




DOMESTIC VIOLENCE PROTECTIONS Issue Brief

Status of Protections in the U.S. for Victims of Domestic Violence in Same-Sex Relationships

Introduction

Prior to 2015, across the United States, the debate over the right of same-sex couples to marry was in full swing. While some states were well ahead of the curve in their gender-neutral approaches to marriage and legislation protecting same-sex couples, an overwhelming majority of states legally defined marriage as a union between one man and one woman and refused to recognize same-sex marriages performed in other jurisdictions.¹ In 2015 came the landmark Supreme Court decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). *Obergefell* held that: (1) the right to marry is a fundamental right protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) same-sex couples may not be deprived of that right; and (3) states must recognize lawful same-sex marriages performed in other states. This decision provided a clear directive to states that same-sex couples have a fundamental right to marry, rendering any existing laws to the contrary unconstitutional. *Obergefell* was not only monumental because it legalized same-sex marriage, but because it also extended to same-sex married couples a multitude of benefits, many of which are intended to assist families in times of crisis (e.g., the automatic right to visit a hospitalized spouse and the right to make medical decisions on an incapacitated spouse's behalf).² In addition, although perhaps not widely recognized as a "benefit," with the recognition of same-sex marriage comes access to a myriad of protections for married victims of domestic violence and intimate partner violence ("IPV").³

Although there is a pervasive myth that IPV is a heterosexual issue, a number of studies have revealed not only the existence of IPV in same-sex couples,⁴ but the occurrence of IPV as comparable to or exceeding the incidence among heterosexual couples.⁵ In a recent 2013 study, it was estimated that approximately 4.1 million members of the LGB community have experienced IPV in their lifetime in the United States.⁶ Prior to *Obergefell*, the protections available to victims of domestic violence at the hands of a same-sex partner were questionable at best. Post-*Obergefell*, since all states recognize married and formerly married couples as a protected category under civil domestic violence laws, these laws automatically protect same-sex married couples. But where did *Obergefell* leave unmarried victims in same-sex relationships? All states, with the exception of North Carolina, utilize gender-neutral language in their civil domestic violence laws. This language greatly increases the likelihood that victims of domestic violence in same-sex relationships will be protected regardless of their marital status. However, in light of state attitudes towards same-sex marriage, the reality of domestic violence protections for same-sex couples with regard to equitable access to enforcement and equal access to protection under the laws may be different.



This issue brief (1) examines the various approaches taken by states in implementing the *Obergefell* decision; (2) demonstrates how the various approaches may impact or implicate the applicability of domestic violence statutes to unmarried victims in same-sex relationships; (3) outlines the potential enforcement issues of existing domestic violence statutes as applied to unmarried victims in same-sex relationships; and (4) examines certain non-legal barriers to accessing domestic violence protections for victims.

1. Implementing the Obergefell Decision


Since the Supreme Court's decision in *Obergefell* in 2015, states with offending statutes have taken one of several approaches to address their existing laws: (1) by far the most common approach, taking no action to remedy unconstitutional laws on the books; (2) attempting to repeal offending statutes; (3) successfully repealing and replacing offending statutes with gender-neutral language; or (4) codifying laws that explicitly protect the right of same-sex couples to marry.

As of 2012, 40 states had legislation prohibiting the recognition of same-sex relationships and/or defining marriage as solely between a man and a woman.⁷ To date, of those 40 states (i) Colorado, Delaware, Hawaii, Minnesota, Nevada, and New Jersey have successfully replaced the offending statutes with gender-neutral language and (ii) California and Illinois have codified laws explicitly recognizing and protecting the rights of same-sex couples to marry.⁸ A total of 32 states continue to have such laws despite these statutes being held unconstitutional by the Supreme Court in *Obergefell*.⁹ Of those 32 states, Florida, Kansas, Michigan and Missouri have made attempts to revise their offending statutes but such attempts were ultimately unsuccessful and the offending laws remain on record.

These varying approaches to addressing *Obergefell* are telling and can have a trickle-down effect when it comes to the enforcement of domestic violence protections for unmarried same-sex couples. More progressive jurisdictions that have taken active steps to repeal and replace any laws adversely affecting the right of same-sex couples to marry seem likely to extend domestic violence protections to unmarried same-sex couples. However, in jurisdictions at best indifferent and at worst hostile to same-sex marriage, a lack of explicit protections renders unmarried same-sex IPV victims vulnerable to an unsympathetic legal system.¹⁰ Essentially we are asking victims of same-sex IPV to rely upon the same institutions to protect them as have historically been prejudiced against them.

2. Applicability of Domestic Violence Statutes to Unmarried Same-Sex Relationships

All states and the District of Columbia have civil domestic violence statutes that recognize members of currently or formerly married couples as an eligible category afforded protection. Other eligible categories include, cohabitants and former cohabitants, couples with children in common, relatives, and current or former members of dating, intimate, or sexual relationships. Often many of these categories are encapsulated in the overarching category of "family or household member." Although the language of each state's domestic violence statutes vary, generally, a court must determine (1) whether a petitioner is eligible for relief as a member of a protected category and (2) whether a proper showing was made that an act of domestic violence in fact occurred.¹¹ The provisions included in a civil domestic violence protection order vary from jurisdiction to jurisdiction but may include the following: (1) that the perpetrator stay a certain distance from the victim; (2) not assault or otherwise abuse the victim; and (3) refrain from contacting the victim (directly or indirectly).¹² Such orders also vary in duration and may also include remedies such as emergency financial assistance, temporary child custody and support assistance, and housing.¹³ In every jurisdiction, there is a mechanism whereby the victim may summon law enforcement to enforce the provisions of the protective order if violated.¹⁴ It is important to note that civil domestic violence protection orders are separate and distinct from protective orders designed to protect the general public from abuse or harassment from third-party individuals whom the victim is not related to, not residing with, and not otherwise engaged with in an intimate relationship.¹⁵ General civil protection orders (i.e., orders not designed to



protect victims of domestic violence specifically), tend to be shorter in duration and tend to provide less comprehensive protections to the victim.¹⁶

The right to marry conferred by the Supreme Court in *Obergefell* automatically places married same-sex couples within the protected category of current or former married couples by virtue of the plain meaning of these statutes. However, since nearly every state uses gender-neutral language in lieu of explicit protections for same-sex couples in its domestic violence statutes, applicability to unmarried same-sex couples is open to interpretation. Generally, the most commonly remaining eligibility categories for a civil domestic violence protective order (after current or formerly married couples) are (i) family members (by blood or marriage); (ii) current or former cohabitants, (iii) individuals with a child in common, or (iv) members of an intimate relationship.¹⁷ Qualification under item (i) does not apply to unmarried couples, and items (ii) and (iii) are relatively clear in their applicability to both unmarried same-sex and opposite sex couples because the nature of the relationship between abuser and victim is not in question. The court need only determine whether the alleged abuser and the alleged victim are or were residing together or have a child in common, respectively. In contrast, qualification under item (iv) requires the court to assess the nature of the relationship between the parties in question. As discussed in greater detail below, there have been cases in a number of states where the definition of “intimate relationship” was found to include same-sex couples. However, one can easily foresee a circumstance in which a judge or magistrate in a jurisdiction with prevailing hostile attitudes about same-sex relationships could allow this animosity to permeate the legal process.


Gender-neutrality can be interpreted as providing domestic violence protections to all unmarried same-sex couples. For example, in Florida, Illinois, Kentucky, and Ohio, even prior to the *Obergefell* decision, there were cases in which courts held that same-sex partners qualified for protection under gender-neutral domestic violence statutes.¹⁸ Furthermore, in a majority of states where case law exists addressing the applicability of domestic violence statutes, courts typically conclude that the statutes are to be liberally construed in order to provide maximum protections to victims of domestic violence.¹⁹ Such construction increases the likelihood that an unmarried domestic violence victim in a same-sex relationship would be permitted to seek a protective order under one of the existing gender-neutral statutes.

However, it is important to note that despite precedent to the contrary,²⁰ there is anecdotal evidence to suggest that victims of domestic violence in same-sex relationships have encountered challenges in obtaining protective orders. In 2003 and 2005, there were two reported cases in which individuals seeking temporary protective orders against their same-sex live-in partners were denied protection because the judge hearing the cases interpreted the statute’s language, “person living as a spouse” to mean only couples who could legally marry in Ohio (i.e., that could legally be living together as spouses).²¹ The court reasoned that being afforded protection under Ohio’s domestic violence statute would be akin to Ohio recognizing same-sex marriage (which was not legal in 2003 or 2005). The Ohio marriage amendment, prohibiting same-sex marriage, was passed in 2004.²² Although the amendment was passed after the judge’s decision in 2003, when asked about his rulings, the judge stated that his “determination was consistent with the beliefs of [his] community.”²³ While Ohio’s marriage amendment has since been held unconstitutional, rendering it unlikely that such a result could be reached in Ohio today, it illustrates how, despite legal precedent, the attitudes, assumptions and prejudices of individual judges can directly impact an individual’s ability to obtain protection under the laws – even if such laws are gender-neutral.

It is difficult to predict with any certainty, the effect of *Obergefell* on the challenges discussed above. Indeed, there is a lack of case law addressing the issue (due in large part to the fact that the denial of a protective order is rarely appealed). However, it is possible that *Obergefell* is serving as a deterrent in many jurisdictions where domestic violence statutes are gender-neutral (while attitudes towards same-sex marriage may historically be hostile) even though *Obergefell* did not address the rights of non-married couples.

3. Barriers to Enforcement

Recent cases in North Carolina and South Carolina illustrate some of the issues unmarried domestic violence victims in same-sex relationships continue to face despite the Supreme Court’s ruling in *Obergefell*. Currently, North Carolina is the




only state with a domestic violence statute that is not gender-neutral. In order for an alleged victim of domestic violence to qualify for protections under North Carolina's domestic violence law, the individual, if not a current or former spouse of the alleged abuser, must fall into the protected category of being in a "personal relationship" with the offending party. The North Carolina Code provides that in order for two individuals to be considered to be in a "personal relationship" the individuals must be: (1) current or former spouses; (2) persons of opposite sex who live together or have lived together; (3) related as parents and children; (4) have a child in common; (5) are current or former household members; or (6) are persons of the opposite sex who are in a dating relationship.²⁴ Under the North Carolina law, while all opposite sex couples may obtain a protective order, and most categories of same-sex intimate partners may obtain a protective order, victims of same-sex dating violence are specifically excluded from protection (i.e., unless the victim is or was married to the abuser, has a child in common, or resided with the abuser, the victim is not eligible for relief).²⁵ In the North Carolina case of *M.E. v. T.J.*, M.E. filed for and was denied a protective order in Wake County District Court against her former same-sex partner which would have prevented her former girlfriend from contacting her or having access to firearms. Despite recognizing that M.E. was "terrified" and that she was caused "substantial emotional distress" at the hands of her former girlfriend, M.E. was not granted the protective order because of the fact that she and her former girlfriend are both women. The court concluded that a Domestic Violence Protective Order would have been granted had the parties been of opposite genders or were currently or formerly cohabitants. Instead, M.E. was granted a temporary "no contact" order, which provided a significantly lesser level of protection. Currently, the American Civil Liberties Union of North Carolina is challenging the constitutionality of this law which, in their view, denies equal protection to LGBTQ+ people.²⁶

Meanwhile, in South Carolina, a 2017 decision by the state Supreme Court temporarily rendered protections for victims of domestic violence in same-sex relationships completely in flux. In *Doe v. State*, the court held that §20-4-20(b) of the South Carolina Code was unconstitutional because same-sex couples were excluded from the definition of "household member" thus rendering same-sex couples ineligible for a civil order of protection (unless the couple is currently or formerly married or has a child in common).²⁷ Opposite sex couples were entitled to protection as current or former cohabitants, regardless of whether they were currently or formerly married, or whether they have a child in common.²⁸ While the court's holding that the portion of the statute making this distinction was unconstitutional, in violation of the Equal Protection Clause of the Fourteenth Amendment, was clearly the correct legal result, there have been unfortunate and perhaps unintended consequences. The court's chosen remedy to address the statute's unconstitutionality was to strike down the offending provision.²⁹ This created concern that with the phrase "male and female who are cohabitating or formerly have cohabitated" removed, domestic violence charges could only apply to married people or direct relatives.

Fortunately, in December 2018, after months of dismissals in York County South Carolina, denying same-sex couples protection under South Carolina's domestic violence law, York County Magistrate Judge Michael Scurlock announced that the court is to find probable cause in domestic violence preliminary hearings involving unmarried same-sex couples if cohabitation can be proven along with meeting the other evidentiary requirements.³⁰ This determination applies statewide and according to Magistrate Scurlock, the guidance came directly from the South Carolina Supreme Court.³¹

4. Additional Barriers to Accessing Domestic Violence Protections

The social science research suggests that there are a number of barriers outside the law that prevent victims of domestic violence in same-sex relationships from obtaining adequate protections under existing laws, not the least of which is the attitude of the courts and law enforcement.³² According to a study published in 2018, understanding the prevalence of LGB IPV is difficult because of the silence that has historically existed in the LGB community.³³ Individuals fear stigmatization, and as a result, many LGB victims of IPV choose to remain silent to prevent further oppression and social marginalization.³⁴ There is also the issue of pervasive gender-related stereotypes. For example, there is the myth of violence being seen as a "mutual conflict," particularly in a gay couple because of the perception that men "fight equally."³⁵ Historically, men are assumed to have comparable physical strength and violent behavior between men is socially normalized.³⁶ Such myths create obstacles to providing services for homosexual victims and also have the tendency to minimize the severity of IPV.³⁷ Other barriers include, but are not limited to, concerns about "outing" oneself



when seeking help; lack of awareness of LGBT-specific or LGBT-friendly assistance programs and resources; homophobia from staff or service providers or from non-LGBT survivors of IPV with whom they interact; and low levels of confidence in the sensitivity and effectiveness of law enforcement officials and the courts for LGBT people.³⁸ LGBT people have reported experiencing discrimination and harassment from law enforcement and overall, the perception that law enforcement will not be helpful in addressing IPV seems pervasive.³⁹ This perception, in and of itself, can deter same-sex IPV victims from coming forward to seek help in the first instance. It is important to remain cognizant that these social and psychological barriers exist and that the law itself is merely one factor in a more complicated system confronted by victims of domestic violence in same-sex relationships.

Conclusion

While North Carolina and South Carolina each have uniquely drafted civil domestic violence statutes with language that explicitly excludes protections for unmarried same-sex couples in certain circumstances, the manner in which these laws are enforced demonstrates the extreme level of power and discretion courts maintain in interpreting the law. Fortunately, a majority of states have taken a gender-neutral approach and therefore, unmarried victims of same-sex domestic violence are at least arguably covered or, at a minimum, not blatantly excluded from protection.

Overall, unmarried domestic violence victims in same-sex relationships are better protected when domestic violence statutes explicitly include them rather than relying on gender-neutral language. Where there is ambiguity there is always uncertainty and room for traditionally marginalized groups to be excluded from legal protections afforded the remainder of the population. As a society, we are asking victims of same-sex domestic violence to take quite a leap of faith in the legal system in states that have been traditionally and historically resistant and hostile towards recognizing the validity of such relationships to begin with.

SUPPORTERS



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¹ American Bar Association Commission on Domestic & Sexual Violence Report to the House of Delegates, August 2015 (submitted by Angela Vigil, Chair, ABA Commission on Domestic & Sexual Violence) (available at: https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/LGBT/109B.pdf).

² National Center for Lesbian Rights, Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States (available at www.nclrights.org) (2017).

³ In this issue brief, because most states use the term “domestic violence” in their statutes, “domestic violence” is used to refer to all violence that occurs between individuals in intimate relationships (whether residing together or not). However, according to the social science research cited in this brief, domestic violence is sometimes referenced as one part of a larger category of violence experienced between individuals in intimate relationships, known as “intimate partner violence” or “IPV”. Where research studies and other resources address IPV specifically, any descriptions of such studies or resources will utilize the terminology as it appears in the original cited study.

⁴ For purposes of this issue brief, the term “same-sex couples” will be used interchangeably to refer to gay, lesbian, bisexual, transgender, and queer couples (“LGBTQ”). Reference to a subsection of this population will be specifically noted where appropriate. Certain studies reviewed in connection with this issue brief utilize different identifiers (e.g., “LGB,” “LGBT”). Any descriptions or discussions of such studies will utilize the terminology as it appears in the original cited study.

⁵ When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence, *Frontiers in Psychology*, published online 2018 August 21 (available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6113571>); Intimate Partner Violence and Sexual Abuse Among LGBT People, A Review of Existing Research, The Williams Institute, Taylor N.T. Brown and Jody L. Herman, November 2015 (available at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf>); American Bar Association Commission on Domestic & Sexual Violence Report to the House of Delegates, August 2015 (submitted by Angela Vigil, Chair, ABA Commission on Domestic & Sexual Violence) (citing Walters, M.L., Chen, J., and Breiding, M.J., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, Atlanta, Georgia, January 2013) (available at: https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/LGBT/109B.pdf).

⁶ When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence, *Frontiers in Psychology*, published online 2018 August 21 (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6113571>).

⁷ See Domestic Violence and Same-Sex Relationships Fact Sheet, The Network for Public Health Law (available at: https://www.networkforphl.org/_asset/lmb0yo/Master-List-of-SameSex-Domestic-Violence-Protections-Updated-1262012.pdf).

⁸ See 2019 Updated Domestic Violence and Same-Sex Relationships Fact Sheet, The Network for Public Health Law (available at: https://phl.amm.clockwork.net/_asset/tww8p0/Fact-Sheet---DV-Protections.pdf).

⁹ *Id.*

¹⁰ American Bar Association Commission on Domestic & Sexual Violence Report to the House of Delegates, August 2015 (submitted by Angela Vigil, Chair, ABA Commission on Domestic & Sexual Violence) (available at: https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/LGBT/109B.pdf).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See State Protection Order Durations Matrix, Revised 2015, Battered Women’s Justice Project, National Center on Protection Orders and Full Faith & Credit (available at: <https://www.bwjp.org/ncpoffc-state-protection-order-duration-matrix.pdf>).

¹⁶ See *id.* A comparison of Maryland’s peace order statute vs. its protective order statutes illustrates an example of how civil protection orders and civil domestic violence protection orders differ. In Maryland, peace orders (i) may remain in effect for 6 months with a maximum extension of up to 6 months and (ii) are limited in scope, allowing the court only to order the relief that is minimally necessary to protect the petitioner. Md. Code Ann., Cts. & Jud. Proc. §§3-1505-3-1506. In contrast, protective orders (i) can last as long as a year, two years, or in some cases permanently until the victim requests termination and (ii) the court has the option to include any or all relief options available under the statute to craft an order that covers the victim’s specific needs. Md. Code Ann., Fam. Law, §4-506. Perhaps one of the most important forms of relief available under a protective order and not under a peace order is the surrendering of the respondent’s firearms. *Id.*

¹⁷ See 2019 Updated Domestic Violence and Same-Sex Relationships Fact Sheet, The Network for Public Health Law (available at: https://phl.amm.clockwork.net/_asset/tww8p0/Fact-Sheet---DV-Protections.pdf).

¹⁸ See *Peterman v. Meeker*, 855 So.2d 690 (2nd Dist. Florida 2003); *Glater v. Fabianich*, 252, Ill.App.3d 372 (1st Dist. 4th Div. Illinois 1993); *Ireland v. Davis*, 957 S.W.2d 310 (Ky.Ct.App. 1997); *State v. Hadinger*, 61 Ohio.App.3d (Ohio Ct. of Appeals, 10th Dist. 1991); *Moore v. Bentley*, 2004 WL 2804785 (Ohio Ct. App. 2004).

¹⁹ See e.g., *Boyd v. Ottman*, 961 So. 2d 148 (Ala.Civ.App.2006) (holding that a former boyfriend was a “household member” under the PFAA, even though the boyfriend maintained his own residence, because the statute includes persons who satisfy the “continuing contact” provision of § 30-5-1(b)(2)) and the statute should be liberally construed to protect victims of domestic violence); *State v. Virgil*, 895 N.W.2d 873 (Iowa Sup. Ct. 2017) (holding domestic violence statute to be construed in reasonable or liberal manner to best effect its purpose); *Raynes v. Rogers*, 183 Vt. 513 (Vt. 2008) (holding the Abuse Prevention Act must be liberally construed to suppress the evil and advance the remedy intended by the legislature).

²⁰ See *State v. Hadinger*, supra; *Moore v. Bentley*, supra.

²¹ *Some courts reluctant to help abused gays*, The Columbus Dispatch, Updated November 28, 2011.

²² *Id.*

²³ *Id.*

²⁴ N.C. Gen. Stat. §50B-1(b)(1) through (6).

²⁵ M.E. v. T.J., Brief of *Amici Curiae* North Carolina LGBTQ+ Non-Profit Organizations, 2019 WL 270539 (N.C. App. 10th Dist.). For purposes of its brief, “LGBTQ+” refers to lesbian, gay, bisexual, transgender, queer, and other sexual and gender minorities.

²⁶ *Id.* For purposes of its brief, “LGBTQ+” refers to lesbian, gay, bisexual, transgender, queer, and other sexual and gender minorities. *Id.*

²⁷ According to the South Carolina Supreme Court, in its reading of the relevant statute, the definition of “household member” provides that a person, who fits within one of the following relationships, would be eligible for an order of protection: “(1) a same-sex married or formerly married couple; (2) a same-sex couple, either married or unmarried, who have a child in common; (3) an opposite-sex married or formerly married couple; (4) an opposite sex couple, either married or unmarried, who have a child in common; and (5) an unmarried opposite-sex couple who is living together or who has lived together.” *Doe v. State*, 421 S.C. 490, 507 (S.C. 2017).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *York Co. judge: SC law protects same-sex domestic violence victims*, The Herald, by: Dys Andrews, December 19, 2018 (available at: <https://www.heraldonline.com/news/local/crime/article223301695.html>).

³¹ *Id.*

³² *When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence*, *Frontiers in Psychology*, published online 2018 August 21 (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6113571>).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Intimate Partner Violence and Sexual Abuse Among LGBT People, A Review of Existing Research*, The Williams Institute, Taylor N.T. Brown and Jody L. Herman, November 2015 (available at: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf>).

³⁹ *Id.*