.*, Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1149–50 (Pa. 1997); *see also* Frideres v. Schiltz, 540 N.W.2d 261, 268 (Iowa 1995) ("[N]o cause of action will be recognized for loss of spousal consortium when the underlying acts occurred prior to the marriage."); Ferrell v. Fireman's Fund Ins. Co., 696 So. 2d 569, 573 (La. 1997) ("It is well settled in Louisiana that a cause of action exists for loss of consortium.").

121. *See, e.g.*, Carlson v. Okerstrom, 675 N.W.2d 89, 111 (Neb. 2004) (citing Anson v. Fletcher, 220 N.W.2d 371, 378 (Neb. 1974)) ("Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, comfort, assistance, and particularly his or her conjugal society.").

122. It is easier for married individuals to recover for emotional distress because spouses presumptively satisfy the requirement that there be a close family relationship between the victim of harm and the spouse who is the bystander. *See, e.g.*, Folz v. State, 797 P.2d 246, 260 (N.M. 1990) ("Marital or intimate family relationships are required for recovery of damages based on emotional distress, except under the impact rule stating that a third-party bystander with no close familial ties can only recover if that bystander is also physically injured."); Drew v. Drake, 168 Cal. Rptr. 65, 66 (Cal. Ct. App. 1980) (finding that a woman claiming to be the victim's "de facto spouse" was not entitled to

allow individuals who are in a relationship similar to marriage to recover for emotional distress.[123]

Individuals can often continue to receive benefits after a marriage has dissolved, including alimony and property division. Marriage creates a property interest such that, upon dissolution, each spouse is entitled to a portion of the property.[124] Continued benefits of marriage dissolution can also include child custody, support,[125] and visitation rights. This stands in contrast to parents in unmarried relationships. In many states, only the biological parent in an unmarried relationship has standing to seek visitation or custody.[126] Correspondingly, many same-sex parents who are the domestic partners of a child's biological parent may not have the same rights as the biological parent. Following *Obergefell*, however, married same-sex couples can now enjoy the same legal protections and benefits that married opposite-sex couples enjoy.[127]

Courts began recognizing non-solemnized, long-term unions as marital in nature with the adoption of common law marriage.[128] The aforementioned benefits

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recover for emotional distress because there was not a close enough relationship between her and the victim). However, some states allow individuals who are in a relationship similar to marriage to recover for emotional distress.

123. *See* Paugh v. Hanks, 451 N.E.2d 759, 766–67 (Ohio 1983) (holding that an engaged couple might constitute the close relationship needed to sue in emotional distress case); *see also* CAL. CIV. CODE § 1714.01 (West, Westlaw through Ch. 1 of 2022 Reg. Sess.) (holding that domestic partners may recover for emotional distress).

124. Marriage creates a property interest such that, upon dissolution, each spouse is entitled to a portion of the property. *See, e.g.*, Blaylock v. Blaylock, 586 S.E.2d 650, 651 (Ga. 2003) ("An equitable division of property is based upon the respective interest of the parties in the marital estate, and not upon one party's generosity."). Only married individuals are entitled to the rights that accompany a divorce. *See, e.g.*, Rosengarten v. Downes, 802 A.2d 170, 183–84 (Conn. App. Ct. 2002) (finding that same-sex civil union is not marriage and, therefore, not entitled to divorce).

125. Men, once married, have an easier time showing paternity than unmarried men, thereby simplifying one potentially contentious element in a custody dispute. A child born to a married couple living together is presumed to be the child of both parents unless the male partner is sterile or impotent. *See, e.g.*, CAL. FAM. CODE § 7540 (West, Westlaw through Ch. 1 of 2022 Reg. Sess.); Michael H. v. Gerald D., 491 U.S. 110, 131 (1989); Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 296 (Cal. Ct. App. 2000).

126. *See, e.g.*, *In re* Thompson, 11 S.W.3d 913, 918–19 (Tenn. Ct. App. 1999) (holding that non-parent lacks standing to sue for visitation rights of child). *But see* Conover v. Conover 146 A.3d 433, 453 (Md. 2016) ("We hold that *de facto* parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interest of the child analysis.").

127. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003) ("Each plaintiff attests a desire to marry his or her partner in order to . . . secure the legal protections and benefits afforded to married couples and their children."). The *Goodridge* court also held that the denial of a marriage license was tantamount to the denial of "access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations." *Id.* at 950.

128. Courts were likely to grant a couple marital status if they had cohabitated like a married couple, if they had held themselves out to their community as married, and if they were accepted by their community as such. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 968 (2000); *see, e.g.*, Whitenhill v. Kaiser Permanente, 940 P.2d 1129, 1132 (Colo. Ct. App. 1997) (holding that absent an express agreement, two factors considered most reliable in

are also available to common law marriages in the District of Columbia and the seven states that fully recognize common law marriage formation, as well as posthumously to a surviving spouse in New Hampshire.[129] Some states have clauses which recognize common law marriages entered into prior to the abolition of common law marriage in that jurisdiction.[130] In the states that recognize common law marriages, after *Obergefell*, same-sex common law marriages can be legally contracted.[131] However, states might differ about the date at which the common law marriage commenced.[132] Primarily, the issue will be whether the same-sex common law marriage commenced when *Obergefell* was decided, or when the couple met the state's common law marriage requirements.[133]

Most states define common law marriage as some type of mutual agreement between two partners, without the express or implied certification of a civil or religious ceremony.[134] Although the remaining states explicitly forbid the legal recognition of common law marriage formation within their borders,[135] they

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determining whether an intent to be married has been established, for purposes of showing existence of common law marriage, are cohabitation and a general reputation in community that parties hold themselves out as husband and wife); *see generally In re* Est. of Smith, 679 S.E.2d 760 (Ga. Ct. App. 2009) (holding that putative wife of decedent failed to prove existence of common law marriage when parties separated numerous times, putative wife had a boyfriend during one such separation, she filed income tax returns as a single person, and she was the only witness who testified in support of her common law marriage while the remaining witnesses, decedent's former wife and son, testified that neither of the parties to the alleged marriage held themselves out as such).

129. Only Colorado, D.C., Iowa, Kansas, Montana, Rhode Island, Texas, and Utah continue to recognize common law marriage through statute. *See Whitenhill*, 940 P.2d at 1132; Robinson v. Evans, 554 A.2d 332, 337 (D.C. 1989); *In re* Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004); *In re* Est. of Antonopoulos, 993 P.2d 637, 647 (Kan. 1999); *In re* Est. of Ober, 62 P.3d 1114, 1115 (Mont. 2003); DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004); Russell v. Russell, 865 S.W.2d 929, 931 (Tex. 1993); Kelley v. Kelley, 79 P.3d 428, 430 (Utah Ct. App. 2003). New Hampshire recognizes common law marriage posthumously. *See* Joan S. v. John S., 427 A.2d 498, 499 (N.H. 1981) (citing N.H. REV. STAT. ANN. § 457:39 (2010)).

130. *Common-Law Marriage*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 19, 2011), https://perma.cc/4C6U-N673. States which recognize common law marriages entered into prior to abolition in the state include Pennsylvania (holding that no common law marriage recognized if contracted after January 1, 2005), Ohio (no common law marriage recognized if entered into after October 10, 1991), Indiana (no common law marriage recognized if contracted after January 1, 1958), Georgia (no common law marriage recognized if entered into after January 1, 1997), Florida (no common law marriage recognized if entered into after January 1, 1968), and Alabama (no common law marriage recognized if entered into after January 1, 2017).

131. Mark Strasser, Obergefell*, Retroactivity, and Common Law Marriage*, 9 NE. U. L. REV. 379, 420 (2017).

132. *Id.*

133. *Id.*

134. *See, e.g.*, *In re* Garges, 378 A.2d 307, 309 (Pa. 1977) ("A marriage contract does not require any specific form of words. All that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time."); *see also* 52 AM. JUR. 2D *Marriage* §§ 43–52 (1970).

135. All but fifteen states and D.C. explicitly refuse to recognize common law marriages. *See* IND. CODE ANN. § 31-11-4-13 (West, Westlaw through all legislation of 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb. effective through Sept. 15, 2022); LA. CIV. CODE ANN. art. 87 (West, Westlaw through 2023 1st Extra. Sess.); Harrelson v. Harrelson, 932 P.2d 247, 250 (Alaska 1997); Brissett v. Sykes, 855 S.W.2d 330, 332 (Ark. 1993); People v. Badgett, 895 P.2d 877, 897 (Cal. 1995); McAnerney v. McAnerney, 334 A.2d 437, 441 (Conn. 1973); Tabieros v. Clark

generally recognize valid out-of-state common law marriages[136] unless they are "repugnant" to public policy.[137] A state will generally find a marriage repugnant to public policy if it violates a well-settled statutory scheme or judicial decision.[138]

C. PLURAL MARRIAGE

Plural marriage, or polygamy, is the formation of a marriage between more than two persons.[139] Traditionally, plural marriages were of two types: polygyny, in which one man had two or more wives, and polyandry, in which one woman had two or more husbands.[140] Historically, the majority of plural marriages that were sanctioned by religion or government were polygynous in nature.[141]

All fifty states, all five U.S. territories, and the District of Columbia prohibit every type of plural marriage and provide criminal penalties for violating anti-bigamy laws.[142] In 1878, in *Reynolds v. United States*, the Supreme Court upheld

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Equip. Co., 944 P.2d 1279, 1291 n.2 (Haw. 1997); Cecil v. Farmers Nat'l Bank, 245 S.W.2d 430, 432 (Ky. 1952); Wilcox v. Trautz, 693 N.E.2d 141, 145 (Mass. 1998); State v. Patterson, 851 A.2d 521, 524 (Me. 2004); Enis v. State, 408 So. 2d 486, 487 n.1 (Miss. 1981); Randall v. Randall, 345 N.W.2d 319, 322 (Neb. 1984) (applying NEB. REV. STAT. § 42-104 (West, Westlaw through end of 1st Spec. Sess. of 107th Leg. (2021) and requiring a valid marriage license and ceremony for marriage); *In re* Lamb's Est., 655 P.2d 1001, 1002 (N.M. 1982); State v. Lynch, 272 S.E.2d 349, 354 (N.C. 1980); Cermark v. Cermark, 569 N.W.2d 280, 284 (N.D. 1997); Martin v. Coleman, 19 S.W.3d 757, 760 (Tenn. 2000); Stahl v. Stahl, 385 A.2d 1091, 1092 (Vt. 1978); *In re* Marriage of Pennington, 14 P.3d 764, 769 (Wash. 2000); Goode v. Goode, 396 S.E.2d 430, 431 (W. Va. 1990); Kinnison v. Kinnison, 627 P.2d 594, 595 (Wyo. 1981); Berdikas v. Berdikas, 178 A.2d 468, 469 (Del. Super. Ct. 1962); McLane v. Musick, 792 So. 2d 702, 704 (Fla. Dist. Ct. App. 2001); Jambrone v. David, 156 N.E.2d 569, 571 (Ill. App. Ct. 1959); Goldin v. Goldin, 426 A.2d 410, 412–13 (Md. Ct. Spec. App. 1981); *In re* Est. of Burroughs, 486 N. W.2d 113, 114 (Mich. Ct. App. 1992); Weston v. Weston, 882 S.W.2d 337, 339 (Mo. Ct. App. 1994); Torres v. Torres, 366 A.2d 713, 714 (N.J. Super. Ct. Ch. Div. 1976); Potter v. Davie, 713 N.Y.S.2d 627, 629 (N.Y. App. Div. 2000); *In re* Wilmarth's Est., 556 P.2d 990, 992 (Or. Ct. App. 1976); Farah v. Farah, 429 S.E.2d 626, 629 (Va. Ct. App. 1993).

136. *See, e.g.*, CAL. FAM. CODE § 308 (West, Westlaw through Ch.1 of 2022 Reg. Sess.); *Brissett*, 855 S.W.2d at 332; Hudson Trail Outfitters v. D.C. Dep't of Emp. Servs., 801 A.2d 987, 989 (D.C. 2002) (applying Virginia law); State v. Williams, 688 So. 2d 1277, 1280 (La. Ct. App. 1997); *Goldin*, 426 A.2d at 412; *In re* Est. of Burroughs, 486 N.W.2d at 114; *Enis*, 408 So. 2d at 487 n.1; Bogardi v. Bogardi, 542 N.W.2d 417, 420 (Neb. 1996); *In re* Lamb's Est., 655 P.2d at 1003; Poulos v. Poulos, 737 A.2d 885, 886 (Vt. 1999); *In re* Marriage of Pennington, 14 P.3d at 769 n.6; Griffis v. Griffis, 503 S.E.2d 516, 524 n.14 (W. Va. 1998).

137. *Cf.* Johnson v. Lincoln Square Props., Inc., 571 So. 2d 541, 542 (Fla. Dist. Ct. App. 1990) (recognizing common law marriages from other states was not repugnant to state law and state interests).

138. *See, e.g.*, People v. Ezenou, 588 N.Y.S.2d 116, 116 (N.Y. Sup. Ct. 1992) (holding that although man's second marriage is in accord with his home country of Nigeria's customs, recognition of polygamous marriage is repugnant to New York policy and the marriage is null and void).

139. Rebecca J. Cook & Lisa M. Kelley, *Polygyny and Canada's Obligations Under International Human Rights Law*, CAN. DEP'T OF JUST. 1 (Sept. 2006), https://perma.cc/R59H-DRN7.

140. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1966 (2010).

141. Cook & Kelley, *supra* note 139, at 1.

142. *See* Reynolds v. United States, 98 U.S. 145, 166–67 (1878); *see, e.g.*, *In re* Dalip Singh Bir's Est., 188 P.2d 499 (Cal. Ct. App. 1948); *In re* Est. of Diba, 957 N.Y.S.2d 635 (N.Y. Sup. Ct. 2010).

the constitutionality of a statute outlawing plural marriage.[143] No jurisdiction within the U.S. recognizes legal foreign plural marriages, but some states have recognized them for the limited purpose of decedent estate proceedings, where multiple wives may receive equal shares.[144] In these instances, the decedents were domiciled in foreign countries where their plural marriages were legally recognized and their spouses never resided in the U.S.[145] These states distinguished these cases from *Reynolds* because they found no public policy concern as these matters involved a question of descent of property rather than the decedents attempting to cohabitate with their wives in the U.S., something that could be offensive to community morals.[146]

Amicus briefs for *Obergefell*[147] raised concerns that a holding by the Court that the fundamental right to marry is based on consent rather than historic tradition would "open the floodgates" for legitimizing other marriage types that are currently prohibited, including polygamy and incest.[148] Some scholars believe, however, that the current prohibition on legal plural marriage can pass constitutional muster even under a strict scrutiny analysis, based on a theory of the documented harm and externalities caused by plural marriage,[149] as well as the U.S.' implied obligations under international treaties for human rights.[150] For example, some argue that when women are denied external education in closed polygynous communities, it undermines their ability to give free and informed consent to the marriage as required under international human rights law.[151]

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143. *Reynolds*, 98 U.S. at 166–67.

144. *See, e.g.*, *In re* Dalip Singh Bir's Est., 188 P.2d at 502; *In re* Est. of Diba, 2010 WL 2696611, at *2 (N.Y. Sup. Ct. 2010).

145. *In re* Dalip Singh Bir's Est., 188 P.2d at 502; *In re* Est. of Diba, 2010 WL 2696611, at *2.

146. *See, e.g.*, *In re* Dalip Singh Bir's Est. at 502 ("Where only the question of descent of property is involved, 'public policy' is not affected.").

147. *See, e.g.*, Brief of the Committee for Justice as Amicus Curiae in Support of Respondents at 3, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1545068, at *3.

148. *Id.*

149. Maura I. Strassberg, *Scrutinizing Polygamy: Utah's Brown v. Buhman and British Columbia's Reference Re: Section 293*, 64 EMORY L.J. 1815, 1869–71 (2015) (details polygyny's harms and externalities, including polygyny's effect on reducing the number of available women for marriage, lost boys, underage marriage, and other abuses).

150. Cook & Kelley, *supra* note 139, at 5 (stating polygamy "contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited"); *see also* Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 1249 U.N.T.S. 13 (signed by the U.S. on July 17, 1980 but not ratified) (Article 15 states women have "the same right freely to choose a spouse and to enter into marriage only with their free will and consent.").

151. Cook & Kelley, *supra* note 139, at 29 ("As human rights reports have argued in the U.S. Fundamentalist Mormon context, women and girl-children who are denied external education and are trained to obey religious teachings within closed polygynous communities may not see any other options outside polygynous unions.").

D. COVENANT MARRIAGE

A response to the perceived harms of high rates of divorce—allegedly exacerbated by the no-fault divorce regime—is the development of covenant marriage.[152] Covenant marriage gained prominence in the 1990s and is a type of marriage designed to protect marriage and decrease divorce rates.[153] In a covenant marriage, a couple first engages in premarital counseling that emphasizes the nature and responsibilities of marriage.[154] The couple then makes an addendum, called a declaration of intent, to their marriage license to indicate stricter rules governing their union and their ability to separate.[155] A covenant marriage is further restricted to two opposite-sex parties who have contractually agreed to a lifelong partnership,[156] although this requirement may no longer be valid in the wake of the *Obergefell* decision.

Covenant marriage legislation was part of a nationwide movement led by conservative Christians and proponents of traditional family structures to rewrite or repeal no-fault divorce laws, which they argued increased divorce rates and led to the dissolution of families.[157] Louisiana passed the U.S.' first covenant marriage act in 1997.[158] Representative Tony Perkins, in his 1997 presentation of the Covenant Marriage Act to the Louisiana House of Representatives, argued that the Act would help mitigate societal problems such as crime and drug use[159] by making the family environment more stable and a better place to raise a child.[160] Arizona[161] and Arkansas[162] are the only other states to have passed similar statutes, but a number of states have attempted to introduce covenant marriage

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152. *See, e.g.*, Ashton Applewhite, *Would Louisiana's "Covenant Marriage" Be a Good Idea for America?*, INSIGHT MAG., Oct. 6, 1997, at 25; Mary Beth Lane, *"Covenant Marriage" Bill Testimony Marked by Tears*, PLAIN DEALER, Oct. 16, 1997, at 5B.

153. *See, e.g.*, Applewhite, *supra* note 152, at 25; Lane, *supra* note 152, at 5B.

154. Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 24, 1997, at A14.

155. Cynthia DeSimone, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse Has Stifled the Effort to Strengthen Marriage*, 52 CATH. U. L. REV. 391, 401 (2003); *see also* J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged*, 27 PACE L. REV. 559, 593 n.259 (2007) (defining covenant marriage as a "lifelong relationship"); Louisiana Covenant Marriage Act, codified at LA. REV. STAT. ANN. § 9:272 (Westlaw through 2021 Reg. Sess. & Veto Sess.); ARK. CODE ANN. § 9-11-801 et seq. (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 24, 2023).

156. *See, e.g.*, ARK. CODE ANN. § 9-11-803(a)(1) (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 24, 2023).

157. Sack, *supra* note 154, at A1.

158. Louisiana Covenant Marriage Act, codified at LA. REV. STAT. ANN. § 9:272 (Westlaw through 2021 Reg. Sess. & Veto Sess.).

159. Melissa S. LaBauve, *Covenant Marriage: A Guise for Lasting Commitment?*, 43 LOY. L. REV. 421, 424 (1997).

160. *Id.*

161. ARIZ. REV. STAT. ANN. § 25-901 et seq. (West, Westlaw through 2nd Reg. Sess. of 55th Leg. (2022)).

162. ARK. CODE ANN. § 9-11-801 et seq. (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 24, 2023).

legislation.[163] Covenant marriages do not allow for no-fault divorces; divorce is limited to grounds such as adultery, abandonment, physical or sexual abuse, if one spouse commits a felony, or if the parties have lived apart continuously for specified periods of time.[164]

Critics have called covenant marriage a potentially dangerous injection of religious belief into a civil, state-regulated commitment because it uses the Bible as a line-drawing mechanism: it is more difficult to obtain a divorce on non-Biblical grounds than on Biblical grounds, such as adultery and abandonment.[165] Others argue that covenant marriage might trap spouses and children in loveless or abusive family dynamics.[166] Covenant marriage is an unpopular option among couples in states with covenant marriage legislation, and the movement for covenant marriage has largely petered out.[167]

E. STATUS OF CIVIL UNIONS AND DOMESTIC PARTNERSHIPS

Following the 2015 *Obergefell* decision, there remained a legal question of whether civil unions and domestic partnerships would be recognized as legal marriages or whether they would retain a separate legal status. As of January 2022, five states allow for civil unions,[168] seven states allow for domestic partnerships,[169] and Hawaii allows for a similar relationship known as reciprocal beneficiaries.[170] Five states have converted all prior civil unions to full legal marriages.[171]

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163. States that considered covenant marriage legislation include: Alabama, S.B. 606, Reg. Sess. (Ala. 1998); California, S.B. 1377, Reg. Sess. (Cal. 1997); Georgia, H.B. 249, 144th Gen. Assemb. (Ga. 1997); Indiana, H.B. 1052, 100th Gen. Assemb., 2nd Reg. Sess. (Ind. 1998); Iowa, IA H.B. 387, 87th Gen. Assemb. (Iowa 2017); Kansas, H.B. 2839, 77th Reg. Sess. (Kan. 1998); Minnesota, S.F. 2935, 80th Reg. Sess. (Minn. 1998); Mississippi, H.B. 1645, Reg. Sess. (Miss. 1998); Missouri, H.B. 1864, 89th Gen. Assemb., 2nd Reg. Sess. (Mo. 1998); Nebraska, L.B. 1214, 95th Leg., 2nd Sess. (Neb. 1997); Ohio, H.B. 567, 122nd Leg., Reg. Sess., (Ohio 1997); Oklahoma, H.B. 2208, 46th Leg., 2nd. Sess. (Okla. 1998); South Carolina, S.B. 961, Gen. Assemb. 112th Reg. Sess. (S.C. 1998); Tennessee, H.B. 2101, 100th Gen. Assemb. (Tenn. 1998), Virginia, H.B. 1056, Reg. Sess. (Va. 1998); Washington, S.B. 6135, 55th Leg. (Wash. 1998); West Virginia, H.B. 4562, 73rd Leg. Reg. Sess. (W. Va. 1998).

164. *See* Louisiana Covenant Marriage Act, codified at LA. REV. STAT. ANN. § 9:307 (West, Westlaw through 2023 1st Extra. Sess.); ARK. CODE ANN. § 25-903 et seq. (West, Westlaw through 2nd Reg. Sess. of 55th Leg. (2022)); ARK. CODE ANN. § 9-11-808 et seq. (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 24, 2023).

165. Sack, *supra* note 154, at A14.

166. Kevin Allman, *Covenant Marriage Laws in Louisiana*, GAMBIT (Mar. 2, 2009, 10:00 PM), https://perma.cc/NK5A-FZZZ; Sack, *supra* note 154, at A14.

167. Peter Feuerherd, *Why Covenant Marriage Failed to Take Off*, JSTOR DAILY (Feb. 11, 2019), https://perma.cc/RW58-HVTK ("[C]ouples in the three states largely ignored the option. Covenant marriage never comprised more than 5% of all marriages.").

168. *Civil Unions and Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 10, 2020), https://perma.cc/NC32-D3WT (listing states allowing civil unions as Colorado, Hawaii, Illinois, Vermont, and New Jersey).

169. *Id.* (listing states allowing domestic partnerships as California, District of Columbia, Maine, Nevada, Oregon, Washington, and Wisconsin).

170. *Id.*

171. *Id.* These states are Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont.

F. CHILD MARRIAGE

Child marriage, "the marriage of a minor to an adult or to another minor," is legal in forty-four states.[172] Because there is no federal law banning child marriage, regulation is left to the states.[173] Many states allow child marriage with parental consent; some add additional requirements such as pregnancy or a judge's approval.[174] States vary in the minimum age for child marriage: in Alaska, the minimum age is fourteen, whereas in Oregon and Nebraska, the minimum age is seventeen.[175] In nine states, including California, there is no minimum age as long as certain conditions are met.[176] Six states do not allow child marriage under any circumstances.[177] Between 2000 and 2018, almost 300,000 child marriages took place in the U.S., most of which were between girls and adult men.[178] Child marriage is most common in rural areas and in poor families.[179]

Since 2015, over half of states have taken action to raise the minimum marriage age or outlaw child marriage altogether.[180] In August 2021, North Carolina raised the minimum age to sixteen, leaving Alaska as the only remaining state that expressly allows marriage for children as young as fourteen.[181] In March 2022, the Alaska legislature passed a bill eliminating marriage for fourteen- and fifteen-year-olds, and it now awaits the governor's signature.[182] Some advocates contend that states should raise the minimum marriage age to eighteen, thus banning child marriage completely,[183] framing the issue in human rights terms.[184] According to the Tahirih Justice Center, "girls who marry before age eighteen face greater vulnerability to sexual and domestic violence, increased medical and mental health problems, higher drop-out rates from high school and college, greater risk of poverty," and other adverse outcomes.[185] Because federal law makes marriage a statutory defense to prosecution for sexual abuse of a minor,

172. Rebecca Boone, *Child Marriage Becomes a Legal Loophole in Custody Fights*, ASSOC. PRESS (Mar. 2, 2022, 5:04 AM), https://perma.cc/GGA9-ELXT; Kaia Hubbard, *Child Marriage Is Not Uncommon in the U.S., but States Are Taking Action*, U.S NEWS & WORLD REP. (Sept. 1, 2021, 11:39 AM), https://perma.cc/V2HP-W5EK.

173. Hubbard, *supra* note 172.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* These states are Delaware, Minnesota, New Jersey, New York, Rhode Island, and Pennsylvania.

178. *Child Marriage in the United States,* EQUAL. NOW, https://perma.cc/773S-RCA8 (last visited Mar. 4, 2023) (citing *About Child Marriage in the U.S.,* UNCHAINED AT LAST, https://perma.cc/FM43-T4KQ (last visited Mar. 4, 2023)).

179. Hubbard, *supra* note 172.

180. *Id.*

181. *Id.*

182. *Child Marriage in Alaska*, UNCHAINED AT LAST, https://perma.cc/2DSV-9FVM (last visited Mar. 4, 2023).

183. *Id.*

184. *Id.*

185. *Id.*

some states' marriage laws enable adults to marry minors with whom sex would otherwise be a crime.[186]

IV. DIVORCE AND DISSOLUTION STRUCTURES

Section A of this section will examine jurisdictional requirements for divorces before focusing on the dissolution structures available in divorce proceedings to eligible heterosexual couples. These alternatives include traditional fault-based divorce, no-fault divorce, and the dissolution of covenant marriages. Section B will discuss emerging divorce remedies, such as the increasing use of tort law and alternative dispute resolution. Section C will address divorce issues for same-sex couples arising in the wake of *Obergefell*. Finally, Section D will discuss dissolution structures in the context of non-traditional family structures, such as civil unions and domestic partnerships.

A. DIVORCE STRUCTURES

Divorce is defined as the legal dissolution of marriage, effectuated by a judicial decree that terminates the marital relationship and changes the legal status of married parties.[187] Grounds for divorce may be fault-based[188] or no-fault,[189] and the dissolution may be limited[190] or absolute.[191] Divorce proceedings and decrees may involve rights and duties related to spousal support,[192] property division,[193]

186. *Id.*

187. *See* Burger v. Burger, 166 So. 2d 433, 436 (Fla. 1964); Seuss v. Schukat, 192 N.E. 668, 671 (Ill. 1934).

188. S.B. v. S.J.B., 609 A.2d 124, 126 (N.J. Ch. 1992) ("Other than eighteen-month continuous separation . . . all grounds for divorce are bottomed in some type of 'fault' concept which give the aggrieved spouse the right to seek termination of the marriage.").

189. *In re* Marriage of Bates, 490 N.E.2d 1014, 1016 (Ill. App. Ct. 1986) ("The no-fault provision allows a dissolution if three criteria can be established: (1) the parties have been separated for at least two years; (2) irreconcilable differences have caused an irretrievable breakdown of the marriage; and (3) attempts at reconciliation have failed or future attempts at reconciliation would be impractical and not in the best interest of the family.") (citing ILL. REV. STAT., 1984 Supp., Ch. 40, par. 401(a)(2)); *see also* Joy v. Joy, 734 P.2d 811 (N.M. Ct. App. 1987); Cary v. Cary, 937 S.W.2d 777 (Tenn. 1996); Haumont v. Haumont, 793 P.2d 421 (Utah Ct. App. 1990); Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984).

190. *See* McLendon v. McLendon, 169 So. 2d 767 (Ala. 1964); Brewer v. Brewer, 129 S.E.2d 736 (S.C. 1963); Gloth v. Gloth, 153 S.E. 879, 886 (Va. 1930) (explaining that limited divorce, sometimes referred to as divorce *a mensa et thoro*, "divorce from bed and board," or legal separation is a change in status by which the parties are separated and are precluded from cohabitation, but the actual marriage is not affected).

191. *See, e.g.*, MD. CODE ANN., FAM. LAW § 7-103 (West, Westlaw through 2021 Reg. Sess.).

192. *See, e.g.*, *In re* Fowler, 764 A.2d 916, 919 (N.H. 2000) ("The trial court has broad discretion in determining and ordering the distribution of property and the payment of alimony in fashioning a final divorce decree.").

193. *See* Barnes v. Sherman, 758 A.2d 936, 939 (D.C. 2000) ("The trial court is charged by [state] statute with distributing marital property in 'a manner that is equitable . . . .'"); *In re* Marriage of Ignatius, 788 N.E.2d 794 (Ill. App. Ct. 2003) (abating a dissolution proceeding when wife died before the entry of judgment for dissolution; thus, the trial court lost jurisdiction to rule on all of the other matters concerning the husband and wife's marriage relationship and could not order an accounting and division of property).

custody,[194] child support,[195] and child visitation rights.[196]

1. Jurisdiction

In the U.S., divorce is considered a matter of state jurisdiction.[197] The federal government does not have jurisdiction in divorce proceedings and alimony determinations, even when there is diversity of citizenship.[198] In *Elk Grove Unified School District v. Newdow*, the Supreme Court discussed the domestic relations exception under which the Court customarily declines to intervene in the realm of domestic relations,[199] finding it to be so reverential to state law as to preclude federal courts from exercising jurisdiction over divorce proceedings.[200] This exception is based on statutes and public policy, not on a constitutional mandate.[201]

2. Fault-Based Divorce

Fault-based divorce, stemming from English common law,[202] defines the dissolution of a marriage as when one spouse proves that the other spouse's actions led to the failure of the marriage.[203] Because marriage was considered a key aspect of society during the nineteenth century, its dissolution was subject to public regulation.[204] Under the fault-based regime, for divorce to be granted, a person seeking divorce had to demonstrate that their marital partner was guilty of

194. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (showing that a court will consider the intent of the parents when determining who will retain custody of the child). *But see In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005) (vacating adoption of intent test).

195. *See, e.g.*, Guerin v. DiRoma, 819 So.2d 968 (Fla. Dist. Ct. App. 2002); Henke v. Guerrero, 692 N.W.2d 762 (Neb. Ct. App. 2005); *In re* Feddersen, 816 A.2d 1033 (N.H. 2003) (announcing that when awarding child support, state statutes usually authorize or mandate the divorce court to order the responsible parent to give security for payment of the award).

196. *See* Vincent B. v. Joan R., 126 Cal. App. 3d 619 (Cal. Ct. App. 1981) (finding that divorce proceedings may require the court to determine child visitation rights to preserve the best interests of the child).

197. Chowhan v. Chowhan, 67 Pa. D & C.2d 610, 614 (Pa. Ct. Com. Pl. 1974) ("[J]urisdiction over divorce lies within the several States and not in the laws or courts of the United States.").

198. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–13 (2004) (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)) ("So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'").

199. *Id.* at 12 ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." (quoting *In re* Burrus, 136 U.S. 58, 593–94 (1890)).

200. *Id.*

201. *See Ankenbrandt*, 504 U.S. at 697, 703–04.

202. *See* JOYCE HENS GREEN, JOHN V. LONG, & ROBERTA L. MURAWSKI, DISSOLUTION OF MARRIAGE 8, 10–14 (1986); WILLIAM J. O'DONNELL & DAVID A. JONES, THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES 115–16 (1982); JUDITH AREEN, MARC SPINDELMAN, PHILOMILA TSOUKALA, & SOLANGEL MALDONADO, CASES AND MATERIALS ON FAMILY LAW 317, 317 (1992); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 6 (1985).

203. *Fault Divorce*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/H4TC-MNQ8 (last visited Mar. 4, 2023).

204. *See* Maynard v. Hill, 125 U.S. 190, 206 (1888).

misconduct.[205] Grounds for fault-based divorce vary from state to state, but some examples of accepted grounds include adultery, impotence, extreme cruelty, long-term imprisonment, and confirmed drug or alcohol abuse.[206]

Upon a showing of recognized misconduct, a court would traditionally evaluate the validity of the divorce request and decide whether to dissolve the marriage.[207] If the wealthier party was found guilty of misconduct, they were obligated to support the innocent spouse; however, if the lower-income party was found guilty, the financial award given to the innocent party would be decreased at the discretion of the judge.[208] When both parties were deemed to be at fault, some courts impliedly recognized that if the mutual wrongs were of the same character and proportion, it would be difficult to determine which party was mainly at fault, and as a result they would not interfere or grant relief to either.[209] Most states continue to recognize some form of fault as grounds for divorce, but a growing contingent has shifted to a completely no-fault system.[210] See Appendix B for a summary of divorce laws by state.

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205. *See, e.g.*, 23 PA. STAT. & CONS. STAT. ANN. § 3301 (West, Westlaw through 2022 Reg. Sess. Act 3); *see also* Elizabeth S. Scott, *Rational Decision Making About Marriage and Divorce*, 76 VA. L. REV. 9, 13 (Feb. 1990) ("A precommitment analysis suggests that the discredited fault-based divorce law, despite other inadequacies, may have served a beneficial function by imposing costs on divorce. An alternative legal regime offering precommitment options that are more compatible with contemporary social norms may promote marital stability and thereby benefit spouses and children.").

206. *See, e.g.*, ALA. CODE § 30-2-1(a) (West, Westlaw through the end of the 2022 Reg. & 1st Spec. Sess.) (stating that grounds for divorce include: [(a)(1)] impotency, [(a)(2)] adultery, [(a)(4)] imprisonment of spouse in state penitentiary for two or more years, if the sentence is seven or more years, [(a)(11)] reasonable apprehension of actual violence due to husband's conduct, [(a)(8)] commission of spouse to an insane asylum for five or more years, if spouse is hopelessly and incurably insane, [(a)(3)] separation from bed and board for one year preceding complaint, [(a)(6)] addiction to habitual drunkenness or habitual use of opium, morphine, cocaine, or similar drug if addiction started after marriage). *See also* LaBauve, *supra* note 159. In Louisiana, separation from bed and board was granted on the following bases: "adultery, condemnation to an infamous punishment, habitual intemperance, excesses, cruel treatment, outrages of one of the spouses towards the other (if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable), public defamation . . . abandonment . . . [and] an attempt of one . . . against the life of the other." *Id.* at 426 n.27.

207. *See* Kenneth Rigby, *Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative to the Reinstatement of Fault as a Prerequisite to a Divorce*, 62 LA. L. REV. 561, 576–77 (2002). The early English ecclesiastical courts permitted two types of divorce: one based on a "prior-existing impediment to the marriage, such as a prohibited degree of consanguinity between the parties," and the other based on fault. *Id.* at 574.

208. *See* Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 608 (1997); *see also* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 42 (1991).

209. *See* Eals v. Swan, 59 So. 2d 409, 410 (La. 1952) ("The Louisiana rule is that while mutual, equal fault operates as a bar to relief being given to either litigant, the courts consider in each case the degree of guilt, and only where there is a finding of fact that the degree of guilt has been equal is the suit dismissed. The rule of comparative rectitude has been impliedly recognized.").

210. *See* Hon. Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers Have Left the Building*, 51 FAM. CT. REV. 28, 30 (2013).

The fault-based divorce scheme was eventually deemed inadequate because it did not address marriages that failed for reasons unrelated to any wrongdoing by one party.[211] By treating marriage as a binding contract, the fault-based system made marriage irrevocable unless one or both parties committed the requisite misconduct.[212] This policy encouraged perjury by couples, often with the assistance of legal counsel, who wanted to end their marriages despite the fact that neither spouse had engaged in the required misconduct.[213] Eventually, the underlying rationale for restricting divorce shifted as, following several decades of pressure for change, society in the 1960s began to view marriage as a contract terminable at the will of the parties involved.[214]

3. No-Fault Divorce

Under the no-fault regime, a marriage can be dissolved because of irreconcilable differences or incompatibility of temperament.[215] As of January 2022, all fifty states and the District of Columbia have adopted some type of no-fault divorce statute.[216] Thirty-nine states continue to recognize fault-based grounds for divorce.[217] A minority of states have adopted broad-reaching, uniform no-fault divorce statutes that outline all the procedures for making custody, child support, maintenance or alimony, and property division decisions, in hopes of achieving consistency amongst divorce law in the states that adopt them.[218]

The no-fault divorce regime has substantially lessened the fraud and stress associated with divorce litigation[219] and has changed the basis for spousal

211. *See* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270–71 (1997).

212. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 181, 373–77 (1968).

213. *See* Swisher, *supra* note 211, at 270; *see also* Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

214. *See, e.g.*, Swisher, *supra* note 211, at 270–71; Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (describing confusion over defining "the problem" with American families and arguing that it concerns a lack of public commitment to sexual equality and quality of life following divorce).

215. *See* ALA. CODE § 30-2-1(a)(9) (West, Westlaw through the end of the 2022 Reg. & 1st Spec. Sess.); CAL. FAM. CODE § 2310 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.) (defining legitimate legal grounds for divorce).

216. *See infra* Appendix B.

217. *See infra* Appendix B.

218. *See, e.g.*, *Marriage and Divorce Act, Model Summary*, UNIF. L. COMM'N (Dec. 19, 2022, 12:11 PM), https://perma.cc/6RAL-9XSZ. But only a few states have adopted the Uniform Dissolution of Marriage Act, and there are vast dissimilarities between the versions adopted. *See, e.g.*, *In re* Marriage of Cargill & Rollins, 843 P.2d 1335, 1338–39 (Colo. 1993).

219. *See, e.g.*, Heather Flory, *"I Promise to Love, Honor, Obey . . . and Not Divorce You": Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 FAM. L.Q. 133, 137 n.31 (2000) ("No-fault reforms were generally given good marks within the legal community. Concentrating on the objectives shared in the legal community, it was concluded that no fault had in fact achieved its purpose in reducing fraud and stress. A survey of judges and attorneys in Iowa concluded: 'The elimination of the

support, which is no longer correlated with marital misconduct.[220] Divorce rates increased significantly after the advent of the no-fault regime, spurring debate about divorce legislation.[221] Critics of divorce legislation across the political spectrum have argued that no-fault divorce regimes are causally related to this increase, along with child welfare issues and the feminization of poverty.[222] Others assert that no-fault divorce caused the increase, but that the ultimate societal effect of allowing bad marriages to be more easily dissolved is positive.[223] Still others attribute the rising number of divorces to larger social forces, such as urbanization and increased employment and education opportunities for women.[224] Overall, while divorce rates have increased since the creation of no-fault divorces, the increase spiked predominantly in the 1970s, and divorce rates have decreased consistently from 2000 to 2019.[225]

4. Dissolution of Covenant Marriage

Dissolution of a covenant marriage is only permissible when there has been a complete breach of the marital covenant, a much higher standard than no-fault divorce. Statutes related to dissolution specify limited reasons that must be proven to establish breach of the covenant.[226] Examples of grounds for breach include adultery, commission of a felony, separation without reconciliation for a specified period of time, habitual drug or alcohol abuse, and physical or sexual abuse of the spouse seeking dissolution or of a child of one of the spouses.[227] Dissolution of covenant marriages may also require marital counseling as an intermediary step.[228]

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specific fault based grounds for divorce resulted in a more honest and civilized approach void of the fraud, perjury, and abuse other parties frequently employed in divorce proceedings under the old law.'" (internal citation omitted)).

220. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1278 (1996).

221. *See* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1237 (Oct. 1998) (referencing Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 L. & SOC'Y REV. 543 (1989) (showing the increase in divorce rates after the introduction of the no-fault divorce regime)).

222. Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243, 246–47 (2004); Flory, *supra* note 219, at 137–38.

223. *See, e.g.*, Andrew Schouten, *Breaking Up Is No Longer Hard to Do: The Collaborative Family Law Act*, 38 MCGEORGE L. REV. 125, 125 (2007) ("The adversarial system [of fault-based divorce] exacerbates family divisions . . . . Existing antagonisms between the parties are made worse by the costly, protracted, and frustrating aspects of civil litigation . . . .").

224. *See generally* Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1 (2000).

225. *See* Swisher, *supra* note 222, at 246; *National Marriage and Divorce Rate Trends, National Vital Statistics System*, CTR. FOR DISEASE CONTROL (2019), https://perma.cc/B39E-4BSP (showing that the divorce rate per thousand people was 4% in 2000 and followed a declining pattern to 2.7% in 2019).

226. *See, e.g.,* ARK. CODE ANN. § 9-11-808(a) (West, Westlaw through acts of the 2023 Reg. Sess. of the 94th Ark. Gen. Assemb. effective Feb. 24, 2023), ARIZ. REV. STAT. ANN. § 25-903 (West, Westlaw through 2nd Reg. Sess. of 55th Leg. (2022)).

227. ARIZ. REV. STAT. ANN. § 25-903 (West, Westlaw through 2nd Reg. Sess. of 55th Leg. (2022))

228. *Id.* at § 25-901(B)(2).

B. ALTERNATIVE REMEDIES

Some couples look to alternative legal remedies, including tort law and alternative dispute resolution, to address grievances not adequately covered under the current approaches to no-fault divorce.[229] Due to the personal nature of divorce, blame and negative feelings are often prevalent in divorce proceedings. Spouses who feel they have been wronged may turn to tort law to address those perceived wrongs in states with only no-fault divorce options.[230]

Traditional procedures for granting divorce include adversarial hearings before judges to determine the rights and duties relating to spousal support, property division, child custody and visitation.[231] Even in an ideal no-fault divorce, the parties are still required to dissolve the marriage in a court setting.[232] More recently, critics have argued that, in order to be consistent with other forms of contractual relationships, such as partnerships and joint ownership of real estate, dissolution of marriage should not require litigation unless there is a disagreement between parties.[233] To avoid the courtroom altogether, couples are turning to alternative dispute resolution mechanisms in their divorce proceedings.[234] This approach allows married individuals to separate on non-hostile terms outside of an adversarial setting.[235]

1. Remedies Under Tort Law

Couples may use a tort law approach to litigate perceived wrongs that took place during marriage.[236] This development is particularly significant in states where no-fault divorce is the only option or where the grounds for fault-based divorce are particularly narrow.[237] In these no-fault states, victims of marital misconduct seek justice by punishing the wrongdoer through the use of damage awards.[238] However, tort remedies are problematic because they may undermine the legitimate goals of no-fault divorce regimes—in some cases by forcing

229. *See* Nehal A. Patel, *The State's Perpetual Protection of Adultery*, 2003 WIS. L. REV. 1013, 1041 (2003) ("Since the abolition of inter-spousal immunity . . . courts now recognize that existing legal remedies for certain types of marital misconduct are inadequate.").

230. *See* Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 211 (2010) ("The transfer of fault litigation from divorce to torts, while often criticized as simply transferring the acrimony from one forum to another, has distinct theoretical and practical advantages, which can preserve what seems inescapably relevant in fault divorce while benefiting from the advantages of no-fault divorce.").

231. *See id*. at 235–36.

232. *See id*. at 218–20.

233. *See* John C. Sheldon, *The Sleepwalker's Tour of Divorce Law*, 48 ME. L. REV. 7, 9 (1996).

234. *See* Swisher, *supra* note 222, at 246–47.

235. *Id*. at 248.

236. *See, e.g*., Drewes v. Ilnicki, 863 F.2d 469, 471 (6th Cir. 1988) (holding that federal court had jurisdiction over a diversity lawsuit alleging that a former spouse committed intentional infliction of emotional distress by interfering with plaintiff's visitation rights).

237. *See* Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 62–64 (1991).

238. *Id*. at 67.

couples to assign some level of blame, in others by leaving one party undercompensated for wrongs inflicted during the marriage.[239] Furthermore, torts related to marriage still lack clearly defined standards for conduct, which may produce inconsistent results when marital torts are considered at trial.[240]

2. Alternative Dispute Resolution

Increasingly, couples seeking a divorce are choosing to use alternative dispute resolution (ADR) in place of courtroom divorce proceedings.[241] Family disputes have a number of characteristics that make them appropriate for ADR.[242] They usually involve continuous interdependent relationships and a complex interplay of emotional and legal components.[243] Additionally, an out-of-court setting may enable the parties to a family dispute to more easily find a mutually satisfactory settlement.[244] Various mechanisms utilized include court-annexed arbitration, mediation under court auspices, private mediation, and arbitration by agreement.[245]

In some jurisdictions, disputing parties have tried to use general arbitration legislation, such as the Uniform Arbitration Act, to resolve marital disputes.[246] Most courts, however, have declared that issues such as child support and custody may not be arbitrated as matters of public policy.[247] As a result, a few states have begun to provide for arbitration of family law issues by adding statutes to the Uniform Act or by special legislation.[248] The Texas Alternative Dispute Resolution Procedures statute lays out the requirements for arbitration or mediation—the former chosen by written agreement of the parties and the latter by

239. *Id.* at 66.

240. *See* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L. J. 773, 800-01 (1996); *see* Weiss v. Weiss, 375 F. Supp. 2d 10, 17–19. (D. Conn. 2005). The plaintiff alleged claims for breach of fiduciary duty, fraud, and conversion/theft as well as breach of contract. The court granted the defendant's motion to dismiss the tort and contract claims brought against him by his former wife on the grounds that the claims were too closely related to those discussed in the marital dissolution agreement, which bound the parties. The court also established that "federal courts may exercise subject matter jurisdiction over claims between former spouses." This decision is notable for two reasons. First, although there is a domestic relations exception to federal jurisdiction that divests federal courts of power to issue divorce, alimony, and child custody decrees, this ruling suggests that divorce matters may no longer be confined to state court. Second, individuals who use the no-fault divorce regime to dissolve their marriages may still be able to bring tort claims against their former spouses for perceived wrongs.

241. Linda D. Elrod, *Alternative Dispute Resolution*, CHILD CUSTORY PRAC. & PROC. § 1.12 (2021).

242. George L. Blum & Eric C. Surette, *Arbitration of Family Disputes,* 4 AM. JUR. 2D Alternative Dispute Resolution § 32 (2022).

243. *Id.*

244. *Id.*

245. Rachel Rebouché, *A Case Against Collaboration*, 76 MD. L. REV. 547, 549 (2017).

246. George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIM. LAW. 429, 431 (2003).

247. Arbitral awards are final under the Act and similar legislation. However, it is in the best interest of the child for these issues to remain open and subject to change. *Id.* at 432.

248. *See, e.g.*, *id.* at 444; CAROLYN MORAN ZACK, FAMILY LAW ARBITRATION: PRACTICE, PROCEDURE, AND FORMS 8 (ABA ed., 2020).

written agreement of the parties or on the court's own motion—so that whatever decision reached is binding on the parties involved.[249] In 2005, the American Academy of Matrimonial Lawyers published a Model Family Law Arbitration Act, based on the Revised Uniform Arbitration Act (RUAA).[250] Some state legislatures have enacted new alternative dispute resolution legislation as cases continue to operate within statutory and rule formulas.[251] It remains to be seen what new rules courts will develop as alternative dispute resolution becomes an increasingly favorable alternative to settling matrimonial disputes inside the courtroom.

C. DIVORCE ISSUES FOR SAME-SEX UNIONS

Same-sex couples who have married and divorced currently face some issues that different-sex couples do not. Prior to *Obergefell*, Same-sex couples in most states were not permitted to legally marry, while different-sex couples could marry at any point in their relationship.[252] As a result, there are many same-sex couples that were in relationships with one partner for many years and were unable to get legally married.[253] This presents an issue to the courts when same-sex couples who were together for decades decided to get married after *Obergefell* and then divorced after a short period of time.[254] The court has to analyze whether the marriage should be considered a short-term marriage when awarding divorce settlements—an issue that is still unresolved and left to judicial discretion.[255] There is no universal definition for short-term marriage, but most states consider a marriage of under 10 years to be short-term.[256]

Another issue for same-sex couples that has arisen in many states is the awarding of child custody during divorce proceedings. For example, before 2010, same-sex couples could not both be named as a child's legal parents under Florida law.[257] If now-married same-sex couples do not take legal protective measures to ensure both parties are named parents, such as through adoption or a judgment of parentage, there can be very complicated child custody disputes over which parent has legal custody upon separation.[258] Furthermore, LGBTQ parents

249. TEX. FAM. CODE ANN. § 153.0071 (West, Westlaw through 2021 Reg. & Called Sess. of 87th Leg.).

250. George K. Walker, *Family Law Arbitration: Legis. and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521, 521 (2008).

251. *Id.* at 522.

252. G.M. Filisko, *After* Obergefell*: How the Supreme Court Ruling on Same-Sex Marriage Has Affected Other Areas of Law*, ABA J. (June 1, 2016, 4:00 AM), https://perma.cc/4FTK-3PP3 (noting that some judges classify a three-year marriage between a same sex couple that was together for 32 years as a short-term marriage).

253. *Id.* at 5.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 6.

258. *Id.* at 5.

who do not conform to a two-parent, middle-class, monogamous model of marriage can face discrimination and limitations to access to justice.[259]

D. NON-TRADITIONAL FAMILY STRUCTURES

Individuals who have entered into domestic partnerships but who have chosen not to marry are generally excluded from the established dissolution structures and remedies available to similarly-situated married individuals when they wish to terminate their relationships. Problems arise particularly in the context of children[260] and shared property.[261]

Various alternative family structures exist outside of the traditional notion of marriage and have achieved varying degrees of legal recognition.[262] Such alternative structures include non-marital cohabitation[263] and families in which children[264] are adopted or are biologically related to one parent but not the other.[265] Through a series of cases involving illegitimacy of children and the right to contraception outside of marriage, the Supreme Court recognized that there was a right to family planning and parenting outside of marriage.[266]

One solution to the legal inequities between marital and non-marital families is to create a system for couples to register contracts outlining their obligations and rights with the state.[267] These registered contracts would confer upon the couple the same benefits and rights as those married couples enjoy.[268] Some people believe that the legal recognition of non-marital unions based on contract or

259. Maria Federica Moscati, *Understanding LGBTQ Unions and Divorces*, DISP. RESOL. MAG. (2019), at 32, https://perma.cc/R5SP-J574.

260. *See* Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997) ("Given the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem, not the courts.").

261. *See, e.g.*, Trombley v. Sorrelle, 786 N.Y.S.2d 296, 297 (Watertown City Ct. 2004) (quoting Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980)) ("If non-marital cohabitants wish to form an economic partnership, they may do so; but the partnership can be created only by agreement, not by operation of law."); Champion v. Frazier, 977 S.W.2d 61, 64 (Mo. Ct. App. 1998) (holding that evidence concerning the conduct of unmarried cohabitants was insufficient to establish an implied-in-fact contract between the plaintiff cohabitant and defendant cohabitant to share equally in the ownership of their home; although the plaintiff contributed to the household, she did not substantially contribute to the purchase of the home and her name was neither on the title nor the bank loan for the home).

262. Charles P. Kindregan, Jr., *Religion, Polygamy, And Non-Traditional Families: Disparate Views On The Evolution Of Marriage in History and in the Debate Over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19, 32 (2007).

263. *Id.* at 32 n.79.

264. Nonmarital and/or non-biological families with children face a number of legal questions and inequities compared to marital and/or biological families. These parentage issues are outside the scope of this Article.

265. *See, e.g.*, Kate Rice, *New 'Non-Traditional' American Families*, ABC NEWS (Jan. 19, 2017), https://perma.cc/3WEK-ZJYH.

266. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1210 (2016) ("Despite the difference in subject matter, these cases together suggest the promise of constitutional protection for nonmarriage, the unmarried, and nonmarital families, and therefore constitute a coherent jurisprudence.").

267. Erez Aloni, *Registering Relationships*, 87 TULANE L. REV. 573, 576 (2013).

268. *Id.*

equitable theories is subversive to marriage itself, while others have argued that it is senseless to refuse recognition of non-marital family structures because these alternatives have gained wide societal acceptance.[269] There are also scholars who argue that increasing non-marital options by which couples can gain access to protections within their relationships would actually increase the quality of marriage.[270]

The majority of states offer relief to unmarried couples who terminate their relationships.[271] In *Marvin v. Marvin*, the California Supreme Court upheld the right of an unmarried couple to enter into express and implied contracts governing the economic consequences of the termination of their relationship and recognized the availability of equitable remedies.[272] Since that decision, many other courts have accepted some or all of these theories to provide relief to cohabitants.[273] In addition to theories of express or implied contract, some courts permit cohabitants to assert equitable remedies based on a theory of restitution or unjust enrichment.[274] The requirements of equitable relief may cause particular hardships for an individual who has functioned exclusively as a homemaker during the course of the relationship, as it will be harder to convince a court that their partner has been unjustly enriched.[275]

The lack of legal recognition for non-traditional family structures contributes to the perpetuation of social issues faced by members of such non-traditional families.[276] Social issues that largely develop with the presence of children include maternal gatekeeping[277] and a lack of a formal co-parenting structure when a romantic relationship ends.[278]

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269. Kindregan, *supra* note 262, at 33.

270. Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMPLE L. REV. 45, 47 (2014).

271. Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 76 (2016).

272. Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 105–06 (1990).

273. *Id.*; *see also* Marvin v. Marvin, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

274. Perry, *supra* note 272, at 110.

275. *Id.*; *see also Marvin*, 176 Cal. Rptr. at 555 (holding that there was no basis for an award to plaintiff-homemaker based on equitable principles, finding that defendant was not unjustly enriched and that plaintiff actually benefited from the relationship to the tune of $72,000).

276. Claire Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 170 (2015) ("Family law is a critical but often unappreciated part of the problem, contributing to the differential outcomes for children born to unmarried parents. Family law places marriage at the very foundation of legal regulation. Indeed, the most fundamental divide in family law is between married and unmarried couples, and this schism carries over to how the law addresses nonmarital children.").

277. *Id.* at 171 (Maternal gatekeeping takes place between unmarried, different-sex parents where the custodial mother determines the father's access to a child or children). Maternal gatekeeping can cause issues when a mother hinders father-child relationships by behaving in ways that impact how fathers feel about their parental role. Such gatekeeping often results in less involvement by the non-residential parent and feelings of insecurity in children regarding their relationship with that parent. *See also* Marsha Kline Pruett, Lauren A. Arthur, & Rachel Ebling, *The Hand That Rocks the Cradle: Maternal Gatekeeping After Divorce*, 27 PACE L. REV. 709, 712 (2007).

278. *See* Huntington, *supra* note 276, at 171 (comparing the lack of a formal structure to the formalized co-parenting structure given to divorcing parents through the court system).

V. FORUM SHOPPING

A relevant issue in family law is the belief that differing state policies regarding marriage and divorce have led to an increased use of forum shopping. This may cause a breakdown of the legitimacy of laws in some states because one state's specific marriage and divorce laws can be circumvented when interested parties venture into other states with more lenient or less stringent institutions, absent any evasion statutes.[279] "This increasing disparity . . . will impose additional pressures on our federalist system—states will have to decide not only whether to confer rights or impose obligations on individuals whose non-marital relationships were established in that jurisdiction, but also whether to enforce rights conferred or obligations imposed in other jurisdictions when individuals subsequently decide to cross state lines."[280]

State policies with respect to the enforcement of rights and obligations created elsewhere have the potential to promote forum shopping to facilitate individual's promoting their own interests at the expense of others.[281] Absent congressional action or general agreement among the states, one can expect increasing issues in regards to forum shopping with respect to a whole range of issues in family law.[282]

VI. CONCLUSION

Over time, societal perceptions of marriage have drastically shifted. In response, case law and political viewpoints have attempted to adapt to the change in values. Marriage and divorce continue to be divisive and contentious in societal discourse. The courtroom will increasingly serve as the forum for the disputation of these issues.

Furthermore, the judicial system will be called upon to interpret the rights and obligations conferred by different states, limiting to varying degrees the steps that can be taken by the state legislatures to address the needs of their citizens. In a post-*Obergefell* era, that focus will be on the disparity between the states with respect to the benefits conferred and obligations imposed, on individuals in both marital and non-marital relationships.

Same-sex marriage remains a controversial issue as LGBTQ advocates continue to battle for marriage equality in courtrooms and statehouses.[283] Individuals continue to advocate for equality for same-sex couples on issues such as marriage licenses, birth certificates, and even divorce proceedings.

Although marriage is widely considered a private decision made by two individuals, it is nonetheless a legal relationship regulated by the state. As the cultural

279. Mark Strasser, *The Future of Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 87, 87–88 (2008).
280. *Id.* at 88.
281. *Id.*
282. *Id.*
283. Julie Moreau, *These Recently Elected Trans Lawmakers Say Anti-LGBTQ Bills Inspired Them to Run*, WE THE PEOPLE (Dec. 5, 2022), https://perma.cc/7HV8-M2V5.

understanding of marriage continually shifts to meet the evolving views of society, the circumstances surrounding the formation and dissolution of marriage change to meet that shift, creating the need for ever-flexible and updated state regulation.

While states vary in the minimum age for child marriage, many states still allow child marriage with parental approval, and some add additional requirements such as pregnancy or a judge's approval.[284] Many opponents frame the issue of child marriage in human rights terms, pointing to data showing that girls who marry before age eighteen face increased issues with violence, health problems, and poverty.[285] Absent federal regulation of child marriage, it is left up to the states to protect young women from the issues that follow child marriage.

While there appears to be constant and ever-increasing confusion surrounding marriage and divorce laws, it is clear that states will be forced to adapt to the shifting views of a public that, however gradually, wants to expand the legal definition and private determination of marriage and the rights implicated in traditional and alternative forms of dissolution.

Lastly, an issue that is likely to arise due to different state laws for divorce is forum shopping. Couples seeking a divorce may choose to go to a state with more lenient laws of divorce that may be favorable. Absent congressional action providing uniformity in divorce and other areas of family law, increased forum shopping can be expected.[286]

284. *See* Hubbard, *supra* note 172.
285. *Id*.
286. *See* Strasser, *supra* note 279, at 88.

APPENDIX A: SELECTED MARRIAGE REGULATIONS BY JURISDICTION

Jurisdiction	Consanguinity Prohibited	Affinity Prohibited	Age of Consent/*Age with Parental Consent*/Age with Court Consent	Mental Capacity Lacking	Physical Capacity Lacking	Waiting Period for Marriage License	Common Law Marriage	Evasion of State Laws Prohibited
Alabama ALA. CODE § 13A-13-3 ALA. CODE § 30-1-4 ALA. CODE § 30-1-5 ALA. CODE § 30-1-20	Aunt, uncle, niece, nephew (3rd degree)	Stepchild, stepparent, sibling	18/*16*/16	Consent of the parties	Consent of the parties	None	Recognized if entered into before 1/1/2017	No
Alaska ALASKA STAT. § 25.05.011 ALASKA STAT. § 25.05.021 ALASKA STAT. § 25.05.171 ALASKA STAT. § 25.05.031 ALASKA STAT. § 25.05.311	1st cousin (4th degree)	None	18/*16*/16	Voidable	Consent of the parties	3 days	Recognized if entered before 1/1/1964	No
Arizona ARIZ. REV. STAT. ANN. § 25-101 ARIZ. REV. STAT. ANN. § 25-102 ARIZ. REV. STAT. ANN. § 25-112 ARIZ. REV. STAT. ANN. § 25-121	1st cousin (4th degree)	None	18/*16*/16	Consent of the parties	Consent of the parties	None	Valid out of state recognized	Yes

Arkansas ARK. CODE ANN. § 9-11-101 ARK. CODE ANN. § 9-11-102 ARK. CODE ANN. § 9-11-103 ARK. CODE ANN. § 9-11-106	1st cousin (4th degree)	Step grand-child/ Adopted grandchild	18/17/16<x<18, if pregnant	"Capable in law of con-tracting"	"Capable in law of con-tracting"	If <18, 5 days	Not recognized	No
California CAL. FAM. CODE § 301 CAL. FAM. CODE § 302 CAL. FAM. CODE § 308 CAL. FAM. CODE § 2200 CAL. FAM. CODE § 352 CAL. FAM. CODE § 359 CAL. FAM. CODE § 303	Uncle, niece (3rd degree)	None	18/*No*/<18	"Lacks capacity"	"Lacks capacity"	None	Recognized only if mar-ried out of state	No
Colorado COLO. REV. STAT. § 14-2-106 COLO. REV. STAT. § 14-2-109.5 COLO. REV. STAT. § 14-2-110 COLO. REV. STAT. § 14-2-107 COLO. REV. STAT. § 14-2-108 COLO. REV. STAT. § 14-10-111	Uncle, niece (3rd degree)	None	18/*16*/16	Voidable	Voidable	None	Recognized	Yes
Connecticut CONN. GEN. STAT. § 46b-20a CONN. GEN. STAT. § 46b-21 CONN. GEN. STAT. § 46b-25 CONN. GEN. STAT. § 46b-28A	Uncle, niece (3rd degree)	Stepparent, stepchild	18/*16*/16	None	None	None	Valid out of state recognized	No

Delaware DEL. CODE ANN. tit. 13 § 101 DEL. CODE ANN. tit. 13 § 107 DEL. CODE ANN. tit. 13 § 110 DEL. CODE ANN. tit. 13 § 123 DEL. CODE ANN. tit. 13 § 126	Uncle, niece, 1st cousin (4th degree)	None	18/*No*/No	Voidable	Prohibited if a party is intoxicated; voidable	24 hours	Valid out of state recognized	Yes
Florida FLA. STAT. § 741.04 FLA. STAT. § 741.041 FLA. STAT. § 741.21 FLA. STAT. § 741.211	Uncle, niece (3rd degree)	None	18/*17*/17	Consent of the parties	Consent of the parties	3 days, if haven't completed pre-marital preparation course	Not recognized	No
Georgia GA. CODE ANN. § 19-3-1.1 GA. CODE ANN. § 19-3-2 GA. CODE ANN. § 19-3-3 GA. CODE ANN. § 19-3-4 GA. CODE ANN. § 19-3-5 GA. CODE ANN. § 19-3-33	Uncle, niece (3rd degree)	Stepchild, grandchild	18/*17*/17	Prohibited	Prohibited if a party is intoxicated; voidable	None	Prior to 01/01/1997	Yes
Hawaii HAW. REV. STAT. § 572-1 HAW. REV. STAT. § 572-2 HAW. REV. STAT. § 572-3 HAW. REV. STAT. § 572-5 HAW. REV. STAT. § 572-6 HAW. REV. STAT. § 572-9 HAW. REV. STAT. § 580-26	Uncle, niece (3rd degree)	Step-siblings	16/*16*/15	Voidable	Voidable	None	Valid out of state recognized	No

Idaho IDAHO CODE ANN. § 32-202 IDAHO CODE ANN. § 32-205 IDAHO CODE ANN. § 32-206 IDAHO CODE ANN. § 32-403	Parents and children, ancestors and descendants of every degree, brothers and sisters of half or whole blood, uncles and nieces, aunts or nephews, first cousins	None	18/16/16	Voidable	Voidable	None	Prior to 01/01/1996 and valid out of state recognized	Yes
Illinois 750 ILL. COMP. STAT. 5/203 750 ILL. COMP. STAT. 5/207 750 ILL. COMP. STAT. 5/208 750 ILL. COMP. STAT. 5/212 750 ILL. COMP. STAT. 5/214 750 ILL. COMP. STAT. 5/216 750 ILL. COMP. STAT. 5/217	Ancestor and descendant, siblings, uncle and niece, uncle and nephew, aunt and nephew, aunt and niece, first degree cousins (with exceptions)	None	18/16/16	Voidable	Voidable	1 day	Valid out of state recognized and before 6/30/1905	Yes

Indiana IND. CODE § 31-11-1-2 IND. CODE § 31-11-1-4 IND. CODE § 31-11-1-5 IND. CODE § 31-11-2-2 IND. CODE § 31-11-2-3 IND. CODE § 31-11-4-11 IND. CODE § 31-11-8-4 IND. CODE § 31-11-8-5 IND. CODE § 31-11-8-6 IND. CODE § 31-11-9-2	More closely related than second cousins, unless first cousins are at least 65	None	18/16/16	Prohibited	Consent of the parties; prohibited if a party is intoxicated	None	Prior to 01/01/1958 and valid out of state recognized	Yes
Iowa IOWA CODE § 595.1A IOWA CODE § 595.2 IOWA CODE § 595.3 IOWA CODE § 595.4 IOWA CODE § 595.19 IOWA CODE § 595.20	Man and his father's sisters, mother's sister, daughter, sister, son's daughter, daughter's daughter, brother's daughter, or Sister's daughter. Woman and father's brother, mother's brother, son, brother, son's son, daughter's son, brother's son, or sister's son. First cousins	None	18/16/16	Prohibited if a party is disqualified from making any civil contract	Prohibited if a party is disqualified from making any civil contract	3 days	Recognized	Yes

Kansas KAN. STAT. ANN. § 23-2502 KAN. STAT. ANN. § 23-2503 KAN. STAT. ANN. § 23-2505 KAN. STAT. ANN. § 23-2508	Parents and children, including grandparents and grandchildren, brothers and sisters, uncles and nieces, aunts and nephews, first cousins	None	18/16/15	Consent of the parties	Consent of the parties	3 days	Recognized if both parties are 18+	No
Kentucky KY. REV. STAT. ANN. § 402.010 KY. REV. STAT. ANN. § 402.020 KY. REV. STAT. ANN. § 402.100 KY. REV. STAT. ANN. § 402.210	Anything closer than second cousins	None	18/18/17	Prohibited	Consent of the parties	None	Recognized	No
Louisiana LA. STAT. ANN. § 9:211 LA. CIV. CODE ANN. art. 90 LA. CIV. CODE ANN. art. 90.1 LA. CIV. CODE ANN. art. 95 LA. REV. STAT § 9:241	Ascendants and descendants, collaterals within 4th degree	4th degree; but if by adoption, court may waive prohibition	18/16/16	"Free Consent of the parties" required; voidable if party is "incapable of discernment"	None	24 hours	Valid out of state recognized	Yes

Maine	Man to his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister, the daughter of his father's brother or sister or the daughter of his mother's brother or sister. Woman to her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, mother's brother, the son of her father's brother or sister or the son of her mother's brother or sister. A person may not marry	None	18/16/16	Voidable	Voidable	None	Not recognized	Yes
ME. REV. STAT. ANN. tit. 19-A § 650-B								
ME. REV. STAT. ANN. tit. 19-A § 652								
ME. REV. STAT. ANN. tit. 19-A § 656								
ME. REV. STAT. ANN. tit. 19-A § 701								
ME. REV. STAT. ANN. tit. 19-A § 751								

	that person's parent, grandparent, child, grandchild, sibling, nephew, niece, aunt, or uncle. However, a man may marry the daughter of his father's brother or sister or the daughter of his mother's brother or sister, and a woman may marry the son of her father's brother or sister or the son of her mother's brother or sister as long as the man or woman provides the requisite physician's certificate of genetic counseling.							

Maryland MD. CODE ANN. FAM. LAW § 2-201 MD. CODE ANN. FAM. LAW § 2-202 MD. CODE ANN. FAM. LAW § 2-301 MD. CODE ANN. FAM. LAW § 2-405 MD. CODE ANN. FAM. LAW § 2-502	Grandparent, parent, child, sibling, grandchild, parent's sibling, stepparent, sibling's child	Grandparent's spouse, spouse's grandparent, spouse's parent, spouse's child, child's spouse, grandchild's spouse, spouse's grandchild	18/17/17	Consent of the parties	Consent of the parties	License not effective until 6 a.m. on the second calendar day after the license is issued, with exceptions for good cause if one of the parties is a Maryland resident or a member of the U.S. armed forces	Valid out of state recognized	No

Massachusetts MASS. GEN. LAWS ch. 207, § 1 MASS. GEN. LAWS ch. 207, § 2 MASS. GEN. LAWS ch. 207, § 7 MASS. GEN. LAWS ch. 207, § 10 MASS. GEN. LAWS ch. 207, § 15 MASS. GEN. LAWS ch. 207, § 25 MASS. GEN. LAWS ch. 207, § 28	Man to mother, grandmother, granddaughter, granddaughter, sister, stepmother, brother's daughter, sister's daughter, father's sister or mother's sister. Woman to father, grandfather, son, grandson, brother, stepfather, brother's son, sister's son, father's brother or mother's brother	Man to grandfather's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter. Woman to grandmother's husband, daughter's husband, granddaughter's husband, husband's grandfather, husband's son, husband's grandson	18/< *18*/<18	Voidable	None	3 days	Not recognized Yes

Michigan MICH. COMP. LAWS § 551.2 MICH. COMP. LAWS § 551.3 MICH. COMP. LAWS § 551.4 MICH. COMP. LAWS § 551.51 MICH. COMP. LAWS § 551.102 MICH. COMP. LAWS § 551.103	Parent, sibling, grandparent, child, grandchild, sibling's child, parent's sibling, or cousin of the first degree	Stepparent, grandparent's spouse, child's spouse, grandchild's spouse, spouse's parent, spouse's grandparent, spouse's child, spouse's grandchild	18/16/16	"Capable in law of contracting"	None	3 days	Prior to 01/01/1957 and valid out of state recognized	No
Minnesota MINN. STAT. § 517.01 MINN. STAT. § 517.02 MINN. STAT. § 517.03 MINN. STAT. § 517.08 MINN. STAT. § 518.01 MINN. STAT. § 518.02	Ancestor, descendant, siblings, uncle or aunt and niece or nephew, first cousins, except as permitted by aboriginal cultures	None	18/18/18	Requires consent of the state for otherwise incompetent persons; null if under the influence	"Capable in law of contracting"	None	Prior to 04/27/1941 and valid out of state recognized	No

Mississippi MISS. CODE ANN. § 93-1-1 MISS. CODE ANN. § 93-1-3 MISS. CODE ANN. § 93-1-5 MISS. CODE ANN. § 93-1-15 MISS. CODE ANN. § 93-7-1 MISS. CODE ANN. § 93-7-3	1st cousin (4th degree)	Uncle, niece (3rd degree), stepchild	21/*17 male, 15 female*/<17 male, ≤15 female	Understands the nature and consequences of marriage; voidable	Voidable	None	Prior to 04/05/1956	Yes
Missouri MO. REV. STAT. § 451.010 MO. REV. STAT. § 451.020 MO. REV. STAT. § 451.040 MO. REV. STAT. § 451.090	1st cousin (4th degree)	None	18/*16*/16	"Capable in law of contracting"; Prohibited if "lack capacity"	Prohibited if "lack capacity"	None	Not recognized	No
Montana MONT. CODE ANN. § 40-1-104 MONT. CODE ANN. § 40-1-107 MONT. CODE ANN. § 40-1-202 MONT. CODE ANN. § 40-1-401 MONT. CODE ANN. § 40-1-402 MONT. CODE ANN. § 40-1-403	1st cousin (4th degree)	None	18/*No*/16	Consent of the parties	Voidable if other party did not know of incapacity	None	Recognized	No

Nebraska NEB. REV. STAT. § 42-101 NEB. REV. STAT. § 42-102 NEB. REV. STAT. § 42-103 NEB. REV. STAT. § 42-104 NEB. REV. STAT. § 42-105 NEB. REV. STAT. § 42-117 NEB. REV. STAT. § 42-118	1st cousin (4th degree)	None	18/17/None	Prohibited if "mentally incompetent to enter into the marriage relation"	Prohibited if venereal disease	None	Valid out of state recognized	No
Nevada NEV. REV. STAT. § 122.010 NEV. REV. STAT. § 122.020 NEV. REV. STAT. § 122.025	Closer than 2nd cousin (5th degree)	None	18/1717	"Capable in law of contracting"	"Capable in law of contracting"	None	Prior to 03/29/1943	No
New Hampshire N.H. REV. STAT. ANN. § 457:3 N.H. REV. STAT. ANN. § 457:4 N.H. REV. STAT. ANN. § 457:5 N.H. REV. STAT. ANN. § 457:2 N.H. REV. STAT. ANN. § 457:22 N.H. REV. STAT. ANN. § 457:33 N.H. REV. STAT. ANN. § 5-C:42	1st cousin (4th degree)	1st cousin (4th degree)	18/16/16	None	None	None	Recognized	Yes

New Jersey N.J. STAT. ANN. § 37:1-1 N.J. STAT. ANN. § 37:1-4 N.J. STAT. ANN. § 37:1-6 N.J. STAT. ANN. § 37:1-9 N.J. STAT. ANN. § 37:1-10	Uncle, niece (3rd degree)	None	18/*No*/None	Prohibited if a party is "adjudicated incapaci-tated"	Prohibited if a party is "adjudicated incapaci-tated"	72 hours	Prior to 12/01/1939	No
New Mexico N.M. STAT. ANN. § 40-1-1 N.M. STAT. ANN. § 40-1-4 N.M. STAT. ANN. § 40-1-6 N.M. STAT. ANN. § 40-1-7 N.M. STAT. ANN. § 40-1-10	Uncle, niece (3rd degree)	None	18/*16*/<16	"Capable in law of con-tracting"	"Capable in law of con-tracting"	None	Valid out of state	No
New York N.Y. DOM. REL. LAW § 5 N.Y. DOM. REL. LAW §7 N.Y. DOM. REL. LAW §13-b N.Y. DOM. REL. LAW §15 N.Y. DOM. REL. LAW §15-a	Uncle, niece (3rd degree)	None	18/*No*/None	Voidable	Voidable	24 hours	Valid out of state recognized	No
North Carolina N.C. GEN. STAT. ANN. § 51-2 N.C. GEN. STAT. ANN. § 51-2.1 N.C. GEN. STAT. ANN. § 51-3 N.C. GEN. STAT. ANN. § 51-4 N.C. GEN. STAT. ANN. § 51-8	Double 1st cousin (4th degree)	Stepchild	18/*16 (spouse must be no more than four years older)*/16 (spouse must be no more than four years older)	Prohibited	Prohibited for impotence	None	Valid out of state recognized	No

North Dakota N.D. CENT. CODE ANN. § 14-03-02 N.D. CENT. CODE ANN. § 14-03-03 N.D. CENT. CODE ANN. § 14-03-08 N.D. CENT. CODE ANN. § 14-03-17	1st cousin (4th degree)	1st cousin (4th degree)	18/16/16	Prohibited if under the influence of alcohol or drugs	Consent of the parties	None	Valid out of state recognized	Yes
Ohio OHIO REV. CODE. ANN. § 3101.01 OHIO REV. CODE. ANN. § 3101.05 OHIO REV. CODE. ANN. § 3101.06 OHIO REV. CODE. ANN. § 3105.31 OHIO REV. CODE. ANN. § 3105.12	Uncle, niece (3rd degree)	None	18/17 if both parties are 17/17 if both parties are 17	Voidable	Prohibited if a party is intoxicated or has syphilis	None	Prior to 10/10/1991 and valid out of state recognized	No
Oklahoma OKLA. STAT. tit. 43 § 1 OKLA. STAT. tit. 43 § 2 OKLA. STAT. tit. 43 § 3 OKLA. STAT. tit. 43 § 5 OKLA. STAT. tit. 43 § 7	1st cousin (4th degree)	Stepchild	18/16/<16	"Legally competent of contracting"	"Legally competent of contracting"	If <18, 72 hours	Recognized	No

Oregon OR. REV. STAT. § 106.010 OR. REV. STAT. § 106.020 OR. REV. STAT. § 106.030 OR. REV. STAT. § 106.050 OR. REV. STAT. § 106.060 OR. REV. STAT. § 106.077	1st cousin (4th degree)	Adoption in the 3rd degree	18/17/17	Voidable	Consent of the parties	3 days	Valid out of state recognized	No
Pennsylvania 23 PA. CONS. STAT. ANN. § 1103 23 PA. CONS. STAT. ANN. § 1303 23 PA. CONS. STAT. ANN. § 1703 23 PA. CONS. STAT. ANN. § 1304	1st cousin (4th degree)	None	18/18/18	Prohibited	Prohibited if intoxicated	3 days	Prior to 01/01/2005	No
Rhode Island R.I. GEN. LAWS § 15-1-2 R.I. GEN. LAWS § 15-1-3 R.I. GEN. LAWS § 15-1-5 R.I. GEN. LAWS § 15-1-8 R.I. GEN. LAWS § 15-2-1 R.I. GEN. LAWS § 15-3.1-6	Uncle, niece (3rd degree)	Spouse's grandchild, grandparent's spouse, stepchild	18/18/<18	Prohibited	Consent of the parties	None	Recognized	Yes

South Carolina S.C. CODE ANN. § 20-1-10 S.C. CODE ANN. § 20-1-100 S.C. CODE ANN. § 20-1-220 S.C. CODE ANN. § 20-1-250	Uncle, niece (3rd degree)	Spouse's grandchild/ grandparent, grandpar- ent's spouse, stepchild	18/*16*/16	Prohibited	None	24 hours	Recognized	No
South Dakota S.D. CODIFIED LAWS § 25-1-1 S.D. CODIFIED LAWS § 25-1-6 S.D. CODIFIED LAWS § 25-1-7 S.D. CODIFIED LAWS § 25-1-9 S.D. CODIFIED LAWS § 25-1-10 S.D. CODIFIED LAWS § 25-1-13 S.D. CODIFIED LAWS § 25-1-29 S.D. CODIFIED LAWS § 25-1-38 S.D. CODIFIED LAWS § 25-1-39	1st cousin (4th degree); uncle, niece	Adoption in the 4th degree, step- parent- stepchild	18/*16*/16	"Consent of parties capa- ble of mak- ing it"	Voidable	None	Prior to 07/01/1959 and valid out of state recognized	No
Tennessee TENN. CODE ANN. § 36-3-101 TENN. CODE ANN. § 36-3-105 TENN. CODE ANN. § 36-3-106 TENN. CODE ANN. § 36-3-107 TENN. CODE ANN. § 36-3-109 TENN. CODE ANN. § 36-3-306	Uncle, niece (3rd degree)	Parent's spouse, child's spouse	18/*17 (if the other party is no more than 4 years older)*/No	Prohibited	Prohibited if drunk; voidable	If <18 and no parent consent, 3 days	Not recog- nized, but one narrow exception	No

Texas TEX. FAM. CODE ANN §§ 1.103 TEX. FAM. CODE ANN §§ 1.104 TEX. FAM. CODE ANN §§ 2.004 TEX. FAM. CODE ANN §§ 2.101 TEX. FAM. CODE ANN §§ 1.104 TEX. FAM. CODE ANN §§ 2.204 TEX. FAM. CODE ANN §§ 2.401	Uncle, niece (3rd degree) (including adoption)	Stepchild, stepparent (current or former)	18/*No*/<18 if the participants have a court order	Voidable	Voidable	72 hours	Recognized if 18+	Yes
Utah UTAH CODE ANN. § 30-1-1 UTAH CODE ANN. § 30-1-2 UTAH CODE ANN. § 30-1-4 UTAH CODE ANN. § 30-1-4.5 UTAH CODE ANN. § 30-1-7 UTAH CODE ANN. § 30-1-9	Marriages between any individuals related to each other within and not including the fifth degree of consanguinity; 1st cousins (4th degree), with certain exceptions if age 55 or older	None	18/*16*/No	Voidable ("grounds existing at common law")	None	None	Recognized if court grants petition; valid out of state recognized	Yes
Vermont VT. STAT. ANN. tit. 15 § 1a VT. STAT. ANN. tit. 15 § 511 VT. STAT. ANN. tit. 15 § 512 VT. STAT. ANN. tit. 15 § 514 VT. STAT. ANN. tit. 15 § 515	Parent, grandparent, child, grandchild, sibling, sibling's child, parent's sibling	Uncle, niece (3rd degree)	18/*16*/16	Voidable	Voidable within two years of marriage solemnization	None	Not recognized	No

Virginia VA. CODE ANN. § 20-16 VA. CODE ANN. § 20-38.1 VA. CODE ANN. § 20-39 VA. CODE ANN. § 20-45.1 VA. CODE ANN. § 20-48	Between an ancestor and descendant, or between siblings, whether the relationship is by the half or the whole blood or by adoption; between an uncle or aunt and a nephew or niece, whether the relationship is by the half or the whole blood	None	18/*18*/<u>< 18</u>	Voidable	Voidable	None	Valid out of state recognized	Yes
Washington WASH. REV. CODE § 26.04.010 WASH. REV. CODE § 26.04.020 WASH. REV. CODE § 26.04.130 WASH. REV. CODE § 26.04.180	2nd cousin (6th degree)	Uncle, niece (3rd degree)	18/*18*/<u>< 17</u>	Voidable	Consent of the parties	3 days	Valid out of state recognized	Yes

West Virginia W. VA. CODE § 48-2-103 W. VA. CODE § 48-2-301 W. VA. CODE § 48-2-302 W. VA. CODE § 48-2-303 W. VA. CODE § 48-2-602 W. VA. CODE § 48-3-103 W. VA. CODE § 48-5-101	2nd cousin (6th degree), cousins by adoption excluded	Those related in consanguinity	18/16/<16 (but must have parental approval also, not just court)	Voidable	Voidable	If <18, 2 days	Valid out of state recognized	Yes
Wisconsin WIS. STAT. § 765.01 WIS. STAT. § 765.02 WIS. STAT. § 765.03 WIS. STAT. § 765.04 WIS. STAT. § 765.08 WIS. STAT. § 765.11 WIS. STAT. § 765.21	2nd cousin (6th degree), but cousins can marry if female is over 55 or if either party can submit medical proof of being sterile	None	18/16/16	Prohibited	None	5 days, waivable by county clerk	Prior to 1917 and valid out of state recognized	Yes
Wyoming WYO. STAT. ANN. § 20-1-101 WYO. STAT. ANN. § 20-1-102 WYO. STAT. ANN. § 20-1-103 WYO. STAT. ANN. § 20-1-111 WYO. STAT. ANN. § 20-2-101	1st cousin (4th degree)	None	18/16/<16	Voidable	Voidable within 2 years of solemnization	None	Valid out of state recognized	No

Non-State								
District of Columbia D.C. CODE § 46-4	Uncle, niece (3rd degree)	Spouse's grandchild/ grandparent, grandpar- ent's spouse, stepchild	18/*16*/16	Voidable	Consent of the parties	None	Recognized	Yes
American Samoa AMERICAN SAMOA CODE, *Title 42, Ch. 1*	4th degree (e.g., 1st cousins)	None	18/*14 female*/14 female	None	None	30 days	Prior to 2007	No
Guam GUAM CODE, Title 19, Ch. 3	Uncles and nie- ces (4th degree), all degrees of ancestor and descendant	Stepchild, stepparent	18/*16*/16, can be younger if applicant is pregnant	Prohibited	Prohibited if intoxicated	5 days, unless pay waiver fee	Prior to 1948	No
Commonwealth of the Northern Mariana Islands COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS CODE, Title 8, Div. 1, Ch. 2	None	None	18/*16 female*/16	None	None	None	Prior to 2004	No

Puerto Rico PUERTO RICO CIVIL CODE, Title 31, Subtitle 1, Part 3	4th degree (*e.g.*, 1st cousins)	Marriage: parent, child; adoption: step-parent and stepparent's descendants	21; 18 if it can be shown that the woman was "raped, seduced, or is pregnant"/*18 male, 16 female*/16 male, 14 female	Prohibited	Prohibited for diseases or impotency	None	Not recognized	Yes
U.S. Virgin Islands U.S. VIRGIN ISLANDS CODE, Title 16, Ch. 1	Uncle, niece (3rd degree)	Spouse's grandchild/ grandparent, grandparent's spouse, grandchild's spouse, stepchild	18/*18*/18	Voidable	Voidable	None	Prior to 09/01/1957	Yes
Cherokee Nation CHEROKEE NATION, Title 43	1st cousin (4th degree)	None	18/*<18*/<18	Prohibited	"Capable in law of contracting"	30 days	Recognized	No
Navajo Nation NAVAJO NATION CODE, Title 9, Ch. 1	Uncle, niece (3rd degree)	Uncle, niece (3rd degree)	18/*No*/<18 if pregnancy	None	None	3 days	Recognized	Yes

APPENDIX B: SELECTED DIVORCE REGULATIONS BY JURISDICTION

Jurisdiction	Residency Requirement Before Filing of Divorce Petition	No Fault Grounds	No Fault is Sole Ground
Alabama ALA. CODE § 30-2-1 ALA. CODE § 30-2-2 ALA. CODE § 30-2-5	At least one party must be a resident for 6 months prior to filing	Incompatibility; irretrievable breakdown	No
Alaska ALASKA STAT. § 25.24.050	None (plaintiff must be a resident of the state)	Incompatibility of temperament	No
Arizona ARIZ. REV. STAT. ANN. § 25-312 ARIZ. REV. STAT. Ann. § 25-313 ARIZ. REV. STAT. ANN. § 25-903	One party must be Arizona domiciliary (or stationed in Arizona while a member of the armed services) and presence has been maintained 90 days prior to filing	Irretrievable breakdown	Yes
Arkansas ARK. CODE ANN. § 9-12-301 ARK. CODE ANN. § 9-12-307	One party must have been resident at least 60 days before action and a resident for 3 months before final decree is granted	Separation of 18 months	No
California CAL. FAM. CODE § 2310 CAL. FAM. CODE § 2312 CAL. FAM. CODE § 2320	One party must have been resident of California for 6 months and for 3 months in county where divorce is sought	Breakdown of marriage relationship; permanent legal incapacity to make decisions	No
Colorado COLO. REV. STAT. § 14-10-106 COLO. REV. STAT. § 14-10-110	One party must have been a resident for at least 91 days before prior to filing	Irretrievable breakdown	Yes
Connecticut CONN. GEN. STAT. § 46b-40 CONN. GEN. STAT. § 46B-44	One party must have been a resident for 12 months before filing or one party must have been domiciliary at time of marriage and returned with intent to stay or the cause for dissolution occurred after either party moved to the state	Irretrievable breakdown	No

Delaware DEL. CODE ANN. tit. 13, § 1503 DEL. CODE ANN. tit. 13, § 1504 DEL. CODE ANN. tit. 13, § 1505	One party must have been a resident for 6 months prior to filing	Irretrievable breakdown; voluntary separation	No
Florida FLA. STAT. § 61.021 FLA. STAT. § 61.052	Petitioner must have been a resident for 6 months prior to filing	Irretrievable breakdown; mental incapacity of one of the parties for three years	Yes
Georgia GA. CODE ANN. § 19-5-2 GA. CODE ANN. § 19-5-3 GA. CODE ANN. § 19-5-4	One party must have been a resident for 6 months before action	Irretrievable breakdown	No
Hawaii HAW. REV. STAT. § 580-1 HAW. REV. STAT. § 580-41 HAW. REV. STAT. § 580-42 HAW. REV. STAT. § 580-71	One party must have been domiciled or physically present 6 months before filing	Irretrievable breakdown; court separation term expired; separation for two years has expired	No
Idaho IDAHO CODE ANN. § 32-603 IDAHO CODE ANN. § 32-610 IDAHO CODE ANN. § 32-701	Petitioner must have been a resident for at least 6 weeks prior to filing	Irreconcilable differences; separation for 5 years without cohabitation	No
Illinois 750 ILL. COMP. STAT. § 5/401 750 ILL. COMP. STAT. § 5/402	One party must have been a resident for 90 days prior to filing	Irreconcilable differences; separation for 6 months without cohabitation	No
Indiana IND. CODE § 31-15-2-2 IND. CODE § 31-15-2-3 IND. CODE § 31-15-2-6 IND. CODE § 31-15-2-7	One party must have been resident for 6 months prior to filing	Irretrievable breakdown	No
Iowa IOWA CODE § 598.5 IOWA CODE § 598.17	No requirement if the respondent is in Iowa; 1 year residency requirement if only petitioner is in the state	Irretrievable breakdown	Yes
Kansas KAN. STAT. ANN. § 23-2701 KAN. STAT. ANN. § 23-2703	One party must have been a resident for 60 days prior to filing	Incompatibility	No
Kentucky KY. REV. STAT. ANN. § 403.050 KY. REV. STAT. ANN. § 403.140 KY. REV. STAT. ANN. § 403.170	One party must have been a resident or stationed at a military base for 180 days prior to filing	Irretrievable breakdown	Yes

Louisiana LA. CIV. CODE ANN. art. 102 LA. CIV. CODE ANN. art. 103 LA. CIV. CODE ANN. art. 104	None	Irretrievable breakdown	No
Maine ME. REV. STAT. ANN. tit. 19-A § 901 ME. REV. STAT. ANN. tit. 19-A § 902	One party must have been a resident, or the parties resided and were married in the state, or the parties resided in the state when they separated or the cause for the divorce occurred. If respondent is not a resident, the petitioner must have resided in the state in good faith for at least 6 months prior to filing	Irreconcilable differences	No
Maryland MD. CODE ANN., FAM. LAW § 7-101–03	One party must have been resident for at least 6 months prior to filing if the grounds for divorce occurred outside the state	Irretrievable breakdown; voluntary separation for 12 months	No
Massachusetts MASS. GEN. LAWS ch. 208, § 1 MASS. GEN. LAWS ch. 208, § 1a MASS. GEN. LAWS ch. 208, § 1b MASS. GEN. LAWS ch. 208, § 2 MASS. GEN. LAWS ch. 208, § 4 MASS. GEN. LAWS ch. 208, § 5	Spouses must meet one of the following residency requirements depending on grounds for divorce: parties cohabitated in the state while married; petitioner lived in the state for at least one year before filing; the cause for divorce occurred in the state and petitioner is resident; or the cause for divorce occurred in another state, the spouses lived together in the state, and at least one spouse is a resident of the state	Irretrievable breakdown	No
Michigan MICH. COMP. LAWS § 552.6 MICH. COMP. LAWS § 552.7 MICH. COMP. LAWS § 552.9	One party must been a resident of the state for 180 days prior to filing and one party must have resided in the county where the complaint is filed for 10 days immediately preceding filing	Breakdown of marriage relationship	Yes
Minnesota MINN. STAT. § 518.06 MINN. STAT. § 518.07	One party must have been a resident or a domiciliary for 180 days prior to filing	Irretrievable breakdown	Yes

Mississippi MISS. CODE ANN. § 93-5-1 MISS. CODE ANN. § 93-5-2 MISS. CODE ANN. § 93-5-5	One party must have been a bona fide resident for 6 months prior to filing	Irreconcilable differences, uncontested only	No
Missouri MO. REV. STAT. § 452.305 MO. REV. STAT. § 452.320	Either party must have been a resident for 90 days prior to filing	Irretrievable breakdown; if one party disagrees, court must find one of five enumerated facts	No
Montana MONT. CODE ANN. § 40-4-104 MONT. CODE ANN. § 40-4-105	One party must have been a domiciliary for 90 days prior to filing	Irretrievable breakdown, as evidenced by voluntary separation of 180 days or serious marital discord	Yes
Nebraska NEB. REV. STAT. § 42-349 NEB. REV. STAT. § 42-350 NEB. REV. STAT. § 42-353	Marriage was solemnized in the state and one party resided in the state since marriage or one party was a resident for 1 year prior to filing	Irretrievable breakdown	Yes
Nevada NEV. REV. STAT. § 125.010 NEV. REV. STAT. § 125.020 NEV. REV. STAT. § 125.190	Unless grounds accrued in the county where action is brought, one party must have been a resident for at least 6 weeks prior to filing	Incompatibility	No
New Hampshire N.H. REV. STAT. ANN. § 458:26 N.H. REV. STAT. ANN. § 458:5 N.H. REV. STAT. ANN. § 458:7 N.H. REV. STAT. ANN. § 458:7-A	Both parties domiciled in the state, or petitioner domiciled in the state for at least 1 year prior to filing, or petitioner is domiciled in the state and respondent was personally served	Irreconcilable differences	No
New Jersey N.J. STAT. ANN. § 2a:34-2 N.J. STAT. ANN. § 2a:34-3 N.J. STAT. ANN. § 2a:34-10	Either party must have been a bona fide resident at the time the cause of action arose and must remain a resident until commencement of the action	Irreconcilable differences	No
New Mexico N.M. STAT. ANN. § 40-4-1 N.M. STAT. ANN. § 40-4-5	One party must have been domiciled in the state for at least 6 months prior to filing	Incompatibility	No

New York N.Y. DOM. REL. LAW § 170 N.Y. DOM. REL. LAW § 171 N.Y. DOM. REL. LAW § 202 N.Y. DOM. REL. LAW § 230 N.Y. DOM. REL. LAW § 231	If parties were married in the state or resided in the state as a married couple, or the cause occurred in the state, there is a 1-year residency requirement; if parties were not married in the state, one party must establish 2 years of residency prior to filing	Irretrievable breakdown; voluntary separation of at least 1 year without cohabitation	No
North Carolina N.C. GEN. STAT. ANN. § 50-6 N.C. GEN. STAT. ANN. § 50-7	One party must have been a bona fide resident for 6 months prior to filing	Voluntary separation of at least 1 year without cohabitation	No
North Dakota N.D. CENT. CODE ANN. § 14-05-03 N.D. CENT. CODE ANN. § 14-05-07 N.D. CENT. CODE ANN. § 14-05-17	Petitioner must have resided in state for 6 months prior to filing	Irreconcilable differences	No
Ohio OHIO REV. CODE. ANN. § 3105.01 OHIO REV. CODE. ANN. § 3105.03 OHIO REV. CODE. ANN. § 3105.17 OHIO REV. CODE. ANN. § 3105.61-65	Petitioner must have been a resident for 6 months prior to filing	Incompatibility (both parties must agree); voluntary separation for 1 year without cohabitation	No
Oklahoma OKLA. STAT. tit. 43, § 101 OKLA. STAT. tit. 43, § 102 OKLA. STAT. tit. 43, § 103	One party must have been a bona fide resident in for 6 months prior to filing	Incompatibility	No
Oregon OR. REV. STAT. § 107.015 OR. REV. STAT. § 107.025 OR. REV. STAT. § 107.075	One party must have been a resident for 6 months prior to filing; if marriage was solemnized in state, one party must be a resident at time of filing	Irremediable breakdown	Yes
Pennsylvania 23 PA. CONS. STAT. ANN. § 3104 23 PA. CONS. STAT. ANN. § 3301	One party must have been a bona fide resident for 6 months prior to filing	Irretrievable breakdown; voluntary separation of 2 years without cohabitation	No

Rhode Island R.I. GEN. LAWS § 15-5-2 R.I. GEN. LAWS § 15-5-3 R.I. GEN. LAWS § 15-5-3.1 R.I. GEN. LAWS § 15-5-12	One party must have been domiciled and a resident for 1 year prior to filing	Irreconcilable differences; voluntary separation of 3 years without cohabitation	No
South Carolina S.C. CODE ANN. § 20-3-10 S.C. CODE ANN. § 20-3-30	Both parties must have been residents for 3 months prior to filing, or one party resident for 1 year	Voluntary separation of 1 year without cohabitation	No
South Dakota S.D. CODIFIED LAWS § 25-4-1 S.D. CODIFIED LAWS § 25-4-2 S.D. CODIFIED LAWS § 25-4-17.2 S.D. CODIFIED LAWS § 25-4-30	Petitioner must be a resident at the time the action is commenced	Irreconcilable differences	No
Tennessee TENN. CODE ANN. § 36-4-101 TENN. CODE ANN. § 36-4-102 TENN. CODE ANN. § 36-4-103 TENN. CODE ANN. § 36-4-104	No residency is required if grounds for the divorce arose while the petitioner was a resident of the state. If grounds arose outside of the state, one party must have resided in the state for 6 months prior to filing	Irreconcilable differences; separation of 2 years with no minor children	No
Texas TEX. FAM. CODE ANN. §§ 6.001–6.007 TEX. FAM. CODE ANN. § 6.301	One party must have been a domiciliary for the preceding 6 months and a resident of the county in which the action is commenced for 90 days prior to filing	Insupportability due to discord; voluntary separation of 3 years without cohabitation	No
Utah UTAH CODE ANN. § 30-3-1	One party must have been a resident for 3 months prior to filing	Irreconcilable differences; legal separation without cohabitation for at least 3 years	No
Vermont VT. STAT. ANN. tit. 15, § 551 VT. STAT. ANN. tit. 15, § 555 VT. STAT. ANN. tit. 15, § 592	One party must have been a resident for 6 months prior to filing and 1 year prior to the final hearing	Separation of 6 months and court finds it is not reasonably probable that marital relationship can be resumed	No
Virginia VA. CODE ANN. § 20-91 VA. CODE ANN. § 20-97	One party must have been a resident of the state and domiciled in the state for 6 months prior to filing	Separation of 1 year without cohabitation	No

Washington WASH. REV. CODE § 26.09.030	Petitioner must be a resident, a member of the armed forces stationed in the state, or married/in a domestic partnership with a resident at the time of filing	Irretrievable breakdown	Yes
West Virginia W. VA. CODE § 48-5-103 W. VA. CODE § 48-5-105 W. VA. CODE §§ 48-5-201–209	One or both parties must reside in the state at the time the action is commenced	Irreconcilable differences; separation of 1 year without cohabitation	No
Wisconsin WIS. STAT. § 767.301 WIS. STAT. § 767.315	One party must have been a bona fide resident for 6 months prior to filing	Irretrievable breakdown	Yes
Wyoming WYO. STAT. ANN. § 20-2-104 WYO. STAT. ANN. § 20-2-105 WYO. STAT. ANN. § 20-2-106 WYO. STAT. ANN. § 20-2-107	Plaintiff must have been a resident for 60 days prior to filing	Irreconcilable differences	No
Non-State			
District of Columbia D.C. CODE § 16-901 D.C. CODE § 16-902 D.C. CODE § 16-904	One party must have been a bona fide resident for 6 months prior to filing	Both parties to the marriage have mutually and voluntarily lived separate and apart without cohabitation for a period of six months; separation for 1 year without cohabitation	No
American Samoa AM. SAMOA CODE ANN. § 42.02	Either party was a bona fide resident of American Samoa for at least one year preceding the commencement of the action	Irreconcilable differences; voluntary separation for 5 years or more	No
Guam 19 GUAM CODE ANN. § 8203 19 GUAM CODE ANN. § 8318	One party must have been a resident of Guam for at least 90 days preceding the filing of the complaint	Irreconcilable differences	No
Commonwealth of the Northern Mariana Islands 8 N. MAR. I. CODE § 1331 8 N. MAR. I. CODE § 1332	One party must have been a resident of the Commonwealth of the Northern Mariana Islands for at least 90 days preceding the filing of the complaint	Irreconcilable differences; separation for two consecutive years without cohabitation	No

Puerto Rico P.R. LAWS ANN. tit. 31, § 321	One party must have been resident of Puerto Rico for one year preceding the action or the grounds on which the suit is based must have been committed in Puerto Rico	Irreconcilable differences; a "statement of mutual consent;" separation for an uninterrupted period of two or more years	No
U.S. Virgin Islands V.I. CODE ANN. 16, § 104 V.I. CODE ANN. 16, § 106	Plaintiff must have resided in the U.S. Virgin Islands uninterrupted for at least six weeks before commencing the action	Breakdown of marriage relationship to court's satisfaction through evidence; this is the only stated ground	*No (only ground at all is breakdown of marriage relationship generally)
Cherokee Nation	The Cherokee Nation does not have a divorce code; members seeking divorce generally must do so elsewhere (such as in state court)		
Navajo Nation NAVAJO NATION CODE ANN. tit. 9, § 401 NAVAJO NATION CODE ANN. tit. 9, § 402	Complaining party shall have resided in the Navajo Nation at least 90 days prior to commencing of any action for the dissolution of marriage	Voluntary separation of husband and wife for a period of one year or more	No