

## The Rights of Same-Sex Spouses

By Diana Richmond

The California Supreme Court decided *In re the Marriage Cases* (47 Cal. 4th 757 (2008)) against a backdrop of marriage-like legal rights already available through registered domestic partnerships (see Cal. Fam. Code §§ 297–299.6).

It is important, regardless of practice area, to recognize how legal rights for same-sex spouses compare with those of opposite-sex spouses. For example, while employment benefits available to spouses in California must be provided to a same-sex spouse or a registered domestic partner (Cal. Gov. Code § 12921(a)), not everything is truly “equal,” particularly when one considers the impact of the federal Defense of Marriage Act (DOMA, 1 U.S.C. § 7, 28 U.S.C. § 1738C).

### Registered Domestic Partners

Same-sex spouses will have the same rights under California law as opposite-sex spouses, with only shades of difference for those who were registered domestic partners immediately before marrying. There is no need to dissolve an existing registered domestic partnership before getting married to the same person. However, the origin of the couple’s community property rights and other marital rights will be considered as of the date of registration of their domestic partnership, not the date of their marriage (Cal. Fam. Code § 297.5).

For couples who registered before January 1, 2005, the rights revert back to the initial date of registration unless the couple, before June 30, 2005, made a written agreement akin to a premarital agreement that changed their rights (Cal. Fam. Code § 299.3). Thus, for example, real estate acquired or employee benefits earned by either spouse while they were registered domestic partners is presumed to be their community property (Cal. Fam. Code §§ 760, 297.5), even if it was acquired years before their marriage.

A child born to either partner while they were registered is presumed to be a child of the couple (Cal. Fam. Code §§ 7540, 297.5(d)). In like vein, if the couple dissolves their marriage, the duration of the marriage for determining spousal support rights may predate the marriage by the amount of time the couple were registered domestic partners (Cal. Fam. Code §§ 4336, 297.5(b)).

Same-sex couples who are registered domestic partners already have a fiduciary duty toward each other, and their premarital agreements are likely to be evaluated under different standards as a consequence. (See *In re Marriage of Burkle*(2006) 139 Cal. App. 4th 712.)

### Discrimination Under DOMA

The chief differences lie in rights created under federal law. The *Marriage Cases* rest on the California Constitution and not federal law. Under DOMA: (1) all federal rights and obligations created for spouses apply only to a man and woman, and (2) states are not required to recognize a marriage performed in another state between two persons of the same sex. Under the first prong of DOMA, same-sex spouses are deprived of well over 1,000 benefits otherwise provided for married couples. Consider taxes. Married same-sex couples may file joint California income tax returns (Cal. Rev. & Tax. Code § 18521(d)), but they remain single taxpayers for federal purposes. Estate planning also is entirely different: Because of DOMA, none of the tax benefits designed for spouses applies to same-sex couples. This poses a challenge for surviving same-sex spouses who own community property but who are not entitled to a step-up in basis (26 U.S.C. § 1041). Nor are same-sex spouses entitled to the unlimited marital deduction, by which a spouse may give the other spouse property without taxation (26 U.S.C. § 2056). Rights created for spouses in dividing retirement benefits (See 29 U.S.C. § 1056(d)(3)(B)) also are not available to same-sex spouses. Similarly, DOMA precludes treating members of same-sex couples as spouses under immigration rules and for Social Security benefits.

### Relocation Pitfalls

Portability of rights is not necessarily available to same-sex spouses. Only one other state—Massachusetts—recognizes same-sex marriage. Many states have precluded any recognition of an out-of-state same-sex marriage by application of their own DOMAs. And some states will not recognize joint parentage for same-sex spouses. Thus, it may be necessary for same-sex spouses to undergo the redundant step of a second-parent adoption or, if possible, obtain an adjudication of parentage before moving to another state.

Full marriage equality will not be realized until DOMA is eliminated and all states recognize out-of-state same-sex marriages. Until then, lawyers will need to be aware that there are still differences for same-sex spouses and advise accordingly. And they’ll also have to deal with the consequences of the November election, when California voters will be asked to adopt or reject a ballot proposition that could overturn the landmark decision that sparked this discussion.

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