



by Deb L. Kinney

AB 205 THE DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT OF 2003

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 goes into effect on January 1, 2005, same sex partners who have registered with the state of California as registered domestic partners ("RDPs") will have essentially all of the same rights and obligations as married persons under California law. The delay in implementation is intended to give currently registered domestic partners time to become familiar with the many implications of the legislation and to opt out of its coverage if they so desire.

In almost all places where "husband," "wife" or "spouse" is used in the California Code, AB 205 amends 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 pre-

empted by federal law, RDPs should not expect equal treatment. In addition, partners will 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/dpreistry, execute it in the presence of a notary, and return the form to the Secretary of State with a check for \$10. 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, once the new law goes into effect in 2005, RDPs will be entitled to virtually all of the benefits, and bound by virtually all of obligations imposed by the state on married couples. Dissolution of a partnership will become a lot more complicated. No longer will moving out be 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 or separate or joint assets greater than \$25000 or mutual debt in excess of \$4000, partners will be required to go to 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 will provide 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, 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 currently registered and those 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. 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 (perhaps miraculous as well when one considers the difficulty involved in two men bearing a child), it is important to remember that the legal recognition afforded the child and parents is *state specific* and will not result in entitlement to federally mandated rights such as eligibility for social security survivor benefits. In order to create eligibility for federal benefits, a non-biological, non-adoptive parent must take affirmative steps to ensure that his or her relationship with

a partner's child is legally recognized by the federal government and other states. On the other hand, a presumed parent under the new law would most likely be required to provide child support in the event of dissolution of the relationship.

As is the case with married couples, registered domestic partners will be able to agree in writing to waive 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.

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 mandates that all employers offering insurance or any other benefits to spouses of employees must offer the same benefits to RDPs of employees, presumably at the same cost. Nothing in the law requires 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 renegotiate contracts with their providers and providers will need to adapt their products so that employers will be in compliance with the new law.

Currently, very few companies that provide benefits to domestic partners of employees require proof of actual domestic partner registration. Generally, a simple declaration of partnership status will suffice. But once the new law goes into effect and employers that have not voluntarily provided benefits are forced to do so, proof of registered status may be required.

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. Benefits will not be taxable at the state level, however.

INCOME TAX, GIFT TAX AND ESTATE TAX

Even after the new law goes into effect, RDPs will continue to file separate state and federal income tax returns. Earned income will not be considered shared 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 married couples can transfer any amount of money to each other at any time with no tax consequences, there is no similar rule for RDPs. Gifts in excess of \$11,000 per year to any person (including your partner) require the filing of a gift tax return. Each partner can transfer a maximum of \$1 million during his or her life; 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 will want to take steps to leverage their gifts to their partners through various tax advantaged techniques.

Under current federal law, each person can transfer \$1.5 million at death (less amounts transferred during life and credited against the \$1 million 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 life insurance 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.

WHAT'S COMMUNITY PROPERTY ALL ABOUT?

One of the biggest effects of AB 205 will be that RDPs will 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 are changing midstream for couples that have been in relationships for some time. Pending legislation indicates that 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 relationship. 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 among partners. Among the issues that have yet to be resolved is how federally regulated pension and retirement bene-

fits 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??

REAL PROPERTY

In response to the passage of AB 205, the State Board of Equalization has passed new laws expanding the rights of RDPs who transfer real estate to one another. Even though a transfer may still be subject to gift tax, if title is taken correctly, RDPs may be eligible to be exempt from reassessment upon transfer at death or dissolution of the relationship. The new laws are very narrow and must be followed carefully in order to preserve the eligibility of the exemption. We recommend that you consult with a lawyer to determine whether the way you hold title to your real estate accurately reflects your arrangement and whether it is necessary for you to take remedial measures (such as executing a series of corrective deeds) in order to qualify for the exemption.

PUBLIC BENEFITS

AB 205 will affect eligibility determination for state regulated benefits. It is expected that combined incomes of RDPs will 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.”

FAMILY PROTECTION AND THE NEED FOR ESTATE PLANNING

AB 205 offers 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 many 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 regarding planning for and protecting each other and their children. Just as the rights and obligations conferred by law on married couples don't obviate the need for estate planning in hetero families, registering as domestic partners doesn't make estate planning unnecessary for LGBT couples. Executing trusts, wills, durable powers of attorney and health care directives is still vitally important to ensure that your loved ones and you are protected. Working with attorneys who understand and are sensitive to the unique issues affecting LGBT families and how AB 205 affects planning is extremely important. The rights of members of our community are ever changing; it is important to be kept current in order to fully benefit from the great strides being made.

Deb Kinney is a partner in Boutiette + von Herrmann, LLP, a San Francisco lawfirm specializing in estate planning for LGBT families. Our firm provides realistic solutions that reflect the goals and desires of each client.

If you would like to find out more about how to protect yourself and your loved ones, visit www.bvhlaw.com, or call 415.693.0550 to arrange for a complimentary consultation.