

CONTRA COSTA LAWYER

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Same-Sex Marriage: The Long Road to Equality

When the California Supreme Court heard oral argument in *Perry v. Brown* on September 6, it seemed like déjà vu all over again. For the third time in four years, the court was considering the continuing fight for equality being waged by



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[Inside: Guest Editor's Column](#)

Since Massachusetts became the first state to legalize marriages of same-sex couples in May, 2004, same-sex unions have remained a hotly divided topic throughout the United States. As seen in the articles and charts, although there has

Spotlight

[Interview with Gordon Erspamer – Part II](#)

Gordon "Gordy" Erspamer, Senior Counsel with Morrison Foerster, has been fighting tirelessly for veterans' rights. Gordy's most recent victory, in front of the 9th Circuit Court of Appeals earlier this year, provides hope to veterans suffering from post-traumatic stress disorder. Describing problems at the VA as

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Same Sex Unions

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The original blog can be found at
[http: // cclawyer.cccba.org/](http://cclawyer.cccba.org/)

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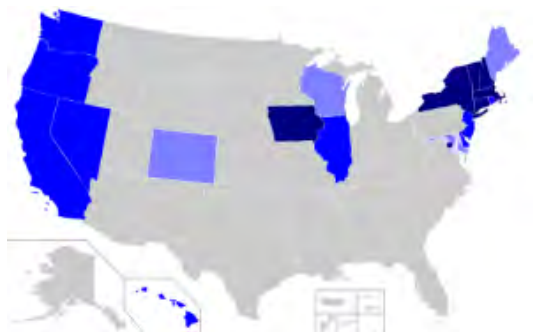
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Inside: Guest Editor's Column

Saturday, October 1, 2011

Since Massachusetts became the first state to legalize marriages of same-sex couples in May, 2004, same-sex unions have remained a hotly divided topic throughout the United States. As seen in the articles and charts, although there has been substantial progress in the legitimizing of same-sex unions, there still is much confusion and a long way to go. Not only are there strongly held societal views on the subject, but the subject is made more complex because of a myriad of federal and state laws, many of which are conflicting and even the weighing in on the subject by a Proposition of the citizens.



Recognition of same-sex relationships in the United States

Our articles this month offer a variety of topics regarding same-sex unions. **Gary Watt**, a partner with Archer Norris in Walnut Creek¹, discusses the highly publicized issues pertaining to Proposition 8, which dictates that marriage is a union between a man and a woman only. He follows the history of this Proposition, reflecting on the fight over whether or not Prop 8 is constitutional. As noted in his article, the right of same-sex couples to marry in California still is unresolved and does not appear likely to be resolved in the near future.

¹<http://archernorris.com/About/Offices/walnut-creek>



Constitutional bans on same-sex unions in the United States

As discussed in the article by **Steven Mehlman**, of the Mehlman Law Group² in Walnut Creek, while the constitutionality of Proposition 8 and same-sex marriage continues to be litigated, there remain issues regarding the holding of real property. Mr. Mehlman offers advice on the characterization of the holding of property, avoiding probate, dividing property upon termination of a relationship and avoiding disputes between unmarried couples or those who are not registered as domestic partners.

Erika Portillo, a partner with the firm of Guichard, Teng & Portello, APC³ in Concord, describes the challenges faced by bi-national same-sex couples who seek residency or citizenship for a partner. She addresses the impact of the Defense of Marriage Act (“DOMA”) on the Immigration and Customs Enforcement’s (“ICE’s”) practices, as well as practical controls available to identify fraud in any union. As she discusses, the ICE, in recognition of the competing interests of the individuals with the various laws, addresses the issue in a practical manner, giving the ICE more discretion in handling such cases.

Employee benefits for same sex couples are addressed in the article by **Rita A. Holder**, Esq. of Concord. As she notes, California is a leader in providing same-sex couples health insurance benefits. She further describes the complexity of the issues, including various scenarios in which tax treatment and rights to continued coverage vary.

²<http://www.mehlmanlawgroup.com/>

³<http://www.gtplawyers.com/>

Melanie Kay, of “suddenly on your own” in Berkeley, discusses the practical aspects of dissolutions of unions, whether through death or a separation of partners. She addresses the emotions and realities of separations, and ways in which assistance can be provided to ease a transition.

Additionally, in this month’s edition, statistics are provided regarding gay marriages. While California is not in the forefront of legalizing such marriages, it still recognizes some out-of-state same sex unions.

We hope that these articles are helpful for understanding the laws and trends regarding same-sex unions.

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⁴<http://www.fairpaycal.com/>

Same-Sex Marriage: The Long Road to Equality

Saturday, October 1, 2011



Gary A. Watt

When the California Supreme Court heard oral argument in *Perry v. Brown*⁵ on September 6, it seemed like *déjà vu* all over again. For the third time in four years, the court was considering the continuing fight for equality being waged by same-sex couples seeking the right to marry. Whatever the court's ruling on the question of standing that was before it, the legal battles will continue until the United States Supreme Court has the final word. How the highest court will rule is not at all certain – and the roller-coaster ride will continue until *that* decision is announced.

To say it all began with the California Supreme Court's decision in *The Marriage Cases*⁶ is to overlook the long march toward equality that preceded it. But for purposes of looking back and taking stock, that decision remains the high-water mark for the state court litigation. It was there that

⁵<http://www.courts.ca.gov/13401.htm>

⁶<http://www.courts.ca.gov/2964.htm>

the court held that Family Code provisions limiting marriage to one man and one woman violate same-sex couples' fundamental right to marry and the equal protection clause of the California Constitution. As Chief Justice Ronald George, writing for the majority put it, "retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation [domestic partnership] for same-sex couples may well have the effect of perpetuating a more general premise – now emphatically rejected by this state – that gay individuals and same-sex couples are in some respects 'second class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 784-785.)



After the decision in *The Marriage Cases*⁷, San Francisco and other counties issued approximately 18,000 marriage licenses to same-sex couples. But if *The Marriage Cases* embodied the triumph of equality over discrimination, that triumph was also short-lived. And it is no little irony that Chief Justice George's legacy includes the court's subsequent decision *validating* Proposition 8, and reversing *The Marriage Cases*' holding that same-sex

⁷<http://www.courts.ca.gov/2964.htm>

couples have the right to marry, not just to be “domestic partners.” (*Strauss v. Horton* (2009) 46 Cal.4th 364.)

While *The Marriage Cases*⁸ were pending in the Supreme Court, the opponents of same-sex marriage initiated a petition proposing an amendment to California’s constitution. The measure, Proposition 8, added the words, “Only marriage between a man and a woman is valid or recognized in California.” These are the very same words that were added to the Family Code, but were nullified by the Court when it decided *The Marriage Cases*. Less than six months after *The Marriage Cases* decision, Prop 8 was approved by a majority (52.3 percent) of those casting votes on it.

As Chief Justice George would later write in an our-hands-are-tied tone, “the principal issue before us concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state constitution itself* through the initiative process . . .” (46 Cal.4th at p. 385 (italics in original).) It must have been somewhat vexing for the Chief Justice to put pen to paper, for in deciding that Prop 8 is a permissible amendment and not an impermissible “revision,” he repeatedly reiterates that “Proposition 8 does not abrogate . . . any other of ‘the core set of basic substantive legal rights and attributes traditionally associated with marriage’ such as the right to establish an officially recognized and protected family relationship with the person of one’s choice . . .” (*Id.* at p. 390.) As the court put it, “Proposition 8 . . . carves out a narrow exception applicable only to access to the *designation* of the term ‘marriage’ . . .” (*Ibid.*) But it was access to *that* designation which the Court found *must* be provided to same-sex couples in *The Marriage Cases*. Nevertheless, where the Family Code statutes nullified in *The Marriage Cases* ran afoul of the previous version of California’s constitution, the same language nested in the *amended* constitution, “eliminate[d] the ability of same-sex couples to enter into an official relationship designated as ‘marriage’ . . .” (*Id.* at p. 411.)

If something as important to both sides could be described as a game of chess, then in *Strauss*, Prop 8’s supporters won the match. But the next battle would take place in federal court and involve the federal constitution. After a lengthy trial, the same language permissibly amending the California constitution was found to violate the federal document. “Proposition

⁸<http://www.courts.ca.gov/2964.htm>

8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.” (*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N. Dist. Cal. 2010).)

In finding that Prop 8 violates the due process clause, Judge Vaughn Walker wrote, “The record reflects that marriage is a culturally superior status compared to a domestic partnership. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution [domestic partnership] that denies marriage to same-sex couples.” (*Id.* at p. 994.) And in finding that Prop 8 violates the equal protection clause, Walker wrote that Prop 8’s supporters “assume[d] a premise that the evidence thoroughly rebutted: rather than being different, same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same.” (*Id.* at p. 1001.) “The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.” (*Ibid.*)

“Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples.” – Judge Vaughn Walker

The Prop 8 proponents appealed and the struggle shifted to the Ninth Circuit. And so it seemed surreal that the case came back to the California Supreme Court – now the Chief Justice Tani Cantil-Sakauye Court – on the question of standing. In *Perry v. Brown*⁹, the Ninth Circuit certified a question to California’s high court, namely, whether the proponents of Prop. 8 have standing to defend it given the governor’s and attorney general’s refusal to do so. The Cantil-Sakauye Court seemed skeptical of the argument that nobody could defend Prop. 8 if the governor and attorney general declined. But this is only a detour, and it will not obviate the Ninth Circuit’s obligation to fully address Article III standing, and if standing is found, the merits. All of this is, of course, just a stop along the way to ultimate resolution in the United States Supreme Court.

⁹<http://www.courts.ca.gov/13401.htm>

Appellate judges and lawyers often remark that controlling how the questions are framed is the best way to control the result. As the parties await the next and further decisions on same-sex marriage, the ultimate decision will turn in no small part on how the United States Supreme Court frames the questions. Do the proponents of same-sex marriage seek to exercise the fundamental right to marry? Or do they seek recognition of a new right? Is sexual orientation a suspect class for equal protection purposes? And so on. Judge Walker answered the questions this way: “Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples.” Only time will tell if his words retain their force and whether same-sex couples in California will finally stand on an equal – and married footing – with opposite-sex couples.

Gary A. Watt, partner with Archer Norris in Walnut Creek¹⁰ and member of the firm’s appellate practice section, is director of UC Hastings’ Ninth Circuit clinical program, “The Hastings Appellate Project,” and chair of the Contra Costa County Bar Association’s appellate practice section. He can be reached at gwatt@archernorris.com¹¹.

¹⁰<http://archernorris.com/About/offices/walnut-creek>

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Taxation of Same-Sex Employee Benefits: A Primer

Saturday, October 1, 2011



Rita A. Holder

The law of taxation of employee benefits for same-sex couples is complicated. The foremost reason is that the body of law surrounding employee benefits for same-sex couples actually involves an enormous jumble of rules and regulations. The most influential are: the Employee Retirement Income Security Act of 1974¹²(ERISA), the Internal Revenue Code¹³, the Defense of Marriage Act¹⁴ (DOMA), the Consolidated Omnibus Budget Reconciliation Act of 1985¹⁵(COBRA), and the Health and Insurance Portability and Accountability Act of 1996¹⁶ (HIPAA). This article will take a closer look at the law and taxation of employee benefits.

¹²<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

¹³http://www.law.cornell.edu/uscode/usc_sup_01_26.html

¹⁴<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>:

¹⁵<http://www.dol.gov/dol/topic/health-plans/cobra.htm>

¹⁶<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3103.ENR>:

Overview of Employee Benefit Plan Regulation “Employee benefits” is an umbrella covering any non-cash compensation provided to workers as a condition of their employment. [1]¹⁷ Employees generally look to their jobs for health care and retirement benefits. Companies are not required to offer these benefits, so why do they?

TYPES OF BENEFITS BY FUNCTION [PDF]¹⁸

Surprisingly, employers’ reasons are largely altruistic:

- Providing employees’ economic security by insuring against illness, death and disability
- Raising workforce retirement living standards
- Competing for recruits who look to health and retirement benefits as an important consideration when deciding where to work
- Securing the income and welfare of employees and their families
- Encouraging employee savings[2]¹⁹

ERISA²⁰ section 514 preempts all states’ laws that relate to any employee benefit plan with certain enumerated exceptions. The most important exceptions are state insurance, banking or securities laws, criminal laws, and domestic relations orders that meet ERISA’s requirements. In actual practice, ERISA offers an almost complete preemption of most retirement plans. For employees participating in health and welfare plans, ERISA usually provides a regulatory floor; states can provide more protection of employees’ procedural rights, but not less.

Under ERISA²¹, jurisdiction over employee benefit plans is divided between the Internal Revenue Service (IRS), the Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC). The responsibility of the IRS centers on plans covered by Internal Revenue Code (IRC) section 401(a), and includes pension, 401(k) profit sharing, and stock-bonus plans.

¹⁷#_ftn1

¹⁸<http://cclawyer.cccba.org/wp-content/uploads/2011/09/Types-of-Benefits-Chart-2.pdf> ↩

¹⁹#_ftn2

²⁰<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

²¹<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

The DOL is generally responsible for health and welfare plans and other plans that are not designed to provide retirement benefits or the deferral of income.

History of Benefits for Same-Sex Couples Employee benefit programs have existed in the United States since colonial times. According to the Employee Benefit Research Institute²² (EBRI), the first recorded employee benefits included the Plymouth Colony settlers' military retirement plan in 1636; Gallatin Glassworks' profit-sharing arrangement initiated in 1797; American Express Company's pension plan in 1875; Montgomery Ward's group health, life, and accident insurance program in 1910; and Social Security retirement payments in 1935. Today, nearly two-thirds of Americans are covered under employer-sponsored benefit programs. [3]²³

In comparison, the history of employee benefits for same-sex couples is brief. In 1982, the *Village Voice*²⁴, a New York weekly newspaper, became the first U. S. company to offer health benefits to same-sex partners of its employees. The City of Berkeley was the first town to do so, in 1984. In 1995, Vermont became the first state to extend same-sex benefits to its public employees. In 1997, the State of Hawaii was the first state to offer domestic partnership benefits to all same-sex couples.

The movement toward same-sex benefits in the workplace has arisen, in part, from a growing awareness that equal work should mean equal pay, including employment benefits. For many employees, those benefits can amount to 25% to 40% of a worker's total compensation. As of 2011, a majority of *Fortune* magazine's 500 largest publicly traded companies provide health insurance benefits to same-sex partners of employees.[4]²⁵

The Defense of Marriage Act²⁶ (DOMA), 28 U. S. C. A. §1738C (1996) was a touchstone for gay rights activism in employee benefits. It defines "marriage" as a legal union between a man and a woman and a "spouse" as a person of the opposite sex who is a husband or wife. The law directly

²²<http://www.ebri.org/>

²³#_ftn3

²⁴<http://www.villagevoice.com/>

²⁵#_ftn4

²⁶<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:>

applies to COBRA²⁷, HIPAA²⁸, and ERISA²⁹. However DOMA does not prohibit an employer from extending coverage and benefits to same-sex spouses or domestic partners (whether same-sex or opposite-sex).

In California, same-sex couples are categorized as a type of domestic partnership. When large U. S. companies first offered domestic partnership benefits, many offered benefits only to same-sex couples. The majority of plans now cover same-sex as well as opposite-sex couples.[5]³⁰

Domestic partner workplace benefits can be offered at the discretion of the employer. There are generally two procedures in employer health plan documents for approving employee eligibility for domestic partner benefits. One is an individually designed employer approval process (i.e. using customized applications or e-forms); the easier way is to use state or local domestic partnership registration as proof of eligibility.

Domestic Partnership Registration Domestic partnership registration provides a legal status that varies according to state or municipal government codes. In California, domestic partners can register as same-sex or opposite-sex duos. Family Code section 297³¹ identifies a domestic partnership where the following are met:

- Both persons have a common residence;
- Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity;
- Both persons are not related by blood in a way that would prevent them from being married to each other in this state;
- Both persons are at least 18 years of age;
- Both persons are members of the same sex, OR one or both of the persons of opposite sex are over the age of 62 and meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U. S.

²⁷<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>:

²⁸<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3103.ENR>:

²⁹<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

³⁰#_ftn5

³¹[http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam ←
&group=00001-01000&file=297-297.5](http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=297-297.5)

C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U. S. C. Section 1381 for aged individuals;

- Both persons are capable of consenting to the domestic partnership; and
- Both persons consent to the jurisdiction of the Superior Courts of California for the purpose of dissolution, nullity or legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, the state.

Another option for covering a same-sex partner in a health plan is eligibility via same-sex marriage. However California plan sponsors may face a dilemma when same-sex domestic partners marry. Since California law and many health and welfare plan documents require that both persons in the domestic partnership not be married, does this invalidate the participants' eligibility for domestic partner benefits once they marry? Plan amendments are certainly in order to correct this gap.

Impacts on HIPAA and COBRA Rights Under federal law, HIPAA³² ensures the privacy rights of all persons enrolled in group health plans with respect to their identifiable health information, whether electronic, written, or oral. As long as an opposite-sex or same-sex partner is validly enrolled in a covered plan, these protections will still apply.

Under COBRA³³'s special enrollment rights, employees may enroll their spouses and dependents in a group health plan upon a loss of eligibility for other coverage and upon acquiring a new dependent. But when an employee in a same-sex relationship loses or leaves a job, federal law does not guarantee the opportunity to pay for continued coverage for a domestic partner (or a partner's children), even if the employer-sponsored plan originally covered that partner (or the partner's children). This is true even though the former employee pays the premium for this temporary coverage. To remedy this situation, some companies have decided to "mirror" federal law by providing COBRA-like special enrollment (as well as COBRA-like

³²<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3103.ENR>:

³³<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>:

continuation coverage rights) to domestic partners. Clients that sponsor health and welfare plans may want to amend their plan documents to grant the same rights to domestic partnerships and communicate the new policy accordingly.

Clients' Plan Documents May Need Review Clients that sponsor health and welfare plans may be advised to review their plan documents and Summary Plan Descriptions (SPDs) to determine whether changes are in order to ensure the language reflects intent. Plan sponsors can also be assisted in evaluating their enrollment forms and processes.

Most enrollment forms do not require employees to indicate the gender of their spouses. However, because the Defense of Marriage Act recognizes only spouses of the opposite sex, same-sex spouses and domestic partners are not treated the same as opposite-sex spouses under federal taxation rules. As discussed in the following section, same-sex domestic partners are not authorized to pay for benefits with pre-tax dollars, as can the opposite-sex married couples. Therefore, if an employee enrolls a same-sex partner as a "spouse" and the plan sponsor treats the same-sex partner as a spouse for federal tax purposes (rather than a tax-dependent domestic partner), the employee and the plan (i.e. the employer) may be subject to federal withholding and tax penalties for failure to follow the terms of the plan.[6]³⁴

Taxation of Domestic Partner Benefits Under Internal Revenue Code (IRC) section 162(a)(1) and Treasury Regulation section 1.162-10(a) employers may deduct contributions to, or payments under, an employee accident or health plan, including contributions to the cost of accident or health insurance.

TYPES OF BENEFITS BY TAX TREATMENT [PDF]³⁵

Similarly, an employee's own pretax contributions made towards the purchase of group health plan coverage are excluded from income under IRC section 106. [7]³⁶ Likewise, section 106 excludes from an employee's income all contributions made by the employer, on behalf of the employee

³⁴#_ftn6

³⁵<http://cclawyer.cccba.org/wp-content/uploads/2011/09/Taxation-of-Benefits-Chart-2.pdf> ↩

³⁶#_ftn7

and their dependents, for health insurance premiums.[8]³⁷ A corollary provision, IRC section 105(b) excludes from the employee's income all reimbursements of expenses for medical care.

Non-dependent same-sex partners and spouses (and their dependents) are generally treated differently under federal law. [9]³⁸ However, to the extent that employer-provided coverage for an employee's domestic partner is included in the employee's gross income, the benefits payable to the domestic partner are still treated as employee-paid and are excluded from income under IRC section 104(a)(3). Registered domestic partners or same-sex spouses whose marriage is recognized under state law may not file federal tax returns using a married filing jointly or married filing separately status. They may only file as head of household if they otherwise qualify. [10]³⁹

According to the IRS, a registered domestic partner can be a dependent of his or her partner (and thereby exclude premium costs from income) if the requirements of IRC sections 151 and 152 are met. [11]⁴⁰ Dependent children and dependent elders of the domestic partnership will most likely qualify. However, it is unlikely that the registered domestic partners themselves will satisfy the gross income requirement of IRC section 152(d)(1)(B) and the support requirement of section 152(d)(1)(C).

To satisfy the gross income requirement, an individual's gross income must be less than the exemption amount (\$3,650 for 2010). Because registered domestic partners each report half the combined community income earned by both partners, it is unlikely that a registered domestic partner will have gross income that is less than the exemption amount.

To satisfy the support requirement, the person seeking the dependency deduction must provide more than half of an individual's support for the year. If the non-employee partner's (Partner A) support comes entirely from community funds, that partner is considered to have provided half of his or her own support and cannot be claimed as a dependent by another. However, if the employee partner (Partner B) pays more than half of the support of Partner A by contributing separate funds, Partner A may be a dependent

³⁷ #_ftn8

³⁸ #_ftn9

³⁹ #_ftn10

⁴⁰ #_ftn11

of Partner B for purposes of section 151, provided the other requirements of sections 151 and 152 are satisfied.

If the value of the employer-provided coverage is excludable from the employee's income because the domestic partner qualifies as the employee's spouse or dependent, benefits payable to the domestic partner are excluded from income under IRC section 105. A registered domestic partner can be a dependent of the employee partner for purposes of the exclusion in section 105(b) for reimbursements of expenses for medical care only if the support requirement is satisfied. Unlike section 152(d), section 105(b) does not require that Partner A's gross income be less than the exemption amount in order for Partner A to qualify as a dependent.

The employee partner must report imputed income equal to the estimated value of the employer's financial contribution towards health insurance coverage for non-dependent same-sex partners. The non-employee partner's coverage must be paid for with post-tax dollars, thereby limiting the use of Flexible Spending Accounts (FSAs), Health Reimbursement Accounts (HRAs) and Health Savings Accounts (HSAs).

Employers are also impacted. Because the imputed income increases the employee's overall taxable income, it also increases the employer's payroll taxes — Social Security (FICA) and unemployment insurance tax (FUTA) — which employers pay based on employees' taxable incomes. Employers also face additional administrative burdens of annually tracking the dependent status of covered same-sex partners and spouses and maintaining separate payroll functions for income tax withholding and payroll taxes.

California and the Ninth Circuit Lead California continues to be a leader in the protection of the rights of same-sex couples. Under a new law signed by California Gov. Jerry Brown on September 7, 2011, private businesses that want to do contract work for the state need not apply if they don't offer health benefits to their employees' same-sex partners. The most controversial of the law's requirements is that it offers no exemptions for religious organizations.. For further details see SB 117⁴¹, sponsored by state Sen. Christine Kehoe, D-San Diego.

⁴¹[http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number= ↵sb_117&sess=1112](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=↵sb_117&sess=1112)

On the same day, September 7, 2011, the 9th Circuit ruled in *Diaz v. Brewer*⁴² [12]⁴³ that an Arizona law that eliminated health insurance coverage for same-sex partners of public employees violated the U. S. Constitution's Equal Protection Clause. A 2009 Arizona law eliminated health insurance coverage for same-sex partners of public employees. The 9th Circuit upheld a lower court injunction that has blocked the law from taking effect. A three-judge panel of the 9th Circuit concluded that, while the state is not obligated to provide health-care benefits, it cannot deny them to a specific group of employees. The court stated in its opinion:

When a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.

The 9th Circuit concluded the law unfairly impacted gay and lesbians because, unlike straight couples, they are not able to legally marry under Arizona law.

Conclusion The controversy around same-sex benefits continues. In 2011, Gallop and two other polling organizations revealed results indicating a majority trend in public opinion about same-sex marriage in the United States, concluding that “public support for the freedom to marry has increased, at an accelerating rate, with most polls showing that a majority of Americans now support full marriage rights for all Americans.”[13]⁴⁴ Hopefully this heralds ongoing societal tolerance for same-sex couples. However, since the evolution of tax policy has historically lagged public opinion by years, [14]⁴⁵ we will likely have to wait some time for these changes in attitude to be reflected in the U. S. tax code.

The author, attorney **Rita Holder** focuses on three areas of practice: Tax Advocacy, Nonprofit Organizations, Water, Land Use and Natural Resources.

Rita earned a B. S. in Environmental Science from U. C. Berkeley. Her J. D. and LLM in Taxation are from Golden Gate University Law School. She

⁴²http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000011733 ↩

⁴³#_ftn12

⁴⁴#_ftn13

⁴⁵#_ftn14

is currently completing an M. S. in Environmental Policy and Planning at the American Military University.

Rita is a life-long California native. Raised in Marin County, she developed her passion for the outdoors at an early age. Rita and her husband, Richard, have four children and four grandchildren. Their home is nestled next to the Lime Ridge Open Space in Concord.

[1] The U. S. Bureau of Labor Statistics' National Compensation Survey: Glossary of Employee Benefit Terms has an exhaustive list of employee benefits at <http://www.bls.gov/ncs/ebs/glossary20082009.htm> – other

[2] Society for Human Resource Management. (2010, Second Quarter). *Motivation in Today's Workplace: The Link to Performance*. Retrieved September 17, 2011, from <http://www.shrm.org/Research/Articles/Articles/Documents/10-0235%20Research%20Quarterly-Q2-FNL.pdf>

[3] Employee Benefits Research Institute. (2011, March). Chapter 1: Introduction. *EBRI Databook on Employee Benefits*. Retrieved September 15, 2011 from <http://www.ebri.org/publications/books/index.cfm?fa=databook>

[4] Human Rights Campaign. (2011). Domestic Partner Benefits. *HRC Articles*. Retrieved September 17, 2011, from http://www.hrc.org/issues/domestic_partner_benefits.htm

[5] Demian, editor. (2010, March 6).. Domestic Partnership Benefits. Philosophy and Provider Lists. *Partners Task Force for Gay & Lesbian Couples* Retrieved September 18, 2011, from <http://www.buddybuddy.com/d-p-1.html>

[6] ERISA section 402(a), 29 U. S. C. section 1102

[7] Internal Revenue Service. (2011, September). Information about provisions now in effect.

Affordable Care Act Tax Provisions. Retrieved September 20, 2011, from <http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6>
The Affordable Care Act was enacted on March 23, 2010. It contains some tax provisions that became effective in 2010 or 2011, and more that will be implemented during the next several years.

- [8] Internal Revenue Service. (2011). Publication 15-B Employer's Tax Guide to Fringe Benefits For use in 2011. Retrieved September 17, 2011, from <http://www.irs.gov/publications/p15b/ix01.html>
- [9] Internal Revenue Service. (2011, September 16). Q&A #2. *Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California. Publication 555*. Retrieved September 18, 2011, from [http://www.irs.gov/newsroom/article/0, ↵, id=245869,00.html](http://www.irs.gov/newsroom/article/0,id=245869,00.html)
- [10] See Q&A #3 in Publication 555, cited in footnote 9.
- [11] See Q&A #4 and #5 in Publication 555, cited in footnote 9.
- [12] 9th Cir. (2011). No. 10–16797.
- [13] Benenson, J. (2011, June). The Rapid Increase in Support for Marriage Changes Political Equation: Emerging Majority Supports the Freedom to Marry. *Benenson Strategy Group*, and van Lohuizen, Jan. *Voter Consumer Research*. Retrieved September 18, 2011, from [http://freemarry.3cdn ↵.net/5ae85613318ade1b2e_8dm6bnq72.pdf](http://freemarry.3cdn.net/5ae85613318ade1b2e_8dm6bnq72.pdf)
- [14] Yang, S. (2009, September 10). A Chronology Of Federal Income Tax Policy: 1947-2009. *CAEPR Working Paper No. 2007-021*. Available at SSRN: <http://ssrn.com/abstract=1020679>

Ownership of Real Property by Same-Sex Couples in California

Saturday, October 1, 2011



Steven J. Mehlman

As the constitutionality of Proposition 8 and same-sex marriage continues to work its way through our legal system, attorneys with real estate, family law, probate and civil litigation practices regularly encounter clients seeking legal advice or representation related to the co-ownership of real property by same sex couples. As with heterosexual relationships, breakup or death are the two possible endings for homosexual relationships. The manner in which property is held affects the outcome of co-owned property between same-sex couples, just as it does with opposite-sex couples.

Manner of Holding Title Or Ownership By Multiple Parties Since its enactment in 1872, California Civil Code Section 682⁴⁶ has defined four types of ownership interests in real property by multiple persons: 1) joint interests; 2) partnership interests; 3) interests in common; and 4) community interests of husband and wife. The California Domestic Partner Rights

⁴⁶<http://law.onecle.com/california/civil/682.html>

and Responsibility Act of 2003⁴⁷, effective January 1, 2005, resulted in extending the community property interest so that registered domestic partners after that date can also have a community property interest in the common residence[1]⁴⁸, among other property. The key attributes of each type of real property ownership by multiple persons[2]⁴⁹ are further defined by other Civil Code provisions as follows:

A. Partnership interests are owned by several people who are in a partnership and the property is used for partnership interests. (Civil Code §684⁵⁰).[3]⁵¹

B. Interests in common (also commonly referred to as tenancy in common) are created by default when several persons acquire the property, but not expressly in joint interest, as community property or in partnership. (Civil Code §§685-686⁵²). The parties may own unequal shares, which should be set forth in the deed.

C. Joint interests (also commonly called joint tenancies) are owned by two or more people in undivided equal shares and are created by a single will or transfer when expressly declared as joint tenants. (Civil Code §683⁵³). The primary characteristics of joint tenancy are that the property must be held in equal shares and there is a right of survivorship. When one joint tenant dies, the entire estate automatically belongs to the surviving joint tenant(s) by operation of law. Since, upon death of a joint tenant, the deceased joint tenant's interest in the property automatically passes to the other joint tenant(s), that interest is not a part of the deceased joint tenant's estate, and cannot be disposed of by will or probate. The only exceptions to this rule are the simultaneous death of all joint tenants or the murder of one joint tenant by another.

D. Community interests (also commonly called community property) apply to property acquired after marriage or after becoming a registered domestic partnership. (For domestic partnership see Family Code §297 et

⁴⁷<http://www.csac.ca.gov/doc.asp?id=1149>

⁴⁸#_ftn1

⁴⁹#_ftn2

⁵⁰<http://law.onecle.com/california/civil/684.html>

⁵¹#_ftn3

⁵²<http://law.onecle.com/california/civil/685.html>

⁵³<http://law.onecle.com/california/civil/683.html>

seq⁵⁴) Community property provides for equal ownership interests between the spouses or domestic partners (absent a community property agreement to the contrary) but does not have a right of survivorship. Any community property, at the time a spouse or registered domestic partner dies, would be subject to probate.

In 2001, the California legislature created a subtype of community property interest, known as “community property with right of survivorship” that is similar to a joint tenancy, but requires that the joint tenants be married or be registered domestic partners. Community property with right of survivorship must be expressly stated in the deed. It creates the right of survivorship afforded in a joint tenancy to the community property. However, the creditors of the deceased spouse/registered domestic partner have rights against the deceased’s interest, just as they would in a normal community property situation (whereas they would not in a joint tenancy). There may also be tax advantages afforded by a community property with right of survivorship interest as opposed to a joint tenancy for which clients should consult their tax attorneys, CPAs or tax advisors.

If a married couple or a registered domestic partnership wishes to have the property that was acquired during the marriage or domestic partnership be in the sole ownership of one of the individuals, the title company will typically require the non-owning member of the couple to relinquish his or her rights to the property such as by signing and recording a quit claim deed.

Both married couples and registered domestic partnerships have an array of rights and responsibilities concerning community property (including real property acquired during the marriage or registered domestic partnership) during the period of ownership of the property and at death or dissolution of the marriage or registered domestic partnership. Such rights include the right of management and control of community property, a community property interest on dissolution of the relationship, or an interest in the community property of the decedent’s estate. (Family Code Section 297.5⁵⁵)

Avoiding Probate for Same Sex Couples in California As discussed above, there are two methods for avoiding probate in California: joint ten-

⁵⁴[http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam
&group=00001-01000&file=297-297.5](http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=297-297.5) ↵

⁵⁵[http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam
&group=00001-01000&file=297-297.5](http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=297-297.5) ↵

ancies and community property with rights of survivorship. In order to be able to create a community property with rights of survivorship interest, the parties must be married or in a registered domestic partnership. Both of these types of interest allow one party's interest to pass to another party and any property owned in such an interest would not be subject to probate. However, both of these types of interest require that the deed expressly declare either the joint tenancy interest or the interest as community property with a right of survivorship. Accordingly, a deed that did not expressly contain such language would create a tenancy in common. Such a deed would require that the property be probated on the death of one of the title holders.

An alternative method for avoiding probate would be for the parties to have a living trust and to deed the property to the trustee(s) of the living trust to be transferred pursuant to the provisions of the living trust. Partners in a same-sex relationship, who own property together, should consult with an estate planning attorney, just as same-sex couples who own property together should do so to consider whether to create a living trust. Properties for which title is not held in joint tenancy or community property with a right of survivorship would have to be probated on one of the death of one of the parties, absent a living trust.

Division of Property Rights Upon Termination Of A Relationship Between Same Sex Couples When property is held in either joint tenancy or community property with rights of survivorship, whether by same-sex or opposite-sex couples, the joint ownership may be terminated by five methods:

1. A unilateral conveyance of an interest to a third party
2. A recordation of a written declaration
3. A decree of partition
4. A judgment
5. An execution sale

A severance of a joint tenancy extinguishes the right of survivorship and the parties thereafter hold title as tenants in common. A termination of the right of survivorship with community property reverts the property to community

property without survivorship rights. Both parties would then hold a one-half interest in the property as tenants in common (or community property, if the right of survivorship is revoked from a community property with rights of survivorship), which would permit each cotenant (or spouse/registered domestic partner) to make a testamentary disposition of his or her interest in the property.

Couples who have registered as domestic partnerships in California who wish to terminate the registered domestic partnership can do so by either preparing and filing a Notice of Termination of Domestic Partnership form with the California Secretary of State in certain circumstances, or at least one of the partners must file a petition with and obtain a judgment from a California Superior Court similar to the termination of a marriage.[4]⁵⁶ If the parties terminate their registered domestic partnership, part of the court proceedings include a determination of community property. Community property is assigned a fair market value, and after taking into account community obligations and debts, the community property is distributed equally among the parties. The disposition of the property can be decided between the parties in a property settlement agreement, or determined by the Court. Under California law, unless the parties clearly express intent to keep the right of survivorship, it is automatically terminated at the termination of the domestic partnership. This is true for both joint tenancies and community property with rights of survivorship. (Probate Code Section 5601⁵⁷.)

Once a right of survivorship is terminated, or in a tenancy in common, a party has a right to partition; to segregate and terminate common interests in the same parcel of property. A partition may be either a judicial decree or may be a voluntary agreement of the parties. While the parties may agree to a partition non-judicially, each party with an interest in the property has an absolute right to partition the common property through a court partition proceeding.

In a partition action, the Court may physically divide the property. However, that is often not possible, so the alternatives are for one party to buy the other party's interest in the property or for the Court to order the property sold. If one party is buying the other out, it is usually to the advantage of the parties to have the property appraised and to reach an agreement as to

⁵⁶#_ftn4

⁵⁷<http://law.onecle.com/california/probate/5601.html>

the transfer price rather than to proceed with a partition action, which would be expensive and time consuming.

If the property is to be sold, California Code of Civil Procedure Section 873.820⁵⁸ specifically describes the manner in which the proceeds of a sale from a partition are to be divided, as follows:

”The proceeds of sale for any property sold shall be applied in the following order:

(a) Payment of the expenses of sale.

(b) Payment of the other costs of partition in whole or in part or to secure any cost of partition later allowed.

(c) Payment of any liens on the property in their order of priority except liens which under the terms of sale are to remain on the property.

(d) Distribution of the residue among the parties in proportion to their shares as determined by the Court.”

The transfer of an interest where registered domestic partners are terminating their relationship would not cause a re-assessment of the property’s value, just as it would not if the property was transferred pursuant to a property settlement agreement in a divorce action.[5]⁵⁹

Avoiding Disputes Between Couples Who Are Not Married or Registered Domestic Partnerships California does not recognize Common Law Marriage, or any equivalent for domestic partners, but there are other bases under which a person can claim to have acquired an interest in the real property that was owned by his or her partner before the relationship began or was acquired by the other individual in the relationship. These include such things as making contributions towards the mortgage, maintenance costs, or improvements, jointly pooling earnings and accounts to pay common expenses, and performing services for the other individual in the relationship or which improve the property. These factors can have a significant role where title is held in tenancy in common, or in a partition action, where the court can determine the respective shares to be received by the parties.

⁵⁸<http://codes.lp.findlaw.com/cacode/CCP/3/2/10.5/6/4/s873> ↩
.820

⁵⁹#_ftn5

*Marvin v. Marvin*⁶⁰ (1976) 18 Cal. 3d 690 also leaves open the possibility for the Court to find that an express agreement exists between co-habitants which is enforceable except to the extent the contract is explicitly founded on the consideration of meretricious sexual services. The Court further held that in the absence of an express contract, the Court could inquire into the conduct of the parties to determine whether the conduct of the parties demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. While a discussion of *Marvin* and subsequent cases is beyond the scope of this article, one method for avoiding disputes, in addition to carefully choosing the manner in which title is held, would be to have a clear co-ownership agreement between the parties which addresses ownership, capital contributions, contributions for on-going maintenance, improvements, mortgage, taxes, insurance, and other property related expenses, and any division of proceeds from the property in the event the relationship ends or the property is sold.

Steven Mehlman has over 30 years of experience as an attorney handling civil litigation and transactions in the areas of real estate and business. Mr. Mehlman engages in a broad real estate practice, including transactions for the purchase or sale of real property as well as disputes and lawsuits that arise from such sales, such as non-disclosure of material defects, breach of contract and construction defects. He also handles land use and zoning issues, neighbor problems, and residential and commercial landlord/tenant matters including leases and unlawful detainer actions. As an attorney who handles both transactions and litigation, Mr. Mehlman strives to avoid disputes through clear and enforceable contracts between the parties and with respect to how parties take title. He can be reached at steven@mehlmanlawgroup.com⁶¹

[1] Having a “common residence” is the first pre-requisite in Family Code §297(b) for filing a Declaration of Domestic Partnership with the Secretary of State, although the common residence need not be owned by both members of the couple.

⁶⁰<http://www.casebriefs.com/blog/law/family-law/family-law-keyed-to-weisberg/alternative-families/marvin-v-marvin/> ↩

⁶¹<mailto:steven@mehlmanlawgroup.com>

[2] Multiple parties can also form other entities, such as corporations or limited liability companies that can then purchase a property, but that would be ownership by the entity, and not ownership by multiple parties, as the multiple parties would have personal property ownership in the stock or membership interest of the entity. There are also stock cooperatives and common interest developments, such as condominiums, that can result in an ownership interest with others

[3] The property may be held in the partners' names or in the name of the partnership by recording a statement of partnership. .

[4] Couples in registered domestic partnerships should consult with a family law attorney, but for a General Description of the process download the brochure *Terminating A California Registered Domestic Partnership* on the California Secretary of State website. See <http://www.sos.ca.gov/dpregistry/forms/sf-dp2.pdf>

[5] The state law excluding re-assessment of the property for registered domestic partners originally effective January 1, 2006, was made retroactive in 2007 for property transfers between registered domestic partners that occurred between January 1, 2000 and January 1, 2006, so that parties in this situation can apply for relief on a retroactive basis. The exclusion from re-assessment may also apply to couples that registered as domestic partners in states other than California which have laws substantially equivalent to California domestic partnership law, but owned California property. The exclusion also applies to property held in a living trust which transfers pursuant to the trust provisions, if the transferee was a registered domestic partner to the decedent at the time of death.

Immigration Challenges of Bi-National Same-Sex Couples

Saturday, October 1, 2011



Erika Portillo

Same sex couples face many challenges in the United States when seeking the same legal benefits available to heterosexual couples.

For instance, in immigration law, U. S. citizens are allowed to petition for certain qualified relatives to remain or come and live permanently in the United States. Eligible immediate relatives include the U. S. citizen's spouse, unmarried children under the age of 21 and parents.

However, because of the Defense Of Marriage Act⁶² ("DOMA"), bi-national same-sex couples are prevented from petitioning for their spouses. DOMA was enacted in 1996 and specifically prevents the Federal Government from recognizing the validity of same-sex marriages. As a result, bi-national same-sex couples are prohibited from legally living in the United States by DOMA's Section 3.

⁶²<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:#>

Section 3 reads in part as follows: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” Because immigration law is ruled by the Federal government, the immigration authorities are bound by DOMA⁶³.

Although DOMA⁶⁴ has been declared unconstitutional by some states (including California) for violating equal protection of the laws guaranteed by the Due Process Clause, no definitive decisions have been issued as the courts’ rulings are under appeal.

In June, in an attempt to show that the Immigration and Customs Enforcement⁶⁵ (ICE) focus was the detention of criminal aliens, the director of ICE, John Morton, sent out a memo instructing the agency’s attorneys to use their discretion in pursuing deportation cases against individuals. Specifically, he advised his attorneys to take into consideration several factors, including, but not conclusive, having an American citizen spouse. Soon after, ICE began to grant deferred action/administrative closures of cases to individuals with sympathetic cases. Some of those have included gay or lesbian individuals married to American citizens. Although it is a temporary relief, as it essentially puts the case on an indefinite hold, individuals may be able to receive a work permit while the case is pending review. Whether they get to permanently remain in the United States will depend on whether Congress repeals Section 3 of DOMA⁶⁶, or the judicial branch renders a definitive decision against the law’s constitutionality.

DOMA⁶⁷ may not be the only obstacle that bi-national aliens face under U. S. immigration law. Some questions have been raised as to the number of fraudulent applications that may be filed if bi-national same-sex marriage is recognized.

However, that should not be a concern. The safeguards that are currently in place are designed to prevent scam marriages. Those safeguards, although

⁶³<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:#>

⁶⁴<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:#>

⁶⁵<http://www.ice.gov/>

⁶⁶<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:#>

⁶⁷<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:#>

sometimes extreme and invasive, have served as a deterrent to diminish the number of scam marriages in the immigration field.

Currently, when filing an ICE application for a spouse, a US citizen must provide sufficient evidence to prove that there is a bona fide marriage. That evidence may include joint assets, children's birth certificates, photographs, etc. They also have to go through an interview process which sometimes can be videotaped and may even take a few days. In a videotaped interview, the couple is questioned individually and asked intimate questions about their relationship. If there are contradictions as to whether or not the curtains of their bathroom are green, for example, the petition can be denied. That process is related to cases where the foreign national entered the United States legally.

Undocumented individuals go through a much different process. Once a petition by a US citizen has been filed and approved, the foreign national must depart the United States and have an interview in a U. S. consulate. They must also file a waiver for entering the United States without documents. He or she has to establish to the satisfaction of the Attorney General that the refusal of admission of such an immigrant alien would result in extreme hardship to the citizen or lawful resident spouse of such an alien. The foreign national can end up waiting outside the country not only for months but, in many cases, years before the waiver is approved.

Once the related petitions and applications are approved in either of those processes, if the marriage is less than two years, the foreign national is granted a conditional residence for two years as a safeguard. After those two years, a joint petition must be filed, along with evidence in support of their marriage asking the immigration authorities to remove the conditions and grant permanent residence. As to citizenship, the foreign national is able to file for naturalization in three years rather than five, so long as there is proof the couple is sharing a life together.

Certainly these safeguards will serve as a deterrent in bi-national same-sex couples cases.

The reality is that bi-national same-sex couples have a long way to go before their marriages are finally recognized by the Federal Government. Let's hope for a well thought out law allowing the same benefits to bi-national same-sex couples as are currently received by heterosexual couples.

Erika Portillo is a partner at the firm of Guichard, Teng & Portello, APC⁶⁸, general focus of her practice is immigration.

In related news, close to home: Bradford Wells and Anthony Makk, a bi-national same-sex married couple living in San Francisco, continue to live in legal limbo. In August of this year, mere days before Anthony Makk faced deportation to his native Australia, President Obama made the surprise announcement to prioritize deportations and to consider same-sex marriage as a factor in deportation decisions. Two bi-national same-sex couples have so far successfully appealed their deportation orders under the new guidelines. Bradford Wells and Anthony Makk, meanwhile, continue to hope that their deportation order will also be dropped.

Amy Goodman of Democracy Now! interviews Bradford Wells and Anthony Makk in the video below. Also joining them is Rachel Tiven, Executive Director of Immigration Equality.

Assistance After Losing a Domestic Partner

Saturday, October 1, 2011

The death of or separation from a domestic partner, though very different, are similar in the emotional upheaval and turmoil they create – each rendering the person left behind immobilized, anxious and overwhelmed. While the specific needs of each individual are as varied as the individuals themselves, general concerns are common to all.

- Where do I start?
- Who will help me?
- What things do I keep, donate, sell, discard or store?
- How will I be able to change a home which was once “ours” into a home which is now “mine”?

⁶⁸<http://www.gtplawyers.com/>

- How do I perform the routine tasks (financial, personal, household, etc.) once performed by my partner?

Respectful of their emotions, sensitive to their struggle and attentive to their needs, a third-party often is able to do what friends and family cannot: work closely with the individual at his or her pace to help create a comfortable home and bring order to their lives while they are experiencing emotional strife and transition, . without judgment, expectations, personal history, pressure, time restrictions or hidden agenda.

Struggling with the death of a domestic partner During an initial visit, such a third-party assistant can engage in a personal, rather than business, discussion to learn as much as possible about the partners' lives together, their personalities and the current situation. This approach provides insight to determine priorities. Immediate concerns can be addressed and remedied while short-term difficulties and long-term problems can be assessed and resolved. Ideally, a bond of trust develops and a partnership is created.

In the weeks that follow, the assistant can help the grieving party sort and categorize all possessions, sparing the surviving partner any unnecessary emotional upset. This can be the beginning of a time of healing, as stories and anecdotes of lives spent together are shared in the process of working together. Deciding what possessions to part with is often more painful than their actual disposition. The assistant, at this point, should compile detailed inventories of items to be appraised, sold or placed into storage. If the surviving partner is not sure what to do with some items, no decisions need be made at that time. Instead, these items should be addressed at a later time. Some days are filled with such emotion and sadness that work is placed on hold briefly. It is all about working at the survivor's pace.

It is the beginning of redecorating and transforming a home which was once "theirs" into a home which is now "his" or "hers" – a home filled with warm memories rather than cold reminders.

Often a surviving partner is emotionally unable to handle any clothing or deal with the feelings associated with the final parting from the items. Familiar scents or textures alone can often overwhelm the partner. Clothing

and personal items to be donated or sold should be discreetly and respectfully packed, donated and/or sold without the presence of the surviving partner.

Determining which household possessions (furniture, household accessories, keepsakes and mementos) are to be kept, donated, sold, discarded or stored is an emotional process which the surviving partner should not undertake alone. Rather than keeping remaining items in the same place they were kept when the partner was still alive, it is much preferable to give these items a new context. Re-arranging remaining items emphasizes the importance of each item and the memories attached. It is the beginning of redecorating and transforming a home which was once “theirs” into a home which is now “his” or “hers” – a home filled with warm memories rather than cold reminders.

Struggling with the separation from a domestic partner and remaining in the home When domestic partners separate, meaningful personal items are often taken from “their” home, creating both physical and emotional loss and destruction for the partner remaining in the home.

For a third-party assistant, it is important to learn about the separation, including the immediate changes it creates and its long term impact. This personal discussion allows a determination of priorities and the beginning of making the home and parts of his or her life whole again.

In the weeks following the separation, the remaining partner needs assistance to create an “it’s all about me” list for each room. This includes changing the use of a room (i.e., den into extra bedroom), purchasing new items to replace those removed, re-arranging furniture and home furnishings, determining the proper placement of items with sentimental value, removing unwanted items (determining later if those items are to be sold, donated, stored, or destroyed) and re-decorating. The partner remaining in the home may have always wanted to implement these changes but was prevented from doing so by the former partner. Other, more immediate and less complicated, changes represent the need to establish calm, order and comfort throughout the home.

At times, emotions surrounding the separation may surface, self – confidence may be low and the feeling of failure overwhelming. These feelings

may cause work to be interrupted for a few days. His or her emotional well-being is far more important than any established timeline.

The result of the “it’s all about me” list is the beginning of transforming a home which was once “ours” into a home that is now “mine” – a home filled with welcomed change and growth and personal creativity.

Struggling with the separation from a domestic partner and leaving the home Often times when domestic partners separate, the leaving partner takes only those items he or she brought into the partnership and a handful of keepsakes or mementos from the relationship. The partner who stays lives in a home which is all too familiar (yet now so very different). The partner leaving, even though he or she may have initiated the separation, faces an equally challenging situation: that of moving into a place which is empty and void of anything personal, creating a feeling of being displaced. He or she is assured that with the emptiness of a new “house” comes the freedom to create a new “home.”

Placing all personal possessions where they can be easily seen and appreciated is important. This begins the creation of a home filled with familiarity and well being. In the days to come, the assistant should accompany the remaining partner while walking through each room determining its use, what to purchase and the placement of each item. As each room is completed, his or her creativity and personal taste are unleashed and what was once devoid of anything personal becomes a home filled with new beginnings and promise.

Similarities shared by those struggling with the loss of or separation from a domestic partner Sometimes the surviving partner or separated partners have been excluded from or only partially involved in the financial, personal and household responsibilities. A third-party assistant can help the grieving partner with important tasks, including identifying monthly responsibilities should be identified; bookkeeping and tax payment systems established; important documents and legal papers organized; filing systems created. What begins as a time of uncertainty and apprehension ultimately becomes a triumph in personal growth and independence.

While assisting surviving and former domestic partners create new homes, evaluate personal possessions and learn new filing and organizing systems, there is one final aspect of their new life that ought to be addressed – a

change in attitude. In some instances, donating clothing he or she no longer wants and purchasing new clothing gives him or her a new style and instills self-confidence - creating a new attitude about how they look, feel and act. . With others, working together to cultivate new interests and re-visiting old ones leads to socializing with new people. The assistant should also discuss the benefits of a new health and exercise program or the return to a program that may have been placed on hold during the difficult and chaotic times.

A new life for those struggling with the loss of or the separation from a domestic partner It is important to work closely with those suffering loss, suggesting and encouraging ways in which to succeed in their struggle to become comfortable with and accepting of their new life and surroundings. This allows them once again to:

- Anticipate walking into “their” home
- Enjoy entertaining and welcoming friends and family into their new home
- Relate to and spend time with family and friends as they once did
- Engage in the things and activities they once enjoyed
- Appreciate and savor all that they have accomplished
- Meet someone with whom they can share their new life and new home

Creating a new home, accepting responsibility for household tasks, learning financial and record keeping systems and achieving personal growth all contribute to a life filled with independence and confidence.

Melanie Kay helps those coping with the loss of a partner, spouse, parent or sibling, as well as empty-nesters and elders in transition. She is a graduate of Ohio State University. She honed her organizational and problem solving skills as a special events coordinator for a national bank and national charitable organization and as a director for a Sonoma County winery. As a child of divorce and suffering the loss of her father when she was only 21 years of age, Ms. Kay learned, first hand, of the need for compassion, empathy, patience and understanding during times of

emotional upheaval and personal turmoil. Ms. Kay can be contacted at suddenlyonyourown@sbcglobal.net⁶⁹ and 510 649 3047

Joint Bankruptcies For Same-Sex Married Couples

Saturday, October 1, 2011



Marlene G. Weinstein

A bankruptcy judge in the United States Bankruptcy Court for the Central District of California recently issued a decision in the case of *In re Balas and Morales* (June 2011) 449 B. R. 567 in which the court held that the Defense of Marriage Act (“DOMA”), as applied to a same-sex couple legally married under state law, violated the couple’s equal protection rights afforded under the Fifth Amendment of the United States Constitution.

Mssrs. Balas and Morales were a lawfully married couple under the laws of the State of California when they filed a joint bankruptcy petition under

⁶⁹<mailto:suddenlyonyourown@sbcglobal.net>

Chapter 13 of the Bankruptcy Code. In response to the filing, the United States Trustee ("UST") moved to dismiss the case unless Msrs. Balas and Morales agreed to sever their cases into two (2) separate bankruptcy cases. They refused and the matter was submitted to the court. In denying the UST's motion, the court found that DOMA did not serve an important governmental interest, or advance any valid governmental interest, and could not be upheld under either heightened or rational basis scrutiny.

Following the Balas and Morales decision, twenty (20) federal judges in southern California joined together to rule that DOMA does not bar same-sex married couples from filing joint bankruptcy petitions.

Although not given as much national attention as the Balas and Morales case, a New York bankruptcy judge also denied the UST's motion to dismiss a joint Chapter 7 case filed by a same-sex couple who had been legally married. The court held that "cause" did not exist under 11 U. S. C. §707(a) to dismiss the case solely on provisions of federal legislation, DOMA, that the executive branch had declined to enforce. See *In re Somers* (May 2011) 448 B. R. 677.

No formal opinion has been issued by any of the Bankruptcy Judges of the Northern District of California as to how they would rule if the matter was brought before them. However, the court did issue an announcement ("Announcement") in which it stated, in relevant part, as follows:

It is appropriate for this court to clarify its practices regarding joint petitions, in light of the much-publicized Balas and Morales decision, ...

The Balas and Morales decision is not binding in this court, because it is the decision of a court equal to this court, rather than a court superior to this court. This court may properly address the issue raised in Balas and Morales only if and when that issue is properly presented in a case before this court.

The Announcement further provided that the clerks of the bankruptcy courts in the Northern District of California would accept for filing a single bankruptcy petition by individuals representing themselves as lawfully married, and further, that the court would not, on its own initiative an investigation as to whether any such individuals were same-sex, opposite-sex or recognized as married under state or federal law. However, the Announcement also provided that if a motion or action was filed by a party in interest

objecting to such a joint filing, that the court would schedule such proceedings as are appropriate to determine the legal and factual questions raised in the action or motion.

Marlene G. Weinstein is a sole practitioner whose practice is devoted exclusively to Bankruptcy Law representing debtors, creditors and Chapter 7 trustees. She believes pre-bankruptcy planning is important and that it can often be used as an effective tool in negotiations between parties involved in non-bankruptcy disputes. She often works with clients in conjunction with tax, litigation, family law and other non-bankruptcy attorneys. Her office is in Walnut Creek. She can be reached at 925-472-0800.

Interview with Gordon P. Erspamer – Transcript 6

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Gordon: I've also met some of the most amazing people that you'd ever want to meet. I'll give you an example, Al Maxwell, Logan, Utah. World War II he was in the Philippines when the war broke out. He was with Wainwright's group as they tried to escape the Japanese forces along the Bataan Peninsula. Captured, in Bilibid Prison for months, mistreatment. He was six feet three, 236 pounds when the war started. They took him on one of the famous hell ships to Japan, where they would take them to the copper mines and the steel foundries. They took a lot of the POWs.

It was sunk by an Allied submarine, and was one of, I think, 67 survivors of that sinking. He was picked up by a Japanese merchantman vessel, taken to Japan where he worked in Mukden, China for three and half years at a copper mine and then another year or so in a steel plant in Nagoya. He was interned at Nagoya Camp 6.

The war ends with the bombing of Hiroshima and Nagasaki. He's trucked in with other prisoners from Nagoya Camp 6 to clean up at Hiroshima, and they're there for five or six days, sleeping on the open ground, radiation exposure, of course.

He gets discharged. Well, actually Nagoya was one of the last camps liberated, and they take the men out and they go to the hospital ship Hope. Al checks in. Guess how much he weighed?

Lisa: Six three, just his bones would have to weigh 120 pounds, maybe?

Gordon: 89 pounds.

Lisa: Unbelievable.

Gordon: 89 pounds. Then he was nursed back to a relative state of health for a short time, and then just dismissed from the service as unfit for service, and then given a very low percentage disability rating. Later in life, he got multiple myeloma. We know when he left the service he'd had dengue fever and malaria. He had a colony of amoeba in his upper right quadrant that they never, ever were able to kill. It was horrific.

He and his wife had five children. Four of them died at birth or within six months of congenital heart or lung deformities. So they lost four of their five children. They denied his claim.

Lisa: Unbelievable.

Gordon: They denied his claim. I represented Al and Jackie for many years. They were one of the name plaintiffs in the NARS case.

One of the finest human beings you'll ever meet – patriotic, clean living, responsible fellow, wonderful family. What they put him through. But having that relationship with someone that you would not normally meet in this business meant a lot to me.

They were very, very poor but I'll just give you an example of how good people they were. When my son was born, they had no money at all, but Jackie went out to a Nordstroms and got him a nice little blue outfit, a very, way too expensive thing. But they were such fine people, they were going to use their limited resources on something like that, and it was really touching.

Lisa: Very much so.

Gordon: Yeah. I've spent my whole life doing this stuff. There has never been a period of time ever that I didn't have something going. I like to do the major cases, the cases that are going to affect a lot of people.

Lisa: Right.

Gordon: That's why these Edgewood, these chemical and biological weapons testing programs, a lot of these people are dying and the VA has denied 99% of their claims. You can't prove it. You can't prove that the injections you got . . . they didn't just get one thing. One week, mescaline; next week, LSD; next week, B-gas; next week, scopolamine or BZ. For eight weeks. Then, did they follow up on them or monitor them? No. They discharged them from Edgewood and then, "See you later."

It is so galling to the ethical violations and lack of informed consent. They never even told them what they were getting. They'd say, "We're giving you EA-3339." They had code names for everything. They never told them what their medical problems were. They never disclosed. When they learned more about the substances, which are chemical and biological weapons, they never told them anything about it. So a lot of them have died not knowing there was a linkage. They never studied what are the synergistic effects of getting eight different chemicals in a short space of time when you're a young man?

It's not defensible. They made them sign all these consent forms, "I hereby consent to let you do anything to me that you want." Well, they lined them up and they said, "Here are some forms to sign." You sign the forms. It's just tragic how they take advantage of the "little people."

Lisa: Right. Well, they're lucky to have you.

Gordon: Well, thank you.

Lisa: You're definitely the champion.

Gordon: Thank you. Thank you, Lisa.

Lisa: Thank you so much for spending the time with us today.

Gordon: Well, thank you for coming by.

Lisa: You bet.

Gordon: It was good to see you.

Lisa: Likewise.

Interview with Gordon P. Erspamer –

Transcript 5

Saturday, October 1, 2011

Lisa: In 2009, you were awarded the American Bar Association's Pro Bono Publico award. In addition, you've also been honored with Trial Lawyer of the Year awarded by the Trial Lawyer for Public Justice Foundation, the Justice Award from the National Association of Radiation Survivors, the Dean K. Phillips Memorial Award for Advocacy by The Vietnam Veteran's of America, and last, but of course not least, the Contra Costa County Bar Association's Presidents Award, among many other awards that are too many to mention.

You have been actively been involved in pro bono work and advocacy since law school. What inspired you, and what would you tell the next generation of lawyers who might ask, "Why should I get involved in pro bono work?"

Gordon: Well, as I mentioned earlier, I was the kind of person who went to law school thinking I would become a public interest lawyer, and that's why I went. Very tough to get those jobs, especially if you have no experience whatsoever. So like a lot of lawyers, I did the next best thing, which is working for a firm that has a demonstrated commitment to pro bono and diversity and the kind of things that I felt strongly about my whole life.

It was through my father that I got into the particular veteran's area, and I grew to really like the area, not only because I like the people I met. The people are really downhomesy people, very likeable people generally. But it also gave me a great breadth of the kinds of issues to tackle. Where can you get into poverty law, homelessness, federal constitutional law, statutory interpretation, and complex fact patterns like the radiation, all these huge, unannounced and announced nuclear tests before the Nuclear Test Ban Treaty? So there's a lot of science in there, and a lot of my cases have had a lot of science or medicine.

They're very challenging. But how do you get involved? The truth of the answer is for almost every lawyer, and I think it's true of this generation more than any, it's hard to find time. The pressures are so great. What I always said to myself is, "Look, there's never going to be a good time." If

you're a good lawyer, and you're a young lawyer, you're going to be really busy, particularly if you're at a big firm. You're going to be very, very busy, very much sought after.

So when the NARS case came in, I took that. I did it myself and I was an associate. I didn't really have anybody working above me. I just decided, look if you're going to do, you just have to take the cases and you have to make the room. I never thought about hours, the way a lot of people think about hours. If I'm going to take a case, it's not going to be on the back of the law firm completely. I mean in part it's going to be, but if I have to work longer hours for a few years, I'm going to do it. That's the price that I'm paying for the cause of these people. That's the way I've always done it. So I've had a few years where I billed more hours than I really wanted to or my family wanted me to, but that is the price you pay. Particularly in this veteran's area, if you don't do it, I found this out over time, if I don't do it, it often never got done. The most difficult cases to tackle, like the \$10 Attorney Fee Limitation.

Lisa: Right, that was amazing.

Gordon: That started out the NARS case. A veteran can't play an attorney, at the time, more than \$10 to represent him out of his own pocket. Yet, we have all these people that are getting their legal fees paid for by the government. It struck me as a big issue of veterans' civil rights, and that's the way I framed the issue. That's the way the debate later got framed. Why are veterans second class citizens? The limitations on their rights were so great. No judicial review at that time. Every VA decision was final. You could not hire a lawyer.

The third prong, I used to call it the Iron Triangle, whereby the government insulated itself from liability to the veterans who, the metaphor I always used, the "little people" don't get their rights. The third thing was the Feres Doctrine. The Feres Doctrine basically is a judicially created exception to liability for torts that the government commits, and it's not in the statutes. It's not in the Federal Torts Claims Acts. It came out of a 1950 Cold War Era decision of the Supreme Court, which basically immunized the government from damages for service people. Even in cases of clear malpractice, there's actually a case before the Supreme Court on that right now that's going to be argued very soon. It's been around for a long time. The result was a total

lack of accountability, and no one seemed to be ever able to do anything about it.

So over the last four decades, three and a half decades, judicial review got passed for the first time. Reversal rate? Sixty percent. Sixty percent plus every year. What does that tell you about all the injustice that had been done before judicial review? The attorney fee limitation has been relaxed, to some extent.

Lisa: They get \$20?

Gordon: Actually, you can't pay an attorney at all in the first phase of a case.

Lisa: Okay.

Gordon: If you lose and you demonstrate, I guess, that you need an attorney, you can hire an attorney to do an appeal or to try and reopen your case based upon new and material evidence. Still not very good, but that has been upheld.

But the big things about these cases are all the veterans, when the veterans would try to sue, they'd often would be in pauper or they would have some solo practitioner or small person doing a good deed, trying to help them out. But they didn't have resources to really fight the government. So all these cases were just getting thrown out in mass. If you look across, you just look at the Veteran's Administration or DVA across the federal court docket sheets in the computer system, you just find hundreds of cases where they just get thrown out of court. They also defend these cases the same way: no jurisdiction; has it been a waiver of sovereign immunity; all these arguments that have nothing to do with the merits. They just got tossed one after another after another, and they never saw their day in court.

Well, that took some heavy thinking. How do you deal with these issues? The government has a lot of things that it can exert, like failure to exhaust administrative remedies, everything every lawyer has heard a thousand times. I really reacted badly to having people thrown out of court in mass like that, where no one ever heard the merits of their claims. So some of these basic things that I learned years ago, about due process, the right to be heard at a meaningful time in a meaningful place with meaningful procedures, these are important rights. There's a reason why they're in the

Constitution. The Constitution doesn't say everyone except veterans has a right to due process. It seemed pretty basic to me. Yet it took over 30 years to get Cushman and the recent PTSD case, which went off constitutional grounds, due process grounds. Then the very recent case that's probably going to the Supreme Court.

These are very basic principles. I always felt I understood due process pretty well, just because, as you grow up, you have experiences in life, and I just saw a lot of things. Procedures sometimes are the substance, because if you don't give people the procedures, they never get over the hurdle to have their case heard on the merits. So there are a lot of veterans out there even today, the most underrepresented segment in our population is veterans, by far. Almost all represent themselves. They don't do a very good job because they're not lawyers and they lose. People die. When the mother called me and said her son had hanged himself from the rafters of their garage, coming back from Iraq, with their garden hose, and he'd been turned away three times in the last week by the V. A., obviously in severe distress. He had a right to treatment. But there was no procedure. No procedure at the V. A. for contesting a denial of treatment. They can send you away and then they say, "Oh, we're immune, Feres Doctrine. We're immune."

The thing about my new case, the chemical biological weapons testing program case, Edgewood Arsenal and Fort Detrick, they just basically ran hundreds of thousands of troops through a chemical weapons testing program where they injected people with nerve gas, drugs like LSD, horrible substances like BZ that you probably never heard of, but it was weaponized. It's what they call a kind of a knock-out drug. It's an incapacitating agent is what they technically call it, but the right dosage will knock you out for two weeks. You will be flat on the floor for two weeks, and you'll probably die of thirst.

Lisa: Wow.

Gordon: They weaponized this incredibly powerful drug. Not only were they injecting it into people into their blood vein, but it turns out through discovery in this case, and I don't think anybody knows this, they were injecting it through some private entities, researchers who were helping them at universities, intraspinally.

Lisa: Oh, gosh.

Gordon: Into your spine to see how more potent it was in your spine. If anybody has had a spinal tap, you know how painful that can be number one and number two, how dangerous it is to be messing with your spine. They did all kinds of things. They did mescalines intraspinally. All these different chemicals. Over 450 different toxic substances, including most of the organophosphates which are the pesticides, nerve gases, you name it, they got it. Anti-psychotic drugs. They would give people nerve gas almost to the brink of death so they could test antidotes for nerve gas. So they would bring you back. You would have probably died, but for receiving atropine or some kind of antidote to reverse the process. They were doing this for 25 to 30 years, 1943 until the late '70s.

Lisa: And were they volunteers who thought they were going into something completely different?

Gordon: Yeah, they said, "Well, free, here's a great program at Edgewood Arsenal. Work four days a week. No KP duty. Work in civilian clothes. The program is to test the new gas masks and other equipment to protect troops in the future." Well, they get there and it wasn't to test gas masks, I mean there were gas masks there, but they turned the tables on them. Once you had signed up, you couldn't get out. You know how the military, all that little subtle, it's not subtle, the control that they exercise over the people?

Lisa: Right.

Gordon: These were of course all enlisted men. All the men in the atomic bomb tests, who were in the trenches as you've seen from around Ground Zero at the Nevada test site, all enlisted men. Not a single officer of course. They put a non-commissioned in charge, and they would go on their maneuvers. It, again, comes back to the "little people." I actually wrote a poem about the little people at one point.

Lisa: Can you remember it? Can you recite it?

Gordon: I can't recite it, but I can send it to you if you want to read it. I'll send it to you. But I know some of the lines. But it's just a way of looking at the world where, I coined my own term to describe it, "upper snuffy." Upper snuffy, looking down on the little people and they don't really matter. It's like the charge of the Light Brigade. If we lose a million troops or five hundred thousand, who cares because they're just enlisted men?

It's that mentality that permeates too much of our society. But bottom line, when you ask anyone, I've talked about my cases with innumerable people over the years. I have not found anyone, anyone that thinks I'm wrong or that the veterans are wrong. It's just a huge disconnect between the government and the people.

Interview with Gordon P. Erspamer – Transcript 4

Saturday, October 1, 2011

Lisa: Gordy, after all this time defending veterans and fighting what the Ninth Circuit Court calls the unchecked incompetence of the V. A., do you feel that there is any improvement in transparency at the agency or at service delivery?

Gordon: That is an interesting question because there are really two parts to my answer. Some things have improved. They have to because the court is overseeing the process on a lot of these issues. Some there are things they used to be able to get away with that they can't anymore. There is still a lot that they get away with that never sees the light of day. It is an entrenched bureaucracy. It is huge. Someone told me one time, "You do not turn a battleship on a dime." The agency is not going to change overnight either. Most of the people are career people there. They do things the way that they do them, and there is sort of an arrogance I think that comes with having control over people and making decisions about their lives.

Surprisingly, there are a lot of people in the V. A. who think that their job is to protect the public fisc. You see in the documents that most of these people are malingerers. Well, people are not malingerers. They are so paranoid, if I can use that term, about people faking PTSD, that they deny a lot of valid claims. I don't think a veteran is going to fake PTSD, fake nightmares, and fake all that goes with that. It is just not very likely. To the point where, and so many people have it, that some people have suggested, some leading scholars have suggested it would be an easier system if we just assumed that if they made the claim for PTSD and it was backed by a private physician, we just grant the claim.

Why go through the fuss and all the time of spinning in this hamster wheel phenomenon, where their cases go on for decades. They can get denied. They go up on appeal. It takes five years. It comes back down. It gets re-decided because they screwed it up the first time. It goes back up again, and the lawyers that are familiar with this call it the “Hamster Wheel Phenomenon.”

Is it much better? Not much better. The endemic problems, like delay, they are far worse now than they were in 1991 when they had a private task force to look into why disability claims were taking so long. A really very good report, a very good analysis done, and it was by someone who later became the number two person at the V. A., a former admiral. Way worse today, way worse, across the board, much worse today than it was in 1991, notwithstanding the fact that they did adopt some of the recommendations.

It was ironic at our trial, the PTSD trial, ; they were coming up and telling the judge, “Oh, we have all these new programs to fix the problems of delay.” Do you know what their solution was for delay?

Lisa: I can’t imagine.

Gordon: Well, you’re going to be shocked. But perhaps not. They would shorten the time periods for the veterans to assert their rights from 90 days to 30 days. That would save 60 days. That would improve their process. Not one proposal for how they could do something to shorten the process. The judge who said this in the Ninth Circuit decision and it is true, there is not one stage in the entire process of the V. A. where the V. A. is under a time deadline. They can take their own sweet time on everything, and everything the veteran does has a time deadline. Now is that a fair system? Then their solution, “Oh, we can shorten the time by shortening the veteran’s times.”

Lisa: Unbelievable.

Gordon: Don’t put a five year limit on us. Cut them down from 90 to 60 days, or from 60 to 30, that was their solution. Really a total lack of imagination.

Lisa: It is only going to get worse with all of the returning vets.

Gordon: It has gotten worse, and it is going to continue to get worse. As long as these wars go on, there is a steady group, and a lot of them are on

multiple deployments. Multiple deployments are a real problem, because some people can take one tour duty, a year or six months if you are a Marine, or now that can be extended to 14 months for the Army I believe, but anyway, the second time around some of them start to crater, especially when they are in a lot of combat.

The third time around, the rate really spikes up. They don't count these people and their suicide rates, but people who have been recalled, are the reserves to go back a second or a third time, or reassigned service still in the active military. Quite a number of examples I know of where the day before they are to report to duty, they blow their brains out. For the families, every time someone dies, whether it is a man or a woman, every time a soldier dies, you typically have a mother, a father, a spouse, sometimes children. These families are affected.

I will just close with a story about Terry. Terry is his real name. He is a young man who lived in San Diego. He knew another veteran who I had known previously, who was actually going back to law school. He got treated and he came through it very, very well, with PTSD. Anyway, his friend called me and said, "Terry is with me, and Terry was in Iraq. He was bent down behind a wall, and someone shot a rocket propelled grenade at him and it hit the wall immediately above his head."

It went off and he suffered traumatic brain injury, microscopic bleeding in the brain, and horrible post traumatic stress syndrome. They worked with him for a little while on it, but clearly he was very badly off. So they just discharged him. They sent him back through Fort Carson. He came back home, and they gave him a very low percentage disability rating, which is what they call an "under-rating problem." Just to get rid of them and save money, they just give them a very small disability rating. Well, a 20% or 40% disability rating, the amount of money is a few hundred bucks a month.

On short order, see if I can get this sequence right. His wife left him. He lost his home in foreclosure. He was having problems getting medical care at the V. A. He was being turned away. He became homeless, and when my friend found him, he was sleeping on the streets of San Diego. He was living on the streets of San Diego. 24 years old. 24 years old, and the real problem is the true cost of war, these are young people. They are in their 20s most of them. Some of them are only 19 or 20. Caring for

them with these huge mental problems, traumatic brain injury affects your intelligence, your memory. You can't find your way around even familiar surrounds. You have to take care of them for the rest of their lives. We are talking about 50, 60, 70 years. It is expensive.

It is expensive. Let's think about that before we go into the war, and think about how many people are going to die and how many people are going to get injured, and what is that cost going to be?

The funny thing, I don't know if you want the tape on or not. It is interesting. There was a fellow in the Bush Jr. administration, before the start of the Iraq War, who had the temerity to suggest that the war might cost, I forget what the number was, I hesitate to guess, but it was a fairly small number. He got excoriated and he got fired by the Bush administration for suggesting the war might cost that much. It was in the low billions. I think \$1 billion or something like that. Well, one of the latest, best-sellers, in the hard bound non-fiction category is it "The Four Trillion Dollar War"? The war actually has cost thousands of times more than that official who got fired suggested it might cost at its zenith. He got fired and yet he was way, way, way under.

Lisa: Right.

Gordon: That is what happens when people speak out, people in government. Paul Stiglitz wrote that book. It is co-written, two professors, but Paul Stiglitz I think is the lead writer. It's either "The Three Trillion Dollar War" or "The Four Trillion Dollar War." I forget. But it is whatever it was then. It's a year or two ago. I'm sure it's gone up.

Lisa: Right. Ten times that much now. Oh my gosh.

Interview with Gordon Erspamer – Part II

Saturday, October 1, 2011



Gordon P. Erspamer

Gordon “Gordy” Erspamer, Senior Counsel with Morrison Foerster, has been fighting tirelessly for veterans’ rights. Gordy’s most recent victory, in front of the 9th Circuit Court of Appeals earlier this year, provides hope to veterans suffering from post-traumatic stress disorder. Describing problems at the VA as “egregious”, the court ordered the VA to overhaul its mental health system.

Prior to this, Gordy defended ‘atomic veterans’ (veterans suffering the consequences of radiation exposure during nuclear testing in the 1950s) and veterans subjected to secret government tests that occurred until the 1970s.

This is part 2 of the interview between Gordy Erspamer and Lisa Reep, Executive Director of the CCCBA. You can watch or read Part I of the interview [here](http://cclawyer.cccba.org/?p=2057).⁷⁰

⁷⁰<http://cclawyer.cccba.org/?p=2057>

Gordy is the recipient of numerous awards and honors, including the prestigious Pro Bono Publico award from the American Bar Association. Later this year, Gordy will also be honored with a Lifetime Achievement Award from The American Lawyer magazine in New York.

Enjoy:

Gordy, after all this time defending veterans and fighting what the Ninth Circuit Court calls the unchecked incompetence of the V. A., do you feel that there is any improvement in transparency at the agency or at service delivery?

Read the video transcript⁷¹, powered by SpeechPad⁷².

In 2009, you were awarded the American Bar Association's Pro Bono Publico award. In addition, you've also been honored with Trial Lawyer of the Year awarded by the Trial Lawyer for Public Justice Foundation, the Justice Award from the National Association of Radiation Survivors, the Dean K. Phillips Memorial Award for Advocacy by The Vietnam Veteran's of America, and last, but of course not least, the Contra Costa County Bar Association's Presidents Award, among many other awards that are too many to mention. You have been actively been involved in pro bono work and advocacy since law school. What inspired you, and what would you tell the next generation of lawyers who might ask, "Why should I get involved in pro bono work?" Read the video transcript⁷³, powered by SpeechPad⁷⁴.

Read the video transcript⁷⁵, powered by SpeechPad⁷⁶.

Same Sex Statistics

Saturday, October 1, 2011

Here are some interesting same-sex facts and statistics for 2011, as cited

⁷¹<http://cclawyer.cccba.org/?p=2425>

⁷²<http://www.speechpad.com>

⁷³<http://cclawyer.cccba.org/?p=2431>

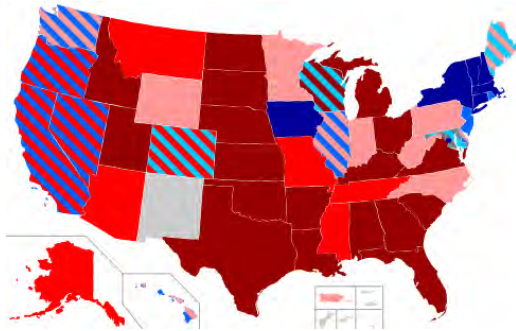
⁷⁴<http://www.speechpad.com>

⁷⁵<http://cclawyer.cccba.org/?p=2436>

⁷⁶<http://www.speechpad.com>

by the Gay Marriage Research Center⁷⁷:

Gay Marriage Facts Same-Sex Marriage in the US: From legal (blue) to constitutional bans (red)

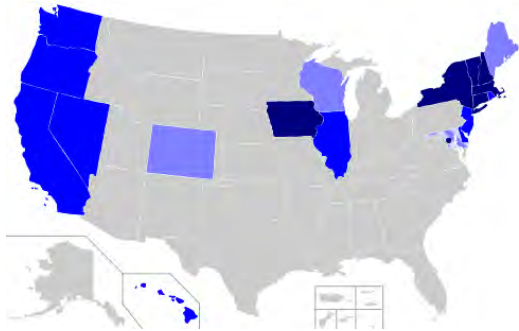


States where gay marriage is legal:

- Massachusetts (2004)
- Connecticut (2008)
- Iowa (2009)
- Vermont (2009)
- New Hampshire (2010)
- Washington, D. C. (2010) (not a state)

Recognition of same-sex relationships in the United States

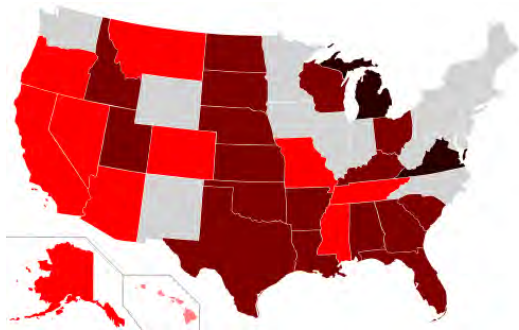
⁷⁷<http://www.gaymarriageresearch.com/>



States That Recognize Out-of-State Gay Marriages:

- New York
- California (only if the marriage is from before Proposition 8 was passed)

Constitutional Bans on Same-Sex Unions



Gay Marriage Support Should gays an lesbians be allowed to marry?

- 43% say yes
- 47% say no
- 10% are unsure

Statistics Source: Pew Research Center⁷⁸

Demographics The 2000 census did not count gay marriages directly, so the following are estimates based on how people reported their household. It counts households with 2 members of the same sex that are unrelated. 2010 census information on gay couples has not yet been compiled.

- **Total Number of Gay Couples:** 594,391
- **Number of People in a Couple:** 1.2 Million
- **State With the Most Couples:** California (92,138)
- **State With the Least Couples:** North Dakota (703)
- **Highest Concentration of Gay Couples** (% of all couples): Washington, D. C. (1.29%)
- **Lowest Concentration of Gay Couples** (% of all couples): North and South Dakota (.22%)

Gay people make up 1-4% of the population in most cities⁷⁹, but are more concentrated⁸⁰ [PDF] in metropolitan areas.

Most Same Sex Couples by City:

1. New York, NY: 47,000
2. Los Angeles, CA: 12,000
3. Chicago, IL: 10,000

Statistics Source: 2000 Census.

Highest LGBT Concentration by Major Metropolitan City

1. San Francisco, CA: 15.4%
2. Seattle, WA: 12.9%
3. Atlanta, GA: 12.8%

Statistics Source: 2000 Census.

⁷⁸<http://www.gaylawreport.com/gay-marriage-poll/>

⁷⁹<http://www.gaydemographics.org/USA/USA.htm>

⁸⁰<http://www.gaycoupleslawblog.com/uploads/file/SameSexCouplesandGLBpopACS.pdf> ↵

Septemberfest – InterProfessional Mixer

Saturday, October 1, 2011

On September 30, 2011, attorneys, bankers, accountants and other professionals from the financial services and commercial real estate industries gathered for an informal networking mixer in Walnut Creek. The patio at Pyramid Alehouse filled up quickly and suit jackets soon started piling up on chairs as nearly 200 guests mingled in the late afternoon heat. Below are some Septemberfest pictures – you can find more on our Facebook page: Facebook.com/CCCBA⁸¹



⁸¹<http://www.facebook.com/cccba>





2012 Judicial Assignments

Saturday, October 1, 2011

You can download 2012 Judicial Assignments here – click on the picture to download the pdf document. It will open in a new browser window:

Superior Court of Contra Costa County
2012 JUDICIAL ASSIGNMENTS
Clara Becton: Presiding Judge
Berry P. Goode: Assistant Presiding Judge

MARTINEZ		PITTSBURG
Criminal Trials	Family	
-John Kennedy (208) Supervising	-Al Farnon (215) Supervising	-Thomas Caruso (214) Supervising
-Brian Stevens (212)	-Ben Kuri (218) Family/Insolvency/Probate Trials	-Roberta Harris (21)
-Linda Davis (213)	-Steve Green (212)	-Sheryl Allen (213)
-Lorena Paez-Munich (210)	-Steve Treas (213)	-George Egan (214)
-Linda Larkin (214)	-Travis White (217)	-Loretta Roberts (217) (Communities)
-Thomas M. Madsen (213)	-Alicia Barker (218) (Communities)	
-Mary Ann O'Malley (214)	-Jeff Huffman (218) (Communities) (Presiding)	RICHMOND
-Evelyn Ziliga (210)		-Dale Weil (218) Supervising
	Child	-Peter Fenger (217)
Criminal Calendars	-Amy Cradock (218) Supervising	-Christopher Brown (218)
-Nick Jackson (215) Trial	-David Austin (218)	-Penny Landon (218)
-Dana Mace (218) Family Criminal	-Lauri Brady (218)	-Robert Edgerton (218) (Communities)
-Doree Davis Ward (210) Admin	-David Hunt (218)	
	-Barry P. Goode (218) (Communities) (Presiding)	WALNUT CREEK
-Richard Armstrong (210) Probation	-Austin Sanford (218) (Communities)	-William Rhee (218) Supervising
		-Helen Schreiner (218)
Appellate	Probate	-Steve Mills (218)
-Linda Miller (218) Supervising	-John Luginbue (218) Supervising	-David Engleman (218) (Communities) (Presiding)
-Barry Batten (217) (Presiding)		-Brad Jones (218) (Communities)
-Barbara Johnson (218) Trial Trial		
-Joni McVey (218) (Presiding)		
-Vivian Houghton (218) (Communities) (Presiding)		

2012 Judicial Assignments

The SideBar: ØL Beer Cafe and Bottle Shop

Saturday, October 1, 2011

VENUE:

- Øl Beer Cafe and Bottle Shop
- www.beer-shop.org

LOCATION:

- 1541 Giammona Drive, Walnut Creek, CA

REASON FOR GOING:

- Beer, Beer, Beer



Even if you're a dedicated wine drinker like me, sometimes the most widely consumed alcoholic beverage in the world, namely beer, demands attention. At øl in Walnut Creek, beer gets the vast and detailed attention it deserves.

øl (Danish for beer, pronounced like cool without the c) has 18 beers on tap, as well as a veritable plethora of bottled beer, either to consume on premises or take home. Don't belly up to the very nice bar and request a Coors or a Bud, the patrons will laugh you out of the establishment. This is real beer only, my friends.

As for styles of beer, you can have something sweet, something chocolately, or something bitter, depending on your mood. The skilled and friendly waitstaff will help you make a selection, and they will offer a taste if you can't make up your mind between an IPA or an ESB.

Food menu is not extensive, but well tailored and reasonably priced. There is no happy hour, but the nice interior (think Restoration Hardware) and friendly crowd make up for the lack of discount.

Enjoy!

Have fun, be safe when you drink and drive.

Send your ideas for Happy Hour to Dana Santos at danasantos@comcast.net⁸²

⁸²<mailto:danasantos@comcast.net>

Coffee Talk: What should be the government's interest in marriage and civil union?

Saturday, October 1, 2011

The government's interest should be in seeing that the laws are just and applied fairly and equally. In this case it means granting marriage equality (civil unions are not equal) for same-sex couples. There is no legally justifiable reason not to. It is a civil rights issue.

Karen Lewis

Absolutely Zero. It's none of the government's business. That goes for what I eat, what I wear, and what I drive, shoot, and fish with (lead?), and what I do with my property. The government should leave its citizens alone so long as they don't harm others or substantially interfere with the quiet enjoyment of others.

Scott E. Carter, Esq. Law Office of Scott E. Carter

---If Marriage is a religious event, founded by God, etc., the government cannot say it must be available to all – especially those who do not believe, for then the Government is interfering with religion.

If the government has a duty to regulate unions, then it should have only civil unions. No mention of marriage and no rules that must be followed, except for those that apply to civil unions.

To argue that our founding Fathers believed this or that making marriage a right of all, this begs the question why the founding Fathers did limit marriage the way they did. Either the Founding Father proscribed marriage or they were discriminatory and marriage must be stricken and the "intentions" of these United States was to regulate only civil unions.

D. J. Hartsough

What difference does it make? The government has so far injected itself into our personal lives and into the concept of marriages and civil unions that extrication would kill the host. I do not believe we can retrench from any point where government involvement has expanded into our lives. Using 25 years as a benchmark for a generation, just sit back and reflect on where the individual was relative to government 25 years ago, 50 years ago, 75 years ago – and so on. And you will perhaps see that what the government calls progress is really not progress at all.

Wayne V. R. Smith

*Attorney * Mediator*

You want a short paragraph on a subject that has developed over centuries if not millenia, is viewed differently by various cultural groups in our “global village” (i.e., the consequences of any change are not just going to be local to the jurisdiction making them), is among the most fundamental and widespread of human relationships, and an introductory discussion of which would take at least a college semester? Get real. In the spirit of cooperation, here is an impractical suggestion suitable only for coffee talk: Proclaim that the legal (governmental) relationship we now call marriage shall henceforth be referred to as “civil union” and that the term “marriage” shall be used solely in the context of religious doctrine.

Mark W. Frisbie

Government should stay out of the marriage side and religion should stay out of the civil union side. Government should issue licenses for civil unions between two consenting adults. If those two consenting adults want to be ‘married’ then they should pick a religious entity that will ‘marry’ them.

David S. Pearson

Law Offices of David S. Pearson

The government's interest in "marriage" or civil union is a dynamic interplay with technological and economic forces, as represented by constant changes in the Civil, Family and Probate Codes. In the past, when birth control was less dependable, ways to procreate were more limited, and a division of labor was more necessary to operate households that lacked labor-saving devices, society (and its government) had more interest in people paring up and staying married both to share costs and to raise the inevitable children in a household less likely to be in poverty. In the present, the Codes operate to (1) define the duties of insurers and protect creditors of those who throw in their economic lot with each other, (2) protect society and its government from having to support financially spouses or children when separated from a person with substantial income or property, and (3) to ascertain who is most likely able to give directives regarding healthcare in an era when medicine can keep a person alive indefinitely, and to be the proper objects of inheritance, when a person is too improvident or existentialist to leave instructions. Government has no interest in the word "marriage" except to the extent that societal norms would lead those who "marry" out of religious or romantic ideals to expect that the duties they assume are approximately what is reflected in the legal codes. It would be more efficient and probably less fraudulent, however, for all persons who apply for a "marriage or civil union license" to get a booklet and perhaps a video describing the economic duties they are assuming. Then, if they still want a license, leave the description of whether it is a "marriage" or a "civil union" for religious ceremony or personal definition.

Michael S. Strimling

Bramson, Plutzik, Mahler & Birkhaeuser, LLP

First, there should be no such thing as a Civil Union. The name suggests a commitment LESS than that of a MARRIAGE, and that only weakens the societal fabric our government has an interest in strengthening. Discrimination based on gender is UNCONSTITUTIONAL, as is the institutionalization of any particular religious practices. Same sex marriage has been around for a lot longer than most realize (Just ask the T's in LGBT...) so get over that and let's see what can be done to strengthen the institution.

It is my understanding that there are efforts afoot to create forms necessary for the issuance of a marriage license that would require the parties to address those areas of a marriage that are frequently overlooked by the young, passionate betrothed that can be points of contention when they inevitably appear.

Such things as defining roles as to children, finances, location of residences, joint and separate property, saving and spending could all be addressed.

When I first began to practice Family Law (then: “Domestic Relations”) the standing joke was... “IT SHOULD COST \$1000 TO GET MARRIED AND \$10 TO GET A DIVORCE, INSTEAD OF THE OTHER WAY AROUND...”the numbers have changed (dramatically) but the idea still has some merit.

JOHN E. MANOOGIAN

Law Offices of John E. Manoogian

---We published all responses we received to our Coffee Talk topic this month. If you wish to add to the discussion, please feel free to use the comment section below...

