

CHAPTER 20

PRISON MARRIAGE AND DIVORCE*

A. Introduction

The U.S. Supreme Court has held that prisoners have a constitutional right to marry; however, this right may be regulated, and in some cases even denied. Prison administrators have the discretion to control how and when you marry.¹ Nevertheless, prison administrators may not abuse this discretion.²

State law sets out the requirements for getting married. These requirements apply to all people who wish to get married in a particular state.³ In addition to complying with these requirements, prisoners who wish to marry must also receive permission to get married, usually from the superintendent of their institution. The rules governing when prisoners can marry differ from state to state, and even from prison to prison.⁴

This Chapter will explain the general constitutional rules about the regulation of prison marriages in Part B. Part C gives an overview of prison divorce. Part D will explain the regulations for marriage in federal prisons. Part E discusses in detail the requirements for prisoner marriage in New York, and in general the requirements in California. Unfortunately, many states do not have statewide policies regarding prison marriage. Even if you are not imprisoned in New York, you may find useful information and explanations about procedures that may be similar to those of your institution.

B. Constitutional Requirements for Prison Marriage Regulations

As stated above, as a prisoner, you have a basic constitutional right to marry.⁵ However, this right only means that every prison must have a procedure for requesting permission to get married. The state government and prison officials have the right to make rules determining who can get permission to marry, so long as the rules are “reasonably related” to valid prison interests.⁶ Valid prison interests include prisoner security and prisoner rehabilitation, as well as protection of people outside the prison. In deciding whether a regulation is “reasonably related” to a valid prison interest, the court will do little more than determine whether the marriage regulation will actually have an effect on the stated prison interest. The same test applies for a prison official deciding whether or not to grant your request. If a prison official denies your specific request to get married, the denial must be explicitly based on grounds reasonably related to valid prison interests.⁷

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1. See *Ferrin v. N.Y. State Dep’t of Corr. Serv.*, 71 N.Y.2d 42, 44, 517 N.E.2d 1370, 1371, 523 N.Y.S.2d 485, 485 (1987) (upholding ban on getting married for life-timers).

2. See *Turner v. Safley*, 482 U.S. 78, 81, 107 S. Ct. 2254, 2257, 96 L. Ed. 2d 64, 73 (1987) (striking down prison regulations that allowed marriages only for compelling reasons); *Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (“[P]rison administrators’ bald assertions of security interests will not justify the loss of a prisoner’s fundamental rights”).

3. States have the power to allow or deny a prisoner the right to marry. See *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983) (acknowledging that the right to marry is not “unfettered” and that marriage is the province of the States). For the rules on marriage in federal prisons, see 28 C.F.R. §§ 551.10–16 (2003).

4. See Virginia L. Hardwich, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U.L. Rev. 275, 277–79 (1985).

5. See *Turner v. Safley*, 482 U.S. 78, 96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987) (finding a “constitutionally protected marital relationship in the prison context”).

6. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

7. See *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987) (holding that there must be a valid, rational connection between the prison and the legitimate government interest put forward to justify it); see also Lockert

Your federal right to marriage is derived from the right to privacy in the Fourteenth Amendment, which requires due process before deprivations of liberty.⁸ Similar clauses (protecting privacy or due process) in your state's constitution may offer additional protections against the infringement of your right to marry. Your state courts may have interpreted these clauses as providing more protection for your right to marry than the U.S. Supreme Court's interpretation of the federal constitution. If you are trying to challenge a denial of permission to be married, you should consult your state constitution and state court decisions dealing with the rights you are entitled to under the particular provisions.

1. Prisoner Status

Prison officials may determine whether or not you can be married based on certain aspects of your prisoner status. Courts have not allowed rules that determine marriage eligibility based on the prisoner's race.⁹ In contrast, classifications according to the length of a prisoner's sentence or other non-invidious (non-discriminatory) classifications have been upheld in some states.¹⁰ Exceptions exist, however, and you should examine the case law in your particular state to determine what the exceptions are. For example, the law varies among states, and is sometimes unclear about the constitutionality of prohibiting prisoners serving life terms from getting married,¹¹ two prisoners from getting married to each other,¹² the marriage of a prisoner and a guard, and the marriage of a prisoner who is being punished as a result of disciplinary hearings.¹³ Thus, some courts have found valid prison interests for prohibiting those marriages, while other courts have said that there are no valid prison interests in doing so.¹⁴ It should be noted, however, that no court has found any outright ban on prison marriage to be constitutional after *Turner*.¹⁵ What this means for you is that if your proposed marriage

v. Faulkner, 843 F.2d 1015, 1017 (7th Cir. 1988) (relying on a state statute requiring "a compelling reason" for denying the request to marry but dismissing for failure to raise the issue at the trial court level).

8. See Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 680, 54 L. Ed. 2d 618, 629 (1978) ("[T]he right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause").

9. In fact, no state can base its marriage laws on race. See Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010, 1018 (1967) ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

10. See Jacqueline B. DeOliveira, *Marriage, Procreation and The Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 Touro L. Rev. 189, 198-99 (1988). See also Ferrin v. State Department of Correctional Services, 71 N.Y.2d 42, 45, 517 N.E.2d 1370, 1371, 523 N.Y.S.2d 485, 486 (1987) (finding that New York legislature's declaration that those sentenced to life are "civilly dead" means they cannot legally marry).

11. By distinguishing a statute in which prisoners sentenced to life were excluded from marriage, the court in *Turner* implied that prohibitions against life term prisoners getting married were constitutional. *Turner v. Safley*, 482 U.S. 78, 96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987); see also *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983) (finding summary judgment inappropriate on issue of whether Florida state laws violated prisoner's right to marry under Constitution); *Dep't of Corrs. v. Roseman*, 390 So. 2d 394 (Fla. 1980) (upholding a rule restricting right to marry as there is no fundamental Constitutional right to marry); *In re Carrafa*, 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (Cal. Ct. App. 1978) (permitting restriction of marriage only if there was no alternative way to ensure prison security); *Ferrin v. State Department of Correctional Services*, 71 N.Y.2d 42, 517 N.E.2d 1370, 523 N.Y.S.2d 485 (1987) (holding that unmarried life prisoners have absolutely no right to get married). A federal court in the Northern District of New York, however, came to the opposite conclusion. See *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989) (holding right to marry fundamental even for prisoners serving life sentences). For further discussion of the contradiction between *Ferrin* and *Langone* and the implications of these decisions in New York, see 45 NY Jur. 2d *Domestic Relations* §§ 2250 (2005).

12. N.J. Admin. Code Tit. 10A, § 17-7.3 (1998); N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.2(a)(4), (b)(1) (2006).

13. N.Y. Comp. R. & Regs. Tit. 7 §§ 711.2(b)(2), (3) (2006).

14. See *Turner v. Safley*, 482 U.S. 78, 99, 107 S. Ct. 2254, 2267, 96 L. Ed. 2d 64, 85 (1987) (concluding that based on the record of the case "the almost complete ban on the decision to marry is not reasonably related to legitimate penological interests," but leaving open the possibility that prohibiting marriage may be constitutionally permissible if reasonably related to legitimate penological interests); *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989) (holding that prohibition against prisoners marrying before parole while serving a life sentence violated equal protection); *Keeney v. Heath*, 57 F.3d 579 (7th Cir.) (holding that there is a valid interest in prohibiting prisoners from marrying guards).

15. The cases finding such regulations generally permissible predate *Turner*. See, e.g., *Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (recognizing the Supreme Court's two-part standard for evaluating prison regulations regarding

is not allowed under prison rules, you can try to challenge the rule as unconstitutional. Even if the courts that supervise your prison have said that the rule is permissible, there is a chance that in light of *Turner* they might be inclined to change that decision, though you should be aware of whether the rule has already been reexamined by the courts since *Turner*.

2. Fulfilling State Marriage Requirements

In order to get permission to be married, you must first meet the requirements set forth in your state's marriage laws. Since the marriage laws of each state would be too lengthy to reproduce here, you will have to find the requirements for your state on your own. The laws should be available in the prison library, and the prison chaplain should also be familiar with them.

Although the marriage laws are not identical for each state, there are some requirements that are common to all states. All states have requirements about how old you have to be to get married (in most states the age is eighteen; in some it is sixteen). Likewise, all states require that any previous marriages be legally terminated before allowing a new marriage.¹⁶ Most states restrict marriages between persons who are related to each other, although how closely related depends on the state.¹⁷ Many states also require marriage licenses and blood tests before allowing a marriage.¹⁸ Currently, Massachusetts recognizes same sex marriage¹⁹ but it is the only state to do so.²⁰ However, a handful of other states do recognize same sex civil unions and domestic relationships.²¹ Although these

prisoner marriages: (1) furtherance of a substantial governmental interest; and (2) restriction on marriage no greater than necessary in order to protect the governmental interest involved.); *Dep't of Corrs. v. Roseman*, 390 So. 2d 394, 397 (Fla. Dist. Ct. App. 1980) (finding that the Florida rule restricting right to marry served a legitimate state interest in the security of its prisons and control of its prisoners).

16. All fifty states have laws criminalizing bigamy.

17. See N.Y. Dom. Rel. Law § 5 (McKinney 1999 & Supp. 2006) (prohibiting brother and sister; uncle and niece; and aunt and nephew from marrying each other); Fla. Stat. §741.21 (2005) (prohibiting brother and sister, uncle and niece, aunt and nephew, or any man or woman from marrying someone with whom there is a common bloodline relationship); O.C.G.A. §19-3-3 (2005) (criminalizing the marriage of a child to parent or stepparent, siblings and half-siblings, grandparents to grandchildren and nieces and nephews to aunts and uncles).

18. See, e.g., N.Y. Dom. Rel. Law § 13-aa (McKinney 1999 & Supp. 2006); Cal. Fam. Code §350 (2006); Fla. Stat. §741.08 (2005); O.C.G.A. §19-3-30 (2005); Tex. Fam. Code §2.001(2005).

19. See *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (holding that the Massachusetts Constitution prohibits the state from limiting civil marriage to heterosexual couples); see also *Largess v. Supreme Judicial Court*, 373 F.3d 219 (1st Cir. 2004) (holding that the Massachusetts judiciary's interpretation of the state constitution in *Goodridge* did not violate the Guarantee Clause of the United States Constitution). There is currently an effort by some Massachusetts legislators to pass an amendment to the Massachusetts Constitution which would allow for same sex civil unions but not same sex marriages.

20. See, e.g., *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (holding that a provision in the Nebraska Constitution (i) recognizing marriage as only between a man and a woman and (ii) prohibiting the recognition of civil unions, domestic partnerships, or other similar same-sex relationships, does not violate the United States Constitution); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (holding that because transsexual appellant was originally male, Texas law would not recognize her marriage nor consequently her right to bring a cause of action as a surviving spouse); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (concluding that it is impossible for two members of the same sex to marry, and thus it is not a denial of the equal protection clause to refuse them permission to marry); *De Santo v. Barnsley*, 328 Pa. Super. 181, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that, as a matter of law, two persons of the same sex could not contract a common law marriage); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that Washington State legislature had not authorized same-sex marriages); *Baker v. Nelson*, 291 Minn. 310, 190 N.W.2d 185 (Minn. 1971) (stating that the 14th Amendment was not violated by Minnesota's classification of persons authorized to marry). A provision in the Nebraska Constitution (i) recognizing marriage as only between a man and a woman and (ii) prohibiting the recognition of civil unions, domestic partnerships, or other similar same-sex relationships, does not violate the United States Constitution).

21. See, e.g., 15 V.S.A. 1201 (2006) (Vermont statute allows for same-sex civil unions but distinguishes civil union from marriage, which is between one man and one woman).

relationships are distinguished from marriage, they often provide most or all of the benefits associated with marriage.²²

3. Conjugal Visits After Marriage (Family Reunion Programs)

While many prisons allow conjugal visits, there is no legal requirement that you be allowed conjugal visits after you marry.²³ In fact, when the Supreme Court declared that prisoners do not lose their right to marry upon incarceration, the Court was careful to state that consummation of the marriage was something that could be looked forward to upon release or parole, rather than something that necessarily must occur during incarceration.²⁴ Even if your state has made some provision for a family reunion program or allows for conjugal visits, and you later lose your ability to participate in such activities, you would have to show that your loss is an “atypical” sanction that imposes “significant hardship” upon you, beyond the ordinary incidents of prison life.²⁵ Some courts have upheld the denial of conjugal visits when a prisoner is found to be HIV-positive,²⁶ and courts have also upheld blanket policies denying conjugal visits to death row prisoners, even where their institutions have family reunion programs.²⁷ Courts have come to the same conclusion regardless of whether it is the prisoner or the prisoner’s spouse who claims that his or her rights have been denied.²⁸

Courts have generally refused to recognize that a prisoner has a constitutional interest in conjugal visits because a prisoner must apply for each visit, and because the superintendent decides each case based on a variety of factors that he or she deems appropriate.²⁹ Since the superintendent does not give

22. See, e.g., *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (holding that the state is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law).

23. See *Block v. Rutherford*, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (holding restrictions on conjugal visits constitutional as long as they are not meant as punishment without due process); *Hernandez v. Coughlin*, 18 F.3d 133, 136–137 (2d Cir. 1994) (holding that the creation of Family Reunion program is not the same as a state-created liberty interest, which could not be denied without due process); *Montana v. Commissioners Court*, 659 F.2d 19, 21 (5th Cir. 1981) (dismissing claim regarding denial of conjugal visits as frivolous); *Toussaint v. McCarthy*, 801 F.2d 1080, 1113–14 (9th Cir. 1986) (holding that denial of conjugal visits is not cruel and unusual punishment); *Doe v. Coughlin*, 71 N.Y.2d 48, 54, 518 N.E.2d 536, 540, 523 N.Y.S.2d 782, 786 (1987) (holding that existence of program for conjugal visits does not create a liberty interest and upholding exclusion of prisoners with communicable diseases, including AIDS, from the program).

24. See *Turner v. Safley*, 482 U.S. 78, 95–96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987) (listing other important attributes of marriage aside from conjugal visits and implying that a right to conjugal visits is not part of a prisoner’s right to marriage).

25. See *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) (holding that while states may still create liberty interests that afford prisoners due process protections, such interests will generally be limited to freedom from restraint that might impose atypical and significant hardships on a prisoner in relation to the ordinary incidents of prison life); see also *Champion v. Artuz*, 76 F.3d 483 (2d Cir. 1996) (holding that regulations creating conjugal visits did not create a liberty interest in such visits); *Cooper v. Garcia*, 55 F. Supp. 2d 1090 (S.D. Cal. 1999) (finding that denial of family visitation did not amount to a violation of due process).

26. See *Doe v. Coughlin*, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987) (upholding the exclusion of prisoners with communicable diseases, including AIDS, from the Family Reunion Program); see also Simeon Goldstein, Note, *Prisoners with AIDS: Constitutional and Statutory Rights Implicated in Family Visitation Programs*, 31 B.C. L. Rev. 967 (1990). Note, however, that the New York State Department of Correctional Services’ current official policy does not deny participation in the Family Reunion Program based solely on the HIV status of the prisoner. Instead, the policy authorizes a special review of the prisoner’s application because of the potential health risk to the visitor. Dep’t of Corr. Servs., Directive 4500 (July 2004).

27. See *Anderson v. Vasquez*, 827 F. Supp. 617 (N.D. Cal. 1992) (upholding denial of conjugal visits to death row prisoners).

28. *Thornburgh and Keeney* outline the general right to challenge infringements of prisoners’ rights. *Thornburgh v. Abbott*, 490 U.S. 401, 410 n.9, 109 S. Ct. 1874, 1880 n.9, 104 L. Ed. 2d 471 n.9 (1989); *Keeney v. Heath*, 57 F.3d 579, 581 (7th Cir. 1995). Courts have also held that when prisoners have problems with the prison administration, the prisoners must go through all the available administrative processes before they can bring a lawsuit. See *Davis v. Carlson*, 837 F.2d 1318 (5th Cir. 1988).

29. See *Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227, 3234 (1984) (holding that “the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility”); *Hernandez v. Coughlin*, 18 F.3d 133, 138 (2d

conjugal visits to every person who meets a certain set of criteria, there is no guaranteed right to the visits.³⁰ Thus, a challenge to a denial of conjugal visits (due to HIV-positive status or a life sentence, for example) is likely to succeed only if your prison has concrete tests to determine who gets conjugal visits, and if you pass those tests.

C. Divorce

The rules for how to get a divorce vary from state to state. If you want to initiate a divorce action, you must investigate how to do so according to the laws of your state. Some states will only give divorces for certain specific reasons,³¹ while others have “no-fault” divorce, meaning that it is enough that you no longer want to be married.³² If you live in a state where you must have a reason to get a divorce, you should be aware that a number of states grant divorces where one spouse has been convicted of a felony or has been incarcerated for a certain number of years.³³ If you have been married for a short period of time, your state may have provisions for “summary dissolution” or “divorce by decree.”³⁴ These are faster, simpler ways of getting a divorce. Many states also have procedures for annulments.³⁵

While you are in prison, you still have the right to start a divorce and participate in divorce proceedings.³⁶ The state is not allowed to make laws or prison regulations that would prevent you from being able to proceed with your divorce.³⁷

If you are sued for divorce and cannot afford an attorney, you should ask a judge to appoint one for you. In addition, if you cannot get an appointed attorney, or would like to start a divorce proceeding on your own, you should contact the court in the county where your spouse is currently living and ask for information regarding clinics or materials for people who want to represent themselves in divorce proceedings.

D. Federal Regulation of Prison Marriage³⁸

Cir. 1994) (holding that a prisoner has no constitutional right to conjugal visits and such an opportunity is “committed to the considered judgment of prison administrators”) (quoting *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 2404); *McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975) (stating that “[f]ailure to permit conjugal visits does not deny an inmate a federal constitutional right” and “[v]isitation privileges are a matter subject to the discretion of prison officials”).

30. See *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (noting that regulations establishing a Family Reunion Program contained no provisions that, if met, would make participation in the program mandatory).

31. See N.Y. Dom. Rel. Law § 170 (McKinney 1999 & Supp. 2006).

32. See, e.g., Cal. Fam. Code § 2310 (2004).

33. See, e.g., Ind. Code Ann. § 31-15-1-2 (2003); N.Y. Dom. Rel. Law § 170 (McKinney 1999 & Supp. 2006); Tex. Fam. Code Ann. § 6.004 (1998); 23 Pa. Cons. Stat. Ann. § 3301 (2001); Ind. Code § 31-15-1-2 (2003).

34. See, e.g., Cal. Fam. Code § 2400 (2004).

35. See, e.g., Ariz. Rev. Stat. Ann. § 25-302 (2000); Cal. Fam. Code § 2024 (2004); Conn. Gen. Stat. § 46b-48 (2004); N.Y. Dom. Rel. Law § 140 (McKinney 1999 & Supp. 2006).

36. See *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (finding that instituting a filing fee that effectively barred indigent individuals from obtaining divorces was a violation of due process, because once the state mandated that certain procedures be followed in order to dissolve the marital relationship, it had to afford all citizens access to those procedures); *Carper v. DeLand*, 851 F. Supp. 1506, 1522 (D. Utah 1994), *rev’d on other grounds*, 54 F.3d 613 (10th Cir. 1995) (finding specifically that a prisoner’s right of access to courts includes the right to pursue or defend adjustments of family relations). For cases generally affirming right of access to courts for civil claims, see *Thompson v. Bond*, 421 F. Supp. 878, 881 (W.D. Mo. 1976) (holding that prisoners’ constitutional right of access to courts “cannot reasonably or logically be limited to habeas corpus or related actions”); *Johnson v. Rockefeller*, 58 F.R.D. 42 (S.D.N.Y. 1972) (holding that denying prisoners the right to litigate certain civil claims raises a substantial constitutional question); *Lloyd v. Farkash*, 476 So. 2d 305, 10 Fla. L. Weekly 2311 (Fla. 1985) (holding that Florida’s statute construed as barring a prisoner from a civil suit violated the State Constitution); *Bilello v. A.J. Eckert*, 42 A.D.2d 243, 346 N.Y.S.2d 2 (3d Dept. 1973) (declaring New York Civil Death Statute unconstitutional to the extent it prevented a prisoner from presenting his civil appeal).

37. See *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 566–67 (7th Cir. 1986) (finding constitutional violation where a prisoner was required to be present at a hearing in order to proceed with his divorce and prison rules would not allow him to attend the hearing).

1. Legal Requirements for Getting Permission to Be Married

(a) You Must Fulfill the Requirements of State Marriage Law³⁹

In order to be married in federal prison, you must first meet the criteria for marriage in the state in which your facility is located. You will have to locate these rules on your own (though the rules for some states are discussed in this Chapter as well); they should be available in your prison law library. The prison chaplain should also be able to help you. This Part tells you how to apply for permission to get married in the federal prison system.

(b) You Must Be Mentally Competent⁴⁰

In addition to fulfilling the requirements of state marriage law, you must also convince the warden that you are mentally competent. This means that you are able to understand the marriage commitment into which you are entering, and that you are capable of giving your consent to such a commitment.

(c) Your Intended Spouse Must Verify His or Her Intention

Your intended spouse must verify, in writing, his or her intention to marry you.⁴¹ This letter must be included in the request to marry that is discussed in the “Procedures for Getting Married,” discussed in Subsections D(2)(a) and D(2)(b) below.⁴²

2. Procedures for Getting Married

(a) Application Procedure for Incarcerated People⁴³

- (i) You must submit a request to marry to your unit team;
- (ii) The unit team will evaluate your request according to the legal requirements and make a recommendation to the warden;
- (iii) The warden will notify you, in writing, whether your marriage request is approved or disapproved; and
- (iv) If your request is denied, the decision may be appealed through the Administrative Remedy Procedure.

(b) Application Procedure for Federal Prisoners Not Confined in a Federal Institution

If you are not presently incarcerated at a federal institution—for example, if you reside in a community corrections center, home confinement, state custody, or a local detention facility—you must submit a request to be married to the appropriate community corrections manager.⁴⁴ This person will confer with your correctional institution's staff about the request.⁴⁵

(c) Approving or Denying Your Request

38. 28 C.F.R. §§ 551.10–551.16 (1998).

39. 28 C.F.R. § 551.12 (1984).

40. 28 C.F.R. § 551.12(b) (1984).

41. 28 C.F.R. § 551.12(c) (1984).

42. 28 C.F.R. § 551.13 (1984).

43. 28 C.F.R. § 551.13 (1984).

44. 28 C.F.R. § 551.14(c) (1993).

45. 28 C.F.R. § 551.14(c) (1993).

Unlike many other jurisdictions, the federal rules do not give the warden the power to deny a marriage request for just any reason. Instead, the warden can only refuse your request for one of three specific reasons.⁴⁶ The first reason is that you do not meet the legal requirements, which are listed in Section D(1) of this Chapter. The second reason is that your proposed marriage presents a threat to the security or good order of the institution.⁴⁷ The third reason is that your proposed marriage presents a threat to the public safety.⁴⁸

(d) Arranging the Marriage Ceremony

You must submit a request to the warden if you want to have the ceremony in your institution.⁴⁹ The warden will consider whether the ceremony poses a threat to the security or good order of the institution.⁵⁰ You may also request that an outside clergy member or justice of the peace perform the ceremony.⁵¹ You are responsible for all expenses for the ceremony.⁵² If your request to marry is approved, and you are also eligible for furlough – temporary release under minimal supervision– you may be considered for a furlough for the purpose of getting married.⁵³

(e) Prisoners with Special Circumstances

Some federal prisoners who want to get married may have special circumstances that require them to go through certain procedures in addition to meeting the criteria set out above. If you are a federal prisoner who has a detainer and/or pending charges, the prison staff review of your marriage request will include an assessment of the legal effects of your marriage on the charges against you.⁵⁴ Prison staff may also look to the court, the U.S. Attorney, and the INS (in the case of aliens) for advice on the marriage requests of pretrial prisoners.⁵⁵

E. Different State Regulations of Prison Marriage

The different rules and procedures for getting married in certain states are discussed below. This discussion is by no means exhaustive, but it should give you an idea of how certain systems work. Therefore, once you get a copy of the procedures for your prison, you can look at this Part to help you understand them. However, the *JLM* does not discuss any of the procedures that would help you enforce the regulations of your state. Therefore, if you find that someone is not performing the duties required under state statutes, you will have to find out on your own what the grievance procedure of your institution is. The New York prisoner grievance program is discussed in Chapter 15 of the *JLM*. The prison system procedures discussed in this Part are New York and California.

Even if you are not in a New York prison, you may want to read the Section on New York because it includes sample letters and other useful information.

1. Getting Married in the State of New York

46. 28 C.F.R. § 551.10 (1998).

47. 28 C.F.R. § 551.10 (1998); 28 C.F.R. § 551.12(d) (1984).

48. 28 C.F.R. § 551.10 (1998); 28 C.F.R. § 551.12(d) (1984).

49. 28 C.F.R. § 551.13 (1984).

50. 28 C.F.R. § 551.16(a) (1984).

51. 28 C.F.R. § 551.16(a) (1984).

52. 28 C.F.R. § 551.16(a) (1984).

53. 28 C.F.R. § 551.15 (1984).

54. 28 C.F.R. § 551.14(a) (1993).

55. 28 C.F.R. § 551.14(b) (1993).

Under New York law, prisoners (with the exception of prisoners serving life terms⁵⁶) are generally allowed to marry, as long as they satisfy certain state regulatory procedures. Those procedures will be discussed in this Chapter.⁵⁷ Prisoners who were sentenced to life but have been placed on or discharged from parole are allowed to enter into a legal marriage,⁵⁸ but those still on parole need to request written permission from the parole board.⁵⁹ A paroled life-termer who fails to get approval before marrying could have his parole revoked by the board.⁶⁰

In order for your prison marriage to be valid, you must follow all New York state statutory and administrative requirements and procedures. These requirements and procedures are relatively simple.

(a) General Requirements

Briefly, in order to marry, you must meet the following requirements (each of these requirements will be discussed more fully below):

- (i) You must be sentenced to a term less than life imprisonment, or be a life-termer approved for parole;⁶¹
- (ii) Your fiancé(e) must not be a prisoner;⁶²
- (iii) Your fiancé(e) must not be a close relative;⁶³
- (iv) You both must be eighteen or older, or have the necessary permission;⁶⁴
- (v) You and your fiancé(e) must be mentally competent and acting with free will;⁶⁵
- (vi) You must not have any living current spouse;⁶⁶
- (vii) You must not be currently subject to any disciplinary actions, although the superintendent can choose to allow persons in disciplinary hearings to marry;⁶⁷ and
- (viii) You and your fiancé(e) must not be of the same gender.⁶⁸

If the superintendent refuses to let you marry, and you believe you meet all the above requirements, you should challenge the decision through your facility's grievance procedures. If your grievance is not successful, you can also challenge the decision through an Article 78 proceeding. See Chapters 15 and 20 of the *JLM* for information on the New York Prisoner Grievance Program and Article 78 proceedings.⁶⁹

(b) Your Prisoner Status

56. N.Y. Civ. Rights Law § 79-a (2002) ("A person sentenced to imprisonment for life is thereafter deemed civilly dead; provided, that such a person may marry while on parole, or after he has been discharged from parole, if otherwise capable of contracting a valid marriage"). See footnote 11 for further discussion of the right to marry for prisoners with life sentences.

57. These requirements are listed in N.Y. Comp. Codes R. & Regs. Tit. 7, § 711 (2006). See N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.2(a) (2006) ("Any prisoner may marry, providing there are no legal or administrative impediments to the marriage").

58. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

59. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

60. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

61. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

62. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.2(a)(4), (b)(1) (2006).

63. N.Y. Dom. Rel. Law § 5 (McKinney 1999 & Supp. 2006). The statute specifically bars marriages between parents and children, brothers and sisters, uncles and nieces, and aunts and nephews.

64. N.Y. Dom. Rel. Law §§ 7, 15(2) (McKinney 1999 & Supp. 2006).

65. N.Y. Dom. Rel. Law § 7(2) (McKinney 1999 & Supp. 2006).

66. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.2(a)(3) (2006).

67. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.2(b)(2) (2006).

68. *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Queens County Sup. Ct. 1971); *B. v. B.*, 78 Misc. 2d 112, 355 N.Y.S. 2d 712 (Kings County Sup. Ct. 1974).

69. See also N.Y. Comp. Codes R. & Regs. Tit. 7, § 701.10-14 (1994) (outlining state's general grievance procedures).

In New York, your marriage rights depend on your prisoner status. Non-life-term prisoners are permitted to marry while in prison.⁷⁰ A prisoner serving an indeterminate term, with a minimum of one day and a maximum of life, is not considered a life-terminer and is eligible to marry.⁷¹ Life-terminers are prohibited from marrying.⁷² However, if you were sentenced after 1981, a life sentence does not affect an existing marriage and you are still legally married.⁷³ If you marry while serving a life sentence and are not on parole, your marriage will not be valid.⁷⁴ Once again, however, it should be noted that the statute does not prevent a life-terminer on parole from marrying so long as he has received written approval from the Board of Parole.⁷⁵ If you marry without first receiving written permission while on parole, your parole may be revoked.⁷⁶ A life-terminer discharged from parole is also free to marry.⁷⁷

It is not clear whether this restriction on life-terminers' right to marry is constitutional. If you are a life-terminer wishing to marry, you should consider bringing a grievance claiming that your fundamental right to marry has been violated (see Chapter 15 of the *JLM*). If the grievance procedure does not work, you may wish to think about a section 1983 lawsuit or Article 78 proceeding (see Chapters 16 and 20 of the *JLM*). One federal district court in New York has found the prohibition on marriage for life-terminers unconstitutional.⁷⁸ The court, in *Langone v. Coughlin*, based its decision on the Supreme Court's holding in *Turner v. Safley*,⁷⁹ which held that any restriction on the right to marry must be "reasonably related" to the goals of the penal system and the state's interest. The judge in *Langone* found that restrictions for life-terminers served no legitimate state interest because the state did not invalidate the marriages of prisoners who had married before they were sentenced to life imprisonment.⁸⁰ The judge therefore held that it was unconstitutional to allow the group of life-terminers who were already married to enjoy the benefits of marriage and deny those benefits to those who were unmarried at the time of sentencing.⁸¹ If you decide to pursue any claim in federal court, you MUST read Chapter 14 of the *JLM* on the Prison Litigation Reform Act. Failure to follow the requirements in the PLRA can lead, among other things, to the loss of your good time credit and to the loss of your right to bring a future claim in federal court without paying the full fee at the time you file your claim.

(c) Prisoner Status of Your Intended Spouse

If you are incarcerated in New York, you may not marry another prisoner.⁸² If the person you want to marry is in prison, you must wait until one of you is released or paroled.

(d) Relationship Between the Parties

In New York, any incestuous marriage is "void" and subject to criminal sanctions.⁸³ Legally, a voided marriage is treated as if the marriage never happened. A marriage is incestuous and void,

70. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.2 (2006).

71. N.Y. Civ. Rights Law § 79-a(4) (McKinney 2002) (the prohibition of marriage for prisoners serving life terms "shall not apply to a person sentenced to imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life").

72. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002). See footnote 11 for further discussion.

73. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

74. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

75. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

76. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

77. N.Y. Civ. Rights Law § 79-a(1) (McKinney 2002).

78. See *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989) (holding that the right to marriage, even in the prison context, is a fundamental right).

79. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed.2d 64 (1987).

80. *Langone v. Coughlin*, 712 F. Supp. 1061, 1061-66 (N.D.N.Y. 1989).

81. *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989).

82. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.2(a)(4), (b)(1) (2006).

83. N.Y. Dom. Rel. Law § 5 (McKinney 1999 & Supp. 2006); N.Y. Forms, Matrimonial & Fam. Law § 1:04 (McKinney 2005).

whether the relatives are legitimate or illegitimate, between either: (1) ancestor and descendant (parent and child, grandparent and grandchild, etc.); (2) brother and sister (whole or half-blooded); or (3) uncle and niece, or aunt and nephew.⁸⁴

(e) Age

Once you turn eighteen, you can marry without your parent's or guardian's consent.⁸⁵ If you are sixteen or seventeen, you can marry with your parents' or guardian's permission.⁸⁶ In that case, your parents or guardian must give written permission to the clerk issuing the marriage license.⁸⁷ If you are younger than sixteen years old and want to get married, you must have the permission of a state supreme court justice or a family court judge.⁸⁸ If your parents or legal guardian refuse to give consent, that decision is final; no judge will overrule it. Therefore, if either you or your intended spouse is under eighteen, the first thing you must do is get written consent from the parents or guardian of the party who is underage. If either of you is under sixteen, you need permission from a judge.

(f) Mental Competency

New York law requires that both you and your fiancé(e) be sane and legally competent to make decisions.⁸⁹ This means that both of you must be capable of understanding the commitment involved in marriage, and must be capable of binding yourself to such a commitment. In addition, if your decision to marry each other was caused by force or fraud, your marriage may be voided.⁹⁰ This means that the decision to marry cannot be based on threats, lies, or any other type of coercive behavior.

(g) Marital Status

If this is not the first marriage for you or your fiancé(e), you must show proof that a divorce was legally obtained, or that the prior spouse is dead. In New York, you may remarry as long as the divorce decree is final.⁹¹ If you marry again before you are legally divorced, you are guilty of bigamy and could be criminally punished. Moreover, this additional marriage is void.

(h) Disciplinary Status

Your disciplinary history in prison may also affect your right to marry. The prison superintendent may prevent your marriage if (1) you are in confinement as a result of a superintendent's or disciplinary hearing, or (2) the superintendent thinks your marriage would threaten the safety and security of the prison.⁹²

(i) Gender of the Parties

84. N.Y. Dom. Rel. Law § 5 (McKinney 1999 & Supp. 2006).

85. N.Y. Dom. Rel. Law § 7(1) (McKinney 1999 & Supp. 2006).

86. N.Y. Dom. Rel. Law § 15(2) (McKinney 1999 & Supp. 2006).

87. N.Y. Dom. Rel. Law § 15(2) (McKinney 1999 & Supp. 2006).

88. N.Y. Dom. Rel. Law § 15(3) (McKinney 1999 & Supp. 2006).

89. N.Y. Dom. Rel. Law § 7(2) (McKinney 1999 & Supp. 2006) (a marriage is voidable if either party was incapable of consenting to a marriage for lack of understanding).

90. N.Y. Dom. Rel. Law § 7(4) (McKinney 1999 & Supp. 2006) (marriage is voidable if spouse consented because of force, duress, or fraud).

91. N.Y. Dom. Rel. Law §§ 8, 15(1) (McKinney 1999 & Supp. 2006).

92. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.2(b)(2), (3) (2006).

A marriage between persons of the same sex is not valid in New York state.⁹³ It does not matter if you mistakenly believed your spouse was of the opposite sex. Also, such a marriage is not made valid by the subsequent sex change of the other party.

(j) Procedures for Getting Married

Once you have met the requirements described above, in order to marry while you are in prison, you must:

- (i) tell the superintendent that you want to get married;
- (ii) arrange an interview with a counselor and possibly with a chaplain;
- (iii) apply for a marriage license;
- (iv) arrange a wedding ceremony by a qualified person in front of one witness; and
- (v) sign and file the marriage license with the city clerk.

(k) Notice to the Superintendent

You must write to the superintendent of your facility to say that you want to get married. The letter will be recorded and kept in your service unit folder.⁹⁴ Here is a sample letter:

[prisoner address]
[date]

[superintendent's name]
[address]

Dear [superintendent's name]:

Please be informed that I, [your name], wish to marry [fiancé(e)'s name]. I am eligible since I am not serving a life term. Additionally, both my fiancé(e) and I meet all the necessary state requirements: [list state requirements].

Your speedy response would be appreciated.

Sincerely yours,
[your signature]

(l) Interviews

After you have sent a letter to the superintendent, the next step is to meet with a counselor. If you want, you may also meet with a chaplain from the prison or from outside.

(i) Counselor's Interview

Your superintendent will assign you to a counselor, who will meet with you and your fiancé(e).⁹⁵ The counselor's job is to make sure that you meet all the requirements to get married⁹⁶ and to explain

93. Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Queens County Sup. Ct. 1971).

94. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.3(a)(1), (2) (2006).

95. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(a)(3) (2006).

96. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(a)(3) (2006).

the prison's procedures. You may not refuse this interview.⁹⁷ The counselor will ask for proof that you meet the requirements to get married. For example, he may wish to see proof of divorce from a former spouse. If the counselor does not see the necessary proof, your marriage will be delayed.⁹⁸

Your counselor will explain how to plan your wedding, either in the prison or on temporary release if you are eligible. Remember that if you want temporary release to get married, you must apply for it separately. Chapter 22 of the *JLM* on temporary release explains how this program works in New York. If you have any questions about how to arrange your wedding, you should ask your counselor. Remember, the counselors are busy people. Although their job is to try to help you, they may forget important things that will delay your marriage. Therefore, you should try to know and follow the prison's rules for marriage. If you have any questions, make sure to ask your counselor about them specifically.

Your counselor will also try to arrange an interview with your fiancé(e).⁹⁹ At this session, your counselor will explain the general marriage process and discuss the possible problems of marrying a prisoner.¹⁰⁰ Also, your counselor will tell your fiancé(e) when you will be eligible for parole or conditional release, and the maximum length of your current sentence.¹⁰¹ Your fiancé(e) may refuse to meet with the counselor.¹⁰² Although you can still get married,¹⁰³ this refusal may cause delay. Therefore, it is a good idea for your fiancé(e) to meet with the counselor. However, there may be good reasons why your intended spouse cannot attend: it may be too far to travel, she may have to work, or she may be ill. If your intended spouse is unable to attend, you should explain the reasons to your counselor. Here are some questions you may want to ask your counselor:

- (1) Am I subject to any disciplinary status that will affect my marriage application?;
- (2) I am (or my fiancé(e) is) under eighteen—how can we get proof of parental (or guardian's) consent?;
- (3) Am I eligible for the temporary release program?;
- (4) Would it be faster to apply for my marriage license at the prison facility rather than to apply for the license while on temporary release?;
- (5) Can I arrange to have my wedding ceremony during my temporary release?¹⁰⁴;
- (6) If I do not want the prison chaplain to perform the ceremony, how do I arrange for another person to conduct the marriage, and how could I meet with him?;
- (7) Is someone at the facility authorized to process my marriage license application? If not, how will the facility arrange for someone to receive the completed application?; and
- (8) Where in the prison would my marriage ceremony be held, and how can I arrange it?

(ii) Optional Chaplain's Interview

After the interview with your counselor, you and your fiancé(e) can meet with the facility chaplain of your faith for additional counseling or to discuss plans for the marriage ceremony. You are not required to use the facility's chaplain to conduct the wedding ceremony; you may ask another

97. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(b) (2006).

98. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.3(b)(1)–(3) (2006).

99. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(b)(4) (2006).

100. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(b)(4) (2006).

101. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(b)(4) (2006).

102. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(b)(5) (2006).

103. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(b)(4) (2006).

104. It must be noted that once you receive your marriage license, you will have no more than 60 days in which to finalize the marriage—that is, to hold the legal ceremony. Note also that if you prefer to have a larger wedding than your facility allows, and you are eligible for temporary release, you may want to reserve this time for the wedding rather than for the license application. This may be a good idea, especially if the license application process can easily be done at your facility.

qualified person to conduct your civil or religious ceremony.¹⁰⁵ If you do not want the prison chaplain to conduct the ceremony, you must make your own arrangements for another official or clergy member to perform the ceremony. Make sure that the person you ask is legally qualified to perform the marriage ceremony.¹⁰⁶

(m) Applying for a Marriage License

(i) Blood Test

If you are not “Caucasian, Native American, or Asian,”¹⁰⁷ you must take a blood test for sickle cell anemia; this includes persons who are “Black or Hispanic.”¹⁰⁸ You must take this test before you apply for your marriage license, and you will have to show the clerk your results when you apply. The purpose of the test is to tell you whether your potential children will be at risk for sickle cell anemia. You can get married no matter what the results of the test are. If your religion prevents you from taking the test, you may get married without the test.¹⁰⁹

(ii) Appearance Before a Clerk

You and your fiancé(e) must both appear before a town or city clerk to apply for a marriage license.¹¹⁰ You are responsible for obtaining your own marriage license¹¹¹ and must pay all the costs for the marriage license and wedding ceremony.¹¹²

If you are eligible for a temporary release, you may apply for a marriage license during this time.¹¹³ You must, however, make sure that you follow all the necessary requirements under the temporary release program. (For example, you must notify the superintendent before applying for the license and must participate in counseling at the facility.)¹¹⁴

If you are not eligible for a temporary release, and therefore cannot leave the facility, you need to meet with the clerk inside the facility. You and your fiancé(e) must arrange this with your counselor. Under New York’s regulations, you are forbidden to receive escorted leave to apply for a marriage license.¹¹⁵ Some facilities have an official who serves as a town clerk and can issue marriage licenses.¹¹⁶ If there is no such official at your facility, then your counselor or a head clerk must make every effort to bring in a local town, city, or county clerk to visit you at the facility or to designate someone at the facility as a deputy to facilitate completion of the application.¹¹⁷

When you appear before the town clerk, you and your fiancé(e) will be required to sign a statement or affidavit containing some general personal information. Specifically, each of you will have to furnish your full name, place of residence, age, occupation, place of birth, father’s name and country

105. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.3(c)(1)–(2), (f)(4) (2004).

106. N.Y. Dom. Rel. Law § 11 (McKinney 1999 & Supp. 2006) (lists people who are legally qualified to perform marriages).

107. These terms are outdated and unclear. If you are not certain whether you are required to take this blood test, ask your counselor.

108. N.Y. Forms, Matrimonial & Fam. Law § 1:14 (McKinney 1998).

109. N.Y. Dom. Rel. Law § 13-aa (McKinney 1999 & Supp. 2006); N.Y. Forms, Matrimonial & Fam. Law § 1:14 (McKinney 1998).

110. Instructions for getting a marriage license in New York state are in N.Y. Dom. Rel. Law § 13 (McKinney 1988); N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e)(1) (2006); N.Y. Forms, Matrimonial & Fam. Law § 1:13 (McKinney 1998). See N.Y. Dom. Rel. Law § 14a (McKinney 1999 & Supp. 2006) for how to register a marriage certificate.

111. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e) (2006).

112. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(g) (2006).

113. For information on temporary release, see Chapter 22 of the *JLM*.

114. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e)(4) (2006).

115. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e)(5) (2006).

116. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e)(2) (2006).

117. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e)(3) (2006).

of birth, mother's maiden name and country of birth, your social security number, and the number of previous marriages.¹¹⁸ You may be required to show documentary proof of age, such as a certified copy of a birth certificate, passport, driver's license, or baptismal record.¹¹⁹ If either you or your fiancé(e) is underage, you will have to show written consent forms from the minor's parent(s) or guardian.¹²⁰

The clerk may ask whether you have ever been married and when and where you were divorced (if your former spouse is still living).¹²¹ You may need to show the clerk a divorce decree,¹²² and the results of your sickle cell anemia test if necessary. You will have to pay for the license, which should cost less than twenty-five dollars.¹²³

The clerk will send your license application to an agency which will review it and check whether you have any other living spouses.¹²⁴ The agency will then send you the license. The license will be dated; your marriage ceremony cannot occur until twenty-four hours after the date on the license,¹²⁵ and must occur within sixty days after the date of the license (or you will have to obtain another license).¹²⁶

(n) Marriage Ceremony

New York no longer recognizes common law marriages, so you must have a legal marriage ceremony.¹²⁷ The ceremony MUST take place within sixty days of the date on your marriage license.¹²⁸ Whether you are in the prison or outside while on temporary release, you must have an authorized person perform the ceremony. New York state law requires that you and your fiancé(e) promise to take each other as wife and husband in the presence of one witness (in addition to the person performing the ceremony).¹²⁹ Anyone, such as a friend, prisoner, employee, or relative, may act as a witness.¹³⁰

Many people are authorized to perform marriages. These include members of the clergy, leaders of the Society for Ethical Culture, justices or judges of a court of record or a municipal court, police justices of a village or town, city clerks, mayors, and magistrates.¹³¹ As long as the person is qualified under New York law, you may choose anyone you like to perform your wedding, and the prison should help you in recruiting someone to perform the ceremony.¹³² Your constitutional right to freedom of religion includes the right to be married by a minister of your own faith.¹³³ If you have a question about who can legally perform a marriage, you can call the office of the clerk of your city or town.

118. N.Y. Dom. Rel. Law § 15(1)(a) (McKinney 1999 & Supp. 2006).

119. N.Y. Dom. Rel. Law § 15(2) (McKinney 1999 & Supp. 2006).

120. N.Y. Dom. Rel. Law § 15(2) (McKinney 1999 & Supp. 2006).

121. N.Y. Dom. Rel. Law § 15(1)(a) (McKinney 1999 & Supp. 2006).

122. N.Y. Dom. Rel. Law § 15(1)(a) (McKinney 1999 & Supp. 2006).

123. N.Y. Dom. Rel. Law § 15(4) (McKinney 1999 & Supp. 2006).

124. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(e)(6) (2004).

125. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(f)(6) (2004).

126. N.Y. Dom. Rel. Law § 13-b (McKinney 1999 & Supp. 2006).

127. N.Y. Dom. Rel. Law §§ 11–12 (McKinney 1999 & Supp. 2006). Generally, common law marriages were informal arrangements; the man and woman considered themselves married but had no official legal ceremony. Solemnization (an official legal ceremony) requires that the bride and groom declare in the presence of an authorized official (for example, a minister, rabbi, or judge) and a witness that they “take each other as husband and wife.”

128. N.Y. Dom. Rel. Law § 13-b (McKinney 1999 & Supp. 2006).

129. N.Y. Dom. Rel. Law § 12 (McKinney 1999 & Supp. 2006).

130. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(f)(2) (2006).

131. N.Y. Dom. Rel. Law § 11 (McKinney 1999 & Supp. 2006) (listing all persons who may perform marriage in New York state).

132. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(f)(4) (2006).

133. *See* O'Neill v. Hubbard, 180 Misc. 214, 40 N.Y.S.2d 202 (Kings County Sup. Ct. 1943) (holding that county clerk could not refuse to certify minister of a duly registered religious group to conduct marriage ceremonies); N.Y. Forms, Matrimonial & Fam. Law § 1:16 (McKinney 1998).

Although New York law requires that you and your fiancé(e) solemnly declare that you take each other as wife and husband, it does not require any particular form of ceremony. You are free to write and exchange your own vows as long as they include the required declaration. Under New York law, you must both attend the wedding ceremony.

If you marry in the prison, only you, your spouse, two witnesses, and the person performing the ceremony may attend.¹³⁴ You must pay for all wedding costs, including the license fee.¹³⁵

Once you know who will perform the wedding ceremony, and who will act as witnesses, the superintendent must write to the Commissioner of Correctional Services with that information, along with the name and address of your fiancé(e) and the date of the ceremony.¹³⁶ If you plan to marry while on parole or temporary release, the superintendent's letter must include your address outside the prison and the name and address of the place where you will be married.¹³⁷

(o) Marriage Certificate

After the ceremony, the person who married you must sign your marriage license. You must then mail the license to the city clerk of the town where the license was issued.¹³⁸ Your marriage will be recorded and filed, and within fifteen days the clerk will send you a marriage certificate.¹³⁹ The city clerk may charge you up to ten dollars for the certificate.¹⁴⁰

(p) Legal Effects of Marriage

Once you are married, you will be entitled to all the legal benefits of a spouse, such as property rights and inheritance; you will also be obligated to support your spouse to the best of your ability.¹⁴¹ Your marriage may make you eligible for certain visitation programs. Many states, including New York, have family reunion programs in some prisons.¹⁴² You must have a valid marriage license to participate in New York's program.¹⁴³ Nevertheless, the prison is not required to have such a program and, even if there is a program, the prison administrator decides who can participate in it.¹⁴⁴

(q) Divorce

(i) Grounds for Divorce

Under New York's divorce law, people may ask for an immediate divorce based on three specific grounds: (1) cruel and inhumane treatment;¹⁴⁵ (2) abandonment for more than one year;¹⁴⁶ and

134. N.Y. Comp. Codes R. & Regs. Tit. 7, §§ 711.3(f)(2), (3) (2006).

135. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(g) (2006).

136. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(h) (2006).

137. N.Y. Comp. Codes R. & Regs. Tit. 7, § 711.3(h) (2006).

138. N.Y. Dom. Rel. Law § 14 (McKinney 1999); N.Y. Forms, Matrimonial & Fam. Law § 1:27 (McKinney 1998).

139. N.Y. Dom. Rel. Law § 14-a(1) (McKinney 1999 & Supp. 2006).

140. N.Y. Dom. Rel. Law § 14-a(2) (McKinney 1999 & Supp. 2006).

141. N.Y. Fam. Ct. Act § 412 (McKinney 2002).

142. N.Y. Comp. Codes R. & Regs. Tit. 7, § 220 (2006).

143. See *Stimpfle-Jones v. Jones*, 124 A.D. 2d 869, 508 N.Y.S.2d 635 (3d Dept. 1986) (finding participation in Family Reunion Program is a privilege, conditioned on valid marriage license); *In re Mary of Oakknoll v. Coughlin*, 101 A.D.2d 931, 932, 475 N.Y.S.2d 644, 646 (3d Dept. 1984) (upholding requirement of valid marriage license because there is "no constitutional right to conjugal visitation within the State prison system.").

144. See *Doe v. Coughlin*, 71 N.Y.2d 48, 56, 57, 518 N.E.2d 536, 541, 542, 523 N.Y.S.2d 782, 787, 788 (1987) (finding that existence of program for conjugal visits does not mean that there is a right to such visits that cannot be denied for legitimate reasons). Also, refer to Section B(3) of this Chapter for a discussion regarding family reunion programs and conjugal visits.

145. N.Y. Dom. Rel. Law § 170(1) (McKinney 1999 & Supp. 2006).

146. N.Y. Dom. Rel. Law § 170(2) (McKinney 1999 & Supp. 2006).

(3) adultery.¹⁴⁷ You may also be granted a divorce if you and your spouse have lived apart for more than one year after a legal separation or after filing a separation agreement with the county clerk.¹⁴⁸

In addition, your spouse can ask for a divorce once you have been confined continuously for three years.¹⁴⁹ Your marriage will end only if your spouse requests a divorce.¹⁵⁰ Note your spouse cannot divorce you just because you received a three year sentence. Your spouse must wait until you have actually served three years during your marriage.¹⁵¹ However, once you have served three years, your spouse can file for divorce on the grounds of continuous incarceration at any time while you are still incarcerated or for up to five years after you have been released.¹⁵²

(ii) Seeking Legal Advice or Representation for a Divorce

If you wish to divorce your spouse, you should seek legal advice. If you cannot afford a lawyer, you should write to the supreme court in the county where your spouse resides and ask about any available clinics, books, or other information for people who want to get a divorce without a lawyer.

If your spouse is suing for divorce, and you cannot afford a lawyer, you should ask the judge to appoint a lawyer for you, free of charge.¹⁵³ However, there is no right to counsel in divorce matters, and it is unlikely that an attorney will be assigned to you. You can also try contacting Prisoners' Legal Services ("PLS"). However, they handle very few divorces. For the nearest PLS office, see Appendix IV to the *JLM*.

F. Getting Married in the State of California

It should be noted that in California a prisoner's right to marry is more expansive than in New York. Prisoners in California retain their right to marry by virtue of a state statute.¹⁵⁴ This right extends to all prisoners, even those serving life or death sentences. The right to marry is limited only by what is necessary to provide for the reasonable security of the institution in which you are incarcerated and for the reasonable protection of the public.¹⁵⁵

G. Conclusion

Prisoners' maintain a right to marry. States and federal prison officials may restrict your right to marry, however, if the restriction is "reasonably related" to prisoner security, prisoner rehabilitation or protection of the public. In addition, in order to marry while in prison, you must still fulfill all of your state's requirements for getting married, which might be related to your prisoner status, age, mental competency or gender. If you wish to get married and your prison is not located in New York State, you should research the marriage requirements for your state. Although divorce law is also determined by each state, while in prison you maintain the right to begin divorce proceedings.

147. N.Y. Dom. Rel. Law § 170(4) (McKinney 1999 & Supp. 2006).

148. N.Y. Dom. Rel. Law §§ 170(5)–(6) (McKinney 1999 & Supp. 2006). For sample separation agreements, see N.Y. Forms, Matrimonial & Fam. Law § 5:26-39 (McKinney 1998). For instructions on changing separation into formal divorce, see N.Y. Forms, Matrimonial & Fam. Law § 12:116-132. (McKinney 1998 and Supp. 2003).

149. N.Y. Dom. Rel. Law § 170(3) (McKinney 1999 & Supp. 2006).

150. N.Y. Dom. Rel. Law § 170(3) (McKinney 1999 & Supp. 2006).

151. N.Y. Dom. Rel. Law § 170(3) (McKinney 1999 & Supp. 2006) ("for a period of three or more consecutive years after the marriage of the plaintiff and defendant") (emphasis added).

152. *See Covington v. Walker*, 3 N.Y.3d 287, 819 N.E.2d 1025, 786 N.Y.S.2d 409 (2004) (holding that where the Domestic Relations Law creates grounds for divorce when a spouse has been continually incarcerated for three years, the statute of limitations does not begin to run until that spouse is released).

153. *See Taylor v. Taylor*, N.Y.L.J., May 10, 1991, at 22 (N.Y. Sup. Ct. 1991) (appointing an attorney for an indigent prisoner being sued for divorce).

154. Cal. Penal Code § 2601(e) (2005).

155. Cal. Penal Code § 2600 (2005).

