Chapter 6

Planning for Registered Domestic Partners

SYNOPSIS

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§ 6.01 Scope of Chapter

This chapter provides a discussion of the issues facing estate planners when trying to plan for same sex couples and California Domestic Partners, as that term is defined by the California Domestic Partner Rights and Responsibilities Act of 2003 ("DPRRA").[1] Although the chapter will primarily examine planning for unmarried registered domestic partners in light of the DPRRA, planning for unregistered and unmarried heterosexual and same-sex couples will be briefly discussed. The chapter will conclude with a discussion of same-sex marriage.

For an overview of tax laws affecting the disposition of estates, see Chapter 2 of this publication. For an overview of selecting the proper estate planning devices generally, see Chapter 3 of this publication.

§ 6.02 California Domestic Partner Rights and Responsibilities Act of 2003

[1] Scope of Act

In 2003, the California Legislature passed the California Domestic Partner Rights and Responsibilities Act of 2003. The DPRRA provides substantial rights to couples registered as "domestic partners" as that term is defined by the DPRRA. The DPRRA expands upon prior legislation which provided limited rights to domestic partners under California law.

In 1999, the legislature enacted the initial legislation creating a statewide registry for domestic partners.[2] Under that legislation, cohabiting adults were given the right to establish a domestic partnership, registered with the Secretary of State, in lieu of the right to marry. The act also required that, to be considered domestic partners, a couple must share a common residence and agree to be jointly responsible for each other's

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[1] California Domestic Partner Rights and Responsibilities Act of 2003, Stats. 2003, ch. 421.

[2] Stats. 1999, ch. 588, § 2 (adding Fam. Code §§ 297–299.6).

basic living expenses incurred during the domestic partnership, be at least 18 years of age and unrelated by blood in a way that would prevent them from being married to each other, not be married or a member of another domestic partnership, and either be persons of the same sex or a couple in which at least one of the persons is more than 62 years of age.[3]

The 1999 legislation, however, afforded those couples who register as domestic partners only limited substantive benefits. In 2000, 2001 and 2002, the legislature passed legislation expanding those limited rights granted to domestic partners.[4] Finally, in 2003 the legislature passed the DPRRA, granting a full range of rights enjoyed by and and responsibilities owed by spouses to a cohabiting couple who complete and file a Declaration of Domestic Partnership with the Secretary of State, who registers the declaration in a statewide registry for such partnerships.[5] The DPRRA specifically provides that "[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses."[6]

[a] Definition of Domestic Partner

The DPRRA defines "domestic partners" as "[t]wo adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[7] In addition, a "legal union of two persons of the same sex that was validly formed in another state or jurisdiction and that is substantially equivalent to a domestic partnership," as that term is defined under California law, will be recognized as a valid domestic partnership in California, regardless of the name given to that union in the state or jurisdiction where it was formed.[8] Although it is not entirely clear which legal unions formed in other jurisdictions will qualify as "substantially equivalent" to a domestic partnership in this state, legal unions which provide for rights and responsibilities, including property rights, which are similar to, or more expansive than, those provided under California law should qualify as "substantially equivalent" for purposes of this provision of the DPRRA.

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[3] Fam. Code § 297(b).

[4] See, Stats. 2000, ch. 1004, §§ 3, 3.5; Stats. 2001, ch. 893, §§ 1-60; and Stats. 2002, ch. 447, §§ 1-3 (amending Prob. Code, § 6401), Stats. 2002, ch. 412, § 1 (amending Prob. Code, § 21351); Stats. 2002, ch. 901, §§ 1–6.

[5] Fam. Code § 298.5(a), (b).

[6] Fam. Code § 297.5(a).

[7] Fam. Code § 297(a).

[8] Fam. Code § 299.2.

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[b] Requirements of Registered Domestic Partnerships

A domestic partnership is established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State and, at the time of filing, all of the following requirements are met:[9]

1. Both persons have a common residence.[10] Under the applicable provisions of the Family Code, "have a common residence" means that both domestic partners share the same residence, although it is not necessary that the legal title be in both of their names. Two people have a common residence even if one or both have additional residences, which are not considered to be their primary residences.[11]
2. Neither person is married to another person or in a domestic partnership with someone else, which marriage or domestic partnership has not been terminated.[12]
3. The persons are not related by blood in a way that would prevent them from being married under California law.[13]
4. Both persons are at least 18 years of age.[14]
5. Either both persons are the same sex, or at least one partner is more than 62 years old.[15]
6. Both persons are capable of consenting to the formation and continuation of the domestic partnership.[16]

[c] Rights and Responsibilities of Registered Domestic Partners

Generally, the DPRRA applies to treat registered domestic partners as the equivalent of spouses for purposes of the creation and management of property rights during the term of the partnership, upon termination, and at death. Section 297.5 of the Family Code, one of the provisions added to existing law by the DPRRA, grants to registered domestic partners "the same rights, protections, and benefits" which are granted to married couples under California law, and further provides that "registered domestic partners shall be subject to the same responsibilities, obligations, and duties under law,

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[9] Fam. Code § 297(b).

[10] Fam. Code § 297(b)(1).

[11] Fam. Code § 297(c).

[12] Fam. Code § 297(b)(2).

[13] Fam. Code § 297(b)(3).

[14] Fam. Code § 297(b)(4).

[15] Fam. Code § 297(b)(5)(A) and (B).

[16] Fam. Code § 297(b)(6).

whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses."[17] Similarly, former domestic partners are granted the same rights and assume the same responsibilities as former spouses,[18] and surviving registered domestic partners, following the death of the other partner, are granted the same rights and assume the same responsibilities as a widow or widower.[19] This Section also specifically provides that, with respect to children, the rights and responsibilities of registered, former and surviving domestic partners are the same as those granted to and imposed upon spouses, former spouses and widows or widowers.[20]

The overall effect of these provisions is that laws relating to community property, marital dissolution, spousal support, child custody, and child support, as well as probate laws relating to death and intestacy, all apply to registered domestic partners as they would apply to married persons.

Finally, "[t]o the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law."[21]

[d] Effective Date of Act

Although enacted in 2003, the DPRRA was made effective as of January 1, 2005.[22] The DPRRA specifically provides that, with respect to any rights, protections, and benefits, and the responsibilities, obligations, and duties of registered domestic partners under state statute, code or case law, a reference to the date of marriage is deemed to refer to the date on which the domestic partnership was registered with the Secretary of State.[23]

In order to provide notice of the effect of DPRRA to domestic partners who registered prior to the effective date of the DPRRA and to give them time to plan accordingly, the Secretary of State was required to send out letters describing the effect

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[17] Fam. Code § 297.5(a).

[18] Fam. Code § 297.5(b).

[19] Fam. Code § 297.5(c).

[20] Fam. Code § 297.5(d).

[21] Fam. Code § 297.5(e). *Cf.* Federal Defense of Marriage Act, 1 U.S.C. § 7, which controls for purposes of application of federal law.

[22] Stats. 2003, ch. 421, § 14.

[23] Fam. Code § 297.5(k)(1).

of the DPRRA.[24] The delayed effective date of the DPRRA was intended to give already registered domestic partners the opportunity to prepare post-registration property agreements that would be treated as pre-registration agreements or, if they so chose, to terminate their status as registered domestic partners. Thus, the Family Code reads:

> Notwithstanding paragraph (1), for domestic partnerships registered with the state before January 1, 2005, an agreement between the domestic partners that the partners intend to be governed by the requirements set forth in [Family Code] Sections 1600 to 1620, inclusive, and which complies with those sections, except for the agreement's effective date, shall be enforceable as provided by [Family Code] Sections 1600 to 1620, inclusive, if that agreement was fully executed and in force as of June 30, 2005.[25]

This provision, which effectively creates retroactive community property rights, is discussed in further detail in § 6.02[2], below.

[2] Specific Considerations: Retroactivity and Community Property Rights

The practitioner should note that the DPRRA retroactively applies to domestic partnerships registered with the state before January 1, 2005 when the parties have created a valid pre-registration agreement that remains in effect as of June 30, 2005.[26] The constitutionality of this retroactive application is unsettled and has not been tested in court, but the argument for its validity would be that notice was adequately provided such that those who did not want to be bound by the DPRRA could have terminated their domestic partnership. The retroactivity provision of the Act may have the effect of creating rights in community property and quasi-community property when the partners registered prior to the effective date of the DPRRA. The practitioner should review the effective date of a registration and analyze any pre-registration and post-registration agreements to determine the characteristics of property then owned by the domestic partners. The practitioner also should educate the domestic partners regarding the effect of California law on their rights and responsibilities with respect to community property, quasi-community property and separate property. The domestic partners may desire to enter into property agreements and transmutation agreements in order to delineate properly what property rights are intended between the partners, including addressing any intentional or unintentional retroactive creation of community and quasi-community property rights.

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[24] Stats. 2003, ch. 421, § 10.

[25] Fam. Code § 297.5(k)(2).

[26] Fam. Code § 297.5(k)(1).

§ 6.03 Estate Planning for Domestic Partners Generally

[1] Ethical Considerations

Generally speaking, the ethical duties and professional responsibilities of estate planning attorneys do not differ whether the attorney is representing married spouses or registered domestic partners. The attorney should determine whether the intended representation will be of one individual partner, or whether the attorney will represent both [registered] domestic partners. The specific issues relating to joint representation and the application of available privileges are discussed below. For a more complete discussion of the ethical considerations and professional responsibility in representation of clients in estate planning matters, see Chapter 4 of this publication.[27]

[a] Joint Representation

An attorney representing both spouses or both registered domestic partners in their estate planning has a duty to avoid conflicts of interest in the representation of those clients. Rule 3-310(C) of the California Rules of Professional Conduct provides as follows:

> An attorney shall not, without the informed written consent of each client, do any of the following:
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> Accept representation of more than one client in a matter in which the interests of the clients potentially conflict;
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> Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
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> Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.[28]

These rules have particular application to the representation of married spouses and registered domestic partners in estate planning matters.

Attorneys seeking to represent both partners in a registered domestic partnership should discuss the matter of joint representation with both domestic partners, ensuring that the parties understand that the attorney must represent the interests of both parties; that the attorney may not keep the information concerning one partner from the other partner, regardless of the circumstances; and that in the event that a conflict of interest arises and the attorney is unable to resolve the conflict, or believes that the conflict is of such a nature that the attorney should not continue to represent both registered domestic partners, each of the parties will need to seek new counsel.

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[27] *See also* House & Ross, *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* (State Bar of California, Trusts & Estates Section, 2d ed. 2008).

[28] Cal. Rules Prof. Conduct, Rule 3-310(C).

In the event that the attorney does represent both registered domestic partners, the Rules of Professional Conduct require the attorney to obtain the "informed written consent"[29] of both clients with regard to potential or actual conflicts. In order for the written consent to be informed, an estate planning attorney should send a joint representation letter to the registered domestic partners, disclosing to each of the partners the actual or potential conflict surrounding joint representation of them, and advising them as to the potential effects of undertaking representation of them jointly. The attorney should also obtain from the clients the written acknowledgment of their waiver of the potential conflict.

The conflict of interest rules become particularly important when the domestic partner clients are considering a pre-registration agreement or when registered partners are considering a property transmutation agreement.[30] The attorney should give specific consideration to ascertaining the intentions of the domestic partners in creating the pre-registration agreement or in transmuting property. The attorney should also properly document those intentions. Prudent practice suggests that the attorney address a letter to the [registered] domestic partners discussing the various options presented to them, the circumstances surrounding the advisability of the particular agreement at issue as well as its effects on the parties' property rights, the intention of the parties in drafting such an agreement, and that both parties wish to execute an agreement. The letter should also remind the partners of their right to seek the advice of independent counsel to consider the effect of the proposed agreement.

Given the natures of pre-registration agreements, post-registration agreements and property transmutation agreements, and the high potential for conflicts of interest between the parties to such agreements, whether presently or at some point in the future, it may be inadvisable for the estate planning attorney to represent either individual registered domestic partner in the creation of such agreements. The attorney should consider the advisability of ensuring that each party to the agreement obtains separate and independent counsel.

[b] Privilege of Confidential Marital Communications

Marital communications are recognized to be privileged when applied to married heterosexual spouses under California law, and because those communications are not specifically exempted from the operation of the DPRRA, the practitioner may infer that the privilege in marital communications extends to registered domestic partners under California law.[31] Nevertheless, as of the date of this writing no revision has been made to California's Evidence Code section 980 that would specifically extend the

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[29] *See* Cal. Rules Prof. Conduct, Rule 3-310(C).

[30] *See* § 6.03[2][c].

[31] *See* Fam. Code § 299.1.

availability of the spousal communication privilege to registered domestic partners.

Even if California law grants to registered domestic partners the same privilege of confidential communications as is granted to married spouses, the privilege may not extend to questions governed by federal law as a result of the Federal Defense of Marriage Act ("DOMA").[32] A registered domestic partner may have the privilege of confidentiality of marital communications extended to him or her under California law, but be unable to claim the same privilege in a federal law action. For a more complete discussion of the state/federal law conflict with respect to registered domestic partners, see § 6.04[6], below.

[2] Characterization of Property and Agreements Affecting Property Interests

This section discusses the general rules relating to the characterization of property under California law, as well as the effects of that characterization on issues that may affect the domestic partners' estate planning needs, including pre-registration agreements, post-registration agreements, and transmutation of property.

For a more complete discussion of the ramifications of characterizing property as community, separate or quasi-community property, as well as a detailed analysis of the requirements for creating valid and enforceable premarital (pre-registration) and postmarital (post-registration) agreements, see California Family Law Practice and Procedure, Second Edition (Matthew Bender 2008). For further discussion regarding the tax treatment and tracing of community property under California law, see California Community Property with Tax Analysis (Matthew Bender 2008).

[a] Characterization of Property

The provisions of § 297.5 of the Family Code operate to apply community property laws to registered domestic partners as of the date of registration of the partnership.[33] As a result, the following general rules apply to property owned by, or acquired by, registered domestic partners (mirroring the state law presumptions regarding the characterization of property owned, or acquired by, married spouses):

1. Property acquired prior to registration: California law imposes a presumption that all property, real or personal, owned by a registered domestic partner *prior to the date of registration*, or property acquired by either partner after registration by gift, devise, descent or bequest, together with the rents, profits and issues from such property, is the separate property of the recipient partner. This presumption can be overcome by a showing that the property was re-characterized or transmuted into community property by a valid pre-

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[32] 1 U.S.C. § 7.

[33] Fam. Code §.297.5 (a), (b), (c), (j).

registration agreement or post-registration transmutation agreement. (Pre-registration agreements, post-registration agreements, and transmutation of property are further discussed below.)

2. Property acquired after registration: All property, real or personal, wherever situated, acquired by a registered domestic partner while domiciled in California is presumed to be community property of the registered domestic partners,[34] if such property was acquired *on or after the date of registration* of the partnership.[35] The DPRRA will therefore validate a domestic partnership registration that occurred prior to January 1, 2005, even though the DPRRA itself only became effective as of January 1, 2005.[36] The result is that the Act converts all property acquired from the date of registration into community property, even if the registration was prior to the effective date of the DPRRA. In many instances, the registered domestic partners may not be aware of the effect of the Act on their property rights. The constitutionality of this retroactive application remains to be decided. Until then, practitioners should advice clients who are registered domestic partners of the effect of their registration on their respective property rights. The domestic partners may wish to resolve the uncertainty by an agreement.

3. Property acquired while domiciled outside of the state of California: The characterization of property acquired by registered domestic partners while domiciled outside of the state of California will depend upon various factors, including the date of registration and the existence of property agreements between the partners. Generally, property acquired by registered domestic partners while residing outside of California that would have been characterized as community property under California law had the registered domestic partners resided in California at the time of acquisition will be treated under California law as quasi-community property for purposes of inheritance, legal separation and dissolution or termination of the domestic partnership.[37] In order for the property of registered domestic partners to be characterized as quasi-community property, the domestic partners must have been in a union, such as a marriage or domestic partnership in California, or in another jurisdiction that, under California law, is "substantially equivalent" to a California domestic partnership, regardless of whether that union is referred

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[34] Fam. Code § 760.

[35] Fam. Code § 760.

[36] Fam. Code § 297.5(k)(1).

[37] *See* Fam. Code §§ 125, 2501, 2550, 4338(c).

to as a "domestic partnership" or by some other name.[38] In addition, if the domestic partners were legally married in another jurisdiction or country, California law may not recognize that marriage.[39] In *In re* Marriage Cases[40] the California Supreme Court held that Family Code § 308.5 was unconstitutional. Nevertheless, a recent Amendment to the California Constitution limits valid marriages to those between a man and a woman.[41] An attorney representing a same-sex couple who was married in another jurisdiction, or who may have been in a domestic partnership or other union outside of California, should investigate the effect of that marriage, partnership or union prior to advising the domestic partners with regard to the characterization of property under California law during life and its disposition at death.

4. Other types of property: Any property owned by registered domestic partners that cannot be characterized as community property is the separate property of the partners.[42] Property held in the sole name of a registered domestic partner—if such property cannot be traced to community property which was improperly or inadvertently re-titled as separate property—as well as property held by one or both of the partners as true joint tenants or tenants in common will be treated as separate property.[43]

Registered domestic partner clients may be unaware of the actual characterization of their property because they are unaware of the effect of their registration on property acquired by them. In addition, the length of the relationship, the extent of commingling of the assets of the partners before and after registration, and the existence of property acquired by the partners during relationships with previous partners, whether registered as domestic partners or simply cohabiting, will affect the characterization of property owned by the registered domestic partner-clients. The attorney should review the titling of assets of the domestic partners and inquire as to the sources of funds used to acquire the property, prior ownership, date of acquisition, and other factors which will affect the proper characterization of the property.

The proper characterization of property owned by the registered domestic partners will affect the passage of property at death to a surviving domestic partner, or to the family or other beneficiaries of the individual partners, including any children of the individual partners and/or children of the partnership. Characterization issues will also

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[38] *See* Fam. Code § 299.2.

[39] Fam. Code § 308.5.

[40] *In re Marriage Cases*, (2008) 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683.

[41] Proposition 8, November 2008; as of this writing, the legal effect of Proposition 8 remains uncertain.

[42] Fam. Code §§ 130, 770(a).

[43] Fam. Code § 750.

affect the need for transmutation agreements between the partners.

[b] Pre-registration Agreements

The effective dates of any pre-registration property agreements will be important to determine the effect of such agreements on the characterization of property. Any agreement entered into *prior to the registration date of the partnership* will be considered a pre-registration agreement; such an agreement will be treated similarly to a premarital agreement between spouses. Such agreements must comply with the Uniform Premarital Agreement Act.[44] By contrast, any agreement entered into *after the registration date of the partnership* will be treated similarly to a post-marital agreement between spouses,[45] unless the partnership was registered before January 1, 2005, and the agreement was fully executed and in force as of June 30, 2005,[46] in which case such agreement is treated as a pre-registration agreement.

Pre-registration agreements may be entered into by unregistered domestic partners contemplating registration, in much the same way that similar agreements may be entered into by couples who intend to marry. Some domestic partners may have entered into a nonmarital cohabitation agreement prior to the registration of the domestic partnership. These agreements, referred to as "*Marvin*" agreements,[47] are designed to address property rights and support payments and responsibilities between cohabiting unmarried persons. These agreements are governed and enforced as contracts under the Civil Code, and not by the Family Code, except when those agreements address parentage or child support.

Since the effective date of the DPRRA, however, unregistered domestic partners who intend to register as domestic partners with the Secretary of State have an alternative to the *Marvin* agreement. These couples have the ability to enter into a pre-registration agreement in anticipation of registration, which is the equivalent of a premarital agreement entered into by a heterosexual couple in anticipation of marriage. Such pre-registration agreements must comply with the Uniform Premarital Agreement Act ("UPAA").[48]

A pre-registration agreement under the UPAA must be in writing and must be signed by both parties, and is enforceable without consideration.[49] If the pre-registration agreement complies with the provisions of the UPAA, it is effective as of the date of

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[44] Fam. Code §§ 1600-1617.

[45] Fam. Code § 297.5(k)(2).

[46] Fam. Code § 297.5(k).

[47] See Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815 (1976), the landmark decision on the issue of the validity of, and requirements for, nonmarital cohabitation agreements.

[48] Fam. Code §§ 1600-1617.

[49] Fam. Code § 1611.

registration of the partnership.[50] Fam. Code § 1612(a) (part of the UPAA) provides as follows:

"(a) Parties to a premarital agreement may contract with respect to all of the following:

(1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.

(2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.

(4) The making of a will, trust, or other arrangement to carry out the provisions of the agreement.

(5) The ownership rights in and disposition of the death benefit from a life insurance policy.

(6) The choice of law governing the construction of the agreement.

(7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."[51]

UPAA provides two additional requirements. First, the parties may not adversely affect the right of a child to support through the use of the pre-registration agreement.[52] In addition,

> Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.[53]

The California Supreme Court has held that, in the case of a marriage, the lack of independent counsel is not, in and of itself, determinative of whether a *premarital* agreement was involuntary, absent the presence of other factors including evidence

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[50] Fam. Code § 1613.

[51] Fam. Code § 1612(a).

[52] Fam. Code § 1612(b).

[53] Fam. Code § 1612(c).

indicating coercion or lack of knowledge, and the Court refused to subject a voluntariness determination to strict scrutiny on that basis.[54] Nevertheless, this requirement of independent counsel is extremely important for the estate planning practitioner to remember when representing registered domestic partners. Many attorneys often represent both parties in their estate planning; this potential pitfall in the drafting of pre-registration agreements, however, should be strictly complied with if the agreement contains a provision related to "spousal support" (in the case of registered domestic partners, "partner support" may be more appropriate) as contemplated by the statute. In addition, even if the pre-registration agreement does not contain a provision related to "spousal support," the prudent practitioner will take reasonable efforts to help both parties to be represented by independent counsel in the drafting of their pre-registration agreement.

Finally, the UPAA requires that, as part of the process of drafting and negotiating the terms of the pre-registration agreement, there be "fair, reasonable, and full disclosure of the property or financial obligations of the other party."[55] A waiver of the required disclosure is permissible under the statute.[56]

Family Code § 297.5(k) provides that domestic partners who were registered prior to the January 30, 2005 effective date of the DPRRA were permitted to draft agreements between themselves governing their property rights with respect to each other so long as those agreements were in full force and effect as of June 30, 2005. The effect of this provision is to treat domestic partners who were registered before the effective date of the DPRRA, as "unregistered" for the sole purpose of allowing them to draft property agreements which operate as pre-registration agreements under the UPAA. As a result, these agreements will be subject to the standards of good faith and full disclosure required of pre-registration agreements, and not the standards imposed upon post-registration agreements.

The constitutionality of the retroactivity provisions of the DPRRA should be kept in mind when reviewing pre-registration agreements, and when drafting post-registration and transmutation agreements for domestic partners.

[c] Post-registration Agreements

A post-registration agreement is an agreement entered into between registered domestic partners after the date of registration of the partnership. A post-registration agreement may be desirable under circumstances when the registered domestic partners wish to modify or clarify the terms of a pre-registration agreement, or when the registered domestic partners do not have a pre-registration agreement but wish to

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[54] *In re* Marriage of Bonds, 24 Cal. 4th 1, 99 Cal. Rptr. 2d 252 (Cal. 2000).

[55] Fam. Code § 1615(a)(2)(A).

[56] Fam. Code § 1615(a)(2)(B).

have a written agreement which governs their property interests with relation to each other, or in order to transmute the character of property.

No specific section of the Family Code governs post-registration agreements exclusively, unlike pre-registration agreements that are governed by the UPAA. The Family Code gives a significant amount of latitude to registered domestic partners in ordering their affairs,[57] and specifically allows registered domestic partners to alter their property rights by pre-registration agreements or "other marital property agreement."[58] The Family Code, however, also imposes upon domestic partners specific requirements in their dealings with each other. For example, registered domestic partners are free to contract with each other, but "cannot, by a contract with each other, alter their legal relations, except as to property."[59] In addition, domestic partners, like married persons, are subject, "in transactions between themselves . . . to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other"[60] except as provided in Prob. Code §§ 143, 144, 146, 16040, and 16047.[61]

[d] Transmutation Agreements

In designing an estate plan for registered domestic partners, the creation of transmutation agreements will often be an issue.[62] Transmutation agreements change the character of the property at issue, converting it from community property to separate property or from separate property to community property. A complete discussion of property transmutation is beyond the scope of this chapter. However, for further discussion of the issues relating to transmutations see Complex Issues in California Family Law, Volume C, "Transmutations: Understanding, Defending and Challenging Changes in Property Ownership Between Spouses" (Matthew Bender). See also, California Family Law Practice and Procedure, Second Edition (Matthew Bender 2008); and California Community Property with Tax Analysis (Matthew Bender 2008).

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[57] Fam. Code § 721(a).

[58] Fam. Code § 1500.

[59] Fam. Code § 1620.

[60] Fam. Code § 721(b).

[61] Sections 143, 144, and 146 of the Probate Code generally govern waiver, by a surviving spouse/domestic partner, of certain rights at death by waiver, pre-registration and post-registration, and to the requirements for valid waiver. Sections 16040 and 16047 of the Probate Code generally govern a trustee's duties under the Uniform Prudent Investor Act ("UPIA").

[62] See § 61.05 for discussion of effect of transmutation agreements on wills.

[i] Requirements of Valid Transmutation Agreements

Transmutation of property between registered domestic partners is specifically authorized by the Family Code, which provides that:

> "[M]arried persons may by agreement or transfer, with or without consideration, do any of the following:
>
> (a) Transmute community property to separate property of either spouse.
>
> (b) Transmute separate property of either spouse to community property.
>
> (c) Transmute separate property of one spouse to separate property of the other spouse."[63]

Under the statute, there are two requirements for the form of a valid transmutation. First, the transmutation must be in writing, by express declaration.[64] In *Estate of MacDonald*, the California Supreme Court, in interpreting this express writing requirement, held that a writing does not satisfy the requirement of an "express writing" under the statute unless it contains language which expressly states and acknowledges that the characterization or ownership of the property is being changed.[65]

Second, the transmutation must be "joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."[66]

By statute, transmutations are subject to California's laws relating to fraudulent transfers,[67] including California Civil Code § 3439 et seq. (general law regarding fraudulent transfers).[68] In addition, if one domestic partner gains an advantage over another through a transmutation, a rebuttable presumption of undue influence arises against the domestic partner in favor of whom the advantage arises.[69] This presumption of undue influence will operate to shift the burden to the advantaged domestic

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[63] *See* Fam. Code §§ 850–853.

[64] Fam. Code § 852(a).

[65] Estate of MacDonald (1990) 51 Cal. 3d 262, 272. At issue in Estate of MacDonald was a beneficiary designation form for an IRA, in which a wife with community property interests in her husband's IRA executed a change which named the husband's children as beneficiaries of his IRA. When the wife died first, her estate contended that she did not relinquish her community property right to the IRA because the form used did not meet the requirements of Family Code § 852. The California Supreme Court agreed, stating that the writing at issue did not contain any language characterizing the property at issue, and contained no language from which it could be ascertained that the wife knew that by signing the form, she was altering her interest in the IRA.

[66] Fam. Code § 852(a).

[67] Fam. Code § 851.

[68] *See* Law Revision Commission Comments to Family Code § 851.

[69] *See* Marriage of Delaney (2003) 111 Cal. App. 4th 991, 996, 4 Cal. Rptr. 3d 1 (2003).

partner to rebut the presumption, and in the event that the domestic partner is unable to disprove undue influence, the transmutation will be invalid. The attorney should keep this presumption in mind when drafting transmutation agreements for registered domestic partners.

[ii] Advantages and Disadvantages of Transmutation Agreements

The ability to draft an agreement that re-characterizes property in a manner that is agreed upon by both domestic partners is a distinct advantage in avoiding both later misunderstandings and potential future litigation, whether upon termination or dissolution of the partnership, or upon the death of one of the partners.[70]

The use of a transmutation agreement for a registered domestic partnership can be limited due to the co-existence of two sets of rules of construction, one state and one federal, for the determination of who is considered to be a "spouse." Under California state law, the DPRRA includes in the term "spouse" all registered domestic partners, which in turn includes registered same-sex partners within its definition. Federal law prevents, however, the recognition of domestic partners as equivalent to spouses, and surviving domestic partners as equivalent to surviving spouses.[71]

As a result, federal law will treat registered domestic partners differently from state law. For example, transfers between registered domestic partners may result in a taxable gift between the domestic partners under the federal gift tax, if the value of the transfer exceeds the federal gift tax annual exclusion amount ($13,000 in 2009).[72] Transmutation agreements will be treated as creating such transfers for federal gift tax purposes. In addition, the unlimited marital deduction under the federal estate tax is unavailable to the estate of a deceased registered domestic partner for the value of property transferred to the surviving domestic partner because a domestic partner is not considered to be a "spouse" under DOMA. Similarly, other advantages of transmutation of property which inure to the benefit of married couples under federal law will not inure to the benefit of registered domestic partners. For example, the unlimited marital deduction under the federal estate tax is unavailable to the estate of

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[70] See Fam. Code § 297.5(e), providing that, to the extent that "provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law."

[71] See Defense of Marriage Act, 1 U.S.C. § 7, which provides that, "In determining the meaning of any Act of Congress. . .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 wife."

[72] I.R.C. §§ 2503(b), 2523 (providing that the unlimited federal gift tax annual exclusion amount is available for gifts between a donor and his or her spouse). The federal gift tax marital deduction under I.R.C. § 2523 is not available to registered domestic partners because of the operation of DOMA. In calendar year 2009, the annual exclusion amount is $13,000. Rev. Proc. 2008-66, 2008-45 IRB 1107.

a deceased registered domestic partner, for the value of property transferred to the surviving domestic partner,[73] because a domestic partner is not considered to be a "spouse" under DOMA.

[iii] Drafting Transmutation Agreements

The attorney should note the statutory requirements found in Family Code § 850 et seq. While the statute does not require any specific wording for such an agreement to be valid,[74] the following should be addressed in drafting and executing the agreement:

1. In order to meet the "express writing" requirement of Family Code § 850, the transmutation agreement should contain very specific recitals regarding the nature of the property that is being transmuted. Even if the property is actually transmuted using a separate instrument, such as a retirement plan beneficiary designation form, bank account title and signature cards, or deed (with respect to real property), the separate transmutation agreement should describe the nature of the property being transmuted, its characterization before and after transmutation, and acknowledge the use of the form or deed in actually accomplishing the transmutation.[75]
2. This publication strongly recommends that both parties be represented by counsel when drafting a post-registration transmutation agreement. The following checklist may assist the parties in preventing the presumption of undue influence from being later successfully asserted:
   - ensure that both parties to the agreement are represented by competent, independent counsel;
   - to the extent possible, ensure that both domestic partners obtain advantages, and specifically describe those advantages in the document, with the partners each agreeing that neither of them has obtained an unfair advantage over the other as a result of the execution of the agreement; and
   - ensure that there is full and fair disclosure of all records relating to assets of the partners and the partnership, and that both parties acknowledge that disclosure as part of the agreement.[76]
3. In order to clarify the intent of the parties in case of dissolution, the agreement should explicitly state the intent of the parties regarding the right to

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[73] I.R.C. § 2056, allowing a deduction for property transferred by a decedent to a surviving "spouse."

[74] *See* Fam. Code § 850.

[75] *See, e.g.*, Estate of MacDonald (1990), 51 Cal. 3d 262, 272.

[76] *See* Marriage of Burkle (2006) 139 Cal. App, 4th 712, 717, 43 Cal. Rptr. 3d 181; *see also* California Estate Planning § 4.40E (CEB 2008).

reimbursement under Family Code § 2640.

4. The inconsistency of the rules that are deemed to apply to domestic partners under state law and under federal law suggests that it may be worthwhile to include a recitation that the domestic partners acknowledge the disparity of the laws, and fully intend whatever effect or consequence the transmutation will have on those rights, including its potential effect on their federal gift tax liabilities. The drafter may also consider it advisable to include a statement acknowledging that the domestic partners have been advised to seek the advice and assistance of a competent tax professional in preparing and filing any and all state and federal returns that are due, or that may come due in the future.

§ 6.04 Specific Estate Planning Issues

Once the property owned by the registered domestic partners has been properly characterized, and any necessary property agreements created and signed, the practitioner can begin the planning and drafting of specific estate planning documents for the partners to implement their specific plan. A discussion of the most common documents used in planning for registered domestic partners follows, with an emphasis on issues specific to the partners and the partnership. For a more complete discussion of the drafting of each document, see the references in the introductory paragraph of each section.

[1] Wills

This section discusses the issues inherent in preparing wills for registered domestic partners. For a discussion of testamentary trusts as they relate to planning for registered domestic partners, see § 6.04[2], below. For a more detailed discussion of the drafting and operation of wills generally, see Chapters 10–63 of this publication. For a more detailed discussion of testamentary trusts generally, see Chapter 110 of this publication.

When a will is the appropriate estate planning vehicle, the drafter should include a paragraph or section identifying the registered domestic partner. The will can also define "registered domestic partner" or "domestic partner," when that term will be used elsewhere in the document.

Care should also be taken to define terms that may have a common meaning, but which may need to be modified to best serve a domestic partner living in a nontraditional family structure. For example, terms such as "child," "children," "grandchild," or "grandchildren," should take into account biological children or grandchildren of one partner only, or children of a domestic partner from a previous partnership, marriage or other relationship.

A registered domestic partner, and any children of the partnership, should be

specifically referenced in the will, or otherwise provided for in the estate plan.[77] If a will is drafted prior to the registration of the partnership and at death omits provision for a domestic partner or child of the partnership, a presumption arises that the failure to provide for these persons was an oversight.[78] Omitted registered domestic partners and omitted children of the partnership take an intestate share of community and separate property from the decedent's estate.[79] To avoid this possibility, a domestic partner's will should be modified after registration specifically to mention both the domestic partner and any children of the partnership, to avoid the operation of the statutes related to omitted partners and spouses.

When drafting the distribution provisions of a will for a registered domestic partner, the drafter should make certain that these provisions are consistent with any preexisting pre-registration, post-registration and transmutation property agreements.

Another area of concern when preparing wills for registered domestic partners is the existence of statutory provisions that are not designed for the alternate family arrangements of some domestic partnerships. For example, the default distribution provisions of the anti-lapse statute can have unintended consequences for registered domestic partners. The anti-lapse statute provides that if a transferee is deceased when an instrument, such as a will, is executed, or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place.[80] This statute could have the unintended effect, for example, of providing for the issue of a surviving domestic partner's children, even though the children and their issue were not children of the partnership. This statutory scheme should be carefully reviewed with the registered domestic partners to ensure that their intentions are in line with the default provisions of this statute; if not, the statute can be avoided by specifying a different intention in the will.[81]

Beneficiary designation forms for life insurance and retirement plans should be checked against pre-registration, post-registration and transmutation agreements and against the will to ensure that they are in agreement with the distribution provisions of the will.

Gifts made under a will for registered domestic partners in a nontraditional family, including gifts to the domestic partner or to children of a domestic partner, should be checked to ensure that the gifts do not unintentionally trigger the generation-skipping

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[77] See Prob. Code § 21610, 21620.

[78] Estate of Poisl (1955) 44 Cal. 2d 147, 280 P. 2d 789.

[79] Prob. Code §§ 21610–21623.

[80] Prob. Code § 21110(a).

[81] Prob. Code § 21110(b).

transfer tax, for transfers to persons more than 37½ years younger than the domestic partner.[82]

Finally, the drafter should remembered that, regardless of the provisions of the will or California law, a registered domestic partner with a potentially taxable estate under the federal estate tax will be treated as if he or she is a single person, so that the typical marital deduction clause cannot be used as a funding formula. Because of DOMA, the federal estate tax marital deduction is unavailable to registered domestic partners under the Internal Revenue Code.[83]

[2] Trusts: Revocable Inter Vivos Trusts and Testamentary Trusts

With the increasing and continued use of revocable inter vivos trusts as will substitutes, and the need for other trusts, such as irrevocable inter vivos trusts and testamentary trusts, to implement a client's estate plan, it will be important for the practitioner to understand the use of trusts in planning for registered domestic partners. For a detailed discussion of the operation of revocable inter vivos trusts, see Chapters 80–96, 111, 114, and 140 of this publication. For a discussion of testamentary trusts, see Chapter 110 of this publication. For further discussion of irrevocable trusts, see Chapter 114 of this publication.

For discussion of the federal estate tax marital deduction see Chapters 2 and 112 of this publication. For a detailed discussion of the federal estate tax charitable deduction, see Chapters 2 and 30 of this publication.

While the use of trusts cannot accomplish the same tax planning for registered domestic partners as it can for heterosexual married couples due to the operation of DOMA,[84] the use of trusts as part of a registered domestic partner's estate plan can still provide probate avoidance, protection and control of assets after a partner's death, and additional flexibility in planning for the unconventional families of many registered domestic partners. For example, for a registered domestic partner who wants to provide for both a surviving partner and his or her own children of a previous relationship, the use of a trust can provide the surviving partner with access to income and/or principal during his or her lifetime with the children as remainder beneficiaries, or the trust might provide simultaneously for the surviving partner and the children through the use of a family pot trust.

Planning with trusts for registered domestic partners is similar to the use of trusts in planning for single settlors. As with a will, a trust created for a registered domestic partner should contain a definition of "registered domestic partner" or of "partner," in order to define clearly what is meant by either of those terms. In addition, the trust

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[82] *See* I.R.C. §§ 2601–2664.

[83] *See* I.R.C. §§ 2056 and 2523.

[84] *See* § 6.04[6], below.

document should define fully the family relationships of the settlor(s) of the trust, including the definition of any terms such as "children" or "grandchildren" which may differ from the treatment of those terms under the trust of a heterosexual couple with a more traditional family structure.

Trusts may be used to take advantage of the tax-savings devices, other than the federal estate tax marital deduction, which remain available to same-sex couples with at least one potentially taxable estate. Two planning opportunities are available to a registered domestic partner with a potentially taxable estate: the federal estate tax applicable exemption, and the federal estate tax charitable deduction.

The applicable credit against the federal estate tax[85] is currently available to any U.S. person with an estate that may be taxable under the Internal Revenue Code. Registered domestic partners can take advantage of the ability to pass an amount to children or more remote descendants by creating a trust valued at the applicable exclusion amount[86] for the domestic partner that at the second death is fully sheltered from federal estate taxes. This trust may, for example, provide income and/or principal to a registered domestic partner for life, with the balance passing in a sprinkling trust or outright to children at the surviving partner's death.

For a registered domestic partner with a potentially taxable estate under the Internal Revenue Code, it may be possible to reduce the potential estate tax burden on the estate by providing a gift to charity at death, to take advantage of the federal estate tax charitable deduction. While this method of planning is not appropriate for every client, it may be an option for a registered domestic partner with charitable inclinations.

In order for a revocable inter vivos trust to be effective to avoid probate at the death of the settlor-registered domestic partner, the trust must be funded. Care should be taken to observe the character of property described in property transmutation agreements (including pre- and post-registration agreements), and the drafter should keep in mind that the transfer of property to a trust typically does not transmute the character of the transferred property interest.[87] Any property characterization or property transmutation issues should be addressed by a separate document that is designed specifically for that purpose, and that meets the requirements of the statutes.[88]

Currently, there is no clear consensus on whether registered domestic partners

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[85] I.R.C. § 2001.

[86] I.R.C. § 2001(c).

[87] Fam. Code § 852, which provides that any agreement to transmute the character of property *must be in writing by express declaration.* Typical trust language does not deal with matters of transmutation, and would not meet this requirement.

[88] *See* § 6.03[2][d], above.

should have separate trusts or joint trusts. The conservative approach would be to have three trusts: a separate trust for each partner's separate property and a joint trust for the community property. But the costs and complications may make this option unattractive to many registered domestic partners. In the case of a single-trust plan, unless the trust instrument or instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee.[89] The trust must provide that it is revocable during the marriage with regard to that property by either of the spouses, acting together or alone, and that any power to modify the trust as to that property may be exercised only with the joinder or consent of both spouses.[90] Community property withdrawn from a trust retains its character as community property, unless there is a valid transmutation of the property at the time of distribution or withdrawal.[91] All of these rules apply to domestic partners and domestic partnerships.[92]

The decision to use a single settlor trust or a joint settlor trust will have to be made weighing the various factors presented in any given situation: existing pre-registration agreements, post-registration agreements, and transmutation agreements; the amount of each type of property, either separate or community; the likelihood of litigation concerning the character of property; the intended trustees of the trust; and the identity of the beneficiaries after each partner's death.

[3] Nomination of Guardian for Children

For registered domestic partners, as with most heterosexual married couples, the issue of custody and guardianship of children is of paramount importance when preparing an estate plan. A complete discussion of the issues surrounding parentage determinations and custody is beyond the scope of this chapter. Nevertheless, this chapter discusses the general rules relating to parentage and custody as they relate to guardianship of children at death.

For a detailed discussion of parentage as it relates to same-sex couples and registered domestic partners, see California Family Law Practice & Procedure, Second Edition (Matthew Bender 2008).

Under the DPRRA, registered domestic partners are given the same rights and assume the same responsibilities as are given to and assumed by married spouses. The rights and responsibilities include all issues related to children of either registered

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[89] Fam. Code § 761(a).

[90] Fam. Code § 761(a).

[91] Fam. Code § 761(b).

[92] Fam. Code § 297.5.

domestic partner.[93]

Registered domestic partners are automatically presumed to be the legal parents of any child born to either of them after registration and after January 1, 2005, the effective date of the DPRRA.[94] Conversely, a child born to either domestic partner before registration and/or before the effective date of the DPRRA, is not presumed to be the legal child of the non-biological parent-partner. The non-biological parent-partner will be the stepparent of the child.

The surviving partner-parent of a child born after registration and after the effective date of the DPRRA will be presumed to have legal custody of the child in the event of the death of the other partner, regardless of whether the surviving parent is the biological parent of the child. On the other hand, the surviving partner of registered domestic partnership would not necessarily be presumed to have legal custody of a child of the partnership who was born before the effective date of the DPRRA, or who was born prior to the registration of the partnership, even if born after the effective date of the DPRRA.

For a child born before the effective date of the DPRRA or before the registration of the partnership, a registered domestic partner of the biological parent of the child could, with his or her partner's written consent, accomplish a stepparent adoption, so long as there is no other biological or presumed parent, such as a previous spouse or a previous registered domestic partner who would be presumed to be the biological parent of the child. If, however there is another actual or presumed parent, a stepparent adoption can only be accomplished if the presumed parent provides written consent for the adoption. The parentage of a child born to registered domestic partners, either before the effective date of the DPRRA or prior to registration of the partnership, will be determined based upon statutory presumptions of parentage. Otherwise parentage will be determined by whether the non-biological parent accepted the child into the partners' household and held the child out to the public as his or her own child. Generally, the standards by which parentage is determined parallel those applied for heterosexual, unmarried couples.

Unless a separate document is drawn in which a guardian is named for a child or children in the event of death, the proper document in an estate plan for nominating such a guardian is the will of the parent, whether natural or adoptive, of the children. A form Nomination of Guardian for a child or children of a testator should take into account the relative parentage rules described above. A guardian will generally be needed (and effective) only when all persons deemed to be "parents" under California

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[93] See Fam. Code § 297.5(d), which states, in relevant part: "(d) The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."

[94] Fam. Code § 7540.

law are incapacitated or deceased. Although it is often desirable to nominate a guardian or guardians for children in the eventuality that a guardian is needed, the client should understand the parentage rules prior to making a decision concerning a nomination of a guardian for children.

[4] Powers of Attorney

As with any other category of client, a registered domestic partner should execute a durable power of attorney for financial management and an Advance Health Care Directive. Many issues inherent in the creation, execution, operation and termination of powers of attorney for registered domestic partners are similar to the issues faced by spouses.[95] Nevertheless, there are some considerations that may be unique to registered domestic partners. This section briefly describes the requirements for powers of attorney, and explores some issues relevant to registered domestic partners with regard to those documents. For a more detailed look at powers of attorney for financial management see Chapter 151 of this publication. For advance health care directives generally, see Chapter 150 of this publication.

[a] Durable Powers of Attorney for Financial Management

The first issue that arises in the planning of a durable power of attorney is the choice. While it may seem natural to name the registered domestic partners as agents for each other (in much the same way that it seems natural to name spouses as agents for each other), due consideration should be given to all of the circumstances surrounding the partners' relationship, including the relationship of families and heirs to the principal as well as to the proposed agent; the ages of the principal and proposed agent, and other circumstances, such as the health and financial management experience of the agent. Such concerns could result in the consideration of naming another person to serve as agent, or in the naming of an alternate agent in the event that an alternate agent is necessary or advisable under the power of attorney.

Another important issue the client should consider is granting specific powers to a third-party agent. In the event that a registered domestic partner chooses someone other than his or her partner to serve as attorney-in-fact, consideration should be given to the effect of that power on the other partner and his or her assets. For example, while it may be desirable to give the agent the ability to deal with the real property of the principal, that real property may include the primary residence of the partners although titled only in the name of the principal. Granting blanket authority to a third-party agent over the real property of the principal in this circumstance may have the unintended effect of curtailing the other partner's decision-making ability with regard to his or her own primary residence (assuming that the property is not treated as community property).

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[95] *See* Fam. Code § 297.5.

One solution may be to ensure that the domestic partners name each other as attorney-in-fact under mutual powers of attorney. This approach avoids conflicts between the domestic partner and a third-party attorney-in-fact with respect to all partnership property, including community property and the primary residence. If it is not possible or practical for any reason to name the domestic partner as the attorney-in-fact under a general durable power of attorney, an alternate solution may be to authorize different agents to perform different tasks on behalf of the principal. For example, the domestic partner can be authorized to manage any interest in the principal residence or community property, while a third-party agent can be named to manage significant assets of the principal, such as a business or investment assets. The drafter should ensure that the agents' duties do not overlap unless such overlap is specifically intended, and that one agent is granted broad power, in the event that a specific transaction does not fall within the parameters of any of the specific grants of power.

Finally, consideration should be given to the effect of dissolution or termination of the registered domestic partnership on an active durable power of attorney. Prob. Code § 4154(a) provides that a principal's designation of his or her spouse as the attorney-in-fact is revoked upon dissolution or annulment of their marriage and it appears that under Fam. Code § 297.5, this statute should apply to registered domestic partners in the same manner in which it applies to spouses. Because the statute does not provide for a method to override this automatic revocation, even if the principal wanted the former registered domestic partner to continue to be his or her attorney-in-fact, the principal would have to execute a new power of attorney.

[b] Advance Health Care Directives

The Health Care Decisions Law[96] governs the creation and use of advance health care directives, and the appointment of an "agent" to make health care decisions for a principal.[97] The term "Advance Health Care Directive" includes:

- "individual health care instruction" (also referred to as "individual instruction"), which is defined as a "written or oral direction regarding a health care decision";[98] and
- "A power of attorney for health care," which is defined as "a written instrument designating an agent to make health care decisions for the principal."[99]

The legislative findings for the Health Care Decisions Act provide that the Act

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[96] Prob. Code § 4600, *et seq*. (2008).

[97] *See* Prob. Code § 4607(a) for definition of "agent" under Health Care Decisions Law.

[98] Prob. Code § 4623.

[99] Prob. Code § 4629.

"applies to health care decisions for adults who lack capacity to make health care decisions for themselves," except as otherwise provided.[100] The Act specifically does NOT apply to adults with the capacity to make their own health care decisions,[101] or the law governing health care in an emergency.[102]

Prob. Code § 4716 provides specific guidance regarding the authority of one domestic partner in making health care decisions for an incapacitated partner. This section states as follows:

> **4716.**
>
> **(a)** If a patient lacks the capacity to make a health care decision, the patient's domestic partner shall have the same authority as a spouse has to make a health care decision for his or her incapacitated spouse. This section may not be construed to expand or restrict the ability of a spouse to make a health care decision for an incapacitated spouse.
>
> **(b)** For the purposes of this section, the following definitions shall apply:
>
> **(1)** "Capacity" has the same meaning as defined in Section 4609.
>
> **(2)** "Health care" has the same meaning as defined in Section 4615.
>
> **(3)** "Health care decision" has the same meaning as defined in Section 4617.
>
> **(4)** "Domestic partner" has the same meaning as that term is used in Section 297 of the Family Code."[103]

In many instances, a domestic partner-principal will choose his or her domestic partner as his or her agent for health care decisions. The Act allows any agent, including the domestic partner of the principal, to make all health care decisions that the principal could have made, in accordance with the principal's wishes and instructions, if known, otherwise in the principal's best interests, in keeping with the principal's personal values, if known to the agent.[104] An agent may not provide consent on behalf of the principal for "commitment to or placement in a mental health treatment facility,"[105] "convulsive treatment,"[106] "psychosurgery,"[107] "steriliza-

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[100] Prob. Code § 4651(a).

[101] Prob. Code § 4651(b)(1).

[102] Prob. Code § 4651(b)(2).

[103] Prob. Code § 4716.

[104] Prob. Code § 4684.

[105] Prob. Code § 4652(a).

[106] Prob. Code § 4652(b).

[107] Prob. Code § 4652(c).

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tion"[108] or "abortion."[109] Mercy killing or euthanasia is not authorized under the Act.[110]

A registered domestic partner-principal should give some care and thought to the naming of an agent under an advance directive. Issues for the principal to consider are the dynamics of the family as a whole, the relationship between the principal's children or other family and his or her domestic partner, and the relative health and age of the domestic partners. In addition, care should be taken to determine the extent to which the domestic partners will be operating under HIPAA (with respect to privacy rights—i.e., the receipt of medical information and records), to determine if the exclusion of domestic partners from the definition of "spouse" under DOMA will create significant issues in the performance of the agent's duties.

If a registered domestic partner of the principal will serve as agent under the Advance Health Care Directive, the client can, if desired, preclude certain persons from challenging the authority of the agent regarding the validity of the directive or power of attorney.[111] Prob. Code § 4753 specifically provides:

> **"4753.**
>
> **(a)** Subject to subdivision (b), an advance health care directive may expressly eliminate the authority of a person listed in Section 4765 to petition the court for any one or more of the purposes enumerated in Section 4766, if both of the following requirements are satisfied:
>
> **(1)** The advance directive is executed by an individual having the advice of a lawyer authorized to practice law in the state where the advance directive is executed.
>
> **(2)** The individual's lawyer signs a certificate stating in substance:
>
> "I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and _____ [insert name] was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive."

This section goes on to provide that the advance directive may not limit the authority of a conservator of the person, "with respect to a petition relating to an advance directive, for a purpose specified in subdivision (b) or (d) of Section 4766, or

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[108] Prob. Code § 4652(d).

[109] Prob. Code § 4652(e).

[110] Prob. Code § 4653.

[111] Prob. Code § 4765.

the agent under a power of attorney for health care, "for a purpose specified in subdivision (b) or (c) of Section 4766."

Finally, Prob. Code § 4697 provides that the designation of a spouse as agent to make health care decisions for a spouse is revoked when the principal's marriage to the agent is annulled or dissolved. Under both Fam. Code § 297.5 and Prob. Code § 4716, the designation of a domestic partner as the agent under an advance directive is automatically revoked when the partnership is terminated or dissolved.

[5] Nonprobate Transfers of Community Property

[a] Nonprobate Transfer Statutes

Nonprobate transfers are transfers that take place outside of the probate process, whether by beneficiary designation, deed or other manner of transfer. The nonprobate transfer statutes, found at Prob. Code §§ 5010–5032, contemplate transfers outside of probate for assets such as insurance policy proceeds, retirement and employee benefit plans, mortgages, securities, trusts, deeds of gift, property agreements and conveyances. Such nonprobate transfers are not effective as to a domestic partner who did not consent to, or join in, the nonprobate transfer.[112] Written joinder by a domestic partner in the non-probate conveyance of property is sufficient to satisfy the requirements of the section.[113]

These types of assets are considered to be the community property of the registered domestic partners when acquired after the date of registration. As a result, both domestic partners must sign a written consent, or join in the designation of beneficiary on the plan, in order for the designation of beneficiary to be effective at death. Therefore, if a domestic partner agrees to a particular beneficiary designation at death, and the other partner subsequently changes the beneficiary designation without the joinder of the other domestic partner, that beneficiary designation is ineffective and is treated as if the domestic partner did not join in or consent to the beneficiary designation at all.[114] Similarly, if a domestic partner consents to a beneficiary designation, and that beneficiary designation is changed after the death of the consenting domestic partner by the other domestic partner, the change of beneficiary is effective only as to the surviving domestic partner's one-half interest in the community property, and the interest of the deceased domestic partner passes according to the beneficiary designation consented to by the partner prior to death.[115]

A non-consenting domestic partner can set aside a nonprobate transfer which was

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[112] Prob. Code § 5020; See § 61.07 for general discussion on nonprobate transfers of community property.

[113] Prob. Code § 5010.

[114] Prob. Code § 5023(b)(1).

[115] Prob. Code § 5023(b)(2).

made without the requisite consent.[116] Care should be taken to ensure that any transfer of community property assets by a registered domestic partner to a third party is accompanied by informed, written consent within the meaning of the statute, by the non-transferring partner. Even with separate property, it may be advisable to obtain acknowledgment by the other partner that it is separate property and that he or she is aware of the gift.

[b] Gifts of Community Property

A domestic partner cannot make a gift of community personal property for less than fair and reasonable value without the written consent of the other domestic partner.[117] In addition, a domestic partner cannot transfer or encumber community real property without the joinder of the other registered domestic partner.[118] Transfers or gifts of community property, therefore, made by one domestic partner without the consent or joinder of the other domestic partner may be set aside or declared void if challenged by a non-consenting domestic partner or that partner's legal representative. Gifts of community property that are made without consent or joinder of the other partner may be invalidated in their entirety during the lifetime of the donor domestic partner.[119] Following the death of a domestic partner who made a unilateral gift without consent, the non-consenting domestic partner may void the gift to the extent of the non-consenting domestic partner's one-half community interest.[120]

[6] Conflict of State and Federal Law

The Federal Defense of Marriage Act ("DOMA")[121] creates one of the key conflicts between state and federal law with respect to registered domestic partnerships. Family Code § 297.5 provides:

> **(e)** To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.

While this provision creates equality (or, at least, equivalent treatment), under California law between married spouses and registered domestic partnerships with

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[116] Prob. Code § 5021(a).

[117] Fam. Code § 1100(b).

[118] Fam. Code § 1102(a).

[119] *In re* Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1070–1071, 209 Cal. Rptr. 383.

[120] *In re* Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1070–1071, 209 Cal. Rptr. 383; *see also* Trimble v. Trimble (1933) 219 Cal. 340, 347, 26 P.2d 477.

[121] 1 U.S.C. § 7.

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regard to provisions of state law that "adopt, refer to, or rely upon" provisions of federal law, the reverse does not follow. As a result of DOMA, the federal courts may be barred from applying DPRRA to federal cases and issues.

The privilege regarding confidential communications between spouses probably extends to registered domestic partnerships under California state law.[122] DOMA makes it unlikely that this privilege will be available under federal law. The unavailability of this privilege may affect registered domestic partners in federal tax issues before the Internal Revenue Service, federal tax cases in Circuit Court or Tax Court, and federal criminal cases.

In addition to the privilege of confidential communications, the conflict between state and federal law with respect to registered domestic partnerships arises in at least four other major areas of importance to the estate planning attorney: the federal gift and estate tax marital deduction,[123] the unavailability of the basis step-up for federal income tax purposes for both halves of community property at the first death,[124] the reporting of income earned by registered domestic partners,[125] and the unavailability of federal health care benefits.

A registered domestic partner whose estate is taxable for purposes of the federal estate tax will be unable to claim the federal estate tax marital deduction as a way to pass property to his or her partner while deferring the federal estate tax on that transfer. The absence may result in the imposition of federal estate tax upon the estate of a deceased registered domestic partner, if that partner's total taxable estate is in excess of the amount of the federal estate tax exemption equivalent for the year of death. Similarly, partners attempting to make gifts during life to avoid the federal estate tax at death may precipitate a taxable gift if one domestic partner gives to his or her partner property whose value is determined to be in excess of the annual gift tax exclusion amount.[126] The practitioner conducting the review of the partners' assets should keep this issue forefront in his planning considerations.

The availability of the basis adjustment at death, for federal income tax purposes, on both halves of community property is limited to heterosexual spouses under DOMA. As a result, it is possible—although far from certain—that under California state law a registered domestic partner may be entitled to a basis step-up at death on both halves of community property, even though the dual step-up is unavailable under the income

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[122] *See* Fam. Code § 297.5; *see* § 6.03[1][b].

[123] I.R.C. §§ 2056, 2523.

[124] I.R.C. § 1014(b)(6).

[125] I.R.C. § 66(a).

[126] *See* I.R.C. § 2503, providing for annual exclusion gift amount of $10,000, subject to adjustment. The exclusion is $13,000 for calendar year 2009, Rev. Proc. 2008-66, 2008-45 IRB 1107.

tax provisions of the Internal Revenue Code.[127] This would result in disparate treatment of the same asset under state and federal law, and is an issue which should be carefully monitored and evaluated upon the death of a domestic partner, before a community property asset is sold by a surviving domestic partner.

In addition, although registered domestic partners are required by California state law to file state income tax returns as "married filing jointly" or "married filing separately," this option is not available to registered domestic partners under the Internal Revenue Code and the Regulations as a result of DOMA. Therefore, registered domestic partners must each separately report their own earned income for federal income tax purposes, and are not entitled to each treat one-half of the partners' combined community earnings as their own reported income for federal income tax purposes.

Finally, with regard to federal health care considerations, a registered domestic partner is not entitled to benefits under a partner's health care plan under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).[128] This may create a hardship for registered domestic partners with health-related issues, and should be carefully considered when deciding whether to form, and continue or maintain, a registered domestic partnership.

§ 6.05 Unregistered/Unmarried Domestic Partners

There are many reasons why domestic partners may choose not to register under the DPRRA. In at least some instances, cohabiting domestic partners may not wish to address the dual taxation rules under the California tax structure and Internal Revenue Code, as those taxation schemes apply, or do not apply, to registered domestic partners. Or, perhaps, the cohabiting domestic partners simply want the freedom to contract between themselves with regard to the financial and personal aspects of their relationship, without the structure imposed by California law on the relationships of registered domestic partners. Regardless of the reason for non-registration, planning for unregistered, cohabiting same-sex partners (hereinafter referred to as "cohabiting partners") will be similar in many ways to planning for unmarried, cohabiting heterosexual couples. The remainder of this section discusses some of the major issues and planning devices available to cohabiting partners in California. For an in-depth discussion of the issues surrounding cohabitation, see California Family Law Practice and Procedure, Second Edition (Matthew Bender 2008).

[1] Cohabitation Agreements

Many cohabiting relationships exist on informal agreements and promises, which may, to some limited extent under the law, be enforceable under theories of

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[127] *See* Fam. Code § 297.5; Rev. & Tax Code § 18031.

[128] 29 U.S.C. §§ 1161–1169.

quasi-contract, implied agreement and quantum meruit. However, cohabiting partners who wish to structure their relationship more formally may contract to do so under California law. So-called *Marvin* agreements,[129] which may also be referred to as "palimony agreements," allow cohabiting partners to address issues such as support, raising of children, payment of taxes, ownership of assets and the financial effects of separation. These agreements may be broad and sweeping in scope, or specific and limited, depending upon the needs of the parties.

Marvin agreements are enforceable under California law under the law of contracts, and not under the Family Code. Thus, any provision that is acceptable in a contract under the law may be includible in the agreement.

An attorney structuring a *Marvin* agreement for cohabiting partners should exercise the same care and judgment in preparing the agreement as he or she would in the preparation of any other contract. Specifically, the law will impose the same requirements of good faith and fair dealing inherent in the creation of other agreements. Cohabiting partners should provide disclosure of assets to avoid having the *Marvin* agreement challenged due to lack of fairness or good faith.

As with other agreements, cohabiting partners creating a *Marvin* agreement should be advised to seek independent counsel in the negotiation and drafting of the agreement. Doing so will preserve the arms-length nature of the agreements, and will aid in upholding the agreement should it be challenged in the future. An attorney representing both parties to such an agreement (or one party, if the attorney is also preparing estate planning documents for both cohabiting partners) could be open to malpractice claims based upon conflict of interest.[130]

[2] Estate Planning

Because the law provides very little guidance and imposes very few rules on these types of relationships, cohabiting partners will want to prepare wills, trusts and other documents that specifically delineate the extent to which each cohabiting partner wishes to provide for his or her partner at death.

Community property laws are inapplicable to cohabiting partners. As a result, cohabiting partners may choose to make use of joint accounts (both joint tenancy with right of survivorship and tenancy in common), pay on death accounts, and beneficiary designations on assets in order to manage their financial responsibilities to each other. Automobiles and homes may be owned in joint tenancy to allow a surviving cohabiting partner to succeed to the interest of the deceased cohabiting partner in certain property at death without the need for complicated or expensive estate planning.

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[129] *See* Marvin v. Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815.

[130] *See* § 6.02[1], above.

Cohabiting partners will be treated as unmarried or unregistered persons for purposes of state and federal tax laws. Such persons have none of the rights and responsibilities of married couples or registered domestic partners. For example, income taxes will be filed separately under both state and federal law, regardless of the length of the relationship between the cohabiting partners. Support payments under *Marvin* agreements are not deductible for income tax purposes. The federal estate tax marital deduction is unavailable. However, unmarried, unregistered persons may make use of both the applicable credit against the federal estate tax, and the federal estate tax charitable deduction. For a discussion of the uses of both of these options, see § 6.04[2], above.

§ 6.06 California's Marriage Laws

[1] Definition of Marriage Under Family Code

No discussion of planning for domestic partners and same-sex couples is complete without a brief discussion of the recent developments under California law with regard to same-sex marriages. This section highlights and briefly discusses these recent developments.

Under the statutory scheme in effect *prior to May 15, 2008*,[131] the term "marriage" is defined as "a personal relation arising out of a civil contract between a man and a woman . . . ."[132] In addition, a marriage contracted outside of California, which is valid under the jurisdiction in which the marriage was contracted, is valid in California,[133] but "[o]nly marriage between a man and a woman is valid or recognized in California."[134]

[2] *In Re* Marriage Cases

On May 15, 2008, the Supreme Court of California issued a decision in *In re Marriage Cases*, a series of consolidated cases challenging the constitutionality of California's marriage statutes, specifically Fam. Code §§ 301 and 308.5. The Supreme Court agreed with plaintiffs, the challengers to the marriage statutes, holding that the marriage statutes were unconstitutional insofar as their provisions drew a distinction between opposite-sex couples and same-sex couples and excluded same-sex couples from access to the designation of marriage. The Court stated that the right to marry, as

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[131] The date of the decision in *In Re* Marriage Cases (2008) 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683.

[132] Fam. Code § 300. This provision was declared unconstitutional by *In Re* Marriage Cases, *supra*; see also Fam. Code § 301 (which provides that "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage."); Fam. Code § 302.

[133] Fam. Code § 308.

[134] Fam. Code § 308.5. This provision was declared unconstitutional by *In Re* Marriage Cases (2008) 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683.

embodied in §§ 1 and 7 of Article I of the California Constitution, guaranteed same-sex couples the same substantive constitutional rights as opposite-sex couples, including the right to choose one's life partner. The statutes posed a serious risk of denying the official family relationship of same-sex couples equal dignity and respect, a core element of the fundamental right to marry. The Court also held that the statutes violated California's Equal Protection Clause, effectively addressing the defendants' "separate but equal" argument in denying access to marriage by same sex couples.

In issuing its decision, the Court in *In Re Marriage Cases* held that the challengers were entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate the ruling. As a result, numerous same sex couples were entitled to marry, and did marry, within a short time following the issuance of the decision.

However, only weeks after the decision in *In Re Marriage Cases*, an initiative measure entitled "Eliminates Right of Same-Sex Couples to Marry"[135] was qualified for the November 4, 2008 ballot as Proposition 8. The measure was intended to amend the California Constitution by adding § 7.5 to Article I, which in effect eliminated the right of same-sex couples to marry in California, and provided that only marriage between a man and a woman would be valid or recognized in California.

On November 4, 2008, Proposition 8 received a majority of the popular vote, amending the California Constitution and eliminating the right recognized in *In Re Marriages Cases* of same-sex couples to marry under California law and the California Constitution. On November 19, the Supreme Court voted not to grant a stay on Proposition 8, meaning that Proposition 8 would be in effect.[136] The Supreme Court also voted to grant review to hear on the merits the claims that Proposition 8 was not properly enacted.[137] It asked the parties to address the issue of how marriages entered into before the passage of Proposition 8 should be treated if Proposition 8 is upheld. The issues to be briefed and argued are as follows:

1. Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const. Art. XVIII, section 104.)
2. Does Proposition 8 violate the separation-of-powers doctrine under the California Constitution?
3. If Proposition 8 is not unconstitutional, what is its effect, if any, on the

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[135] Original title was "The California Marriage Protection Act," but for the ballot the Attorney General changed the title to "Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment."

[136] *See* Petitions S168047, S168066, S168078. Requests for a stay of Proposition 8 in S168047 and S168066 were denied on November 19, 2008.

[137] *See* Petitions S168047, S168066, S168078.

marriages of same-sex couples performed before the adoption of Proposition 8?

The Supreme Court is expected to resolve this matter in 2009. In light of the uncertainty on the issue of marriage, for same-sex clients who wish to be married, it is recommended that, pending the Supreme Court's action, they become registered domestic partners as such status would be the legal equivalent of marriage under DPRRA.[138]

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[138] California Domestic Partner Rights and Responsibilities Act of 2003, Stats. 2003, ch. 421.