An All-Too-Fragile Union

Thousand of Bay Area gay and lesbian couples are learning that domestic partnership isn’t in their best interest—and may never be. **BY PETER BYRNE**

FREDERICK HERTZ NEVER THOUGHT HE’D TURN HIS BACK ON ANYTHING designed to protect his relationship with his partner of two decades. The 52-year-old Oakland lawyer is probably America’s reigning expert on the financial intricacies of gay and lesbian cohabitation and domestic partnership. For 20 years, he has been advising gay and lesbian couples who can’t marry how to weave a thicket of wills, powers of attorney, and agreements to create for themselves the basic married. “One benefit of being excluded from marriage is that it forced me and my partner to custom-design a relationship that works for us,” Hertz explains.

But after the Legislature created a domestic partnership registry in 2000, Hertz and his partner happily signed up along with nearly 20,000 other homosexual couples, not because they needed the benefits—some they’d covered in their own contractual agreement; others didn’t apply to them—but because they thought the concept was worth supporting. “Registering was a symbolic thing for us, a way of affirming the dignity of our relationship,” Hertz says. And for a while, they were content with their decision. →

Photograph by Alex Subrizi

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Then, in 2003, with little fanfare, the Legislature injected the body of domestic partnership law with the legal equivalent of anabolic steroids—and the same roused blessing that comes with the performance enhancers. The California Domestic Partner Rights and Responsibilities Act (AB205) is a remarkable chapter in the saga of the gay liberation movement, as close to legalized gay marriage as a couple can get in most of the United States. (Only Massachusetts, Vermont, and Connecticut go further in granting domestic partner rights.) As of January 1, 2005, registered gay and lesbian domestic partners have had nearly all of the state rights, responsibilities, and benefits available to married heterosexuals, including more inheritance rights, custody rights, and the right to share in a spouse’s income and property.

Governor Gray Davis’s signing of the act barely made a ripple in the local newspapers. Nonetheless, proponents of gay marriage considered the act to be a foreshadowing of marriage equality to come. That’s why it’s so surprising that Hertz and his partner visited a notary last fall to disavow this path-breaking legislation. And they are hardly alone. In the past few months, hundreds of couples have deregistered from AB205; in 2004, more than 2,500 called it quits. And more defections will likely follow, as the National Center for Lesbian Rights, a San Francisco–based nonprofit that advocates for same-sex marriage, is advising people to take a closer look at whether the souped-up state-sanctioned partnership is truly for them.

Why this about-face on such promising legislation? While AB205 is good for many couples, it turns out to have some serious hidden pitfalls. In some cases, AB205 could spell financial ruin, propelling one partner into a much higher tax bracket or robbing a surviving partner of his or her inheritance. Hertz says that upon his death, the clash between AB205 and federal law could cost his partner hundreds of thousands of dollars in tax money that a straight married partner wouldn’t have to pay. It could also threaten anyone on public assistance and lead to deportations in some cases in which one of the partners is a foreigner living in this country on a visa.

So, some people will end up worse off than they were under the original 2000 domestic partner legislation, and much worse off than if they were married. For Hertz and others like him who have championed the rights of homosexual couples to partner up equally without marriage, the irony is painful. “When I deregistered, I had people saying they felt I was betraying the cause we had all fought for so hard,” he says. It was also difficult for Hertz on a personal level. “Friends came to me and said, ‘Is this really true? I heard you and your partner broke up and were afraid to mention it.’”

Of course, the ultimate irony of AB205 is that while it was designed as a viable alternative to marriage, it only makes same-sex marriage much more important. That’s because its flaws stem directly from the fact that while it’s a near replica of marriage, it doesn’t provide all the rights of a legal marriage—and never can. In other words, AB205 is a milestone on the road to gay marriage before the road smacks into a brick wall: federal law that says marriage is for heterosexuals only. Which is why an epic battle may be brewing between the states, which is moving to tear that wall down, and the federal government, which seeks determined to keep it in place.

**THE POLITICAL SLOGFEST**

IT’S CERTAINLY NOT THE FIRST TIME opposing forces on this issue have lined up. It may be hard to believe, but not so long ago domestic partnership was a profoundly divisive idea—even in San Francisco. In 1978, the San Francisco Board of Supervisors passed an ordinance, written by newly elected gay supervisor Harvey Milk, that outlawed discrimination based on sexual orientation in employment, housing, and business. But it took the AIDS crisis to cement the climate for the first domestic partner law. In 1989, Mayor Art Agnos signed legislation establishing a domestic partner registry and granting visitation rights in city hospitals for those who signed up. (The ultimate goal was health insurance for sick partners, not just visitation rights.) In a homophobic lather, the Catholic archdiocese convinced voters to repeal the registry, but in June 1990, San Franciscans flip-flopped and preserved it.

Nearly 15 years after our first domestic partner law went into effect, state legislators Jackie Goldberg, Paul Koretz, Carole Migden, and Mark Leno (from left to right) teamed up to push through AB150.

Over the next decade, health and retirement benefits were granted piecemeal to domestic partners of city employees and city contractors. San Francisco even refused to do business with companies that didn’t honor the domestic partner laws. Several large corporations, including United Airlines, resisted the city’s agenda, but they eventually backed down after California courts upheld the new contracting rules. Meanwhile, in the Legislature, bills designed to extend recognition to domestic partners flared up and died several times. And as the national level, the push for same-sex partnership rights suffered a serious setback when President Clinton signed the Defense of Marriage Act, which defined marriage exclusively as the union between a man and a woman.
The movement finally broke through in 1999, when Assemblywoman Carole Migden (D–San Francisco) wrote a law establishing a statewide registry for gay and lesbian domestic partners that granted hospital visitation rights and benefits for partners of state employees. "Migden created a frame on which we've slowly been able to hang partnership rights," says Assemblyman Mark Leno (D–San Francisco), a leading proponent of same-sex marriage. "Everything that matters in life is incremental," says Migden, now a state senator representing San Francisco and Marin Counties. "We do not believe in magic shows. It took a gradual plan to bring along representatives of the Central Valley and the more conservative areas. We added benefits by making sure we were in step with public attitudes."

The process continued in 2001 as she added more than a dozen new rights, including the right to sue for wrongful death, to use stepparent adoption procedures, and to make medical decisions for a partner. Over the next two years, family leave, protections against domestic violence, death benefits, and more were added as well. Nonetheless, the framework fell considerably short of granting domestic partners the vast array of rights married people take for granted, such as the right to share community property, the right not to testify against each other in court, and the right to alimony.

State Assemblywoman Jackie Goldberg (D–Los Angeles). She spearheaded AB105 to secure some of the most critical rights the original law left out: parental rights vis-à-vis nonbiological offspring. "My partner and I have been together for 26 years," Goldberg says. "Our son, who was four years old when we moved in together, would have loved the provision of knowing no one could take him away from us when he was growing up." Under AB105, nonbiological mothers automatically get parental rights.

In September 2003, the California Legislature passed Goldberg's bill by a solid majority—a measure of how much had changed over the years. Why did Governor Gray Davis, neither a liberal nor a risk taker, go for such a progressive piece of legislation?
Ouch. Say you bought your house for $250,000 in 1995, but five years later you fall in love, and five years after that, you and your in-laws decided to register as domestic partners, prompting a reassessment. During that time, the value of your house would have at least doubled, boosting your annual tax bill by about $2,500. The state and the feds could even decide to make the "new owner" pay a gift tax or a capital gains tax. Luckily, San Franciscans are exempt from this whole mess, since the assessor here is engaging in a minor act of civil disobedience by declining to reassess property transferred between domestic partners.)

Joe Maffeo and his lover, Frank Capley, live in San Francisco and were married at City Hall last February. But when the California Supreme Court overturned all same-sex marriages, they registered under A205—only to come face-to-face with the Prop. 13 issue. When Alfano looked into putting Capley on the deed of his weekend home in Monte Rio, he discovered the reappraisal would hike their yearly tax bill by $3,000. "Domes-
tic partnership hasn't helped us at all," Capley says.

And the impact of A205 is not limited to families of means. Although legally helpful to some poor families with children, the law sucks it financially to many who can least afford it. Generally in California, same-sex couples raising kids have significantly lower incomes than their heterosexual counterparts, according to a 2004 study by the Williams Project on Sexual Orientation Law and Public Policy at the UCLA School of Law, a think tank on gay and lesbian issues. That means they're more likely to qualify for some kind of welfare or public health benefit. However, if they register under A205, their state taxable income is held in line to calculate their benefits instead of the individual income of each partner.

According to the Williams Project, this means that thousands of couples could be forced out of state-run public assistance programs, collectively losing as much as $127 million per year.

The new registry could also threaten some binational couples, including helicopter pilot Belinda Ryan and her partner, Wendy Daw. After 9/11, the aerial photography company that employed Ryan, who is British, nearly hit the skids when flights were curtailed by the Federal Aviation Administration. Ryan's visa was suddenly in jeopardy because losing one's job can trigger deportation, and despite the fact that the women are domestic part-
ners, only a spouse can sponsor someone for permanent resident status. So the couple live in fear that Belinda's visa will be revoked if her company goes under or lets her go. They've thought about moving to the United Kingdom, which is on the verge of granting full marriage rights to same-sex couples, but Daw, a native Californian, isn't thrilled by the idea. "I don't really want to live in Wales," she says. "Our home is here."

WHERE IS THE LOVE? NOT IN D.C.

DETAILS ASIDE, THE PEOPLE WHO REALLY STAND TO lose are those who registered as domestic partners before A205's passage, only to be hit a few years later with these potential deal-breakers. Although the secretary of state sent two warn-
ing letters to 27,000 domestic partners, many couples did not understand the consequences of A205's fate print. And once
they do, it's not an easy matter to sign off. Until January 1, 2005, a couple could have dissolved their domestic partnership simply by filling out a form. Until June 30, couples can keep their AB205 status but write up independent contracts separating some of their assets. After that, however, if two people want to back out of AB205, the process they have to go through is tantamount to a divorce without the full protection of the marriage laws, which means they can be subject to a penalty of taxes that heterosexual couples escape.

Did legislators foresee all these difficulties when crafting AB205? Yes, says Assemblyman Leon. "But we weighed the pros and cons and decided it was more beneficial to go forward than not." Besides, he thinks AB205 isn't the main culprit. "The problems we subsequently faced are not the result of AB205; they're the result of the inequity of denying marriage licenses to same-sex couples."

So will these problems go away if same-sex marriage is approved in California? A prospect that seems increasingly likely? Last year, the city and county of San Francisco filed a lawsuit arguing in favor of civil marriage for all people, regardless of sexual orientation. The suit even called the ban on same-sex marriage unconstitutional, much like the separate-but-equal laws that discriminated against African Americans. In a move that stunned advocates and opponents of gay marriage, San Francisco Superior Court Judge Richard A. Kramer upheld the argument. "No rational purpose exists for limiting marriage to opposite-sex partners," he wrote in his opinion. And many experts believe the state Supreme Court will uphold Kramer's ruling.

But that won't solve all of AB205's problems. The Prop. 13 scare will disappear, but same-sex partners will still be subject to the same federal tax issues, as well as the parental rights and visa problems, all of which are governed by federal law. And with the current powershale, same-sex marriage on the federal level is as likely as America's withdrawing from Iraq. All of which means that at least for the foreseeable future, Herzl's business will continue to thrive.

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