Estate planning for Non-traditional Couples

By Howard S. Klein and Geoffrey M. Murry

Although the majority of estate plans created by practitioners will contemplate marriage between the settlor and a person of the opposite sex, life and the practice of law in the 21st century dictate that not all of those who seek the services of estate planning specialists and other estate and probate professionals will fit that mold. With that simple fact in mind, the author here surveys the current legal landscape in California and addresses the concerns of providing legal counsel to clients whose households challenge the traditional concepts of a family.

I. THE NEW LANDSCAPE OF CALIFORNIA DOMESTIC PARTNERSHIPS

The Establishment of State Recognized Domestic Partnerships

In 2000, the California legislature enacted and then Governor Davis signed legislation involving same-sex partners living together in committed relationships. The signal legislation in this field, the California Domestic Partner Rights and Responsibilities Act ("DPRRA"), [AB 205, comprising Division 2.5, including Sections 297-299.6, of the Family Code], was signed into law in 2003 and became fully effective January 1, 2005, creating perhaps the broadest grant of a marriage-like status to same-sex couples among those 49 states that do not recognize same-sex marriage[1]. As a result, nonmarried eligible couples who have already properly registered as domestic partners or who so register in the future have essentially all the rights and obligations of married persons under California law[2]. DPRRA was amended in 2004 by a "cleanup bill" [AB 2580, being Family Code Section 297.5(m)(1)], which provided that a domestic partnership would be deemed to exist on the date of its registration with the state (thus giving retroactive effect to the provisions of DPRRA as to those registered domestic partnerships which predated the effective date of the statute).

The requirements of registration as domestic partners are largely identical to the requirements of marriage, with the exception that the parties must live together and, if the parties are *not* of the same sex, that at least one of the parties meets the eligibility requirements for the receipt of Social Security old-age benefits and at least one of them is aged over 62 years. As with prospective opposite-sex spouses, neither of the parties can be already married or registered as a domestic partner; they cannot be related by blood within the degree that the blood relationship would prohibit marriage; and each must meet the age and consent requirements.

Family Code Provisions

Family Code Section 297.5(a) makes explicit the legislative intent that its provisions be construed liberally in order to provide a full range of rights to registered domestic partners, whether such rights, protections and benefits, and responsibilities, obligations and duties derive from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law. Thus, registered

Howard S. Klein

domestic partners have been accorded hundreds of rights and obligations of community property and community debt, support, fiduciary duties, duties with respect to children of the relationship that married persons have, hospital visitation, medical decision-making, financial and legal decision-making, recovery for wrongful death, access to records, sick leave, financial support, community property and related rights, "marital privileges" in legal proceedings, and fiduciary duties to one's domestic partner.

Probate Code Provisions

Registered domestic partners now have essentially the same rights as married persons under the Probate Code. These include (a) the right to an intestate share of a deceased partner's estate[3], (b) the same priority to a right to appoint an administrator of a deceased partner's estate[4], and (c) the same priority of right to serve as or nominate a conservator[5]. The vast majority of changes to the Probate Code consist of amendments to the statutory language to provide for domestic partners or domestic partnerships as a logical analog to statutes mentioning spouses and marriage[6] or to include domestic partners in the list of affected or interested persons[7].[8] Entirely new

Probate Code sections, added in 2001, include Sections 6122.1, which is the analog to Section 6122, regarding the effect of divorce on spousal testamentary provisions, and Section 4716, which gives a patient's domestic partner the same authority as would have a spouse in making health care decisions for the incapacitated patient.

Rights Not Conferred Upon Registered Domestic Partners

The Act does not affect the California Defense of Marriage Act[9], which provides that the only lawful marriage in this state is one between a man and a woman. More importantly, the Act expressly does not amend or modify federal law[10].

This is highly significant from a tax standpoint in several ways: It denies to domestic partners the federal estate tax marital deduction and the ability to file joint federal income tax returns. Further, Internal Revenue Code section 1041 does not apply to transfers made in connection with the dissolution or legal separation of registered domestic partners, because 1041 only applies to transfers involving spouses or former spouses. In addition, the spousal property transfer exemption of Internal Revenue Code Sections 2056 and 2523 probably does not apply, and such transfers would be treated as taxable gifts.

With regard to taxation on the California state level, Governor Schwarzenegger recently signed into law a bill that allows registered domestic partners to file joint state tax returns. Although having no effect on federal treatment of domestic partners, SB 1827, which became law in early October, is likely to result in beneficial state tax treatment for many registered domestic partners. However the benefits may be outweighed by the potential complications of an individual filing a joint state tax return but still being forced to file federal taxes as single or head of household.

Finally, registered domestic partners are denied federal rights involving Social Security, Medicare, veterans' benefits, immigration, ERISA and family leave, among others.

Termination or Modification of Registered Domestic Partnership

Family Code section 299 sets forth two currently available procedures for terminating a registered domestic partnership. First, if the partnership is less than five years in duration, there are no children of the relationship, the asset and debt amounts are *de minimus*, there is no real property except for a short-term lease and the parties waive support and have executed a property settlement and related documents, the parties may execute and submit to the Secretary of State a Notice of Termination of Domestic Partnership. This procedure is similar to the summary dissolution procedure of Family Code section 2400.

For all other registered domestic partnerships, the Family Court has exclusive jurisdiction over proceedings relating to the dissolution or nullity of the partnership and the legal separation of partners. The procedures are equivalent to those involving married persons. Thus, all rights and obligations that attach in marital status proceedings will apply to domestic partnership status proceedings, including equal division of community property, debt liability, spousal support, standard temporary restraining orders ("ATROs"), child custody and support determinations, and *pendente lite* orders. Note that the ATROs, which are set forth in Family Code Section 2040, are just as significant a factor in estate planning which occurs during the dissolution of a domestic partnership as they are in estate planning in the course of a marital dissolution.

Possible Downsides to Registered Domestic Partnerships

Clearly, one or both of the domestic partners may elect not to register under DPRRA, for one or more of the following reasons:

1. The wealthier partner may not wish to commit to paying support either during the partnership or following domestic partnership dissolution.

2. The higher earner may wish to retain his/her earnings as separate property rather than have them characterized as community property, as to which the lower earner would have a one-half entitlement.

3. The equal division of community property in the event of dissolution may be unattractive to the partner whose efforts produced most of that property, and that partner might just want to retain that property, or most of it, as his/her separate property.

4. If one of the partners is a spendthrift, the other partner might not want to be liable for the spendthrift's debts.

5. If one of the partners is a low-income individual who would

otherwise qualify for state benefits, e.g. Medi-Cal, that qualification might be eliminated if the state considered the other partner's income, which would be the case with registered domestic partners.

6. The partnership can only be terminated judicially unless it is short term with no children and but little assets and the partners waive support.

Options Available to Domestic Partners

Domestic partners can elect to either register or not register under the Act. The decision should not be a strictly emotional one, but should involve considerations of the finances and health of each of the partners, the stability of the relationship, among other issues, and the pros and cons of a entering into a legal relationship which is entirely "marriage-like".

Under any circumstances, the domestic partners should seriously consider contracting as to the manner, rights and responsibilities of holding property, income, debt and support issues. And, of course, the parties should do estate planning. In this regard, while there is no federal estate tax marital deduction, the registered domestic partnership could involve the community property exclusion and the use of an equitable life estate on the death of the first partner to die.

II. ESTATE PLANNING FOR COUPLES WHO HAVE NEITHER MARRIED NOR REGISTERED AS DOMESTIC PARTNERS

Ethical Issues

The attorney should explain to the partners (a term used throughout to indicate two persons of either same or opposite-sex who have neither married or officially registered as domestic partners) that an attorney must represent the interests of each of his/her clients and may not keep any confidences from either one of them (as compared to keeping what he/she or either partner tells the other partner or him/her from third parties). The attorney must explain the possibility of conflicts that may arise in ownership of assets (as belonging either to one partner or the other partner or both of them) and as to the distribution of assets.

The attorney must advise that both of the partners have the right to seek independent counsel. The attorney must also remember that he or she can represent both partners only if they sign a conflict of interest waiver/dual representation letter, and the partners have been advised that they have the right to seek counsel about that letter. Finally if an actual conflict arises, and the attorney cannot properly represent both clients he or she must withdraw as counsel and advise the parties to obtain independent legal counsel.

Understanding the Marital Status and Family Relationships of the Partners

For couples in this situation who have not together gone through the marriage or registration process, it is important that the attorney inquire as to the exact, current marital status of each of the partners, the names and ages of any minor children that each of the partners have, and of the other parent of such minor children. It is of critical importance that no spouse or minor child be in the position of being considered an omitted spouse or child of that partner and thereby acquire an intestate share in that partner's estate. In this regard, see Probate Code Sections 21623.

The recent case of *Elisa B. v. The Superior Court of El Dorado County* (2005) 37 Cal.4th 108 adds an important dimension to considerations of estate planning for non-traditional couples, especially those households headed by two persons of the same sex. In *Elisa B.* the California Supreme Court found that a woman who had agreed to raise her partner's twin children, had supported the artificial insemination process, and had held the children out as her own was a parent per the Uniform Parentage Act (Family Code Section 7600 et seq.). The Supreme Court's decision was made regardless of the fact that the couple had not registered as domestic partners.

The decision in *Elisa B.* must be taken into account when providing services to individuals or couples who have not registered but whose households include children with whom either partner has taken a parental role. It is a foreseeable result of the Supreme Court's decision that a child born into such a household could later claim the status of an omitted heir.

Inquiry into Existing and Future Assets and Obligations

The attorney should inquire closely into the nature, extent and ownership of all principal assets and obligations before proceeding further. Further, the attorney should not be satisfied by the clients' word as to the titling and beneficiary designations of significant assets; rather, the attorney must examine the deeds to all real property, the most recent statements of brokerage accounts, and the face sheets and beneficiary designations of life insurance policies and retirement benefits.

Are the parties in agreement as to the distribution of those assets? What is the partners' intent as to the distribution of those assets and of significant assets, for example a residence, to be acquired in the foreseeable future?

Does either or both of the partners have significant debts? Is it the intention of the partners, or either of them, to incur substantial debt in the foreseeable future - for example, in connection with the purchase of a residence? What is the position of each party as to those debts? If the debt is, or is to be, joint, will the partners be jointly and severally liable? If the debt is, or is to be, an individual debt, will the debtor partner hold the other partner harmless and agree to defend him/her therefrom?

Explanation of the Property Law as it Affects the Cohabitants

The parties must be given to understand the differences between separate property, joint tenancy, tenancy in common, and payable on death holdings as it affects their property. Are the parties in agreement as to what that holding should be as to each principal asset?

Cohabitation Agreement

Because the cohabitants will be holding many assets during the period of their life together, it is important that they execute a cohabitation agreement in addition to the usual estate planning documents.

In the cohabitation agreement, the partners should define the rights and responsibilities flowing from their relationship as to:

(1) The respective interests in real and personal property acquired by either or both of them;

(2) The interest of a partner, if any, in the income of the other partner;

(3) Whether a partner will commit to the ongoing financial support of the other partner;

(4) The right of a partner to be supported, and of the other partner to give that support, if the cohabitation terminates;

(5) Whether the parties agree to pool their income;

(6) Whether the parties agree to hold all property that is acquired during their relationship in accordance with the law governing community property;

(7) The agreement of the parties with respect to raising and supporting any children of the relationship, recognizing that the parties' agreement regarding children is not binding on the Court should the matter ever come before the Court for determination.

The California Court of Appeal in the famous case of *Marvin vs. Marvin* (1976) 18 Cal.3d 660, held that the Court shall enforce such an agreement (except of course with respect to child issues) so long as the agreement does not rest on the consideration of "meretricious sexual services". Cohabitation agreements are governed by the law of contract, which is contained in the Civil Code, and not by the Family Code, except regarding child issues.

Usual Estate Planning Documents

The parties will probably need to execute the usual documents of estate planning, including wills, a joint living trust or separate living trusts, advance health care directives, general and/or limited durable powers of attorney for financial management, nominations of conservator, funeral and burial/cremation instructions, trust transfer deeds, assignments of assets, and so forth.

The estate planner must remember that most of the favorable federal tax laws which are central to estate planning for married couples just do not work with non-married cohabitants (or to same sex domestic partners, whether registered or not). For example, there is no marital deduction for non-marrieds. There is no inter-spousal deeding without adverse tax consequences. Thus, the simple placement of one cohabitant's property into a joint trust may constitute a taxable gift. So may the pooling of assets or the deeding of one cohabitant's property to the other in order to equalize the estates. In short, even transactions that appear innocuous must be reviewed closely.

Naming Back-Up Fiduciaries

It is essential that the estate planner have the clients name alternate and second alternate executors and successor and second successor trustees, agents and conservators, so that if the partner of the testator, trustor, principal or conservatee does not survive or is incapacitated, the family of the testator, trustor, principal or conservatee can not step in to

drastically alter the administration of the will, trust, advance health directive, power of attorney, or conservatorship. This occurs frequently when the family is estranged, distant or hostile and thus might be motivated to thwart the intent of the client. Further, if the client feels strongly that he/she does not want the family to serve in a fiduciary capacity, that should be expressly stated in the document.

No Contest Clauses

To help ensure that the estate plan of the cohabitants is not overturned by a contest of the principal dispositive instruments, it is frequently quite helpful to include no contest clauses in the trust(s) and will(s) directing that unsuccessful contestants receive nothing under the instrument. And, of course, the no contest clause should be coupled with a provision leaving some distribution of modest, but not inconsequential, value to those family members or others who might be expected to mount a challenge if they had nothing to lose by doing so.

III. ESTATE PLANNING FOR COUPLES WHO HAVE REGISTERED AS DOMESTIC PARTNERS

Ethical Issues

The issues presented here, with respect to potential conflict of interest, actual conflict of interest, dual representation versus independent counsel, and conflict waiver letters are the same as those set forth in Section II, above.

Understanding the Family Relationships of the Partners

By definition, neither partner can be married for there to be a valid registered domestic partnership. (See Section I, Requirements for Domestic Partnerships, above.) The discussion of family relationships, including the spousal support obligation to a former spouse, the child support obligation to the other parent of a minor child, and the need to name any such former spouse or minor child in the estate planning documents in order to avoid their treatment as omitted and entitled to an intestate share, is equally applicable here.

Ensuring that the Domestic Partnership Has Been Registered

The attorney must not take the partners' word for the critical fact of registering with the Secretary of State under DPRRA. The attorney should request and examine a copy of the Declaration of Domestic Partnership that was filed in Sacramento. This is of great importance in light of the several different species of domestic partnership that were available at one time both before and concurrent with the statewide recognition. Municipalities, like the City of West Hollywood, and counties, like San Francisco, had allowed couples of varying definitions to register as domestic partners. These registrations were of relatively little effect and were often used only to secure health insurance and other work-related benefits for partners of those fortunate enough to have worked for employers willing to extend those benefits to non-married couples.

The California Court of Appeal in a decision filed in September, 2006, found that a lesbian couple's having registered as domestic partners *only* with the City and County of San Francisco in 1994, as part of that local government's domestic partnership program, was not sufficient to bring them within the purview of the Family Code and hence the jurisdiction of the Superior Court for purposes of the property division and orders for partner support and the payment of attorney's fees. "To obtain the benefits of the current law . . . compliance with the provisions for formation of a domestic partnership under the Domestic Partner Act, including formal registration. is necessary." *Lena Velez v. Krista Smith* (2006) 142 Cal.App.4th 1154, 1165.

California local governments no longer provide domestic partner registration, as the statewide recognition has taken precedence. Regardless there are likely many potential clients who are under the impression that their original registration with a city or county has the same force and effect as the statewide institution.

Inquiry into Existing and Future Assets and Obligations

The discussion of this topic in Section II, above, is equally applicable here.

The estate planner must also be aware that the laws of community property and of joint liability for community debts are applicable in the case of registered domestic partnerships. Thus, assets acquired from and after the time of registering with the Secretary of State are presumed community property, and if they were purchased with the personal service earnings of either or both of the partners during that period are certainly community property unless the parties have contracted to the contrary. And if, during the same period, one of the partners has incurred a debt, that debt is also owed by the other partner, unless the parties have contracted to the contrary.

Explanation of the Property and Spousal Support Laws as They Affect Registered Domestic Partners

With respect to property, not only must the attorney explain to the registered domestic partners the differences between separate property, joint tenancy, tenancy in common, and payable on death holdings, but, most importantly, how community property, both with regard to assets and debts, factor into the partners' relationship. In particular, the attorney must carefully explain how community property differs from separate property with respect to lifetime entitlement, the ability of the owner to transfer it by inter vivos or testamentary instrument, and perhaps most importantly the statutory requirement of an equal division of the community property in the event of a dissolution of the domestic partnership, which is exactly comparable to the situation in a marital dissolution.

The attorney must explain to the registered domestic partners that the duties to support the other partner during the partnership, and after the dissolution of the partnership through alimony awarded by the Court, are just as applicable as in the case of marriage. Further, the Family Court always has jurisdiction over the rights of minor children, whether such children are born of marriage or of domestic partnership (registered or not).

The registered domestic partners must be given to understand that their legal relationship is generally that of a marriage except that virtually none of the benefits that federal law confers upon spouses apply to same sex couples. Those excluded federal benefits include, but are by no means limited to, those relating to immigration, Social Security, Medicare, treatment as a couple under federal tax law, veterans' benefits, and federal employment benefit laws such as ERISA.

Domestic Partnership Agreement

The domestic partnership agreement is the analog of the cohabitation agreement for heterosexual couples and non-registered same sex couples and is recommended unless the partners agree that their relationship will be governed by the same rules that apply to marriage. That is because a domestic partnership agreement clearly defines the relationship of the partners with regard to several issues. For example, will partnership personal service earnings be considered community property, as provided by the divisional law or will they be the separate property of the earning partner? Will accretions to separate property be considered mixed under *Pereira vs. Pereira* (1909) 156 Cal.1, or *Van Camp vs. Van Camp* (1921) 53 Cal.App. 17? Or are they to remain entirely the separate property of the partner who brought them into the partnership? And if the domestic partnership is ultimately dissolved, will the partners waive or limit the amount and duration of alimony?

In sum, a domestic partnership agreement is analogous to a prenuptial agreement if it precedes the partners' registering with the Secretary of State. Conversely, it is analogous to a postnuptial agreement if it is executed following such registration.

The requirements for the enforceability of prenups (or their analogs in the domestic partnership situation) are stringent. See the Uniform Premarital Agreement Act, Family Code Sections 1600-1617 ("UPAA"). As a practical matter, although not strictly required by UPAA, the parties should have independent counsel, the parties should exchange full information as to assets and obligations, and the agreement should be fair (whatever that means). The requirements for enforceability of postnups (or their analogs) are even more stringent, since the parties are subject to interspousal fiduciary duties under Family Code Sections 721 and 1100; with postnups, an adequate consideration is required. See *Messenger vs. Messenger* (1956) 46 Cal.2d 619.

Usual Estate Planning Documents

The discussion of this topic in Section II, above, applies with a vengeance in the context of registered domestic partners. Here, however, the planning is very much like estate planning for married couples except, alas, that the marital deduction is non-existent, there are no federal interspousal tax-free transactions, and placing one domestic partner's property into a joint trust and comparably innocuous-appearing transactions may constitute federal taxable transactions. Thus, the estate planner must have his income, gift and estate tax thinking cap on at all times. And the frequency of the accountant's preparing gift tax returns will be significantly greater than when dealing with marrieds.

When drafting estate planning documents, from trusts to wills to financial powers of attorney and advance health care directives, it is imperative to set forth the existence of the domestic partnership and the date of the partners' registration, so that it is clear on their face that the

documents are to be treated as analogous to those involving married couples.

For many reasons, the estate planner must handle transmutations of property with care. For one thing, the transmutation must strictly comply with the requirements of Family Code Sections 850 *et seq*., to wit: there must be a writing, it must constitute an express declaration of intent to change the character of particular property, for example, from separate to community; and it must be made, joined, consented to, or accepted by the partner who is adversely affected by it. Additionally, attorneys drafting such documents must be acutely aware of significant potential for conflicts of interest, particularly with respect to transmutations, since they almost always involve one party gaining and the other party losing as to the property involved.

By the same token, transmutations which occur after registration as domestic partners always are presumed the result of undue influence in a family law or family law-analogous setting, because in the context of an existing marriage or registered domestic partnership, any transaction which benefits one spouse or partner to the detriment of the other spouse or partner is presumed the result of undue influence and invalid. See, for example, *Marriage of Haines* (1995) 33 Cal.App.4th 277 and *Marriage of Lange* (2002) 102 Cal.App.4th 360.

IV. Conclusion

Unmarried heterosexual couples and the attorneys who represent them have long recognized that cohabitation, without the benefit of clergy or the County Clerk's office, is fraught with significant risks, both as to legal and tax aspects. For same sex couples and the lawyers who advise them, however, the recent domestic partnership statutes present a brave new world. It is a world in which same sex couples possess essentially all the benefits of married couples, except for federal tax benefits, but also are subject to the same detriments as married couples, including community property laws, duty of support, and dissolution. It is a world in which such couples and their lawyers must proceed with care.

---

[1]The Supreme Judicial Court of Massachusetts ruled in 2003 that the denial of marriage rights to same-sex couples was unconstitutional. Massachusetts remains the only state in the Union that recognizes same-sex marriage. Vermont and Connecticut provide for civil unions between same-sex partners. New Jersey, Maine and California provide for domestic partnerships.

[2] The registration referred to here is required to have been at the state level. Prior registrations at the municipal or county level in California were nullified with the passage of the Domestic Partner legislation. *See below*.

[3] Probate Code Section 6401

[4] Probate Code Sections 8461, 8462

[5] Probate Code Section 1811

[6] E.g., Probate Code Section 1812

[7] E.g., Probate Code Section 1874

[8]Apparent anomalies in a review of Probate Code sections include the provisions relating to guardianship and conservatorship and specifically the interested persons who may appear at hearings, who may file requests for special notice, persons whose names must appear in the contents of petitions and who may object to petitions or accounts. Viz., both spouses *and* domestic partners of conservatees but only spouses of wards may claim the above rights. *See* Probate Code Sections 2622, 2653, 2700, 2803, and 2805. As well, Probate Code Section 2430, which covers payments of debts and expenses by a guardian or conservator, allows for the provision of "the necessities of life" to the "spouse and minor children of the ward or conservatee" but allows for the provision of only "basic living expenses . . . to the domestic partner of the conservatee."

[9] Family Code Section 308.5

[10] Family Code Section 297.5(k)