

# Critical Common Law Marriage Update For Same Sex Couples

By

The District of Columbia Court of Appeals has just issued a wide-reaching decision on the issue of the retroactivity of common law marriages, particularly as applied to same sex couples. The impact is significant.

In the District of Columbia, common law marriages have long been recognized. Common law marriage in D.C. requires proof of only two elements – express mutual agreement to be married, in the present tense, and, thereafter, cohabitation. *Mesa v. United States*. Cohabitation is the easier of the two elements to prove, and unlike other common law jurisdictions, the District does not have a time requirement for the length of time the couple must cohabit. Express mutual agreement is more challenging to establish. One needs to identify a specific moment in time as that moment when the couple agreed to be married. A readily identifiable example of this would be having participated in a commitment ceremony, particularly prior to the advent of same sex marriage recognition.

Does the couple use terms like “spouse” or “life partner,” or “husband” or “wife” when referring to one another? How does the couple act or hold themselves out? Was there an exchange of wedding bands? Was there a recurring celebration of the specific date promises were exchanged? These concepts apply to same sex couples as well as opposite sex couples; however within the LGBTQAI+ community specifically, couples who had a commitment ceremony in D.C. many years ago, or even just exchanged private promises to be wed, may very well be common law married and not realize the legal implications of their common law marriage. Most importantly, the recent decision of *Gill v. Van Nostrand*, states quite clearly that a same-sex couple may enter into common-law marriage in the District of Columbia and that **the recognition of that marriage applies retroactively, even at a time when same-sex marriage was not legal.**

Why is this new ruling important? Because the D.C. Court of Appeals has just expressly indicated they will recognize same sex marriages retroactively, including long before same-sex marriage was legal in D.C. (2010) and/or at the federal level in the United States (2013 or 2015). This can vastly increase the size of a marital estate to be divided at the time of divorce and/or to be inherited at the death of a spouse. This new legal recognition can also, arguably, create recognition of a marriage long enough to establish entitlement to spousal benefits, such as social security income based on a spouse’s earning history. Typically, a person claiming spousal benefits must be currently married to the primary recipient and/or former spouses can receive benefits if their marriage lasted 10 years or longer, although certain restrictions apply.

In light of the Full Faith and Credit Clause of the United States Constitution, Maryland and Virginia, as well as other U.S. jurisdictions, will afford full and faith and credit to a valid common law marriage properly entered into in a jurisdiction where those marriages are permitted, unless such a marriage is strongly against a state’s public policy.

Are you, or were you, a resident of the District of Columbia? Do you have a client that is or was a resident of the District of Columbia? Do you think you or your client may be common law married in the District of Columbia? Did you subsequently marry the same or a different individual? **There may be issues surrounding the legality and validity of your marriage to your current spouse.** Consider the impact on your respective estates and on the dissolution of the marriage relationship, including alimony and property rights. If you have any questions, please give us a call. We would be happy to consult with you on any related questions about this important update to the status of common law marriages.