I. What is the State of the Law for Same-Sex Couples in Wisconsin?

A. Domestic partnerships were an option starting in 2009.

B. Same-sex marriage was lawful in Massachusetts in 2004 and subsequently in other states.

C. Same-sex marriage in Wisconsin became effective October 6, 2014.

D. United States Supreme Court will hear oral arguments in *Obergefell v. Hodges* on April 28, 2015 in a constitutional challenge to a constitutional ban on same-sex marriage from the Sixth Circuit.

E. Marriage Evasion Statute – Section 765.30(1)(a), Wis. Stats.

1. A Wisconsin resident who goes outside of the state to contract a marriage prohibited or void under the laws of Wisconsin is subject to a fine of no more than $10,000, nine months in jail, or both.

2. Statute dates back to 1915.

3. No known prosecution of a same-sex couple by a Wisconsin district attorney, but the same-sex couples who left the state to marry in other states before it was legal in Wisconsin took a risk.

4. Defenses might include that they sought no marriage-related benefits in Wisconsin because they could not. Marriage was merely ceremonial. Secondly, could the statute apply given that the state’s ban on same-sex marriage was found to be unconstitutional?

F. U.S. Supreme Court on October 6, 2014 refused to hear the appeal of *Wolf v. Walker*, the decision by the Seventh Circuit to uphold Judge Barbara Crabb’s decision to strike down as unconstitutional, Wisconsin’s prohibition on same-sex marriage.

G. The Court framed the argument with two questions:
1. Does the 14th Amendment require a state to recognize marriage between two people of the same sex?

2. Does the 14th Amendment require a state to recognize a marriage of two people of the same sex when the marriage was lawfully performed in another state?

H. Possible outcomes of the Supreme Court decision?

1. If the United States Supreme Court overturns the Sixth Circuit decision, same-sex marriage will be lawful in all states, the outcome forecast by Justice Scalia in his Perry v. Hollingworth dissent.

2. If the United States Supreme Court upholds the Sixth Circuit decision, same-marriage will continue in the current 36 states in which is it legal, but will be illegal in the states with bans that survive the Obergefell decision

II. Wisconsin’s Domestic Partnership Registry – Chapter 770.

A. Enacted in 2009, three years after Wisconsin voters ratified a constitutional amendment to preclude state recognition of same-sex marriage.

B. Rights of “domestic partner” are scattered throughout the statutes, creating approximately 40 rights previously associated only with those who marry.

C. Only same-sex persons may register.

D. Rights affected include ownership of real property, intestacy, hospital visitation, family medical leave, worker’s compensation benefits, income taxes, wrongful death claims, and the “spousal” privilege.

E. Qualifications include:

1. Each partner is at least 18 years of age;

2. Partners are the same sex;

3. The partners share a common household;

4. The partners are not married to or in another domestic partnership with another individual;

5. At least one partner has been a resident of the county of registration for at least 30 days immediately prior to making the application for domestic partnership.
F. County clerks must maintain a domestic partnership docket book that is open for public inspection.

G. Some of the more significant benefits of domestic partnership registration.
   1. Real estate owned by parties who are registered domestic partners is presumptively joint tenancy property.
   2. Wisconsin Family Medical Leave Act treats a registered domestic partner the same as a spouse for purposes of eligibility to take leaves.
   3. A surviving registered domestic partner has intestacy rights similar to those available to a surviving spouse.
   4. A registered domestic partner has visitation rights in medical facilities.

H. What are some of the key limitations of the Domestic Partnership Registry versus marriage?
   1. Registered domestic partners cannot file joint income tax returns.
   2. Statutory marital property rights do not apply to registered domestic partners.
   3. Step-parent adoption is not available to registered domestic partners.
   4. No claim for maintenance can be made if a domestic partnership registration is terminated.
   5. The Registry creates no rights or responsibilities for addressing division of property.

I. Is there still a need for the Registry in light of the legality of same-sex marriage in Wisconsin?
   1. Outcome of April 28, 2015 hearing before the U.S. Supreme Court is uncertain. Until same-sex marriage is no longer subject to a legal challenge, the Registry is an important option.
   2. If the U.S. Supreme Court “nationalizes” approval of same-sex marriages, some couples may still prefer the more limited scope of the Registry versus marriage.
III. What Are the Property Rights of the Same-Sex Parties Who Are Domestic Partners?

A. If a marriage ends, the state Family Code provides rules and a forum for addressing the property rights of the spouse. (Chapter 767)

B. If a domestic partnership ends, there are no comparable state laws. Equitable claims have been the basis for settlement negotiations and litigation for many years, applying contract principles related to property rights.¹ ²

C. “Unjust enrichment” and “implied contract” apply to the division of property.

D. “Partition” applies to division of real property, and “conversion” addresses the division of other property.

E. Emotional bonds and commitment cannot be addressed with this doctrine, leaving parties with a lack of closure, and in some circumstances a sense of illegitimacy of their relationship.

IV. Variety of Types of Legal Status for the Children of Same-Sex Partners.

A. Adoption.

1. Joint adoptions by same-sex couples have been done in some Wisconsin circuit courts for many years.

2. One same-sex parent may have adopted a child before they begin a same-sex partnership.


² Watts v. Watts, 137 Wis.2d 509, 405 N.W.2d 303 (1987). Legislature did not intend for Section 767.255’s provisions concerning division of property to apply to unmarried co-habitants.
B. Guardianships.

1. Some same-sex couples elect this option because it was generally less expensive, less cumbersome, and involves more settled law, than the adoption process.

2. A guardianship can be terminated even though it was labeled “permanent” at the time it was granted. If the same-sex couple breaks up, the guardianship could be terminated at the request of one party. If there is a biological or adoptive parent, the other parent’s rights are inferior. The legal standard is not what is in the “best interest” of the child, but requires a showing that the biological or adoptive parent is “unfit” or that “other compelling reasons” exist, necessitating an award of custody to the other person. *Barstadt v. Frazier*, 118 Wis. 549, 64-65, 348 N.W.2d 479 (1984).

3. The playing field between the same-sex parents is not level because the biological or adoptive parent has constitutional rights as a parent, and the other parent is presumed to be a third party who has inferior rights. See Chapter 3 in “Sexual Orientation and the Law” for an excellent discussion of this topic by Christopher S. Krimmer. The biological or adoptive parent’s constitutional right to parent, and the high burden imposed on the other person to show that sufficient reason exists to interfere with that relationship, is a very heavy, and frequently insurmountable, burden.

4. Guardianships afford a viable means to share parenting so long as the same-sex relationship continues. If it ends, the non-biological or non-adoptive parent is vulnerable.

5. The non-biological, non-adoptive parent’s only resource if the guardianship is terminated is a *Holtzman*-type visitation schedule.


1. A former same-sex partner who had a parent-like relationship with the child of the other partner can petition for visitation with the child. If a same-sex parent had a “parent-like” relationship with the children, and satisfied the specific criteria set out in *Holtzman*, courts had the power to award visitation, but not custody or placement.

2. Sandra Holtzman and Elizabeth Knott were partners for more than 10 years. They had a child by artificial insemination which Knott bore. When the child was five, they ended their relationship and Knott terminated Holtzman’s relationship with the child. Holtzman petitioned for custody and visitation of the child. The Wisconsin Supreme Court held that because Knott was the biological parent, Holtzman could not be awarded
custody of the child unless she could show that Knott was “unfit or unable to care for the child”, or there were compelling reasons to award custody or placement to her. Holtzman could not, but did establish her “parent-like” relationship with the child and was awarded visitation with the child.

3. The Holtzman requirements include first a showing that a “triggering event” necessitated the state’s interference with the parent-child relationship. The petitioning party must establish that the other parent “substantially interfered” with the petitioning party’s “parent-like” relationship with the child, and that the petitioner sought court-ordered visitation within a reasonable time after the other parent’s interference. 

Holtzman, 193 Wis.2d at 695.

4. Frequently, the triggering event is the breakup of the parties’ relationship, and the denial of access to the child.

5. If the triggering event, and a sufficiently prompt response is established, the petitioning parent must then demonstrate that they had a “parent-like” relationship with the child by establishing the following factors.

1. Did the biological parent consent to, and foster, the petitioner’s formation and establishment of a “parent-like” relationship with the child?

2. Did the petitioner and the child live in the same household?

3. Did the petitioner assume obligations of parenthood?; and

4. Was the petitioner in a potential role for a length of time sufficient to establish a bonded dependent relationship parental in nature.

A court can order visitation if all of the elements were satisfied and the court finds that ordering visitation is in the child’s best interests.

D. Co-parenting agreements.

1. Same-sex couples have frequently entered into co-parenting agreements that sometimes went so far as to set out their commitment to co-parenting even if their relationship ended.

2. The agreements have had limited benefit if the parties end their relationship and disagree about sharing placement of the children, because courts do not treat them as enforceable under the Family Code.

3. Such agreements may provide guidance to a court if the court is willing to apply them, but they create no enforceable legal rights. The parenting
plan may be helpful to a parent who is seeking to invoke visitation rights under *Holtzman*.

V. When Same-Sex Parents Marry, Do a Step-Parent Adoption, and Subsequently Divorce, What Impact Will the Marriage Have for the Children?

A. The parents are on equal footing under the Family Code, and Chapter 767, “Actions Affecting the Family”, applies.

B. Joint or sole custody, a placement schedule, and a decision about child support must be made at the time of a divorce, legal separation or annulment. Section 767.41, Wis. Stats.

C. Recent panel of Milwaukee County Family Court judges and Family Court commissioners strongly recommended that same-sex parents with minor children marry and do step-parent adoptions so that the Family Code would apply to their children.

D. A guardian ad litem is appointed for the child if there is a dispute about the custody or placement of the child. Section 767.407, Wis. Stats.

E. The court is to set placement that “maximizes the amount of time the child may spend with each parent”. Section 767.41(4), Wis. Stats.

F. Factors for a court to consider in determining what is in the child’s “best interest” are set out in Section 767.41(5), Wis. Stats.

VI. Visitation/Placement Scenarios.

A. Scenario One: Joan and Jane are partners who break up after 10 years. They did not marry. Joan had a child, Zoe, in a marriage, but became partners with Jane after the marriage ended and Zoe was age 2. For a decade they raised her together, with Zoe calling Joan “Momma” and Jane “Mommy”. When Joan and Jane break up, Joan tells Jane she will not permit Zoe to spend time with her, despite their Parenting Agreement that provided for shared equal placement if they broke up. What recourse does Jane have?

B. Scenario Two: Ellen and Julie are partners who, during their 20 year relationship, each bore a child, James and Peter, respectively. They married in Massachusetts in 2008, but divorced in Wisconsin in late 2014. They don’t agree upon a placement schedule for the children during the divorce. What are their respective rights to placement with James and Peter?

C. Scenario Three: John and Peter parent Rachel, whom John adopted several years before becoming partners with Peter. John and Peter break up after a
decade. Although Peter was an active father to Rachel, out of spite for leaving the relationship, John tells Peter he cannot see Rachel. What are Peter’s rights? Would those rights be different if John and Peter had married before Peter ended their relationship?

D. Scenario Four: Beth and Deb jointly parent Robert for 10 years. Beth bore Robert because Deb could not carry a child for physical reasons. They established a “permanent” guardianship, and drafted a parenting plan. Beth has an affair with Scott, leaves the relationship with Deb and marries Scott. Beth files a petition to terminate the guardianship and rejects Deb’s efforts to spend time with Robert. What are Deb’s options? Would Deb’s rights be different if she and Beth had married?

VII. Maintenance Claims Made in Divorces Involving Same-Sex Marriages.

A. What is the date of the marriage?

1. Parties married in a state other than Wisconsin as residents of a state other than Wisconsin, and subsequently moved to Wisconsin.

2. Parties were residents of Wisconsin when they were married in another state between 2004 and 2014.

3. Parties married in Wisconsin.

B. Maintenance under Section 767.56, Wis. Stats.

1. Available in an action for an annulment, legal separation or divorce. Not available to domestic partners unless they agree.

2. Legislature set out ten factors for courts to consider when considering a maintenance request. Section 767.56(1c), Wis. Stats.

767.56 Maintenance. (1c) FACTORS TO CONSIDER FOR GRANTING. Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time, subject to sub. (2c), after considering all of the following:

(a) The length of the marriage.
(b) The age and physical and emotional health of the parties.
(c) The division of property made under s. 767.61.
(d) The educational level of each party at the time of marriage and at the time the action is commenced.
(e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(f) The feasibility that the party seeking maintenance become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

(g) The tax consequences to each party.

(h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(i) The contribution by one party to the education, training or increased earning power of the other.

(j) Such other factors as the court may in each individual case determine to be relevant.

3. Factors (a), (d), (f), and (h) take into account the length or what occurred "during the marriage". Will a court consider the period of cohabitation under these factors since the parties could not marry anywhere until 2004, and not in Wisconsin until 2014?

4. Because Section 767.56(1c)(h), Wis. Stats., specifically recognizes as a factor, any "mutual agreements" before or during the marriage, same-sex couples who elect to marry may also decide to formalize their long-standing financial understandings if they have not already done so.

5. In the absence of a marriage, neither same-sex partner would have a claim for maintenance from the other partner. Marriage brings the potential for an obligation of financial support.

VIII. Property Division in a Same-Sex Divorce.

A. Like when considering a claim for maintenance, what the court considers to be the date of the marriage and the length of the marriage are key to application of Section 767.61, Wis. Stats., which governs the division of property.

B. Section 767.61(3) factors a court is to consider when presumptively dividing marital property equally:
(3) PRESUMPTION OF EQUAL DIVISION. The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(a) The length of the marriage.
(b) The property brought to the marriage by each party.
(c) Whether one of the parties has substantial assets not subject to division by the court.
(d) The contribution of each party to the marriage, giving appropriate economic value to each party’s contribution in homemaking and child care services.
(e) The age and physical and emotional health of the parties.
(f) The contribution by one party to the education, training or increased earning power of the other.
(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
(i) The amount and duration of an order under s. 767.56 granting maintenance payments to either party, any order for periodic support payments under s. 767.531 and whether the property division is in lieu of such payments.
(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
(k) The tax consequences to each party.
(l) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
(m) Such other factors as the court may in each individual case determine to be relevant.

C. Like the court’s consideration of a period of cohabitation for purposes of considering a request for maintenance, the court’s view of the “length of marriage” will significantly affect the application of these factors if there was a long period of cohabitation.
IX. What Are Some of the Practical Implications for Lawyers of Same-Sex Marriage in Wisconsin?

A. Marital property laws of Chapter 766 – Estate Planning.

B. Income tax rules.
   1. Filing options of married filing jointly or married filing separately.
   2. End of imputed income for employer-provided health insurance benefits for a same-sex domestic partner.
   3. Amended returns for prior years.
   4. See www.revenue.wi.gov.

C. State employee benefits.
   1. Termination of a domestic partnership is not required by the Employee Trust Fund in order to add a same-sex spouse to a state provided health insurance plan. For Wisconsin System purposes, a same-sex spouse is treated the same as an opposite-sex spouse.
   2. For Wisconsin Retirement System purposes, a same-sex spouse is treated the same way as an opposite-sex spouse.

D. Drafting powers of attorney for health care and general powers of attorney.

X. Resources


B. Fair Wisconsin www.fairwisconsin.com

C. Human Rights Campaign www.hrc.org

D. Lambda Legal www.lambdalegal.org