

AB 205:

THE DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT OF 2003

By Deb L. Kinney

Late in 2003, Governor Grey Davis signed the groundbreaking legislation known as AB 205, the Domestic Partner Rights and Responsibilities Act of 2003. When this new law went into effect on January 1, 2005, same sex partners who had registered with the state of California as registered domestic partners ("RDPs") became vested with essentially all of the same rights and obligations that married persons have under California law. The delay in implementation was intended to give previously registered domestic partners time to become familiar with the many implications of the legislation and to opt out of its coverage if they so desired.

In almost all places where "husband," "wife" or "spouse" is used in the California Code, AB 205 amended the law to include "registered domestic partner". In time, all state forms should reflect this change in the law. In the meantime, courts and other state agencies are directed to apply the same standards to RDPs as they apply to married persons. There is one important exception: where state law conflicts with or is preempted by federal law, RDPs should not expect equal treatment. In addition, partners have the ability to modify the law by contract, much like married couples are able to do by executing pre-nuptial or post-nuptial agreements.

REGISTRATION AND DISSOLUTION

Registering with the state of California as domestic partners is a fairly straightforward process. Simply download the form from www.ss.ca.gov/dpregistry, execute it in the presence of a notary, and return the form to the Secretary of State with a check for \$33. The effective date of your registration will be the day that the state receives notice of your intention to register. The Secretary of State will then issue and mail back to you a certificate of domestic partner registration.

As stated above, RDPs are now entitled to virtually all of the benefits and bound by virtually all of obligations imposed by the state on married couples. This means that dissolution of a partnership is now a lot more complicated. No longer is moving out enough to terminate a relationship between RDPs. In any partnership that has lasted more than five years or involves children, real property ownership by either party, separate or joint assets greater than \$33,000 or mutual debt in excess of \$5,000 (as of 2007), partners are now required to go through the superior court to obtain a "divorce." If partners are unable to resolve their differences privately, property issues, spousal support and child custody will be decided by the courts.

BIG STEP FORWARD

No doubt about it, AB 205 is a very important development in our community's quest for equal treatment. The new law provides many social and legal benefits historically not available to same sex couples, such as the right not to be excluded from a partner's home, the right to authorize medical treatment of a partner's children, the right to take unpaid leave to care for an ill partner or his or her children, legal recognition for inheritance purposes, the right to use force to defend a partner, the right to preserve the confidentiality of communications between partners, the right to refuse to testify against a partner, and the right to certain state benefits.

But along with the benefits come obligations. It is imperative that partners who are considering registration fully understand both the implications of the law and its limitations so that they are able to make a reasoned decision as to whether registration is right for them. It is also important for currently registered partners to understand the new law so they can decide if modification by contract is appropriate. We have highlighted a few of the most important issues in the following paragraphs.

FAMILY LAW

Although LGBT couples have been able to adopt in California for some time now, the process was for

many years intrusive, cumbersome and expensive. Since 2002, LGBT couples have been able to utilize the more streamlined step-parent adoption process, a better but not perfect solution.

AB 205 takes matters even further. The new law reads that a child born into a relationship between RDPs will be presumed to have two legal parents. As positive as this may sound, it is important to remember that the legal recognition afforded the child and parents is *state specific* and does not result in entitlement to federally mandated rights, such as eligibility for social security survivor benefits or protection from interstate challenges to parenting rights. In order to create eligibility for federal benefits and to secure legal protection across state lines, a non-biological, non-adoptive parent must take affirmative steps, typically going through a formal adoption process, to ensure that her/his relationship with a partner's child is legally recognized by the federal government and other states. In California, partners can utilize the second parent (or co-parent) adoption process. This is a legal procedure that allows a same-sex parent to adopt her/his partner's biological or adoptive child without terminating the first parent's legal status as a parent. This process is generally easier, less intrusive, and less expensive than a traditional adoption.

Whether or not the non-biological parent has actually adopted her/his partner's child, a presumed parent under the new law will most likely be required to provide child support in the event of dissolution of the relationship because that is an obligation imposed by the state rather than the federal government.

WHAT'S COMMUNITY PROPERTY ALL ABOUT?

One of the biggest effects of AB 205 is that RDPs now have community property rights. California is one of nine community property states in the U.S. In a community property state, couples have a vested 50/50 interest in all assets (and the appreciation) acquired during the marriage or partnership, and all property held in any form of joint title is presumed to be shared equally. Property brought into the relationship or inherited during the relationship is considered to be separate property as long as it is kept separately from community assets.

Community property is intended to recognize equally the efforts of both parties during the relationship. For some couples, this makes intuitive sense and is the way they have operated all along; for others, this is a completely new concept. To make things more complicated, the rules have changed midstream for couples that have been in relationships for some time. In addition, community property rules are to be applied retroactively to the date of a couple's registration with the state, which for some RDPs dates back to January 2000.

Absent a written agreement between partners, in the event of dissolution of the relationship, the presumption will be that both partners have an equal interest in all assets acquired during the time that they were registered. The family courts have been dealing with these issues for years in the context of divorce, and complex accounting rules already exist to determine how assets will be valued and allocated between partners. Among the issues that have yet to be resolved is how federally regulated pension and retirement benefits will be allocated during dissolution since presumably some or part of the contribution to these plans was a result of earnings during the relationship, yet there exists no precedent to allow RDPs to make claims on property that is regulated federally. Another important issue will be how property division during dissolution will be treated by the IRS—specifically, whether a transfer of assets in dissolution will constitute a taxable event and if so, will the allocation be treated as income or a gift.

As is the case with married couples, registered domestic partners are able to agree in writing to waive community property rights and future spousal support obligations (but not child support), yet the courts may use their discretion to set aside an agreement if at the time of dissolution there has been a change in circumstances that would make its enforcement unjust.

FEDERAL INCOME TAX, GIFT TAX AND ESTATE TAX

Even with the new law in effect, RDPs must continue to file separate federal income tax returns and each partner's earned income is characterized as that partner's separate property for filing purposes.

Gift tax and estate tax are both federal taxes, and thus RDP status has no bearing on their applicability in the context of same sex partners. While federally recognized married couples can transfer any

amount of money to one another at any time with no tax consequences, there is no similar rule for RDPs. Gifts in excess of \$12,000 per year to any person (including your partner) require the filing of a gift tax return. Each person can transfer a maximum of \$1 million during his or her life without paying gift tax; amounts transferred in excess of that are subject to gift tax of close to 50%. Partners must keep these rules in mind when transferring assets to each other, and remember that transfers can occur in innocuous ways such as by adding a partner to title to a house or an investment account. Further, higher net worth partners wishing to make lifetime gifts will want to take steps to leverage transfers to their partners through various tax advantaged techniques.

Under current federal law, each person can transfer \$2 million at death (less amounts transferred during life and credited against the \$1 million gift exemption) without estate tax consequences. Above this amount, the tax rate is similar to the gift tax rate—close to 50%—and is applied to a decedent's "gross estate" (which includes all assets in that person's name, such as life insurance proceeds and retirement accounts). Given the high values of real estate in California, many couples face the issue of one or both partners having a taxable estate. Careful estate planning can help to minimize or eliminate estate tax liability.

STATE INCOME TAX

While AB 205 created a significant move towards full legal equality for RDPs in California, the law included two important exceptions: RDPs were required to file state tax returns as individuals and RDPs were still precluded from characterizing earned income as community property. SB 1827, which was signed into law in September 2006, has changed this.

Beginning with the fiscal year 2007, which means taxes filed in 2008, RDPs are required to file state income tax returns like married persons do. Accordingly, RDPs can use the status "married filing jointly" or "married filing separately" on their California tax forms, but can no longer file as "head of household" or as an "individual". Furthermore, absent a pre-domestic partnership contract (pre-dup), each partner's earned income will be characterized as community property.

Although the joint filing requirement appears to be little more than a procedural change, it actually creates a number of issues because of the interplay between state and federal income tax law. The California Franchise Tax Board has been working with experts and advocates to develop tax preparation guidelines that should address most of the procedural questions. However, as this will be the first year of combined filings for RDPs, there are likely to be unanticipated complexities encountered when preparing the returns. Therefore, although the intent of the law is to bring even more parity to registered partners, the most prudent course of action for RDPs will be to work with an accountant or tax preparer who is familiar with the new requirements and procedures.

REAL PROPERTY

Transfers of California real property between RDPs is now excluded from reassessment for property tax purposes as a result of SB 565, which applies to property transfers initiated after January 1, 2005. SB 559, which is expected to be approved in June 2007, will expand the scope of these rules to cover transfers from one RDP to another made between 2001 and 2005.

Even though property transfers may be exempt for property tax purposes, how partners hold title to real property is extremely important. Unlike married persons, RDPs cannot add or delete names from a deed without being subject to a federally imposed gift tax if the equity value of the transfer exceeds \$12,000. Moreover, federal tax treatment at the death of the first partner for estate inclusion values is often dependent on how title is held. For instance, even though many hold title as "joint tenants with right of survivorship", intending to protect the survivor and avoid probate, the presumption at the first death is that 100% of the equity value (not 50% as is true for married couples) should be included in the estate for valuation purposes. This increased amount often creates a taxable estate. The surviving partner may rebut this presumption, but that may require the production of records from many years ago, something that will be very difficult, if not impossible, for many.

We recommend that you consult with an experienced attorney to determine whether the way you hold title to your real estate accurately reflects your expectations, and whether it may be necessary for you to take remedial measures (such as executing a series of corrective deeds or other documents) in order to qualify for the reassessment exemption.

INSURANCE AND OTHER EMPLOYEE BENEFITS

Domestic partner health insurance benefits have been offered by many California insurance companies for a number of years. AB 205 and subsequent legislation mandates that all employers (other than those who self insure) that offer insurance or any other state regulated benefits to spouses of employees must offer the same benefits to RDPs of employees, presumably at the same cost. Nothing in the law mandates that an employer offer specific benefits to RDPs; the requirement is only that benefits be equally available. Undoubtedly, it will be necessary for employers to negotiate contracts with their providers and for providers to adapt their products so that employers will be in compliance with the new law.

Prior to the enactment of the new law, very few companies that provided benefits to domestic partners of employees required proof of actual domestic partner registration. Generally, a simple declaration of partnership status sufficed. However, now that employers who had not previously voluntarily provided benefits must do so, proof of registered status may be requested or required. Such a request for proof must be equally applicable to married persons, so an employer may request proof of registration only when similar proof is required for married couples applying for employee benefits for the non-employee spouse.

Although the intent of the law is to provide benefits to domestic partners that are equivalent in terms of coverage and cost to those provided to spouses, the actual cost will be higher to domestic partners because the federal government will continue to tax the benefit as income to the employee. However, benefits are not taxable at the state level.

PUBLIC BENEFITS

AB 205 should affect eligibility determination for state regulated benefits. It is expected that the combined incomes of RDPs will now be evaluated to determine eligibility for individual and family benefits such as housing and tuition assistance. On the other hand, it is not expected that RDP status will have any bearing on eligibility requirements for federal benefits since under federal law RDPs will continue to be "legal strangers." There is still uncertainty as to how eligibility for federally funded yet state-mandated programs, such as Medi-Cal, will be evaluated.

FAMILY PROTECTION AND THE NEED FOR ESTATE PLANNING

AB 205 and the associated legislation discussed in this article offer significant protections for LGBT couples that have chosen to register, but it is important to remember that the rights are still limited and are only available within the state of California. Some couples will choose registration combined with a property or cohabitation agreement, which may be advisable in some cases, at least until the inherent conflict of non-recognition by the federal government as to tax and property issues is addressed and resolved.

LGBT couples, whether registered or not, should be particularly mindful about planning for and protecting each other and their children. Just as the rights and obligations conferred by law on married couples do not obviate the need for estate planning in hetero families, registering as domestic partners does not make estate planning unnecessary for LGBT couples. Executing trusts, wills, durable powers of attorney and advanced health care directives is still vitally important to ensure that you and your loved ones are protected. Working with attorneys who understand and are sensitive to the unique issues affecting LGBT families and how AB 205 and its progeny affect planning is extremely important. In addition, it will be important to stay abreast of future developments in and interpretations of the new law that will shed additional light on how we can protect ourselves, our assets and our families to the greatest degree possible.

DLKLawGroup^{PC} specializes in estate planning, trust administration services, probate and beneficiary representation for Registered Domestic Partners and other members of the LGBT community. Our expertise allows us to provide comprehensive and critical assistance to our LGBT clients as the legal landscape for LGBT families continues to change.