THE EXPANSION OF CALIFORNIA'S DOMESTIC PARTNERSHIP LAW: DISCERNING THE UNCERTAIN IMPACTS OF AB 205

BY FREDERICK HERTZ, J.D.

Effective January 1, 2005, California registered domestic partners will be subject to nearly all of the state-based rights and obligations that apply to married partners. As simple as the language of A.B. 205 reads, the long-term implications of this dramatic legislative application of marital laws to non-marital relationships (codified in Family Code §207.5 and 209) are truly complex and, to a very great degree, fairly uncertain at this time. A group of attorneys in the San Francisco Bay Area (including this author) have been meeting since last October to review and analyze the issues raised by A.B. 205, and this article incorporates the findings and preliminary insights of this group.

One preliminary note: as currently enacted, any same-sex couple and a limited set of older opposite-sex couples (who might otherwise lose Social Security benefits) may register as domestic partners—even those who reside outside of state. However, because of the expansion of Family Code benefits and burdens to domestic partners and the possible recognition of those benefits by the Social Security Administration, there may no longer be any financial value to registration for opposite-sex couples. Thus, it is anticipated that the overwhelming majority of state-registered domestic partners will be same-sex couples.

I. Issues of Jurisdiction and Procedure

In an effort to avoid some of the obstacles that have arisen with regard to similar legislation in other states, A.B. 205 contains broad provisions regarding jurisdiction and the applicability of these laws to those that choose state registration. Non-California couples can register so long as they reside together, and non-Californians are considered 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. Similar registrations, such as Vermont’s Civil Union law, are treated as equivalent to California’s domestic partnership and will invoke the same broad marital rights and obligations, although local registries vary.

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(exemption, under Proposition 13—a seri-
ous consequence for transfers of real
property upon the formation or dissolu-
tion of a partnership—or the death of
either partner. Any profit thus real-
taxed as joint income in California
despite its community property charac-
ter—an attempt by the legislature to lift
the burden from couples of having to file
different tax returns under state rules
than those required under federal
law. So, too, and perhaps most signifi-
cantly, none of the hundreds of federal
spousal benefits, especially tax exemp-
tion benefits, are extended to domestic
partners.

As a result of these exclusions, the
previously unified state and federal
legal landscape has been radically
altered. No longer are there only two
categories of partners, married or
unmarried; treated similarly across
both state and federal lines. The
California legislature has created a third
species for lawyers to contend with:
unmarried couples who have made, but
not all, of the benefits and burdens of
marriage on the state level, but who are
not likely to be treated as married
when they cross state lines, and most
likely will not be eligible for any of the
federal spousal benefits, especially the tax
benefits. It is this very notion of a new
"third species" of family arrangements
that makes the legal questions posed by
A.B. 205 so difficult to resolve.

II. Property/Asset/Debt Issues

The most powerful legal change un-
ered in by A.B. 205 is that it imposes
community property and spousal sup-
port rights and obligations on registered
partners. For gay couples who have reg-
istered since registration was first
allowed in 2000 with the understand-
ing that their registration would have
little if any real impact on their finan-
cial lives, the change is especially dra-
matic. No longer will the financially
dependent partner have to obtain a
cohabitation agreement or make an
attempt to prove a Marvin claim to
obtain a share of his or her partners'
assets or win post-separation support:
the sharing and the support will be
compulsory for registered partners in
the absence of a valid pre- or post-regis-
tration agreement. The financial
tables of non-marital partners have lit-
erally been overturned, with a pre-
sumed sharing of assets and debts instead of the presumptive role of a pre-
sumed lack of any such sharing.

Apart from the secondary implica-
tions of the tax dilemmas resulting
from the non-recognition of domestic
partnerships by the federal authorities,
California's community property and
spousal support rules will be the same
as apply to married couples. Earned
income will be presumed community
property, pre-registration assets, gifts
and inheritances will be presumptively
separable, most debts will be seen as
joint liabilities, and valid transmutation
agreements will be required in order to
establish any exception to the Family
Code rules regarding any particular
asset. As is the case with married cou-
ples, some couples will consciously
organize their financial lives in accor-
dance with these rules, and most others
will simply carry on with little aware-
ness of the implications of these rules,
until such time as a dissolution occurs.
Some couples will execute pre-registra-
tion or post-registration agreements,
but that is not our concern.

As simply summarized at this exten-
tion of Family Code benefits and bur-
den to domestic partners may be, there
are several serious uncertainties and
many particular issues that make these
partnerships legally different than the
standard marital relationship. First, as
currently written the statute is silent as
to the 'date of marriage' for those cou-
ples that registered prior to January 1,
2005. While the effective date of the
legislation is January 2005, couples have
been able to register in California since
2000, leaving unresolved the question of
whether the earlier registration date
should be the date of marriage in the
event of a subsequent dissolution.
An amendment to the existing legislation
(A.B. 2580) will, if passed, establish the
registration date as the date of marriage
for any future proceedings.

In an attempt to deal with the unan-
ticipated burdens created by these
retroactive implications, A.B. 205 has a
unique "opt-out" provision: until
January 1, 2005 either partner can ter-
minate the partnership unilaterally,
simply by filling out a form with the Secretary of State. Moreover, all regis-
tered partners are receiving two letters from the Secretary of State informing
them of the new law and the availabil-
ity of this opt-out alternative. For this
reason, the established family law doc-
tine holding that family law rules can
not be applied retroactively may not
apply to this statutory situation. No
doubt there will be challenges to the
retroactivity aspect of A.B. 205, with or
without the passage of any amend-
ment, as the resolution of the retroac-
tivity issue could have hefty financial
consequences for couples where one
partner acquired significant assets be-
 tween the date of their registration and
January 2005.

In addition, it is not at all certain that
banks, title companies, and other com-
mercial entities will recognize and
 treat domestic partners property. While
it is anticipated that partners will be
able to take title as community proper-
ly, it is far from certain that title compa-
nies will honor such an instruction, or
know to obtain quitclaim deeds for
state registered partners when proper-
ties are transferred. The widespread
assumption among financial institu-
tions is that married people have com-
 munity property and unmarried folks do not – and it may take several years
for these companies to accommodate to
the "third species," the unmarried cou-
ples with community property.

Perhaps the greatest area of confusion
with regard to the application of com-
munity property rules to domestic part-
ners will be the treatment of pre-regis-
 tration assets and obligations. It is cer-
tainly true that opposite sex couples fre-
quently have pre-marital assets and
debts, which often can result in com-
plex disputes in the event of a subse-
quent dissolution. However, it is
believed that such situations have been
more of 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
had significant pre-registration assets,
even where the couple registered prior to
2005. Most such couples will not
have entered into written agreements
regarding these pre-registration assets,
and even those who have signed agree-
ments prior to 2005 may face challenges
as to the validity of those agreements —
 since they most likely did not include
any waivers of family law protections.
In many instances separate civil law
suits will need to be filed in a dissolution
to resolve pre-registration disputes,
resolved according to the principles of
non-marital law, and thus the overlaps
between pre-registration assets and
agreements and post-registration asset
allocations will be easy to resolve.

Further complicating these conundrums,
agreements between domestic partners will likely be evaluated as
post-marital agreements — even those
that were entered into prior to January
2005, because of the retroactivity rule.
The current proposed amendment cre-
ates a June 30, 2005 deadline for allow-
ing registered partners to enter into
agreements subject only to the stand-
sards for pre-nuptial agreements, but
it is unclear how such a provision would
be applied. In addition, for those cou-
ples that have been together for signifi-
cant period of time, the existing confi-
dential relationship between the part-
ners will trigger the higher standards
for evaluating such agreements, even
apart from any "marital status" label.

Where pre-registration agreements are
upheld, they may only apply to pre-
 registration assets, triggering even more
complicated disputes over the applica-
tion of various laws and agreements to
various phases of asset and property
ownership. And, the general lack of
awareness in the legal community, as
well as in the general public, regarding
the implications of A.B. 205 will make
the questions about the validity of part-
nership agreements only more difficult
to resolve. What is clear is that any for-
mal agreements entered into from this
point forward should meet the standards
of a post-nuptial agreement, and should
deal comprehensively with pre-registra-
tion assets as well as post-registration
assets. To the extent that the couple
entered into cohabitation or co-owner-
ship agreements earlier on, these older
agreements should be expressly revoked,
so that all of the couple’s issues can be
resolved in one up-to-date agreement.

As is true for most married couples,
these issues will generally lie dormant
unless and until there is a dissolution.

Then all of the problems of the pre-regis-
tration assets, the uncertainties regard-
ing the issue of retroactivity of A.B. 205,
and the challenges to the validity of any
pre-registration agreements will all come
to a head. And remember, in the
first several years after A.B. 205 goes
into effect, nearly every such issue will
be one of "first impression." It is like-
ly that there will be many test cases and
many uncertain outcomes until the
courts or the legislature resolve these
new and unique legal questions.

Problems in implementation are like-
ly to arise even in the non-tax realm
from the broad non-recognition of the
domestic partnership rules. It is uncer-
tain, for example, how the lack of federal
tax exemptions will fold back into the
determination of spousal support or pen-
sion allocations. Indeed, it is not even
known at this point whether or not DJBORs will be available for enforce-
ment of pension awards. For those
whose partners who have federal pen-
sions or federally regulated assets, it is
 unclear whether the federal non-recog-
nition will limit awards of community
property with regard to these assets. In
simpler non-contested dissolution it will
likely be possible to reach compro-
mise resolutions between the partners
without tackling these legal complexi-
ties, but for higher asset couples in
high-conflict dissolutions, it may be
impossible to avoid these complications.

Finally, it is quite possible that the
existing rules regarding spousal support
will be applied differently to state-regis-
tered domestic partners, for two rea-
sons. First, prejudices regarding gender
roles may creep subtly into the judicial
decision-making regarding claims for
support: will male "wives" receive much
sympathy, and will lesbian "husbands"
generally be viewed as liable for sup-
port? Second, the current rule of disre-
garding pre-marital cohabitation for cal-
culating the length of a marriage does
not make practical or legal sense for
couples who were unable to marry (or
even register) prior to 2000. Thus, it
would seem extremely unfair to one
who has been financially dependent on
his or her partner throughout a twenty-
year relationship to be limited to only
two or three years of spousal support,
especially if the couple registered in the
very first year of state registration.

III. Taxation Issues
If all of these uncertainties were not enough to create dread in the heart of any family law attorney, truly the most difficult questions regarding the implementation of A.B. 205 arise from the lack of federal tax recognition of domestic partners as spouses. The sweeping tax exemption of asset transfers between spouses in the formation, duration, and dissolution of their relationship has long been taken for granted by family law attorneys, allowing a carrying out of financial asset and property planning—and for the enforcement of community property and spousal support rules—without hardly any regard to possible tax consequences.

By contrast, asset transfers between unmarried partners is today 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. In the event of an asset transfer at the time of a dissolution, for example, exemptions have been asserted either under a trust theory or implied contractual rights theory—arguing that the receiving partner is only getting that which was equitably his or hers from the outset of the relationship, and therefore should not be taxed for such a transfer. More typically, attorneys have attempted to characterize transfers in such a manner as to invoke some other form of exemption, such as using the residual capital gains exemption in the event of a buyout of an interest in residential property, or characterizing the payments as child support where both partners are legal parents of a minor child.

The application of community property rules to domestic partners creates serious potential tax concerns, both during the duration of 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—though unlikely in a practical sense—that the legal mandating of community property income 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 have been counseling the need for separate property pre-nuptial agreements for high-earning couples.

It is unlikely that there will be many audits of such legally imposed “transfers” during the course of a partnership, but significant transfers of wealth and/or payment of spousal support at the time of a dissolution will most definitely pose more difficult challenges. For high-earning partners who have accumulated significant wealth, transfers upon dissolution even in excess of the federal gift limit is quite possible, and hefty spousal support obligations may be imposed as well.

On the one hand, it can be argued that a legally mandated transfer under a state doctrine of community property and state-imposed rules of spousal support should not be considered a taxable transfer—as the receiving partner is only receiving that which is already considered legally hers or his. The payments certainly are not considered a gift by the paying partner, nor is it “earned” income. On the other hand, the strong statements in the legislation that domestic partners are not “married” and the 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. This issue will take years to be finally resolved, and thus many of today’s partners will become the test cases for these very thorny tax issues.

And as mentioned previously, to the extent that the tax treatment of these mandated transfers are uncertain, it will be very difficult to apply existing family law rules that assume tax exemption to such transfers, such as spousal support rules. While these same issues will arise with regard to Massachusetts marriages and Vermont civil unions, California’s status as a community property state with a plethora of high asset same-sex couples will heighten the complexity and consequence of the property tax reassessment and may lessen the educational benefits that might otherwise be bestowed on California lawyers by those handling similar disputes in other states.

To some degree there will be state and local tax problems as well. A.B. 205 expressly states that earned income will not be considered joint income for state tax purposes. This provision was included so that the partners would not have to file differently calculated returns for state and federal authorities. However, it is unclear whether transfers upon dissolution or spousal support will be subject to state tax. A.B. 205 is written so as to substitute domestic partners wherever spouses are protected under state law, and so presumptively there should be full state tax protection. Unfortunately, in many instances the state tax code refers to federal exemptions, and thus the lack of any federal exemption could indirectly undermine the broad intent of A.B. 205.

Another problem not resolved by A.B. 205 is that of the property tax reassessment burden faced by unmarried couples. Because the property tax limitations were created by initiative and are embedded in the California Constitution, the legislature cannot expand the spousal exemptions to include domestic partners—this requires a vote of “the people,” something which has not been proposed by the legislature at this time. Thus, whenever a partner buys into his or her partner’s residence, or if there is a buyout upon a dissolution or a transfer of a partial interest in a property upon death of a partner, a reassessment of the transferred partial interest can occur. There are several limited exceptions that can be invoked to avoid such reassessment, such as the joint tenancy exemption, as well as an archaic new exemption of limited applicability enacted recently by the State Board of Equalization. However, except in San Francisco (where local officials are defying state law and refusing to re-assess property transfers between domestic partners on constitutional grounds), voluntary transfers between partners during the course of the relationship, as
well as judicially mandated community property transfers of property, could result in significant property tax burdens on domestic partners.

IV. Issues Regarding Children

Previously enacted legislation has 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, under the broad terms of A.B. 205, a step-parent adoption of a partner’s child to establish both parents as legal parents may not be necessary.

The uncertainty with regard to parentage issues arises from the difficulty of applying the ‘presumed parentage’ rules for married couples to same-sex partners. While A.B. 205 presumptively provides that a child born to or adopted by one partner during the course of the partnership should be presumed to be a legal child of his or her partner (simply by application of the extension of all marital rights to domestic partners), the gender-based standards for rebutting this presumption could create serious conflict in the applicability of these provisions. Would a lesbian partner, for example, ever be able to avoid the rebutting of the presumption of her parentage, in light of the ‘procreate-ability’ standards invoked by these rules? And, will federal and other state jurisdictions honor the presumed parentage seemingly imposed by A.B. 205?

On the other hand, if a domestic partner is indeed a presumed parent of her or his partner’s child, then how can a step-parent adoption be granted, given that it is not permitted as a matter of law for one to adopt a child that is already one’s own? In light of this legal conundrum, it is anticipated that a procedure for a second parent adoption soon will be developed to allow the domestic partner of a legal parent to obtain a judicial decree, a kind of affirmatum of parentage, that acknowledges the presumed parentage rights but also issues a clear judicial declaration of parentage, to avoid any uncertainties in the future regarding parentage of the child. Alternatively, in some situations a step-parent adoption would be most appropriate, especially in the event that the judicial decree procedure is not developed or is seen as inadequate for a particular couple.

Another practical concern regarding parentage: in light of the presumed parentage rule, it is likely that sperm banks and ovum donor providers will require the consent of a recipient’s domestic partner whenever sperm or egg is obtained, in the same manner as is currently 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.

VII. Professional Ethics and Standards

In light of all the complex and uncertain legal consequences of A.B. 205, the professional obligations for attorneys practicing in this area will certainly increase significantly.

Some attorneys have queried whether they have a duty to inform all of their prior clients of these new legal rules. In fact, the Secretary of State is notifying all registered domestic partners, in two sets of mailings, of the basic legal changes imposed by A.B. 205. For this reason, individual notification of existing clients probably is not required. In certain particular situations, however, especially for active client matters or where there have been recent property or asset decisions or where agreements were recently drafted, providing more comprehensive information to the clients is certainly appropriate. In any event, such notification would certainly be an effective marketing opportunity for family law attorneys.

An even more pressing ethical issue arises involving the delicate matter of joint representation. Because domestic partners are now subject to family law rules, the recently enacted standards for the validity of a pre-nuptial or post-nuptial agreement certainly will apply to domestic partner registration agreements. Thus, independent counsel is strongly advised for any such agreements—and perhaps even for the decision-making consultation regarding the termination of an existing partnership or a new registration. Couples that are considering joint asset transfers face other pressures for registering will be compelled to address the financial implications of such registration, and previously registered couples will certainly face these issues. While attorneys can serve as mediators for couples as they decide how to handle these new legal provisions, separate counsel is definitely recommended for any registration agreements, as well as for those couples with economically unequal situations who are deliberating as to whether or not to register (or remain registered) as domestic partners.

One of the most delicate ethical issues involves that of the requirement that the attorney provide competent counsel. In order to advise clients in these matters a basic knowledge of both non-marital and marital law is required, to be able to explain to clients the various consequences of registration and of non-registration for their particular situation, and the possible need for a registration agreement for those couples who do register and remain registered. In addition, an especially high quotient of ‘emotional intelligence’ is required, in order for the attorney to address the great uncertainties and confusion that clients will experience as they try to sort out their options under these rapidly changing laws. Many long-term couples will be faced with issues that they have never seriously considered; indeed, most lesbian and gay couples have not even anticipated these legal revolutions, and the prospect of an entitlement to community property and spousal support will not be easily integrated into long-term relationships that have been shaped by more traditional expectations of financial independence.

Further professional complications arise simply from the uncertainties regarding so many aspects of the implementation of A.B. 205. Clients generally expect their attorneys to provide them guidance based on established and definite legal rules. Here, it simply is not possible to provide much certainty regarding many of the more complex aspects of A.B. 205, especially those
Involving retroactivity, the treatment of pre-registration assets, and the tax implications of domestic partnership asset transfers. Responding to a donor's need for advice and certainty in the face of such legal uncertainty requires an especially sensitive approach to the delivery of legal services.

Providing balanced and competent counsel in an era of such rapidly evolving law, where so many key issues are likely to remain unresolved for many years, will not be an easy task for any of us. Without a doubt, these are exciting times for those of us practicing in this area, and the intellectual and personal challenges of being a family law attorney in an era of such revolutionary legal change will only continue to increase. The key to flourishing in these times is to incorporate the challenges into one's practice and to welcome the dramatic societal changes as yet one more opportunity for expansion, both of one's mind and one's clientele.

PRAGMATIC RECOMMENDATIONS

Stipulations for the appointment of privately compensated judges sometimes provide that all rules of law and procedure that normally would apply in the superior court shall apply to the matter. Nevertheless, it seems impossible that this, or any other stipulation, could mandate the application of the Government Code provisions described above regarding official court records and official court reporters. It also seems impossible that such a stipulation could force the clerk of the superior court to undertake responsibility for overseeing the preparation of the reporter's transcript. In light of the foregoing problems, perhaps the Legislature or the Judicial Council should be asked to modify the applicable statutes and rules discussed above.

In the meantime, we suggest counsel consider doing the following jointly before anyone knows which side may become the appellant.

1. Rule 980.4 requires the court clerk to keep a sequential list of all reporters who work on a case including the date each reporter worked, the reporter's name, business address and certified shorthand reporter license number. Privately compensated judges rarely use a privately compensated court clerk and the judge usually does not keep track of the reporters. Therefore, it can become difficult to contact all the reporters, especially if the private service uses free lance reporters and the final judgment is not entered until many months after the trial. Counsel should monitor this situation carefully during and after trial. If necessary, the current address for a court reporter can be obtained on the website of the Court Reporters Board. The Board also has a compliance division which can be helpful in getting transcripts prepared by timely reporters.

2. Stipulate that each court reporter will be required to prepare a daily transcript and these transcripts will be turned into an appellate record, even if the court reporter who transcribed a particular day becomes unable to comply with the rules.

3. Stipulate that if the notes of any reporter cannot be transcribed for any reason, the trial judge, or the court of appeal, is to apply the standards in Code of Civil Procedure section 914 for deciding whether to grant a new trial, but also agree that notwithstanding Weinstein v. E. F. Hutton & Co., supra, the parties will first try to reconstruct the missing testimony by having the same witnesses testify again and that such reconstruction may be used in the appeal.

4. Stipulate that if there is an appeal, the appellant will lodge the originals of each reporter's transcript with the court of appeal pursuant to a stipulation that they constitute the reporter's transcript on appeal.

5. Discuss these concerns with the private reporting service and provide it with a copy of Rule 9. Confer with each reporter sent to attend the trial to make sure each transcript will comply with Rule 9.

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