

Domestic partnership laws and gay marriage

An overview of recent events and pending legislative changes

by Shane R. Ford and Kelli Fernandez-Medina

In 2003, California passed a broad-based new domestic partnership law. On September 19, 2003, Governor Davis signed AB 205 ("The Domestic Partner Rights and Responsibilities Act of 2003") into law. This historic and controversial act constituted a milestone in the gay and lesbian rights movement, as well as a dramatic overhaul of domestic partnership law in California. Effective January 1, 2005, AB 205 confers upon domestic partners many of the same rights and responsibilities currently enjoyed by spouses in California.

The purpose of this article is to provide a brief overview of AB 205 and to give the family law practitioner some practical tips in confronting some of the difficulties associated with the new legislation.

New domestic partnership provisions

While the basic criteria and procedure for registering as domestic partners remains mostly unchanged, AB 205 alters the requirements for entering into a domestic partnership. Each domestic partner must consent to the jurisdiction of the superior courts of California for the purpose of obtaining a judgment of dissolution or nullity of the domestic partnership.¹ AB 205 also changes the provisions for terminating a domestic partnership. The new law divides dissolution of domestic partnerships into two procedures depending on the length of the domestic partnership.

Pursuant to AB 205, domestic partners will go from currently having approximately 15 legal rights and responsibilities to being subject to the Family Code.

AB 205 will, in effect, subject previously registered domestic partners to the wide array of rights and responsibilities enjoyed by spouses pursuant to California law. The Secretary of State will send



letters to all registered domestic partners twice prior to December 1, 2004, cautioning domestic partners of the impending changes in the law.² While many individuals previously registered as domestic partners prior to January 1, 2005 may welcome this expansion of the law of domestic partnership, a great many people may come under the purview of the new law without realizing the consequences as it pertains to their particular situation. This may cause a great deal of additional conflict within the affected households.

Family law practitioners who represent clients already registered as domestic partners or who advise clients wishing to enter into a domestic partnership should advise their clients of the sweeping changes effective next year. There is a wealth of information, many published by gay and lesbian rights organizations that explains in plain terminology the effects of the new law on domestic partners for further reference or use in client consultations.³

Federal law

There are several areas of family law in which federal law intersects with the Family Code. Nearly all of them represent a particular challenge when dealing with domestic partnerships. Below are a few of the main challenges we foresee.

Taxes. AB 205 does not change tax-filing status in California for registered domestic partners.⁴ In fact, Family Code §297.5, effective January 1, 2005, explicitly states that domestic partners shall use the same tax filing status on their state tax returns as they use on their federal returns. Thus, registered domestic partners must continue to file as single on both their state and federal income tax returns.

Qualified domestic relations orders. Since the management of private retirement plans and the transfer of retirement benefits pursuant to a qualified domestic relations order is governed by ERISA and other federal law, which does not recognize domestic partnerships, domestic partners will encounter substantial difficulties in the area of community property retirement benefits. Pursuant to the new law, registered domestic partners will accrue retirement benefits as community property. As private pension plans do not provide survivorship benefits to domestic partners, many will stand to lose important property rights earned by the community upon the death of the plan participant.

Private plans will also not recognize qualified domestic relations orders that purport to divide the community interest in plan benefits between domestic partners as opposed to spouses. In effect, retirement benefits may not be transferred

between domestic partners pursuant to QDROs. This limitation brings forth many questions. For instance, does this impair the court's ability pursuant to Family Code §2550 to divide the community estate equally between the domestic partners? May the court offset any community property in the form of indivisible retirement benefits by dividing the community estate in an unequal manner?

COBRA coverage. Since COBRA, the Consolidated Omnibus Budget Reconciliation Act of 1985, is a federal law regulating, among other things, insurance benefits for participants and their qualifying dependents in the event of a loss of health insurance coverage due to a termination of employment or dissolution or other qualifying event, domestic partners will not qualify for COBRA coverage. This will result in significant gaps in health insurance coverage for partners of plan participants. Thus, it is important to advise domestic partners to carefully plan their health insurance coverage. It is advisable under many circumstances for each partner to obtain their own health insurance coverage, if available through their employer at the time of the dissolution proceeding to ensure that there is no gap in their coverage.

Full faith and credit

Since Hawaii, Vermont, and California are the only states to offer such broad-based domestic partnership or civil union laws, it is unknown whether any of the other states will give full faith and credit to these unions and partnerships. Many states confer a limited range of benefits upon domestic partners or are in the process of considering or have recently considered same sex marriage, civil union or domestic partnership bills. If domestic partners move to a state that neither has nor recognizes any domestic partnership laws, they will likely not enjoy the benefits conferred upon them in California.

Epilogue

Unless you have been living (or practicing) under a rock for the past month, you are probably aware that on February 10, 2004, the mayor of San Francisco, Gavin Newsom, took the unprecedented step of ordering the San Francisco County Clerk's office to issue marriage licenses to same sex couples, allowing thousands of gay and lesbian couples to marry.

Two groups have filed lawsuits calling for an end to the issuance of the marriage licenses to same sex couples: Campaign for California Families and Randy Thomasson and the Proposition 22 Legal Defense and Education Fund. At this point, no one is certain whether the marriages currently taking place between same-sex couples in San Francisco will remain valid.

As family law attorneys, we need to protect our gay and lesbian clients who are struggling with domestic partnership/gay marriage issues and decisions. Unfortunately, it is simply impossible to predict what will happen in this area of law. The best that we can do, pending the outcome of the lawsuits and advances made in this civil rights movement, is to advise our clients of the pending legislative changes effective January 1, 2005 and to keep abreast of current events and how the law continues to evolve in the second half of the year. ♦

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¹California Family Code §298(c).

²California Family Code §299.3.

³Equality California has an excellent website (www.eqca.org) filled with news and information on gay marriage and domestic partnership issues. Additional helpful websites include: www.arriageequalityca.org and www.lambdalegal.org, among others.

⁴California Family Code §297.5(g).

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