McGeorge Law Review

Volume 31 | Issue 2 Article 14

1-1-1999

Family / Domestic Partnership in California: Is It a Step Toward Marriage?

M. R. Carrillo-Heian

Family

Domestic Partnership in California: Is It a Step Toward Marriage?

M. R. Carrillo-Heian

Code Sections Affected

Family Code §§ 297, 298, 298.5, 299, 299.5, 299.6 (new); Government Code §§ 22867, 22868, 22869, 22871, 22871.1, 22871.2, 22871.3, 22872, 22873, 22874, 22875, 22876, 22877 (new); Health and Safety Code § 1261 (new).

AB 26 (Migden); 1999 STAT. Ch. 588

TABLE OF CONTENTS

I. INTRODUCTION

The 1969 riot at the Stonewall Inn, a gay bar in New York, is generally considered to be the start of the modern gay rights movement.[1] Since then, gay men, lesbians, and bisexuals have actively pursued a status equal to that of heterosexuals in arenas such as employment, housing, and health care.[2]

---

1. ANDREA WEISS & GRETA SCHILLER, BEFORE STONEWALL: THE MAKING OF A GAY AND LESBIAN COMMUNITY 5 (1988). The Stonewall riots were a backlash against continual harassment of gay bars by police. *See generally* MARTIN DUBERMAN, STONEWALL (1993) (detailing the early gay movement and events leading up to the Stonewall riots through the lives of six people); THE QUESTION OF EQUALITY: LESBIAN AND GAY RIGHTS SINCE STONEWALL (David Deitcher ed., 1995) (outlining the pre-Stonewall homophile movement, discussing strategies in the post-Stonewall era, assessing the relationship of gay men and lesbians to traditional institutions, and evaluating the plight of gay and lesbian youth); WEISS & SCHILLER, *supra* (discussing the history of the gay community and the development of the movement from 1900 to 1969). For a comprehensive history on the subject, see JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.: A DOCUMENTARY (rev. ed., Meridian 1992) (tracking various aspects of gay and lesbian history, including excerpts from 1528 to 1976). For a legal history perspective, see William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817 (1997).

2. For instance, gay and lesbian groups have attempted to equalize treatment concerning employment discrimination based on sexual orientation for the past 20 years. Aurelia Rojas, *Davis Signs 3 Gay Rights Bills*, SACRAMENTO BEE, Oct. 3, 1999, at A1.

California has combated sexual orientation discrimination for quite some time. *See* Thomas Weathers, Comment, *Gay Civil Rights: Are Homosexuals Adequately Protected from Discrimination in Housing and Employment?*, 24 PAC. L.J. 541, 543 nn.12-13 (1993) (listing bills that the California Legislature has passed to prohibit sexual orientation discrimination, mostly dealing with employment and housing; most of these bills were vetoed). The Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE §§ 12900-12996 (West 1992 & Supp. 2000), prohibits discrimination on various bases, but prior to the 1999 legislative session, sexual orientation was not included among the list of protected classes. *See, e.g.*, 1993 Cal. Stat. ch. 711, sec. 2, at 4040 (amending CAL. GOV'T CODE § 12940) (prohibiting employment discrimination on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex"); 1993 Cal. Stat. ch. 1277, sec. 4, at 7514 (amending CAL. GOV'T CODE § 12955) (prohibiting discrimination in housing on the basis of "race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability"); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 488, 595 P.2d 592 (1979) (construing the Fair Employment Practices Act, now part of the FEHA, as not including discrimination on the basis of sexual orientation). In 1991, Governor Wilson vetoed a bill that would have added sexual orientation to the FEHA. *See* MICHAEL NAVA & ROBERT DAWIDOFF, CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA ix-xi (1994) (describing the reaction of the gay community to the gubernatorial veto). In 1992, the legislature added a provision to the Labor Code that prohibited discrimination in employment based on sexual orientation, but significant disparities inhered in the protection that was provided. *See* 1992 Cal. Stat. ch. 915, sec. 2, at 4400 (enacting CAL. LABOR CODE § 1102.1) (prohibiting discrimination in employment on the basis of sexual orientation or perceived sexual orientation). *See generally* Weathers, *supra* (discussing the protections provided by law, and concluding that they are not adequate).

During the 1997-1998 legislative session, a bill to add sexual orientation to the list of protected classes in the FEHA and to remove sexual orientation from the Labor Code was vetoed by Governor Wilson, who believed that adequate protections against discrimination based on sexual orientation were already in existence. *See* Governor's Veto Message (AB 257), Oct. 10, 1997 (copy on file with the *McGeorge Law Review*) (reflecting the belief that the inclusion of sexual orientation provisions in the Labor Code has provided a "fair, effective, and efficient remedy to such complaints," and further noting that 90% of the 174 cases filed under that section had been resolved). In the 1999-2000 session, however, Assemblymember Villaraigosa was successful in passing a bill almost identical to the vetoed measure. *See* 1999 Cal. Legis. Serv. ch. 592, sec. 1-17, at 3424-58 (amending

Progress has been made on some issues, but inequity still remains.[3] The status of people in relationships with persons of the same sex has been debated in various contexts for a number of years.[4]

CAL. GOV'T CODE §§ 12920, 12921, 12926, 12930, 12931, 12935, 12940, 12944, 12955.8, and 12993, and amending, repealing, and enacting CAL. GOV'T CODE § 12955, and repealing CAL. LABOR CODE § 1102.1) (adding sexual orientation discrimination to prohibitions contained in the FEHA, and removing such provisions from the Labor Code); *see also* Victoria K. Lin, *Embracing Minority Housing and Employment Rights in the New Millennium*, 31 MCGEORGE L. REV. 211 (2000) (evaluating the provisions of the new law, Chapter 592). *See generally* NAVA & DAWIDOFF, *supra*, at xi (arguing that the pursuit of equal rights for gay men and lesbians is vitally important to the protection of individual liberties in the U.S.).

3. Ten states other than California have enacted laws prohibiting private employers from discriminating on the basis of sexual orientation. *See* CONN. GEN. STAT. ANN. § 46a-81c (West 1995) (barring sexual orientation discrimination in employment); HAW. REV. STAT. § 378-2 (Supp. 1998) (same); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West Supp. 2000) (same); MINN. STAT. ANN. § 363.03 (West Supp. 2000) (same); NEV. REV. STAT. ANN. § 613.330 (Michie Supp. 2000) (same); N.H. REV. STAT. ANN. § 354-A:7 (Supp. 1998) (same); N.J. STAT. ANN. § 10:5-12 (West Supp. 1999) (same); R.I. GEN. LAWS § 28-5-7 (Supp. 1999) (same); VT. STAT. ANN. tit. 21, § 495 (Supp. 1999) (same); WIS. STAT. ANN. § 111.36 (West 1997) (same); *see also States, Cities and Counties that Prohibit Discrimination Based on Sexual Orientation in Private Employment* (visited Feb. 29, 2000) <http://www.hrc.org/issues/workplac/nd/ndjuris.html> (copy on file with the *McGeorge Law Review*) (maintaining a list of public entities that have similar laws).

When the same-sex partner of an employee is eligible for insurance benefits, the benefits that the partner receives are taxable. *See* I.R.C. § 105(b) (West Supp. 1999) (establishing that only health benefits for the taxpayer, the taxpayer's spouse, and the taxpayer's dependents are tax-deductible). *See generally* Lindsay Brooke King, Note, *Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(a) and 106 of the Internal Revenue Code*, 53 WASH. & LEE L. REV. 301 (1996) (evaluating domestic partner benefits with respect to federal income taxes).

4. *See, e.g.*, Adams v. Howerton, 673 F.2d 1036, 1041 (9th Cir. 1982) (holding that, in the context of immigration laws, a citizen's spouse necessarily means a person of the opposite sex); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI., 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (ordering further hearings to determine if a compelling state interest is furthered by the ban on same-sex marriages in the Alaska Marriage Code); Dean v. District of Columbia, 653 A.2d 307, 318, 331 (D.C. 1995) (holding that marriages between persons of the same sex are prohibited and the ability to enter into such marriages does not amount to a fundamental right); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (remanding the case to allow the State to show a compelling interest for the denial of marriage licenses to same-sex couples), *enforced sub nom.* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996) (holding that the denial of marriage licenses to same-sex couples was unconstitutional sex-based discrimination and in violation of the equal protection clause of the Hawaii Constitution), *aff'd*, 950 P.2d 1234, 1234 (Haw. 1997), *appeal dismissed as moot*, No. 20371, 1999 Haw. LEXIS 391, at *5 (Haw. Dec. 9, 1999) (ruling that the denial of marriage licenses to same-sex couples is not violative of the equal protection clause of the Hawaii Constitution in light of a recently passed amendment that gives the Legislature the power to reserve marriage to opposite-sex couples); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) (holding that two female persons, by definition, cannot enter into a marriage); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (holding that marriages between persons of the same sex are prohibited and that such prohibitions are not unconstitutional); Storrs v. Holcomb, 645 N.Y.S.2d 286, 287-88 (1996) (same), *appeal dismissed on other grounds*, 666 N.Y.S.2d 835, 835 (1997); Estate of Cooper, 564 N.Y.S.2d 684, 688 (1990) (holding that a surviving partner in a same-sex relationship is not a "surviving spouse" with the right to elect against the will of the deceased partner); De Santo v. Barnsley, 476 A.2d 952, 952 (Pa. Super. Ct. 1984) (holding that two people of the same sex may not form a common law marriage); Titchenal v. Dexter, 693 A.2d 689-90 (Vt. 1997) (holding that the same-sex partner of an adoptive parent, if the partner had not also adopted the child, had no right to parent-child contact as an equitable or de facto parent); Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000) (holding that two people of the same sex may not enter into a "quasi-marital" relationship); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that the denial of a marriage license to a same-sex couple violates neither the U.S. Constitution nor the Washington Constitution).

Some companies and various state and local governments have recognized a status of "domestic partnership" (DP), loosely defined as two unmarried adults in a committed relationship.[5] With the passage of time, several institutions have recognized domestic partners, and some have granted benefits previously available only to married couples.[6] These moves prompted California to enact Chapter 588. This new law creates a registry for same-sex and senior citizen domestic partners, and grants limited benefits to registered couples.[7] While a DP registry has the potential to provide benefits to such couples, Chapter 588, in its present form, falls far short of its potential.

II. LEGAL BACKGROUND

A. *Existing Law: Marriage in California*

California Family Code section 300 defines marriage as "a personal relation arising out of a civil contract between a man and a woman."[8] If a man and a woman wish to be married in California, the only requirement is that both parties be

---

To date, the Supreme Court of Vermont has made the most significant ruling on the subject. *See* Baker v. Vermont,744 A.2d 864, 886-87 (Vt. 1999) (holding that, under the Vermont Constitution, same-sex couples are entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples," and directing the Legislature to enact appropriate legislation); *id.* at 898 (Johnson, J., concurring and dissenting) ("[W]e should simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation"). For arguments presented in the case, see generally Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 5 MICH. J. GENDER & L. 409 (1999); Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 6 MICH. J. GENDER & L. 1 (1999).

5. *See infra* note 23 (listing various companies that provide domestic partnership (DP) benefits to their employees); *infra* note 28 (listing some of the governmental bodies in California that recognize domestic partners).

6. *See infra* notes 18-34 and accompanying text (documenting the creation and implementation of domestic partner registries and the extent to which such partnerships have been recognized).

7. CAL. FAM. CODE §§ 297(b), 299.5(a) (enacted by Chapter 588); CAL. HEALTH & SAFETY CODE § 1261 (enacted by Chapter 588). California is the second state to institute a statewide DP registry. Hawaii established the first such registry in 1996. *See generally* W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81 (1998) (evaluating the Hawaii act).

8. CAL. FAM. CODE § 300 (West 1994). Senator Pete Knight (R-Palmdale) gathered enough signatures to put an initiative on the March 2000 ballot which explicitly stated that only a marriage between a man and a woman would be recognized in California; any same-sex couple that was married legally in another state would not have a valid marriage in California. *See* Jon Matthews, *Famed Ex-Pilot Fights Gay Marriage*, SACRAMENTO BEE, Oct. 6, 1999, at A1 (recounting Senator Knight's efforts concerning the initiative and similar efforts in the California Legislature). The initiative passed, with 61% of voters in favor. Carol Ness, *Prop. 22 Passage Forces Gays to Regroup; Only 5 Counties Reject Knight Initiative*, S.F. EXAMINER, Mar. 8, 2000, at A1. Senator Knight introduced similar measures in the Legislature in 1995 and 1997, but these were defeated. *See* SB 911 (1997) (as introduced on Feb. 27, 1997, but not enacted) (proposing an exception to the recognition of marriages performed in other states to exclude same-sex marriages); AB 1982 (1995) (as amended on Jan. 12, 1996, but not enacted) (same).

capable of consenting to the marriage.[9] Married couples gain various benefits from their status as "married."[10] Unmarried couples are governed largely by contract law: if there is no contract, then there are no rights or obligations between the parties.[11]

B. Same-Sex Marriage

Same-sex couples are not permitted to marry in any state.[12] Thus, none of the benefits of marriage are automatically available to any same-sex couple, regardless of the length of their relationship.[13] Several states have enacted laws forbidding

---

9. CAL. FAM. CODE § 300 (West 1994); *see id.* § 301 (West 1994) (declaring that unmarried persons over the age of 18 who are "not otherwise disqualified" are capable of consenting to marriage); *id.* § 302 (West 1994) (asserting that minors are capable of consent upon filing a court order or the written consent of a parent).

10. These benefits include the following: the right to sue for wrongful death; rights to statutory benefits such as insurance; presumptions of joint ownership rights; inheritance rights; survivor benefits; additional Social Security benefits; and the right of an American's non-American spouse to become an American citizen. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 66-67 (1996).

11. FREDERICK HERTZ, LEGAL AFFAIRS: ESSENTIAL ADVICE FOR SAME-SEX COUPLES 15 (1998); *see, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 665, 557 P.2d 106, 110 (1976) (holding that provisions of California law regarding the division of property do not apply to unmarried couples, but that the court will enforce express contracts between such couples "except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services").

12. HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 1/3 (10th ed. 1999). Several European communities, including the countries of Sweden, Denmark, and Iceland, and some cities in Italy and Spain, have given various legal rights to same-sex couples, but the status given is not the same as "marriage." *Id.* Hungary allows same-sex couples to be covered by the common law marriage rules, but does not allow them to register as married couples. *Id.*

13. James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 LAW & SEXUALITY 649, 659 (1998). One author's view on the denial of benefits to unmarried couples is that:

> This discussion lumps these two situations together as being two instances of a single type, the discrimination against committed but unmarried couples. But actually they are not. Unmarried heterosexuals are excluded from these marriage benefits in the same way that six-year-olds are excluded from college. The disability is neither permanent nor prejudicial when, at a more appropriate time, the person chooses to claim this prerogative. That all benefits and privileges are not available at all stages of life is not presumptively discriminatory, nor even particularly unusual.
>
> Gays, on the other hand, are "excluded" from marriage benefits in the way that dogs are excluded from college. The proper question is not whether, at any given moment, one has access to all benefits society has to offer, but whether these benefits are permanently out of reach, especially through no fault of your own.
>
> ....
>
> ... Heterosexuals choose not to qualify, and that is a world of difference, a difference of ethical distinction, whether or not it rises to one of legal notice.

Id.

Same-sex couples in the countries that allow same-sex couples to form "registered partnerships" are not given all of the rights that come with marriage. CURRY ET AL., *supra* note 12, at 1/3. In Denmark, Iceland, and Sweden, same-sex couples are specifically not allowed to adopt children. *Id.* In the Netherlands, however, there is a movement to explicitly include same-sex couples in the marriage laws, which would make it the first country to do so. *Id. See generally* Craig A. Sloane, Note, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189 (1997) (concluding that the Danish Act is an important step, but that the omission of critical rights relegates registered same-sex partnerships to a less-favored

recognition of married couples of the same sex, regardless of whether the marriage was considered legal in the jurisdiction in which it was performed.[14] A very small number of states have introduced legislation that would legalize same-sex marriage.[15]

The federal government spoke on the matter in 1996, when President Clinton signed the Defense of Marriage Act (DOMA).[16] DOMA denies federal recognition of same-sex marriages performed in any state, and allows individual states to decide whether to recognize same-sex marriages legally performed in other states.[17]

---

position than that of registered (married) opposite-sex partnerships).

14. ALA. CODE § 30-1-19 (2000); ALASKA STAT. § 25.05.013 (Michie 1998); ARIZ. REV. STAT. ANN. §§ 25-101(c), 25-112 (West Supp. 1999); ARK. CODE ANN. § 9-11-208(b), (c) (Michie Supp. 1997); DEL. CODE ANN. tit.13, § 101(a), (d) (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2000); GA. CODE ANN. § 19-3-3.1 (1999); IDAHO CODE §§ 32-201, 32-209 (1996); 750 ILL. COMP. STAT. 5/201, 5/212(a)(5), 5/216 (West 1999); IND. CODE ANN. § 31-11-1-1 (West 1999); IOWA CODE ANN. §§ 595.2(1), 595.20 (West Supp. 1999); KAN. STAT. ANN. §§ 23-101, 23-115 (Supp. 1998); KY. REV. STAT. ANN. §§ 402.005, 402.020(1)(d), 402.045 (Banks-Baldwin 1999); LA. CIV. CODE ANN. art. 89, 94, 3520 (West 1999 & Supp. 2000); ME. REV. STAT. ANN. tit. 19-A, § 701(1), (1-A), (5) (West 1998); MISS. CODE ANN. § 93-1-1(2) (Supp. 1999); N.C. GEN. STAT. §§ 51-1, 51-1.2 (1999); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (1997); 23 PA. CONS. STAT. ANN. § 1704 (West Supp. 1999); S.C. CODE ANN. §§ 20-1-10, 20-1-15 (Law Co-op. Supp. 1999); TENN. CODE ANN. § 36-3-113 (1996); UTAH CODE ANN. §§ 30-1-2(5), 30-1-4 (1998 & Supp. 1999); VA. CODE ANN. § 20-45.2 (Michie Supp. 1999); WASH. REV. CODE ANN. § 26.04.020(1)(c), (3) (West Supp. 2000). Montana prohibits same-sex marriages and contractual relations designed to create a civil relationship that is prohibited under the marriage laws; DP laws may constitute such a contractual relationship. *See* MONT. CODE ANN. § 40-1-401(1)(d), (4) (1999) (stating that such contractual relationships are void as against public policy). Declaring an action to be against public policy invokes the public policy exception to the Full Faith and Credit Clause of the U.S. Constitution, which means that a state would not have to recognize the act. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971-75 (1997); *see* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *infra* note 17 (listing several analyses of the Defense of Marriage Act with respect to the Full Faith and Credit Clause). South Dakota prohibits same-sex marriages, but does not expressly prohibit same-sex marriages performed in other jurisdictions. *See* S.D. CODIFIED LAWS §§ 25-1-1, 25-1-38 (Michie 1999) (defining marriage as a contract "between a man and a woman," but not restricting foreign marriages). Until recently, California's situation was the same. *See* CAL. FAM. CODE § 300 (West 1994) ("Marriage is a personal relation arising out of a civil contract between a man and a woman"); *id.* § 308 (West 1994) ("A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."); *supra* note 8 (describing changes to these provisions through the California initiative process).

15. *E.g.*, HB 1259 (Md. 1998) (as introduced on Feb. 13, 1998, but not enacted); HB 609 (Md. 1997) (as introduced on Jan. 30, 1997, but not enacted); HB 3886 (Mass. 1999) (as introduced on Jan. 6, 1999, but not enacted); LB 407 (Neb. 1997) (as introduced on Jan. 16, 1997, but not enacted); LB 1260 (Neb. 1995) (as introduced on Jan. 17, 1996, but not enacted); HB 5517 (R.I. 1999) (as introduced on Feb. 2, 1999, but not enacted); HB 7994 (R.I. 1997) (as introduced on Feb. 3, 1998, but not enacted); SB 5346 (Wash. 1997) (as introduced on Jan. 22, 1997, but not enacted).

16. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2420 (codified at 1 U.S.C.A. § 7, 28 U.S.C.A. § 1738C (1996)).

17. *See* 1 U.S.C.A. § 7 (West 1997) (providing that the "Definition of Marriage" includes only a union between a man and a woman, and defining "spouse" as someone necessarily of the opposite sex); 28 U.S.C.A. § 1738C (West Supp. 1999) (allowing states to decide whether to recognize a same-sex marriage which is legal in another state). For arguments on both sides of the issue, see generally *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996); *The Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1996).

C. Domestic Partnerships

Somewhat recently, the language of "domestic partnership" was born.[18] "Domestic partners" may be either cohabiting same-sex couples or cohabiting, unmarried opposite-sex couples.[19] The DP originated in the private sector,[20] but several local governments have since initiated DP registries for cohabiting couples.[21]

1. Private Sector Domestic Partnerships

Private companies entered the DP world first, providing health care benefits or bereavement leave to employees' domestic partners.[22] Several companies now

---

Regarding employee benefit programs, the Defense of Marriage Act (DOMA) is of substantial concern. *See Domestic Partner Benefits Provide Equity, Flexibility for More Employees*, EMPLOYEE BENEFIT PLAN REV., June 1, 1999, at 48, *available in* 1999 WL 13937998 [hereinafter *Domestic Partner Benefits*] (expressing concerns about federal non-recognition of a same-sex marriage that is legal under state law).

The constitutionality of DOMA has been questioned on various bases. *See, e.g.*, James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 373 (1997) (showing DOMA to be prompted by no secular purpose whatsoever and characterizing it as an unconstitutional establishment of religion); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 456 (1998) (finding DOMA to be a constitutionally legitimate exercise of Congress's power under the Full Faith and Credit Clause); Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 350-51 (1998) (concluding that DOMA is unconstitutional under the Full Faith and Credit and Due Process Clauses); Alec Walen, *The "Defense of Marriage Act" and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619, 638-42 (1997) (evaluating the arguments in support of DOMA on moralistic grounds); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391-92 (1998) (concluding that DOMA is not unconstitutional in view of the history of the Full Faith and Credit Clause); Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 879 (1998) (concluding that "DOMA may violate the Equal Protection Clause"); Jennie R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351, 379 (1998) (concluding that DOMA is unconstitutional under the Full Faith and Credit Clause); Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924, 927-28 (1997) (concluding that DOMA is unconstitutional with regard to federal and state equal protection laws).

18. *See* CURRY ET AL., *supra* note 12, at 1/7-1/8 (documenting the short history of DP programs).

19. *Domestic Partner Benefits*, *supra* note 17, at 48; *see* Robert L. Eblin, Note, *Domestic Partner Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1069 n.11 (1990) (listing "domestic partner," "named partner," and "significant other" as terms used to refer to eligible participants with respect to benefit programs).

20. *See infra* Part II.C.1 (reviewing the development of domestic partner benefits in the private sector).

21. *See infra* Part II.C.2 (examining the extent of DP registries provided by local governments).

22. CURRY ET AL., *supra* note 12, at 1/7-1/8. In 1982, the *Village Voice* became the first company to offer DP benefits to its employees. *Id.* at 1/8.

provide DP benefits.[23] Most companies that do not provide DP benefits cite prohibitively high costs of insuring DPs and the difficulty of finding insurance carriers that are willing to insure DPs.[24] A general problem for businesses wishing to provide DP benefits is the ability to verify whether two people really are domestic partners, or if they are merely roommates who are attempting to take advantage of the system.[25] Unlike married couples, cohabiting but unmarried couples have no particular legal documents[26] confirming their status of "being in a committed relationship." Each company choosing to provide DP benefits has had to design and implement its own system for verifying that a person is eligible to participate in the program.[27]

---

23. Companies and organizations providing benefits to DPs (same-sex only or both same- and opposite-sex couples) include ABC, Apple Computer, CBS, Disney Corporation, Dow Chemical, Eastman Kodak, FOX, IBM, International Brotherhood of Teamsters #70, Levi Strauss & Co., Mattel, Novell, PBS, Pacific Stock Exchange, Inc., Paramount Pictures, Seagate Technology, Inc., Silicon Graphics, Southern California Gas Co., Viacom, and Warner Brothers. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 26, at 11 (July 7, 1999). United Airlines offers DP benefits to same-sex and opposite-sex couples, but the benefits provided are not equal. Edward Epstein, *United Airlines Capitulates on Partners Issues; Full Benefits Worldwide for Gay, Lesbian Couples*, S.F. CHRON., July 31, 1999, at A1. Some California universities have also extended benefits to domestic partners, including the University of California, the University of Southern California, Golden Gate University, and the California Institute of Technology. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 26, at 11 (July 7, 1999). In 1995, the State Bar of California became the first professional organization to offer health benefits to both same-sex and opposite-sex domestic partners of members. *Health Briefs: California Bar Covers Domestic Partners*, Pens. & Ben. Rep. (BNA), at 1669, 1669 (July 17, 1995). *See generally* James P. Baker, *Equal Benefits for Equal Work? The Law of Domestic Partner Benefits*, 14 LAB. LAW. 23, 49-52 (1998) (listing the types and scope of benefits offered to domestic partners by nine specific companies and two university systems).

24. *See* Baker, *supra* note 23, at 43-47 (recognizing that cost is the major factor in considering whether to offer DP benefits). *But see id.* at 44-45 (observing that companies offering DP benefits have found that the additional cost is low or zero).

25. *See id.* at 47-49 (stating that the difficulty of defining "domestic partners" and the decision about whether to limit DP benefits to same-sex couples can be barriers to extending benefits to such couples); Edward J. Juel, Note, *Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples*, 13 B.C. THIRD WORLD L.J. 317, 339 (1993) (revealing that fraud is not prevalent, and is in fact unlikely, due to employer safeguards); King, *supra* note 3, at 313-14 (noting that many employers are concerned about both increased costs and the potential for fraud).

26. *See* CAL. FAM. CODE §§ 350-360 (West 1994 & Supp. 2000) (indicating the necessity of obtaining a marriage license, and further specifying the contents of the license and other administrative details).

27. *See Domestic Partner Benefits*, *supra* note 17, at 48 (shedding light on the difficulties that implementation presents with regard to treating employees consistently and maintaining coherent company policies). Conversely, most employers do not require married couples to produce copies of their marriage licenses when they apply for benefits. *Id.* Companies usually reserve the right to ask for proof of marriage at any time, but rarely ask. *Id.* This raises an interesting point, for many opponents of DP benefits would then seem to believe that more people would lie about their status to take advantage of DP benefits. Juel, *supra* note 25, at 339-40. Is it more probable that people would lie to obtain benefits for an unmarried friend of the same sex than for an unmarried friend of the opposite sex?

2. *Domestic Partnership Registration*

Several local governments throughout the nation have established DP registries.[28] DP registration is analogous to obtaining a marriage license. The California Legislature has previously considered establishing a state registry, but it had not done so before Chapter 588.[29]

Few tangible benefits, if any, are given to registered couples,[30] but registries provide documentation by an official agency and often create legal responsibilities between the parties.[31] Exceptions exist with regard to this no-benefit policy, but not many.[32] The response to available registries is mixed.[33] The advantage of having a state or local government administer the registry is that such will provide a centralized location for companies to obtain verification information.[34]

---

28. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 26, at 11 (July 7, 1999). The City of Berkeley was the first municipality to establish a DP registry, in 1984. CURRY ET AL., *supra* note 12, at 1/8. Other local governments in California that have established DP registries include Alameda, Laguna Beach, Los Angeles, Oakland, Petaluma, Sacramento, San Diego, San Francisco, Santa Barbara, Santa Cruz, and West Hollywood. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 26, at 11 (July 7, 1999). County governments providing DP benefits include Los Angeles, Marin, San Francisco, San Mateo and Santa Cruz. *Id.*

29. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 26, at 7-8 (Sept. 5, 1999). In recent years, several bills containing almost identical language have not become law, either by failure to pass in the Legislature or by Governor's veto. *See, e.g.*, AB 1059 (1997) (as amended on Sept. 4, 1997, but not enacted) (proposing DP insurance benefits for public and private employees); AB 427 (1997) (as amended on Jan. 5, 1998, but not enacted) (proposing DP insurance benefits for public employees); AB 54 (1996) (as amended on May 1, 1997, but not enacted) (proposing DP registry with conservatorship and will provisions); AB 1982 (1995) (as amended on Aug. 19, 1996, but not enacted) (same); AB 627 (1995) (as amended on July 21, 1995, but not enacted) (same); AB 1209 (1995) (as introduced on Feb. 23, 1995, but not enacted) (proposing DP insurance benefits for public employees); AB 2810 (1994) (as amended on Aug. 8, 1994, but not enacted) (proposing DP registry); SB 2061 (1994) (as amended on Aug. 26, 1994, but not enacted) (proposing DP insurance benefits for public employees).

30. *See, e.g.*, *Wis Briefs*, A.P. Newswires, July 14, 1999, *available in* WESTLAW, APWIRES Database (noting that Milwaukee's new DP registry "carries no legal, health care, or other tangible benefit").

31. *See, e.g.*, DOMESTIC PARTNERSHIP INFORMATION SHEET 3 (City of Davis ed., 1994) (copy on file with the *McGeorge Law Review*) ("If you sign a domestic partnership [agreement], you promise to make sure that your partner has basic food and shelter. . . . If your partner can't get food or shelter for themselves, they can make you get them.").

32. For example, Florida's Broward County offers health benefits to same-sex and opposite-sex domestic partners of county employees, in addition to providing a registry. Scott Gold, *Pairs Saying 'I Do' to Legal Couplehood; Most Registering First Day Are Gay*, SUN-SENTINEL (Fort Lauderdale, Fla.), July 13, 1999, at 1A. The county also provides bidding advantages to companies who provide DP benefits to their employees. *Id.*

33. *See* Robert D. Davila, *After Five Years, Domestic Partners Law Still Praised*, SACRAMENTO BEE, Nov. 9, 1997, at B1 (noting that 368 couples had registered in Sacramento's DP registry within five years of the registry's enactment, and that most of those registrants are same-sex couples); Martin Wisckol, *Finding Benefits in Partnership; Trends: More Nonmarried Straight Couples Are Enjoying a Fringe Originally Designed for Gays*, ORANGE COUNTY REG., May 2, 1999, at A01 (mentioning that, between May 1992 and March 1999, the DP registry in Laguna Beach registered 234 same-sex couples and 28 opposite-sex couples). *But see* Donovan, *supra* note 13, at 657 (noting that the majority of couples that benefit from DP benefit plans are opposite-sex couples).

34. This means that private companies wishing to provide DP benefits will not have to design and implement their own systems, and perhaps this would create an incentive for more companies to provide DP benefits. *See* Jesse Garza, *D'Amato Wants City to Certify Same-Sex Couples*, MILWAUKEE J. SENTINEL, Apr. 28, 1999, at 7 (expressing the hope that providing a definition of DP would encourage private companies to provide

D. Senior Citizens

Senior citizen couples face a different problem. While some of these couples are same-sex, most of them are opposite-sex couples who have the option of getting married. However, many of these couples receive pension or Social Security benefits that would be significantly reduced or eliminated if they were to get married.[35] Thus, many of these couples do not consider marriage to be an economically viable option.

III. CHAPTER 588

A. Requirements for Domestic Partnership Registration

Chapter 588 establishes a statewide DP registry.[36] Two adults wishing to form a DP must complete and file a Declaration of Domestic Partnership, have it notarized, and pay a fee.[37] The requirements to form a DP are similar to those necessary to form a marriage.[38] Two persons wishing to form a marriage or a DP must be over eighteen,[39] capable of consenting to DP or marriage,[40] not related by blood in certain ways,[41] and not already married or in a DP.[42] The new law also requires that "[b]oth persons agree to be jointly responsible for each other's basic living expenses during the domestic partnership."[43] This agreement parallels an obligation that is automatically created upon the formation of a marriage: a married person is personally liable for living expenses incurred by the person's spouse while the parties are living together.[44] Partners must share a common residence,[45] which

---

DP benefits).

35. Elizabeth Fenner & Roberta Kirwan, *Sizing up the Risks of Living Together*, MONEY, July 1, 1995, at 96. Remarriage often means losing any benefits from a deceased spouse, or forfeiting a capital-gains tax exclusion on the sale of a house. *Id.*

36. CAL. FAM. CODE § 298 (enacted by Chapter 588).

37. *Id.* §§ 298, 298.5 (enacted by Chapter 588). The fee for filing a Declaration of DP is $10. Thomas D. Elias, *Calif. Homosexual Couples Register; Many Resent Getting Fraction of Benefits Granted to Others*, WASH. TIMES, Jan. 16, 2000, at C8.

38. *See infra* text accompanying notes 39-46 (comparing the requirements of DP under Chapte 588 and marriage under existing California law).

39. CAL. FAM. CODE § 301 (West 1994); *id.* § 297(b)(5) (enacted by Chapter 588).

40. *Id.* § 300 (West 1994); *id.* 297(b)(7) (enacted by Chapter 588).

41. *Id.* § 2200 (West 1994) ("Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate."); *id.* § 297(b)(4) (enacted by Chapter 588).

42. *Id.* § 2201 (West 1994) (declaring a marriage void if a party is already married); *id.*§ 297(b)(3) ("Neither person is married or a member of another domestic partnership.").

43. *Id.* § 297(b)(2) (enacted by Chapter 588).

44. *Id.* § 914(a)(1) (West 1994).

45. *Id.* § 297(b)(1) (enacted by Chapter 588).

seems to be an indication that the proposed partners are "in an intimate and committed relationship."[46]

Under Chapter 588, both parties to a DP must either be of the same sex or over the age of 62.[47] Furthermore, the new law explicitly provides that the only opposite-sex DPs that may be formed are those in which both parties are over the age of 62.[48] While an earlier version of Chapter 588 made the registry available to both same-sex and opposite-sex couples,[49] this was changed at the request of Governor Davis, who indicated that he believed that same-sex couples deserve recognition, but should not be allowed to marry, and that opposite-sex couples "could simply choose to get married."[50] The provisions for opposite-sex couples over the age of 62 were also a late addition.[51]

Chapter 588 preempts DPs created under local laws before July 1, 2000; a DP will remain valid only if the couple files a Declaration of Domestic Partnership with the Secretary of State.[52] However, local jurisdictions may retain any rights they grant or duties they impose on DPs that supplement those provided by this law.[53]

B. Rights and Obligations of Domestic Partnerships

Chapter 588 explicitly states that the obligations imposed on the partners by virtue of forming a DP are contained in Family Code section 297,[54] which currently consists of eligibility requirements for forming DPs.[55] The rights acquired by DPs are limited to those contained in Division 2.5 of the Family Code, in which no explicit rights are created, and the hospital visitation privileges in the Health and

---

46. *Id.* § 297(a) (enacted by Chapter 588). Common residence requirements are often part of defining domestic partners in benefit programs, which is often a problem for DPs in which both partners are professionals. *See Domestic Partner Benefits*, *supra* note 17, at 48 (highlighting implementation problems caused by requiring that partners share the same permanent residence). California's registry does not preclude forming a DP between partners who maintain separate residences but travel between them. *See* CAL. FAM. CODE § 297(c) (enacted by Chapter 588) ("Two people have a common residence even if one or both have additional residences. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return.").

47. *Id.* § 297(b)(6) (enacted by Chapter 588).

48. *Id.* § 297(b)(6)(B) (enacted by Chapter 588).

49. AB 26 (1998) (as amended on Apr. 8, 1999, but not enacted).

50. Robert Salladay, *Governor Forces Weaker Bill on Domestic Partners; Benefits Limited to Gay State Workers*, S.F. EXAMINER, July 8, 1999, at A6.

51. *Compare* AB 26 (1998) (as amended on Aug. 16, 1999, but not enacted) (limiting DP registration to partners of the same sex), *with* CAL. FAM. CODE § 297(b)(6)(B) (enacted by Chapter 588) (providing that partners of the opposite sex may register if both are over the age of 62).

52. CAL. FAM. CODE § 299.6(a)-(b) (enacted by Chapter 588).

53. *Id.* § 299.6(c) (enacted by Chapter 588).

54. *Id.* § 299.5(a) (enacted by Chapter 588).

55. *Id.* § 297 (enacted by Chapter 588).

Safety Code.[56] Any obligations that are created between the partners are terminated when the DP is terminated.[57]

Formation of a DP does not change the character of any property owned by either partner before the DP was formed, nor does it create any community property or quasi-community property rights.[58] The partners will proportionally own any property they acquire in shared title during the tenure of the DP; the proportions are to be determined at the time the interest is acquired.[59] Finally, formation of a DP does not change the individual or estate tax liability of a partner.[60]

Chapter 588 allows state and local employers to offer health benefits to domestic partners of employees.[61] An earlier version of Chapter 588 applied to private employers,[62] but this portion of the bill was amended at Governor Davis's request.[63] DPs seeking benefits are to submit proof of a valid Declaration of Domestic Partnership to verify that they are eligible to receive these benefits.[64] Employers are not required to provide these benefits;[65] the intent of these provisions is to give employers the ability to provide the benefits if they wish to do so.[66] Domestic partners are considered "family members" for most purposes, but not for any purpose relating to death or survivorship benefits.[67] The fact that employers are not required to provide these benefits could result in no insurance benefit gain at all for registered DPs in which one partner is a public employee. However, some employers are likely to provide benefits to eligible couples as a show of support for their relationships.[68]

Finally, Chapter 588 provides that health facilities are to accord visitation privileges to a domestic partner, the children of a domestic partner, and a parent's domestic partner, subject to certain exceptions.[69] The stated intent of Chapter 588 is to provide health facilities with "the authority to administer [visitation] policies

---

56. *Id.* § 299.5(a) (enacted by Chapter 588).

57. *Id.* § 299.5(b) (enacted by Chapter 588).

58. *Id.* § 299.5(c)-(d) (enacted by Chapter 588).

59. *Id.* § 299.5(e) (enacted by Chapter 588). The interests held by the partners may be changed by an instrument in writing. *Id.*

60. *Id.* § 299.5(f) (enacted by Chapter 588). This section provides that other laws or regulations may so provide. *Id.*

61. *See* CAL. GOV'T CODE § 22873(a) (enacted by Chapter 588) ("Any employer or contracting agency may, at its option, offer health benefits pursuant to this article, to the domestic partners of its employees and annuitants.").

62. AB 26 (1998) (as amended on Apr. 8, 1999, but not enacted).

63. Salladay, *supra* note 50, at A6.

64. CAL. GOV'T CODE § 22872 (enacted by Chapter 588).

65. *Id.*

66. *Id.* § 22867 (enacted by Chapter 588).

67. *Id.* §§ 22871, 22871.1, 22871.2 (enacted by Chapter 588).

68. *Domestic Partner Benefits*, *supra* note 17, at 48.

69. CAL. HEALTH & SAFETY CODE § 1261(a) (enacted by Chapter 588); *id.* § 1261(a)(1)-(3) (enacted by Chapter 588) (denying these visitation rights if no visitors are allowed, if the particular visitor would be disruptive to the patient or facility staff, or if the patient indicates that she does not want the particular visitor present).

in a manner that applies equally to spouses, registered domestic partners, and other immediate family members."[70] In fact, the only benefit guaranteed to domestic partners by Chapter 588 is this visitation right. Interestingly, this particular benefit is already available to unmarried couples, as health care powers of attorney have been available for several years, allowing the same visitation rights to any person specified on the form.[71]

C. Terminating a Domestic Partnership

A DP is terminated if one partner mails written notice to the other[72] or if they fail to satisfy the eligibility criteria for forming a DP.[73] Upon termination, at least one partner must file a Notice of Termination of Domestic Partnership with the Secretary of State.[74] Notice must also be given to certain third parties.[75] If notice to these third parties is not given, the partner responsible for giving notice is liable for losses incurred as a result.[76] A former partner may not enter into a new DP within six months of the filing of a Notice of Termination of Domestic Partnership unless the DP ended because one partner died or married.[77] This six-month waiting period is similar to the six-month waiting period for a divorce or a dissolution to become final.[78]

IV. ANALYSIS OF CHAPTER 588

A. Marriage versus Domestic Partnership

Polls suggest that Californians believe that same-sex couples should be given many of the legal rights that come with marriage, but they stop short of wishing to

---

70. 1999 Cal. Legis. Serv. ch. 588, sec.1, at 3373.

71. *See, e.g.*, CAL. PROB. CODE §§ 4680-4698 (West Supp. 2000) (providing for health care powers of attorney).

72. *Id.* § 299(a)(1) (enacted by Chapter 588).

73. *See id.* § 299(a)(2)-(4) (enacted by Chapter 588) (stating that the DP terminates if one partner marries or dies, or if the partners no longer have a common residence).

74. *Id.* § 299(b) (enacted by Chapter 588).

75. *See id.* § 299(c) (enacted by Chapter 588) (providing that a third party who has been shown a Declaration of Domestic Partnership must be notified of the termination of the partnership if the Declaration was necessary for the purpose of qualifying the partners for some right or benefit).

76. *Id.* Presumably, third parties who would be affected by this provision are those who have provided a benefit to the partners *because* the partners formed a valid DP under California law. If the DP terminates, the individual partners would no longer be eligible for the benefit. Thus, notice must be given to these third parties.

77. *Id.* § 298.5(c) (enacted by Chapter 588).

78. *Compare* CAL. FAM. CODE § 298.5(c) (enacted by Chapter 588) (providing for a six-month waiting period after termination, unless termination was a result of one partner's death or marriage), *with id.* § 2339 (West 1994) (providing for a six-month waiting period for a judgment of dissolution to become final). One may simply marry in order to end a DP, but there is no comparable action to end a marriage. In this sense, DP is obviously a less-favored status, because the restrictions upon it are not as great.

call any same-sex union "marriage."[79] In this sense, DP seems to be a fitting alternative.[80]

The requirements for entering into a DP under Chapter 588 are similar to the requirements for forming a marriage.[81] However, the rights and obligations that the status of marriage and the status of DP confer are markedly different. The law generally favors married couples, providing them with inheritance rights, property rights, and tax benefits.[82] The rights and obligations that DP registration provides are wholly contained within the DP provisions of Chapter 588.[83] Similarly, the DP provisions in Chapter 588 are the only source of law governing the division of jointly-acquired property after termination of the DP,[84] and the new law creates no new property rights.[85] In contrast, the Family Code contains an entire section detailing the rights and obligations of married couples,[86] and another section governing the division of property upon dissolution.[87]

Chapter 588 is silent on the subject of DPs that are registered under the laws of other jurisdictions. An earlier version of the law did recognize such DPs, but this provision was omitted before enactment.[88] Conversely, marriages performed in other jurisdictions are valid in California.[89] If married couples travel or move outside of California, they enjoy substantially the same rights in the target state as they did in California;[90] but if domestic partners travel outside of California, they become legal strangers to each other[91] unless the target state recognizes California

---

79. *See* Jennifer K. Robbenholt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 429 n.84 (1999) (noting that 60% of Californians reporting were opposed to same-sex marriage, but 60-75% approved of granting benefits such as health and family leave benefits and hospital visitation rights to same-sex domestic partners); *see also* John Cloud, *For Better or Worse in Hawaii, A Showdown over Marriage Tests the Limits of Gay Activism*, TIME, Oct. 26, 1998, at 43, 43 (reporting that 29% of Americans polled believed that "homosexual marriages" should be legal, and 64% believed that they should not be legal). *See generally They Needn't Be Called 'Marriage,' But Gay Unions Merit Legal Status*, BUFFALO NEWS, May 20, 1996, at B2 (expressing the view that same-sex unions should be recognized, but that such couples should not be allowed to adopt children).

80. *See* Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 LAW & SEXUALITY 541, 547-51 (1995) (indicating that the public opposes same-sex marriage, but favors domestic partnership).

81. *See supra* Part III.A (comparing the requirements for forming a DP under Chapter 588 with the requirements for forming a marriage under the California Family Code).

82. *See* Andrew Sullivan, *The Conservative Case for Gay Marriage*, OTTAWA CITIZEN, Aug. 26, 1989, at B3 (discussing the benefits of marriage and the benefits traditionally accorded to married couples).

83. CAL. FAM. CODE § 299.5(a) (enacted by Chapter 588).

84. *Id.* § 299.5(e) (enacted by Chapter 588).

85. *Id.* § 299.5(c)-(e) (enacted by Chapter 588).

86. *Id.* §§ 700-1620 (West 1994 & Supp. 2000).

87. *Id.* §§ 2500-2627 (West 1994 & Supp. 2000).

88. AB 26 (1998) (as amended on Apr. 8, 1999, but not enacted).

89. CAL. FAM. CODE § 308 (West 1994).

90. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

91. HERTZ, *supra* note 11, at 23.

DPs as valid.[92] This phenomenon leads to unpleasant results if one partner is injured outside of California: partners may not be entitled to visitation privileges or have any input concerning health care options.[93]

In spite of the disparity of benefits that marriage and DP legislation confer, many people support DP.[94] Same-sex couples wish to have legal recognition of their relationships, even if no other benefits are available.[95] Many same-sex couples, however, do not like the limits of DP, refusing to accept nothing less than full equality.[96] Others favor marriage over DP, but believe that DP legislation is a necessary step on the road to equality.[97] Some people believe that all unmarried couples should be eligible for benefits offered by DP programs, and argue that unmarried opposite-sex couples are in the same position as gay and lesbian couples.[98] Those who believe that DP benefits should only be available to same-sex couples argue that same-sex couples are not allowed to marry and cannot obtain benefits otherwise.[99] At least one court has agreed with this latter view, finding that such a benefit program is not discrimination under Title VII,[100] as an employee in an opposite-sex relationship is not "similarly situated" to an employee in a same-sex relationship.[101]

Opposition to DPs rest largely on moral grounds, often tied to religious beliefs.[102] The fear is that the recognition of same-sex relationships amounts to

---

92. This is the reason that DP benefits and registries have value to unmarried couples: they provide legal recognition of their relationship. Donovan, *supra* note 13, at 667.

93. The problem is much more acute if children are concerned. For instance, consider the situation in which one partner is not the biological parent and has not been allowed to adopt the child. This partner may not be allowed to make any decisions whatsoever about the child's care. HERTZ, *supra* note 11, at 23.

94. *See supra* notes 79-80 and accompanying text (discussing public opinion about DP versus marriage for same-sex couples); Coleman, *supra* note 80, at 544-45 (arguing that legalizing same-sex marriage is not appropriate, but a DP program granting the rights of marriage to same-sex couples would satisfy equal protection arguments).

95. Scott Gold, *For Gay Couples, Love Recognized*, SUN-SENTINEL (Fort Lauderdale, Fla.), July 11, 1999, at 1B.

96. Gold, *supra* note 32, at 1A.

97. *See, e.g.*, William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate*, 31 MCGEORGE L. REV. (forthcoming 2000) (discussing the step-by-step approach).

98. *See* Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN. DIEGO L. REV. 163, 178 (1995) (pointing out that marriage laws discriminate against all unmarried couples); Foray v. Bell Atlantic, a.k.a. Nynex Corp., 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (focusing on plaintiff's claim that he was "similarly situated" to a woman with a female partner).

99. Carol Ness, *Domestic Dilemmas: Legal Hoops for Same-Sex Partners*, S.F. EXAMINER, Jan. 9, 2000, at A1.

100. 42 U.S.C.A. § 2000e-2 (1994).

101. *Foray*, 56 F. Supp. 2d at 329.

102. *See, e.g.*, Donovan, *supra* note 17, at 373 (remarking that "antigay animosity . . . and religious fundamentalism are so tightly intertwined that the one implicates the other"); Carl Ingram, *Senate OKs Benefits for Same-Sex Partners*, L.A. TIMES, May 26, 1999, at A3 (quoting Senator Richard Mountjoy concerning a DP bill: "This bill is wrong. Men sleeping with men and women sleeping with women is wrong. It is wrong because God said it is wrong"). *But see* Bowers v. Hardwick, 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting) ("A State can no more punish private behavior because of religious intolerance than it can punish such behavior

legitimizing homosexuality.[103] Similarly, others point to sodomy laws as justification for opposition to same-sex marriage.[104] Moral objections, however, appear to be a secondary concern with respect to the law, in view of the fact that such things as contraceptives[105] and abortion[106] are legal despite the moral stigma that is attached to them.[107]

B. *Alternative Solutions for Obtaining Benefits*

Over the years, limited solutions to the problem of obtaining benefits for same-sex couples have presented themselves. Some couples have turned to adult adoption, which creates a legal relationship between the parties.[108] An adopting partner may deduct health benefits for the adopted partner from his or her income

---

because of racial animus.").

103. Juel, *supra* note 25, at 320-21; William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307, 315-19 (1998).

104. Mark Strasser, *Sodomy, Adultery, and Same-Sex Marriage: On Legal Analysis and Fundamental Interests*, 8 UCLA WOMEN'S L.J. 313, 333-34 (1998). Examples of sodomy laws include, e.g., IDAHO CODE § 18-6605 (1997) ("Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison for not less than five years."); UTAH CODE ANN. § 76-5-403(1) (1999) ("A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant."); *id.* § 76-5-403(3) (1999) (declaring sodomy a misdemeanor in the State of Utah); *see also Bowers*, 478 U.S. at 190 (holding that the U.S. Constitution does not protect "homosexual sodomy" as a fundamental right). *But see* William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 665 (arguing that the historical rationale for the *Bowers* decision was misguided). The view of DP as a step to same-sex marriage has prompted opposing arguments concerning sodomy and polygamy. *See generally* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997) (examining the efforts of same-sex couples to obtain the right to marry in light of the historical response to polygamy by the government); Strasser, *supra* (arguing that sodomy laws are not a bar to same-sex marriage because married couples are generally not included in their scope); Andrew Sullivan, *Three's a Crowd: The Polygamy Diversion*, NEW REPUBLIC, June 17, 1996, at 10 (refuting the idea that polygamy and homosexuality are equivalent with respect to traditional marriage).

105. *See* Eisenstadt v. Baird, 405 U.S. 438, 450 (1972) (agreeing with the Court of Appeals in striking down the Massachusetts ban on the distribution of contraceptives to unmarried persons, observing that "the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order'[;] it [was not a health measure, but] was cast only in terms of morals").

106. *See* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.").

107. Note also that morality is not a universal notion; acts prohibited in one state may be legal in another. For example, laws prohibiting gaming in California are contained in a section of the Penal Code entitled "Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals." *See* CAL. PENAL CODE § 330 (West 1999) (defining "gaming" and specifying punishments for violations of prohibitions against gaming). In Nevada, however, most forms of gaming are legal. *See* NEV. REV. STAT. ANN. § 463.0129(1) (Michie Supp. 1999) (finding the gaming industry beneficial to the State economy and declaring the public policy of the State with respect to gaming, which, in part, provides that "all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the legislature").

108. *See* CAL. FAM. CODE §§ 9300-9340 (West 1994) (providing for adult adoptions under California law).

taxes.[109] In addition, the adoptive partner may then take advantage of inheritance rights.[110] On the other hand, adoptions are irrevocable, creating obvious problems if the relationship does not last.[111] Such an arrangement may also subject the partners to prosecution under incest statutes[112] and the loss of inheritance rights with respect to blood relatives.[113] Overall, the judicial response to this solution has been mixed.[114]

One difficulty regarding the provision of DP benefits is the absence of a system to determine who is eligible for benefits and the difficulty of creating a fair system.[115] Such a system *is* in place: marriage.[116] The logistical problems of providing benefits to same-sex couples virtually disappear if same-sex marriage is legalized.[117] All of the benefits same-sex couples could realize through Chapter 588—registry, insurance, visitation rights—would flow naturally if these couples were simply allowed to marry.[118]

C. Fiscal Considerations of Chapter 588

The fiscal impact of Chapter 588 is likely to be very small. The largest expenditure will be in startup costs, the bulk of which consists of designing,

---

109. *See* I.R.C. § 105(b) (West Supp. 1999) (establishing that health benefits for a taxpayer's dependents are tax-deductible).

110. Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 386 (1995). Mechanisms such as wills and trusts have been ineffective at safeguarding the property interests of same-sex partners, as blood relatives often succeed in challenging these arrangements. *Id.*

111. *Id.* at 387.

112. *See, e.g.*, CAL. PENAL CODE § 285 (West 1999) (providing that people who fall within the degree of relation for an incestuous marriage are subject to imprisonment if they fornicate or commit adultery with each other).

113. Chase, *supra* note 110, at 387.

114. *See, e.g.*, *In re* Adoption of Swanson, 623 A.2d 1095, 1099 (Del. 1993) (granting adoption of a 51-year-old male by a 61-year-old male by construing the adoption statute to allow adult adoptions for economic reasons); *In re* Adoption of Robert Paul P., 471 N.E.2d 424, 427 (N.Y. 1984) (denying adoption of a 50-year-old male by a 57-year-old male on the ground that "[a]doption is not a means of obtaining a legal status for a nonmarital sexual relationship").

115. *See supra* notes 24-27 and accompanying text (discussing the difficulties that companies offering DP benefits have had in designing and implementing verification systems).

116. *See generally* COMMISSION ON SEXUAL ORIENTATION AND THE LAW, REPORT TO THE 18TH LEGISLATURE OF HAWAII 43-44 (1995) (concluding that "substantial public policy reasons" support extending marriage benefits "in total" to same-sex couples); ESKRIDGE, *supra* note 10 (evaluating the legal, political, and moral issues surrounding the prospect of same-sex marriage); ERIC MARCUS, TOGETHER FOREVER: GAY AND LESBIAN MARRIAGE (1998) (same); ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL, AND LEGAL ISSUES (Robert P. Cabaj & David W. Purcell eds., 1998) (same); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (same).

117. *See supra* notes 24-27 and accompanying text (discussing the problems encountered by companies concerning DP benefits).

118. Legalizing same-sex marriage would also reinforce the idea that couples wishing to gain the benefits of marriage must accept the responsibilities of marriage. Donovan, *supra* note 13, at 669.

printing, and distributing the necessary forms.[119] The collection of filing fees is expected to generate revenue that will eventually be greater than ongoing costs.[120] The cost to employers is unknown, since there is no absolute requirement to offer benefits to employees' domestic partners; costs will depend on the number of partners who seek benefits.[121] Since DPs generally account for about 0.4% of plan enrollment,[122] the costs are not likely to be great.

V. CONCLUSION

The DP registry that Chapter 588 establishes gives legal recognition to same-sex and unmarried senior citizen couples.[123] The only couples who are eligible to gain substantial benefits, however, are those in which one partner is a public employee, and these gains are speculative.[124] Senior citizens are able to keep their pension benefits without marrying, but also stand to gain little unless one partner is a public employee.[125]

The most important benefit flowing from Chapter 588 is that a framework has been established upon which advocates may build. In the future, the Legislature may decide to incorporate further rights and responsibilities into the provisions governing DPs; the existence of the new Family Code sections created under Chapter 588 makes that much easier to do.[126] However, upon the initial enactment of Chapter 588, California will not provide its DPs with any concrete benefits except visitation rights, which may already be obtained under existing law.[127] If, in fact, same-sex couples should be entitled to the many benefits of marriage, the most logical solution is to allow them to marry.[128]

---

119. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 26, at 1 (Sept. 1, 1999); *see* CAL. FAM. CODE § 298 (enacted by Chapter 588) (providing that the Secretary of State is to prepare the forms and establish filing fees).

120. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 26, at 1 (Sept. 1, 1999).

121. *See id.* (reporting the fiscal impact as "unknown, subject to employer option").

122. *Domestic Partner Benefits*, *supra* note 17, at 48.

123. CAL. FAM. CODE §§ 297-298 (enacted by Chapter 588).

124. *See supra* notes 61-68 and accompanying text (stating that public employers are not required to provide benefits to domestic partners under Chapter 588; DPs will gain no benefits if employers refuse to provide them).

125. *See supra* text accompanying note 35 (acknowledging the fact that senior citizens may forfeit benefits if they marry).

126. *See supra* note 34 and accompanying text (hypothesizing that the existence of a system to register DPs may encourage other entities to offer benefits to DPs).

127. *See supra* Part III.B (evaluating the rights provided to DPs by Chapter 588 and concluding that visitation rights in health facilities are the only benefit that DPs are certain to realize).

128. *See supra* text accompanying notes 115-18 (asserting that the problems cited in establishing DP benefit systems would be solved by legalizing same-sex marriage). *But see supra* text accompanying notes 102-07 (discussing moral objections to DP programs, which also apply to same-sex marriage). *See generally* Baker v. Vermont, 744 A.2d 864, 912 (1999) (Johnson, J., concurring and dissenting) ("Finding no legally valid justification for the sex-based classification, I conclude that the classification is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected.").

Chapter 118: Paying Attorney Retainer Fees with Separate and Quasi-Community Property

Cynthia D. Cook

Code Section Affected
Family Code § 2040 (amended).
SB 357 (Ortiz); 1999 STAT. Ch. 118

I. INTRODUCTION

Sometimes the dissolution of a marriage can be longer and more complicated than the original union.[1] When emotional and financial stakes run high, aid from an attorney is often necessary. However, due to an anomaly in the law, paying attorney's fees from marital property has been difficult.[2] Because an automatic temporary restraining order (TRO) accompanies the summons issued with every petition for marital dissolution,[3] parties seeking legal representation have been barred from utilizing their separate property to pay the attorney's retainer fees and costs.[4] Parties have been allowed limited access to community property for the

1. *See* Schnabel v. Superior Court, 21 Cal. App. 4th 548, 550, 26 Cal. Rptr. 2d 169, 170 (1993) (commenting that "[s]ometimes breaking up is hard to do. Such is the case here. Indeed, this is the third opinion we have written, and the Supreme Court has also authored one . . . [a]nd still the parties are married."); *see also* Davidson v. Davidson, 5 Cal. App. 3d 51, 53, 84 Cal. Rptr. 884, 884-85 (1970) (detailing dissolution proceedings for a couple married only two and a half years with attorney's fees of over $30,000); Esther M. Berger, *To Love, Honor and Litigate?: Dollars and Sense*, TOWN & COUNTRY MONTHLY, Jan. 1, 1998, at 111 (stating, "A large chunk of any divorce tab is, of course, the attorney's fee . . . . A contested dissolution is especially expensive, lasting from six months to two or more years, and costing from several thousand dollars to several million.")

2. *See* Telephone Interview with Emily Shattel Edelman, First Vice-President, Beverly Hills Bar Association (June 24, 1999) [hereinafter Edelman Interview] (notes on file with the *McGeorge Law Review*) (lamenting the restrictive nature of the law that only allows access to community property for the payment of attorney retainer fees during dissolution proceedings, and detailing an experience with a client who had separate property but was barred from using it to pay retainer fees).

3. *See* 1994 Cal. Stat. ch. 1269, sec. 13, at 6585 (enacting CAL. FAM. CODE § 2040(a)(2)) (requiring that a restraining order be issued with a summons to prevent the transfer or encumbrance of community, quasi-community, or separate property by the parties to dissolution proceedings). Prior law made allowances for the use of community property for the payment of attorney retainer fees, but the statute remained silent regarding the use of quasi-community and separate property for this purpose. *Id.*

4. *See* Edelman Interview, *supra* note 2 (citing personal experience with a client who had difficulty accessing funds to pay his attorney retainer fee because the couple held no community property, and how he was barred from using separate property to pay the attorney retainer fee).

payment of legal fees during dissolution proceedings.[5] However, determining which assets are community property and which assets constitute separate property is difficult in the early stages of a marital dissolution.[6] Thus, parties in a dissolution have been hindered in determining which marital property is available for use in retaining legal representation.[7] Chapter 118 was sponsored by the Beverly Hills Bar Association, the California Judges Association, and the Family Law Section of the California State Bar[8] in an effort to include separate and quasi-community property in the resources available for the parties to use for attorney's fees in a marital dissolution proceeding.[9]

II. LEGAL BACKGROUND

A. *Types of Marital Property*

California is a community property state, and California law recognizes three types of marital property: community property, quasi-community property, and separate property.[10] Community property is the property acquired by a married couple during the course of the marriage while domiciled in the State of

---

5. *See* 1994 Cal. Stat. ch. 1269, sec. 13, at 6585 (enacting CAL. FAM. CODE § 2040(a)(2)) ("[N]othing in the restraining order shall preclude the parties from using community property to pay reasonable attorney's fees in order to retain legal counsel in the proceeding.")

6. *See* Walter v. Walter, 57 Cal. App. 3d 802, 806-07, 129 Cal. Rptr. 351, 353-54 (1976) (holding that, where distinction between community property and separate property is difficult, the party in error must account for misappropriation of assets believed to be separate); SENATE FLOOR, ANALYSIS OF SB 357, at 2 (Apr. 1, 1999) (noting the difficulties of determining which property is community property, and which is separate property, in a long-standing marriage).

7. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 357, at 1 (Mar. 26, 1999) (citing an instance in which the client of a member of the Beverly Hills Bar Association was prohibited from using his own separate property to pay the attorney's retainer fee); Edelman Interview, *supra* note 2 (detailing a difficulty with prior law prohibiting use of separate property for the purpose of paying attorney retainer fees).

8. *See* ASSEMBLY COMMITTEE ON JUDICIARY, ANALYSIS OF SB 357, at 1-2 (June 22, 1999) (listing the sponsors of Chapter 118).

9. *Id.*

10. *See* CAL. FAM. CODE § 760 (West 1994) (recognizing the concept of community property); *id.* § 125 (West 1994) (discussing quasi-community property); *id.* § 770 (West 1994) (providing for the retention of separate property); *see also id.* § 760 (establishing the definition of community property as "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state"); *id.* § 125 (defining the term "quasi-community" property as including "all property, wherever situated, that would have been treated as community property had the acquiring spouse been domiciled in California at the time of acquisition"); *id.* § 770 (describing "separate property of a married person" as including "(1) [a]ll property owned by the person before marriage; [and] (2) [a]ll property acquired by the person after marriage by gift, bequest, devise or descent"). *See generally In re* Marriage of Haines, 33 Cal. App. 4th 277, 288-89, 39 Cal. Rptr. 2d 673, 680-81 (1995) (delineating the historical background of community property in California).

California.[11] California law creates a rebuttable presumption that all property acquired during the course of a marriage is community property.[12]

Quasi-community property is property that was acquired during marriage by either spouse while the spouse was domiciled in another state that would have been considered community property if he or she had been domiciled in California at the time of acquisition.[13] Separate property includes gifts received or items inherited during the marriage, as well as property acquired prior to the marriage.[14] Although separate property is very clearly defined by statute,[15] determining which property is separate property during a dissolution is often difficult.[16]

B. *Use of Marital Property During Dissolution*

The division of marital property can be controversial in a dissolution, and often the court must protect the community estate from use and abuse by both parties.[17] To protect the shared assets of a married couple, existing law provides that a restraining order is automatically included with the service of summons, restricting the use of community property, quasi-community property, and separate property until the court can equitably divide the assets.[18]

---

11. CAL. FAM. CODE § 760 (West 1994).

12. *See* CAL. FAM. CODE § 2581 (West 1994) ("[P]roperty acquired by the parties during marriage in joint form . . . is presumed to be community property . . . ."); *Haines*, 33 Cal. App. 4th at 291, 39 Cal. Rptr. 2d at 682 (stating the principles of characterization for each type of marital property).

13. CAL. FAM. CODE § 125 (West 1994); *see* Fredericks v. Fredericks, 226 Cal. App. 3d 875, 879, 277 Cal. Rptr. 107, 109 (1991) (holding that "[a] California court determining whether property is quasi-community must first decide whether the property would have been community property in this state had the parties been domiciled here at the time of its acquisition.")

14. *See* CAL. FAM. CODE § 770 (West 1994) (stating that the "[s]eparate property of a married person includes all of the following: (1) [a]ll property owned by the person before marriage; (2) [a]ll property acquired by the person after marriage by gift, bequest, devise, or descent.")

15. *See id.* (classifying separate property as any property gained by a spouse prior to the marriage, and any property received by a spouse through gift or bequest).

16. *See generally* WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE FAMILY LAW 8:30–8:560-574 (1999) (clarifying that parties may agree to the characterization of property at the time of dissolution, but absent such an agreement, characterization is made by the court based primarily on the time of acquisition); Joseph W. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 207-08 (1989) (explaining that "[r]echaracterization of assets may result from commingling of non marital property with marital property such that the nonmarital property is no longer identifiable").

17. *See, e.g.*, Van Hook v. Van Hook, 147 Cal. App. 3d 970, 980, 195 Cal. Rptr. 541, 547 (1983) (speaking of the court's interest in freezing assets until a final decision can be reached in the dissolution).

18. *See* CAL. FAM. CODE § 2040(a)(2) (amended by Chapter 118) (mandating that the restraining order be served along with the summons, restraining both parties from "transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life"); *see also* CAL. CIV. PROC. CODE § 412.20 (West 1973) (explaining the required process for proper service, and providing a description of the content of a proper summons); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 357, at 1 (Apr. 1, 1999) (declaring that the procedure for serving a summons on the other party in dissolution proceedings automatically includes the issuance of a temporary restraining order).

However, two exceptions existed as to the requirement of a restraining order. One exception allows parties to use community property assets to retain counsel in the pending dissolution proceedings.[19] Significantly, prior to Chapter 118 the law did not establish an exception permitting quasi-community property and separate property to be used to pay attorney's fees and costs during dissolution.[20]

The second exception to the restraining order requirement provides that community, quasi-community, and separate assets can be used by the parties for expenses incurred during the "usual course of business or . . . [for] necessities of life."[21] For non-necessity expenses, called "extraordinary" expenditures, a party must give five days' notice to the other party and account to the court for these expenditures.[22] Attorney retainer fees and initial discovery costs are typically a large enough expenditure to be considered "extraordinary," and accounting to the court for that expenditure often requires legal representation.[23] Thus, attorneys whose clients do not have access to community property with which they can pay retainer fees must represent their clients in these extraordinary expenditure proceedings without having been paid a retainer fee.[24]

This type of scenario led the Beverly Hills Bar Association to sponsor Chapter 118. One of their members found the law an impediment to a client who wished to retain the attorney's services but was prevented from using separate property to do so.[25] Prior to Chapter 118, a spouse could not utilize separate property or quasi-

---

19. *See* 1994 Cal. Stat. ch. 1269, sec. 13, at 6585 (enacting CAL. PEN. CODE § 2040(a)(2)) (providing only for the use of community property for the payment of attorney retainer fees).

20. *Id.*; *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 357, at 3 (Mar. 23, 1999) (stating that the statute is silent on the use of quasi-community and separate property for payment of retainer fees to an attorney for assistance in dissolution proceedings.)

21. CAL. FAM. CODE § 2040(a)(2) (West Supp. 1994). *See generally* Droeger v. Friedman, Sloan & Ross, 54 Cal. 3d 26, 42, 812 P.2d 931, 940 (1991) (stating that "debts incurred after separation, other than for the necessaries of life, are the separate obligation of the spouse who incurred the debt").

22. *See* CAL. FAM. CODE § 2040(a)(2) (amended by Chapter 118) (requiring each party "to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all expenditures made after service of the summons on that party").

23. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 357, at 3-4 (Mar. 23, 1999) (claiming that while

> "nothing in existing law prevents a party from petitioning the court for an order allowing the party to use his or her own separate property, upon a clear showing of ownership, for any use whatsoever, including payment of his or her attorney's retainer, the attorney may have to go to court without the retainer having been paid beforehand").

24. *See id.* at 3 (noting that, while a party can petition the court when a party wants to use quasi-community or separate property, the party might still need representation to present such a petition before the court).

25. *See* Edelman Interview, *supra* note 2 (clarifying that the purpose of letting spouses utilize the community property for retainer fees was to enable a spouse who otherwise would not have had funds to retain an attorney for the impending proceedings).

community property to pay retainer fees, but was allowed to use community property for that very purpose.[26]

III. CHAPTER 118

Chapter 118 remedies an anomaly in prior law that prevented parties from utilizing separate or quasi-community property to pay attorney's retainer fees.[27] The new law continues to allow a party to use community property for payment of retainer fees, but specifically allows parties in a dissolution proceeding to use quasi-community property and separate property to pay attorney's fees as well.[28]

This broadening of the exceptions to the automatic restraining order provides parties greater access to their separate resources.[29] As a safeguard, parties using community property and quasi-community property to pay attorney's fees must "account to the community for the use of the property."[30] Similarly, if a spouse makes an error and uses property that is later determined to belong to his or her spouse, then he or she will be required to account to the other for the expenditure of that property.[31] Thus, Chapter 118's provision for an accounting to the community or to the other party for expenditures for attorney's fees is meant to protect the available assets from misuse during dissolution proceedings.[32]

IV. ANALYSIS OF CHAPTER 118

The purpose and effect of Chapter 118 is to correct a minute oversight in the law.[33] When a married couple does not have community property, the restriction upon use of quasi-community and separate property hinders payment of attorney's fees in anticipation of dissolution proceedings.[34] The purpose of allowing access to community property for payment of attorney fees is to make legal representation

---

26. 1994 Cal. Stat. ch. 1269, sec. 13, at 6585 (enacting CAL. FAM. CODE § 2040(a)(2)); *see, e.g.*, Edelman Interview, *supra* note 2 (detailing an experience in which a client was prevented from using his separate property to pay Ms. Edelman's retainer fees).

27. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 357, at 1 (June 22, 1999) (claiming that Chapter 118 will "correct what seems to be an oversight in the law[, as] . . . [a]llowing parties to a dissolution to use community property to retain legal counsel, as the [law] currently does, but not to use their own separate property, seems illogical").

28. CAL. FAM. CODE § 2040(a)(2) (amended by Chapter 118).

29. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 357, at 2 (Mar. 26, 1999) (explaining that the intent of the amendment is to expand available resources for the procurement of an attorney to parties in dissolution proceedings).

30. CAL. FAM. CODE § 2040(a)(2) (amended by Chapter 118).

31. *Id.*

32. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 357, at 4 (Mar. 26, 1999).

33. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 357, at 1 (June 22, 1999) (noting that Chapter 118 was drafted to correct an oversight in the law).

34. *See* Edelman Interview, *supra* note 2 (providing anecdotal evidence showing that restricting the use of quasi-community property and separate property can inhibit a party's ability to pay attorney retainer fees).

possible for all parties.[35] Because community property is utilized for this purpose, preventing parties from utilizing quasi-community property or separate property as a means toward the same end seems illogical.[36]

Quasi-community property, along with community property, is viewed by the court as comprising the community estate.[37] This community estate is then split equitably by the court among the parties.[38] Thus, judicial treatment of quasi-community property is no different than treatment of community property in dissolution proceedings.[39] Consequently, the result is the same whether attorney's fees are paid from community property or quasi-community property, because both combine to form the community estate that is divided upon dissolution.

Because dissolution proceedings are designed to split the community estate, separate property is not intended to be within the scope of the court's jurisdiction.[40] Separate property becomes involved in dissolution proceedings only when parties disagree as to the categorization of particular assets as community, quasi-community, or separate property.[41] Thus, use of a wife's separate property to obtain legal representation for herself would not affect the sum of the community estate that the court seeks to protect until the estate's division.[42] Even if one spouse uses property later determined to be community property to pay retainer fees, the utilization of that community property for payment of such fees is permissible

---

35. *See id.* (declaring that the purpose behind allowing access to community property for payment of attorney's fees was to aid parties in obtaining legal representation).

36. *See supra* note 27 and accompanying text (opining that preventing access to quasi-community property and separate property while allowing use of community property for payment of attorney retainer fees is not logical).

37. Craig v. Craig, 219 Cal. App. 3d 683, 686, 268 Cal. Rptr. 396, 397 (1990).

38. *Id.*

39. *Id.*; *see also* CAL. FAM. CODE § 2580(c) (West 1994) (asserting that "a compelling state interest exists to provide for uniform treatment of property").

40. *See* Reid v. Reid, 112 Cal. 274, 277, 44 P. 564, 564 (1896) (stating that the trial court had no jurisdiction to divide separate property belonging to Mrs. Reid); Doris v. Doris, 160 Cal. App. 3d 1208, 1215, 207 Cal. Rptr. 160, 164 (1984) ("It is well established that the family law court has no jurisdiction in dissolution of marriage proceedings to dispose of either party's separate property.")

41. *See supra* note 16 and accompanying text (observing that separate property and community property can become commingled over the course of a marriage, and that the court's role is to determine which assets are part of the community estate in order to divide the shared assets equitably). *See generally* Gowan v. Gowan, 54 Cal. App. 4th 80, 88, 62 Cal. Rptr. 2d 453, 456-57 (1997) ("When a trial court concludes that property contains both separate and community interests, the court has very broad discretion to fashion an apportionment of interests that is equitable under the circumstances of the case."); Hirsch v. Hirsch, 211 Cal. App. 3d 104, 109-10, 259 Cal. Rptr. 39, 43 (1989) (demonstrating the court's ability to characterize property as either separate or community in nature during dissolution proceedings).

Separate property is not part of the community estate. Because the court has an interest in protecting the community estate but not in overseeing the access each party has to his or her own separate property, use of separate property to pay attorney's fees will not diminish the community estate that the court seeks to protect. *See supra* note 41 and accompanying text (explaining that "separate property is not . . . within the scope of the court's jurisdiction").

42. CAL. FAM. CODE § 2040(a)(2) (amended by Chapter 118).

under California law.[43] If the property used is later determined to belong to the spouse as separate property, the clause in Chapter 118 providing for accountability among parties sufficiently safeguards against wrongful use.[44] Therefore, restricting access to separate property is illogical, because such access would not diminish the community estate to any degree greater than is already allowable under California law.[45]

V. CONCLUSION

As difficult as marital dissolutions can be, attorneys are a necessary part of the process. While a TRO provides protections against the use and abuse of marital assets to the detriment of the other party, exceptions must exist to allow for the retainer fees of attorneys.[46] Under Chapter 118, the exception to a TRO that allows access to community property for the payment of attorney retainer fees is extended to include quasi-community property and separate property.[47] This extended access is beneficial because clients will no longer worry about what type of assets they may utilize to obtain legal representation, and attorneys will no longer have to represent clients in dissolution proceedings prior to receiving an initial payment for their services.[48]

---

43. *Id.*

44. *See supra* note 27 and accompanying text (proclaiming prior law to have been illogical because it prevented access to quasi-community property and separate property while allowing use of community property for payment of attorney retainer fees).

45. *Supra* note 27.

46. *See supra* note 3 and accompanying text (detailing the purpose behind, and the procedures required in, issuing a TRO upon service of a summons in a dissolution proceeding). *See generally* Berger, *supra* note 1, at 111 (warning that, prior to dissolution, a "spouse may squirrel away assets, 'shrinking' his or her apparent financial worth in an effort to drive down the final settlement or judgment amount," and recommending that parties hire a forensic accountant to find any missing or squandered money).

47. *See supra* Part IV (analyzing the effects of implementing Chapter 118).

48. *See supra* notes 23-24 and accompanying text (stating that, under prior law, attorneys often had to appear at "extraordinary expense" hearings prior to being paid attorney retainer fees if their clients did not have access to community property); *see also supra* note 29 and accompanying text (emphasizing that the purpose of Chapter 118 is to broaden access to all types of marital property for the benefit of the parties to a dissolution).