The New Realities of California's Domestic Partnership Law

Discerning the Uncertain Impacts of A.B. 205

By Frederick Hertz

In late 2003, the California legislature enacted Assembly Bill 205 (A.B.205), a bill that has transformed the legal lives of more same-sex couples than perhaps any other legislation, either in the United States or in any other jurisdiction. The language of the legislation was utterly simple: As of Jan. 1, 2005, every California-registered domestic partner is subject to nearly all of the state-based rights and obligations that apply to married spouses in California. More than 28,000 couples had already registered by the end of 2004, and even though the law allowed either partner to unilaterally terminate the partnership prior to Jan. 1, 2005 to avoid the effects of the new law, fewer than 1500 couples actually terminated their partnership.

A limited set of older opposite-sex couples (who might otherwise lose Social Security benefits) are allowed to register as domestic partners, but the overwhelming majority of state-registered domestic partners in California have been, and will continue to be, same-sex couples. Thus, more than 50,000 lesbians and gay men now are subject to the extensive web of California Family Law — a greater number than all of the Vermont civil unions, Massachusetts marriages, and Canadian marriages combined.

Despite the relative lack of attention paid to this new law, and despite the worthy political critique that this is not "marriage," A.B. 205 is truly a landmark event in same-sex legal history. This report summarizes the basic provisions of the new law, with an emphasis on how the new law is affecting registered partners in its first year of implementation.

Issues of Jurisdiction and Procedure

First, it is important to note that non-California couples can register — even by mail — as long as they reside together. In order to overcome the obstacles to dissolution that have plagued Vermont civil unions, non-Californians are deemed to have agreed to "submit to the jurisdiction" of the California courts regarding the dissolution of their partnership, even if they live outside of California at the time of a dissolution. Of course, it's not at all clear that such a provision will be upheld against a non-resident, especially with regard to property allocation. Furthermore, A.B. 205 provides that non-California registrations, which provide for "equivalent" rights and obligations, invoke all of the Family Code rights and obligations that are now imposed on registered couples residing in California.

Termination of a domestic partnership generally requires a full-blown judicial dissolution in the Family Court. The only exception is for couples that have been together less than 5 years, where neither party owns any real property, where there are no children and no disputes about property or debts, and where the total value of all community property assets are minimal. All that is required in those very limited cases is the filing of a jointly signed document with the Secretary of State. Partners in those circumstances do not need even to undergo a summary judicial dissolution.

There are two key arenas that are excluded from the statute's coverage. Rights that are created by initiative cannot, by California constitutional law, be modified by legislative action. As a result, domestic partners are not covered by the spousal re-assessment exemption under California's property tax limitation rules; this is a serious consequence for transfers of real property upon the formation or dissolution of a partnership or upon the death of either partner. And, since it was expected that the federal taxing authorities would not recognize a domestic partnership as equivalent to a legal marriage, earned income is not taxed as joint income in California despite its community property character, in an attempt by the legislature to relieve couples from having to file different tax returns under state rules than those required under federal law. Most importantly, because domestic partners are not considered to be "spouses," none of the hundreds of federal spousal benefits, especially tax exemption benefits, are extended to domestic partners.

As a result of this new law, California has created a "third species" of couples for lawyers to contend with: unmarried couples who have most, but not all, of the benefits and burdens of marriage on the state level — *but who are not likely to be treated as married spouses when they cross state lines, and most likely will not enjoy any of the hundreds of federal spousal benefits, especially the tax benefits.*

Property/Asset/Debt Issues

The most significant consequence of A.B. 205 is the extension of community property and spousal support rights and obligations on registered partners. Broadening this impact, a subsequent amendment established the date of registration (which could be as early as January 2000, when domestic partnership was first enacted in California) as the date of marriage — instantly transforming any savings accrued from earned income retroactively into community property. Because of California's broad community property laws, registered partners will no longer need to negotiate for a cohabitation agreement or make an attempt to prove a *Marvin* palimony claim in order to obtain's a share of a partner's assets or to win post-separation support: The *equal* sharing of all earned income and savings and the right to seek spousal support will be presumed for registered partners, in the absence of a valid pre- or post-registration agreement. In addition, most debts will be seen as joint liabilities that can be satisfied out of the community property income of either partner, even the pre-registration debts of an individual partner.

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Further complicating these marital rules, pre-registration assets and obligations will remain subject to the non-marital laws of contract and palimony claims. It is important to recognize that many opposite-sex couples marry with pre-marital assets and debts; however, such situations have been more the exception rather than the rule. Here, by contrast, nearly every long-term (and certainly most high-asset) same-sex couple is likely to have acquired significant pre-registration assets, even where the couple registered prior to 2005. Most such couples will not have entered into written agreements regarding their pre-registration assets, and agreements signed prior to 2005 may face challenges regarding their validity — since most likely they did not include any waivers of family law protections. In many instances separate civil lawsuits will need to be filed in the event of a dissolution to resolve these pre-registration disputes.

In an attempt to encourage couples to address these issues prospectively, the new law allows partners to enter into agreements modifying these rules, and moreover, it provides that agreements executed prior to June 30, 2005 will be valid under the standards of a pre-marital agreement. Agreements executed after that date, however, will have to meet the stricter standards of a post-marital agreement. The validity of agreements entered into before Jan. 2005 is wholly unresolved at this time.

Taxation Issues

Some of the most difficult questions regarding domestic partnership arise from the lack of federal tax recognition of domestic partners as spouses. These partners are not included in the sweeping tax exemption of asset transfers between spouses in the formation, duration, and dissolution of their relationships. Moreover, the taxation of asset transfers between unmarried partners remains an arena of great uncertainty and confusion. Presumptively, such transfers are not exempt from taxation, although in particular situations persuasive arguments can be advanced for tax exemption for particular sorts of transfers.

The application of community property rules to domestic partners creates serious potential tax concerns, both during the relationship and, most significantly, in the event of a dissolution. Because family law in California characterizes earned income as jointly "owned" by both partners from the outset, arguably the non-earning partner is receiving some share or benefit of the earning partner's income when the income is first earned. Thus, it is theoretically possible, hough unlikely in a practical sense, at the legally mandated sharing of community property income itself could be considered a taxable event, triggering a second tax on the income that has already been taxed when it was earned by the earning partner. For this reason, many California attorneys have been encouraging couples to enter into separate property pre-marital agreements, especially if only one partner is particularly high-earning.

It will be argued that a legally mandated transfer under the state doctrines of community property and spousal support should not be considered a taxable transfer because, in effect, the receiving partner is only receiving that which is already considered legally hers or his. The payments certainly are not considered to be a gift by the paying partner, nor is it "earned" income. On the other hand, because domestic partners are not "married," the anticipated non-recognition of same-sex domestic partnerships (as enunciated in the federal Defense of Marriage Act) may well result in serious tax problems for either or both partners in a high-asset divorcing partnership.

Issues Regarding Children

Previously enacted legislation in California allowed a domestic partner to obtain a step-parent adoption of his or her partner's child, avoiding the need for the more burdensome second-parent adoption. Now, even a step-parent adoption of a partner's child to establish both parents as legal parents may not be necessary, because by law any child born or adopted by one of the partners during a domestic partnership is presumed to be the legal child of both partners.

At the same time, the gender-based standards in law for rebutting the statutory presumption of parentage (which focus on the infertility of the male partner as proof that he is not the father) make it highly impractical to implement these provisions. And, it is unclear if federal authorities and other state jurisdictions will honor the presumed parentage rules. Given these uncertainties, it is generally been recommended that a domestic partner should proceed with a step-parent adoption of his or her partner's child, and not rely on the presumed parentage provisions of the new law.

One additional concern regarding parentage: In light of the presumed parentage rule, it is likely that sperm banks and ovum providers will require the consent of a recipient's domestic partner whenever sperm or egg is donated, in the same manner as is generally required for married couples. If a partner is going to be treated as a legal parent simply by virtue of the couple's domestic partnership registration, and thus be liable for child support, it is only fair that this partner's consent be required before any sperm or egg donation occurs.

Emerging Issues in the First Year of Implementation

Even though the new law has only been in effect for about three months, already there are difficult legal issues emerging. Consider the following situations:

Executing the registration areement. Despite the 1-year opt-out alternative, very few couples opted out of registration or even executed a registration agreement last year. Now that the news is getting out and partners are beginning to discern the real impact of these rules, there is a growing demand for such agreements —especially prior to the June 30, 2005 deadline for a premarital agreement. Because of the presumed invalidity of agreements executed in the absence of independent counsel, each couple needs two attorneys. Moreover, because of the overlap with allocating pre-registration assets and applying the principles of non-marital law, there is a real shortage of "cross-trained" attorneys available to help these clients. Clients are feeling overwhelmed and confused and hey are intimidated by the complexity and high cost of these agreements; at

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Custody Disputes

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typically must be proven to be unfit before custody can be awarded to a non-parent — although this distinction is starting to blur as lesbian and gay partners seek to establish parental rights even without legal parenting status. The Vermont civil union statute, which is implicated in two pending cases, provides that "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." 15 Vt. Stat. Ann. tit. 15, § 1204(f).

The validity of this parentage provision turns on the interstate recognition of gay marriage, civil unions or domestic partnerships. Pursuant to general conflict-of-law principles, other states have discretion to decide whether to recognize a legalized intimate relationship (including marriage) entered into in another state. While there is a general and extremely strong presumption that a marriage validly entered into in one state is valid in others, the presumption can be rebutted if, for example, the marriage was contracted against the strong public policy of the state being asked to recognize it. Thus, the second issue in these interstate custody conflicts concerns the effect of the state and federal DOMA statutes on states' willingness to accord appropriate legal recognition to the rights of the parties. States may actually have conflicting statutes and case law concerning the recognition of the rights of same-sex partners. On the one hand, they may prohibit same-sex couples from marriage, but may simultaneously recognize their rights to adopt.

Finally, where there is litigation both in the state where the partners entered into their relationship as well as in a second state, then which state should have jurisdiction over the case? Under the Uniform Child Custody Jurisdiction and Enforcement Act, currently in effect in 40 jurisdictions including Maryland, Utah, Virginia, and the District of Columbia, only the child's "home state" has jurisdiction to decide custody. The home state is defined as, "the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." (Sec. 102(7)). Furthermore, the federal Parental Kidnapping Prevention Act supports the home state jurisdiction, requiring that there be full faith and credit given in other states to a home state's decree.

AN EXAMPLE

A case involving Janet Jenkins and Lisa Miller illustrates how courts do not agree on their interpretations of these issues. Jenkins and Miller were romantically involved from 1998 until 2003. For most of their relationship, the couple lived in Hamilton, VA, although in December 2000, they traveled to Vermont to enter into a civil union.

In April 2002, Jenkins and Miller had a daughter, Isabella, through artificial insemination. Though it was Miller who carried Isabella to term, the women worked in concert to select a sperm donor and to raise Isabella. A few months after Isabella's birth, the family moved to Fair Haven, VT.

The women's relationship ended in mid-2003, and Miller returned to

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the same time, most lawyers are anxious and confused as to how to best help these clients.

Uncertain tax consequences. It remains highly uncertain whether earned income will be double-taxed by the U.S. Internal Revenue Service, and equally uncertain whether past, present and/or subsequent transfers between partners will be considered "taxable events." In many instances a well-crafted registration agreement can reduce these concerns, but for many clients their particular financial situations preclude such solutions. This is especially a problem for high-asset couples or those where one partner is the sole earner.

Uncertain debt and bankruptcy impacts. A creditor's access to the assets of the non-debtor partner's assets is a very real factor in California, given that it is a community property state. It is uncertain to what degree a separate property agreement and a strict segregation of assets can protect the non-debtor partner's assets from the other's creditors. While most observers had initially believed that the non-debtor partner's assets would be off-limits in a bankruptcy, since it is a federal procedure, the reference to state laws regarding creditor's remedies could actually put those assets in jeopardy, even in a federally structured bankruptcy proceeding. Some advocates may well raise an equal protection protest to a trustee using a federal procedure to come after assets based upon a "spousal-like" connection, but in the meantime, legal planning for registered couples where one partner has significant debts remains very difficult.

Jurisdictional and pocedural ucertainties. Not surprisingly, the paths taken by particular couples do not fit neatly into legal expectations. Already, we have seen disputes between couples that terminated their California registration but failed to terminate their Vermont civil union. Other partners are discovering that they never terminated their partnership, even though the relationship ended years ago. Challenges have emerged involving couples that registered in jurisdictions that are not exactly "equivalent" to California's, but are not so clearly distinct either. Other couples have registered without terminating their prior registration, raising questions as to the validity of the second registration. We also are seeing California couples who married in Canada that are already seeking California marital dissolutions, and there is absolutely no certainty as to what the courts will do in these instances.

CONCLUSION

It's an exciting time to be practicing same-sex law in California, both intellectually and practically. It is also enormously refreshing to witness dependent gay partners seeking spousal support, and to see the "equalizing" power of community property being extended to lesbian and gay male relationships. At the same time, it is a time of much confusion, uncertainty, and difficulty for those of us who are attempting to provide advice and counsel to clients in the vanguard of such a dramatic change in the legal landscape.

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