



JASON DOIY

**GRIEVING CLIENT:** Donald Townes turned to a lawyer after the death of his registered domestic partner, when MediCal threatened to seize the Concord house they'd shared to collect for unpaid medical bills.

## Domestic Miss

### Quirks undermine premise of equality in California's domestic partner law

**By Mike McKee**

RECORDER STAFF WRITER

Three months after 64-year-old Dale Turner died of cancer late last year, MediCal — seeking payment of about \$3,300 in unpaid medical bills — threatened to seize the Concord house in which his surviving partner still lived.

This despite the fact that Donald Townes was Turner's state-registered domestic partner and the two men had co-owned the house and lived together for 26 years.

Townes was in shock.

"We both thought that when one of us died, the other wouldn't

have a problem," said Townes, 51, a telephone operator with Siemens Medical Solutions USA. "The other one would have the house. You know what I mean?"

Townes eventually resolved his problems with the help of Walnut Creek attorney David Nearon Jr., who filed a spousal property petition with the court that transferred the couple's community property to Townes.

If Townes had been married to Turner, there likely wouldn't have been any trouble at all, another attorney familiar with estate law said: Houses are exempt from such claims as long as the surviving spouse lives.

Under current California law, a registered domestic partner-

ship confers the same rights on a couple that a marriage does. But quirks, due to agencies' interpretations or the interplay with other laws and regulations, undermine that promise of equal treatment. And there isn't yet much case law to guide courts through the gray areas.

Evidence of inequities could be a decisive factor for the California Supreme Court as it prepares to tackle *In re Marriage Cases*, S147999, which involves San Francisco's attempt to legalize marriage for lesbians and gays. Just two months ago, the court requested supplemental briefing on several issues, with the very first query seeking a list of "all of the current differences" between the legal benefits and obligations of spouses versus registered domestic partners under California law.

Proponents of same-sex marriage say Townes' predicament illustrates how domestic partnerships — which bestow on gay and lesbian couples significant benefits and obligations — are the poor cousins of marriage under California's broad 2003 law.

They say domestic partners miss out on more than 1,000 state and federal benefits that married couples enjoy. Most are federal — Social Security, certain pensions and joint tax filing, for instance — and are not affected by California's law. But those proponents also cite several instances where domestic partnership isn't equal to marriage under state law.

Among the examples cited by San Francisco in a supplemental brief filed with the Supreme Court on Friday, Chief Deputy City Attorney Therese Stewart pointed out that while the state is required to offer long-term care insurance to certain public officials, employees and their spouses, domestic partners aren't included. She also noted the domestic partner law doesn't apply to any statute adopted by initiative, preventing, for example, registered partners from getting exemptions from reassessments for property transferred between spouses.

"The state of California is arguing that domestic partnership provides legal equality to lesbian and gay couples and, therefore, there is no constitutional impediment to not permitting lesbian and gay couples to marry," said Kathryn Kendell, executive director of the San Francisco-based National Center for Lesbian Rights. "But that analysis can only be true if, in fact, domestic partnership is not just legally, but functionally and culturally, equivalent."



SHELLEY EADES

**NOT ALL FIGURED OUT:** San Francisco estate planning lawyer Deb Kinney said some lawyers refer to the unresolved issues in applying the domestic partner law as "discrimination through complexity."

#### A SIGN OR A STRAW?

Kendell and other same-sex marriage advocates involved in the case took the Supreme Court's request for supplemental briefing as a sign the high court intends to give great weight to the deficiencies of domestic partnerships.

At least one opponent, however, accused Kendell and her cohorts of "grasp[ing] for straws" by trying to find any significant difference between domestic partnerships and marriage.

"California has the broadest domestic partnership law in the country," said Mathew Staver, founder and chairman of Liberty Counsel, a Florida-based legal group advocating to maintain a ban on same-sex marriage in the California case. "But for a few areas, the law says same-sex couples are to have the same rights and obligations."

In their supplemental brief filed with the Supreme Court on Friday, Staver and fellow Liberty Counsel attorney Mary McAlister listed only five ways domestic partnership differs from marriage, and called them "procedural differences."

California domestic partnerships don't allow individuals under the age of 18 to register with parental consent, do require the couples to live together, can be established with a simple form, can be dissolved with a notice of termination and don't require couples to live in California to end their relationship.

All are listed in the city's brief, too, but are referred to there as significant differences.

Some couples who have registered as domestic partners and attorneys who have represented them in legal matters say the devil's in the details. From things as simple as renting a car to matters as serious as being assured of a partner's death benefits, they say, domestic partnership simply isn't treated the same as marriage.

"All it does," said Deb Kinney, a San Francisco estate planning lawyer, "is perpetuate and create a second class of citizenship."

#### THEORY V. PRACTICE

The California Domestic Partner Rights and Responsibilities Act, codified as Family Code §297.5(a), states that registered domestic partners "shall have the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations and duties ... as are granted to and imposed upon spouses."

But in day-to-day situations, equality isn't always happening.

Linda Denning, a MediCal eligibility analyst in Manteca, said that after her registered partner, Gisele Denning, died in a car accident in 2005, she was denied any of Gisele's retirement and death benefits. The deceased woman worked for the county.

"They said it was a federal benefit, and I wasn't due it," Linda Denning said.

Kinney said this area of the law is still a work in progress. Some counties recognize domestic partnerships for such benefits, while others don't. For the time being, confusion reigns. Some lawyers, Kinney said, call such unresolved issues "discrimination through complexity."

And then there's Theresa Leak, a San Francisco plumber who has a son with registered partner Leah Crask (they're expecting another baby within a few weeks). Crask is the birth mother of their son, and Leak can't be recognized as his parent under state law without adopting the child she considers her own already.

"I am on his birth certificate," Leak said,

“but if I travel out of state and something happens — unless I do an adoption — I’m not a parent” under that state’s laws.

The National Center for Lesbian Rights and the New York-based Lambda Legal get calls from people seeking advice on a regular basis.

Among them, the legal groups recall a San Francisco military veteran who was denied medical information about his hospitalized partner and even refused visiting privileges, and a woman refused bereavement leave when her partner died.

Attorneys who have dealt with the law say businesses and government agencies are either confused about how to apply it or ignore it altogether.

“There shouldn’t be a difference,” said Frederick Hertz, an Oakland mediator and co-author of Nolo Press’ “A Legal Guide for Lesbian & Gay Couples,” “but with so many people who don’t understand domestic partnerships, there are problems.”

Hertz and Kinney said major companies with multistate offices are having an especially tough time accommodating domestic partnerships because they aren’t recognized by federal law and don’t cross state lines.

“What I’m hearing more and more from big business,” Kinney said, “is they know how to do marriage, but don’t know how to do domestic partnerships.”

#### **LITTLE CASE LAW**

The courts haven’t helped much because there have been too few suits to generate much case law.

“The issues are just beginning to surface,”

Hertz said. “Ninety percent of the problems get resolved on an ad hoc basis.”

Two of the first rulings gave limited guidance. In *In re Rabin*, 336 B.R. 459, a federal bankruptcy judge declared in 2005 that registered domestic partners, just like married couples, are limited to a single homestead exemption. And in *Velez v. Smith*, 142 Cal. App.4th 1154, a state appeal court held in 2006 that a woman registered with the county, but not with the state, couldn’t seek to dissolve her domestic partnership in family court.

Velez actually emphasized how the domestic partnership law had not granted an equivalent status to marriage. Justice Douglas Swager noted that domestic partners can’t file joint tax returns, have their joint income treated as community property for tax purposes or get the marital benefits of Social Security, Medicare, federal housing, food stamps and federal employment benefit laws. He even noted that prison inmates can marry their nonincarcerated spouses while their gay cellmates can’t file as someone’s domestic partner because the law requires those couples to live together.

That living-together requirement played a big role in an Orange County Superior Court judge’s ruling two months ago. He declared that domestic partnership “is not the equivalent of marriage,” but rather the “functional equivalent of cohabitation.” *Garber v. Garber*, 04D006519, was filed by a man trying to end spousal support after his ex-wife registered as the domestic partner of another woman.

Kendell, of NCLR, called the ruling “a perfect example of the domestic partner scheme being neither fish nor fowl.”

But William Hulsy, the partner in Santa Ana’s Hulsy & Hulsy who represented the ex-husband in *Garber*, doesn’t see it quite that way.

“If you read the plain meaning of Family Code §297.5,” he said, “it’s clear it was intended to make the California domestic partner law co-equal to heterosexual marriage.”

Hulsy, who has appealed the ruling, said that from his experience misapplication of the law has more to do with people’s “ignorance” about it than anything else.

“It’s not somebody who has a full knowledge of the Family Code,” he said, “sitting down and saying, ‘I’m not going to give domestic partnership the same effect as marriage.’”

Staver, of Liberty Counsel, said that may be true. But he admits if he had his way, there would be no domestic partnership laws anywhere in the country. “[It] treats domestic partnerships too much like marriage.”

Hertz and others will only go so far in defending domestic partnership.

“It’s really good, but it’s really limited,” Hertz said. “The answer is to legalize same-sex marriage and also have one term for marriage — which means the same in California as it does in Nebraska and Ohio.”

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