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CALIFORNIA'S DOMESTIC PARTNERSHIP LAW:
INCREMENTAL PROGRESS OR DRAMATIC
SOCIAL CHANGE?

CAROL A. DOCAN* AND RICHARD F. SPERLING**

ABSTRACT

Effective January 1, 2005, the California Domestic Partner Rights and Responsibilities Act of 2003 (CDPRRA) replaced the Domestic Partnership Act of 1999, vesting registered domestic partners with new rights and a court termination procedure similar to divorce. Does the new statute legalize gay marriage? Are domestic partners eligible for spousal support? Are the registration and termination procedures voluntary? Does the Unruh Civil Rights Act now require businesses and private organizations to include gay members? The article reviews the new law and analyzes how three recent court decisions resolve these controversial issues.

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INTRODUCTION

The California Secretary of State's office expects there to be over 41,000 registered domestic partners in California by the end of 2007.¹ Legislation recognizing registered domestic partnerships was first passed eight years ago,² and each year, the number of partners registering has increased.³ At first, California granted rights and duties to domestic partners incrementally.⁴ Effective January 1, 2005, the Domestic Partnership Act of 1999 was replaced with the Domestic Partner Rights and Responsibilities Act of 2003 (CDPRRA), which vested partners with new rights and a new court termination procedure similar to divorce.⁵

With CDPRRA came several questions: Does the new law create a "shadow" or "counterfeit" gay marriage under a different name? Are CDPRRA's registration requirements to be strictly construed? Will the new law interact with other legislation to expand the civil rights of registered partners? These questions are critical to the viability, scope, and enforcement of domestic partnership law.

The purpose of the article is to review the new domestic partnership legislation and analyze three recent court decisions which have addressed the questions posed above. The article begins with an overview of the Domestic Partnership Act of 1999 and several other statutes which established initial rights and benefits for domestic partners who registered with the state. We then review the significant changes made in the law by the passage of the California Domestic Partner Rights and Responsibilities Act of 2003 (CDPRRA). We then analyze three recent court decisions which interpreted CDPRRA. Finally, we discuss the extent to which CDPRRA, as interpreted by the courts, has changed the legal rights and duties of domestic partners.

I. DOMESTIC PARTNERSHIP ACT OF 1999 AND INCREMENTAL CHANGES

A. Formation

In 1999, California enacted the Domestic Partnership Act,⁶ which defined domestic partners as "two adults who have chosen to share

1. E-mail from Special Filings/Domestic Partnership Session, California Secretary of State, to Professor Carol Docan, California State University, Northridge (Feb. 5, 2007, 16:41:51 PST) (on file with author).

2. See CAL. FAM. CODE § 297 (West 1999).

3. E-mail from Sandra Snell, to Professor Carol Docan, California State University, Northridge (Oct. 23, 2006, 13:53:30 PST) (on file with author).

4. See *infra* Part I.D.

5. See CAL. FAM. CODE § 297.5 (West 2004).

6. CAL. FAM. CODE § 297 (West 1999).

one another's lives in an intimate and committed relationship of mutual caring."⁷ A partnership was created by two eligible parties signing and filing a Declaration of Domestic Partnership with the Secretary of State, and submitting a fee.⁸ Those eligible to become partners were required to be at least eighteen years of age,⁹ capable of consenting,¹⁰ not related by blood in a way that would prevent them from being married to each other in California,¹¹ not married,¹² nor a partner of another domestic partnership that had not yet been terminated.¹³ The law provided that same-sex or opposite-sex couples could become partners;¹⁴ however, opposite-sex couples were required to be over the age of sixty-two and eligible for old age Social Security benefits.¹⁵ The law was later amended to permit a partnership if only one partner was over the age of sixty-two.¹⁶

A privacy issue has been raised just by the process of registering a domestic partnership.¹⁷ The law requires domestic partners to provide a mailing address with their Declaration of Domestic Partnership.¹⁸ Upon receipt of the Declaration, the Secretary of State enters the Declaration in a registry of domestic partnerships, and mails a Certificate of Registered Domestic Partnership to the mailing address provided.¹⁹

7. § 297(a). Compare the definition of married spouses as those who "contract toward with each other obligations of mutual respect, fidelity, and support." *Id.* § 720.

8. California Secretary of State form, "Declaration of Domestic Partnership," SEC/STATE NP/SF DP-1 (Rev/03), available at <http://www.sos.ca.gov/dpregistry>. The fee to register was \$10 when the law was enacted. *Id.* However, beginning January 1, 2007, the fee for same-sex partners increased by an additional \$23.00 (for a total of \$33.00). California Secretary of State form, "Declaration of Domestic Partnership," SEC/STATE NP/SF DP-1 (REV 01/2007), available at <http://www.sos.ca.gov/dpregistry/forms/sf-dp1.pdf>. The additional fee is to be used to develop and support a training curriculum specific to lesbian, gay, bisexual, and transgender domestic abuse support service providers who serve the community in regard to domestic violence, as well as to provide brochures specific to lesbian, gay, bisexual, and transgender domestic abuse. CAL. FAM. CODE § 298(a)(2), (b)(3) (West 2006); see also California Secretary of State, Domestic Partners Registry, available at http://www.sos.ca.gov/dpregistry/dp_formsfees.htm, (last visited Nov. 13, 2007).

9. CAL. FAM. CODE § 297(b)(5) (Deering 1999).

10. § 297(b)(7).

11. § 297(b)(4).

12. § 297(b)(3).

13. *Id.*; § 299.

14. § 297 (b)(6)(A), (b)(6)(B).

15. § 297 (b)(6)(B).

16. § 297(b)(6)(B) (Deering 2003).

17. 1 Op. Cal. Att'y Gen. No. 00-910, 2 (Apr. 9, 2001), available at <http://ag.ca.gov/opinions/pdfs/00-910.pdf>.

18. CAL. FAM. CODE § 298(c) (West 2006).

19. § 298.5(b).

While many domestic partners have requested, as they register, to have their address kept confidential, the California Attorney General declared these addresses are subject to public disclosure, unless the partners prove that a disclosure of the address will cause them harm.²⁰ More than speculation is required; the partners requesting anonymity must show actual proof of invasion of privacy.²¹

B. Rights and Responsibilities

The 1999 Act provided that domestic partners must agree to "share the same residence"²² and "be jointly responsible for each other's basic living expenses,"²³ including the cost of "shelter, utilities, and all other costs directly related to the maintenance of the common household," and in some circumstances, medical care.²⁴ "Joint responsibility" means that each partner agrees to provide for the other partner's basic living expenses, if the partner is unable to provide for herself or himself.²⁵ Once registered, domestic partners also gained hospital visitation rights,²⁶ and state employees were entitled to enroll their partners in health benefit programs.²⁷

Filing of a Declaration of Domestic Partnership did not change the character of any real or personal property owned by the domestic partners prior to the filing date.²⁸ In addition, and equally significant, the filing of the Declaration did not "create any interest in, or rights to, any property . . . owned by one partner, . . . including, but not limited to, rights similar to community property or quasi-community property."²⁹ Moreover, the Act provided that any real or personal property "acquired by the partners during the domestic partnership where title is shared shall be held by the partners" in the proportion explicitly

20. 1 Op. Cal. Att'y Gen. No. 00-910, 5 (Apr. 9, 2001), available at <http://ag.ca.gov/opinions/pdfs/00-910.pdf>.

21. *Id.* at 5-6.

22. CAL. FAM. CODE § 297(c) (Deering 1999).

23. § 297(b)(2). It is not necessary that both partners have title to or be named as tenants on a lease to have a common residence. § 297(c). Partners may have a common residence even if one or both have additional residences. *Id.* In addition, "[d]omestic partners do not cease to have a common residence if one leaves the common residence but intends to return." *Id.*

24. § 297(d). Medical expenses are included "if some or all of the [medical] cost is paid as a benefit" to a domestic partner. *Id.*

25. § 297(e). Furthermore, under the law, persons to whom these expenses are owed may enforce this responsibility if, in extending credit or providing goods or services, they relied on the existence of the domestic partnership. *Id.*

26. CAL. HEALTH & SAFETY CODE § 1261(a) (West 2007).

27. § 1374.58; CAL. INS. CODE § 10121.7 (West 2007); CAL. GOV'T CODE § 22867-22868, 22871.3, 22873, 22876-22877 (West 2007).

28. CAL. FAM. CODE § 299.5(c) (Deering 1999).

29. § 299.5(d).

assigned to each partner.³⁰ Finally, the statute specifically provided that a domestic partnership did not change a partner's individual income tax or estate tax liability.³¹

C. Termination

A domestic partnership would terminate if one partner died or married,³² if the partners no longer had a common residence,³³ or when one partner chose to terminate the relationship.³⁴ The partner terminating the relationship was not required to state a reason for the change of status.³⁵ Terminations were permitted without judicial petition, decree, or process.³⁶ A partner choosing to terminate the relationship would simply file a Notice of Termination of Domestic Partnership with the Secretary of State and "send a copy of the notice to the last known address of the other partner."³⁷ The California Secretary of State maintained a record of the number of declarations and terminations filed each month.³⁸

D. Incremental Changes — Additional Rights

The Act was amended,³⁹ and several new laws were enacted in succeeding years, which provided additional rights for registered domestic partners incrementally.⁴⁰ Those rights included the right to sue for wrongful death or infliction of emotional distress for the death or injury of a partner,⁴¹ the right to use employee sick leave to care for an ill partner or partner's child,⁴² the right to make medical decisions on behalf of an incapacitated partner,⁴³ the right to receive

30. § 299.5(e) (indicating property ownership would change if the parties agreed otherwise, in writing).

31. § 299.5(f).

32. § 299(a)(2)(3) (West 2007).

33. § 299(a)(4).

34. § 299(a)(1).

35. § 299.

36. *Id.*

37. § 299(b) (West 1999). Within sixty days of filing the termination, third parties, who relied on the Declaration of a Domestic Partnership to grant benefits or rights, were required to receive notice of the termination. § 299(c). Failure to do so would have created financial liability. *Id.*

38. E-mail from Sandra Snell, *supra* note 3.

39. CAL. FAM. CODE § 297 (West 2001).

40. *See, e.g.,* CAL. CIV. CODE § 1714.01(a) (West 2001); CAL. PROB. CODE § 4716(a) (West 2001).

41. CAL. CIV. CODE § 1714.01(a) (Deering 2001) (extending the scope of CAL. CIV. PROC. § 377.60 (West 2001)).

42. CAL. LAB. CODE § 233(a) (West 2002).

43. CAL. PROB. CODE § 4716(a) (Deering 2003).

unemployment benefits if forced to relocate because of a partner's job,⁴⁴ and the right to adopt a partner's child as a stepparent.⁴⁵ Laws were also enacted giving domestic partners the right to be appointed as the conservator of an incapacitated partner,⁴⁶ a right of inheritance from a partner who died intestate,⁴⁷ and the right to receive six weeks of paid family leave to care for a domestic partner or a partner's child.⁴⁸

II. CALIFORNIA DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT (CDPRRA) OF 2003

In 2003, California enacted the California Domestic Partner Rights and Responsibilities Act (CDPRRA),⁴⁹ which imposed new responsibilities and granted new privileges to domestic partners similar to those enjoyed by married couples.⁵⁰ It also radically changed the legal process required to terminate a domestic partnership.⁵¹ The new law stated it was provided to give:

all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights and to assume corresponding responsibilities, and to further the state's compelling interests in promoting stable and lasting family relationships, in this and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.⁵²

While eligibility of those who could become partners did not change,⁵³ CDPRRA significantly replaced the "joint responsibility" provision of the 1999 Act with the following: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same *responsibilities, obligations, and duties* under law . . . as are granted to and imposed upon *spouses*."⁵⁴ The California legislature intended to provide domestic partners with the right to financial support during and after the relationship terminated,⁵⁵ the

44. CAL. UNEMP. INS. CODE §§ 1030(a)(4), 1032(c), 1256, 2705.1 (Deering 2003).

45. CAL. FAM. CODE § 9000(b) (Deering 2001).

46. CAL. PROB. CODE §§ 37(b), 1813.1(a)(1) (Deering 2001).

47. §§ 6401(c), 6402 (West 2003).

48. CAL. UNEMP. INS. CODE § 3301 (West 2004).

49. CAL. FAM. CODE § 297.5 (West 2004).

50. *Id.*

51. *See* § 299.

52. 2003 Cal. Stat. Ch. 421, *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.html.

53. CAL. FAM. CODE § 297.5 (West 2004).

54. § 297.5 (a) (emphasis added).

55. § 297.5(k)(1) (West 2007).

right of joint ownership of property similar to community property,⁵⁶ the equitable division of the partnership's property upon termination of the partnership,⁵⁷ the rights of custody, support and visitation of the children of either or both partners,⁵⁸ and mutual responsibility for debts to third parties incurred during the partnership.⁵⁹

A. A Need to Notify Partners

The changes in the law were so significant that the state initiated a major effort to give each registered domestic partner notice and an opportunity to consider dissolving the relationship before the new law became effective.⁶⁰ Accordingly, the effective date of CDPRA was deliberately delayed for more than a year.⁶¹ The Secretary of State mailed letters on three separate occasions,⁶² to all registered domestic partners briefly summarizing the changes and advised them to evaluate their legal positions and choices.⁶³ Below is an excerpt of a letter:

Dear Registered Domestic Partner:

... Effective January 1, 2005, California's law related to the rights and responsibilities of registered domestic partners will change. ... Domestic partners who do not wish to be subject to these new rights and responsibilities MUST terminate their domestic partnership before January 1, 2005. ... If you do not terminate ... under certain circumstances, you will only be able to terminate ... by the filing of a court action. If you have any questions about any of these changes, please consult an attorney ...

Sincerely, The Secretary of State⁶⁴

The changes in the law caused concern, confusion, and some debate, even among those who advocated the change.⁶⁵ Domestic partners were forced to confront the question whether they should

56. *Id.*

57. *See* § 297.5(k)(1).

58. §§ 297.5(a), 299(d).

59. § 297.5(k)(1) (Deering 2007).

60. § 299.3 (West 2004).

61. *Id.*

62. § 299.3 (a) (West 2004). Notice was to be sent on June 30, 2004, and on or before December 1, 2004, and on or before January 31, 2005. *Id.*

63. *Id.*

64. *Id.*

65. *See* Joseph Chianese, 'New Rights,' New Questions for Same-Sex Couples, L.A. TIMES, Aug. 25, 2004, at B11.

"[s]plit up now to avoid the cost of divorce."⁶⁶ It was unclear to many partners whether their salaries and Social Security benefits would be the property of one or both partners,⁶⁷ whether retirement plans were subject to distribution upon termination,⁶⁸ and how co-ownership of property might affect MediCal eligibility.⁶⁹ Advocates for change were frustrated, because the law did not allow partners an opportunity to file state joint tax returns.⁷⁰ On the other hand, proponents such as Kate Kendall, Executive Director of the National Center for Lesbian Rights, found that the law was good for domestic partners.⁷¹ She commented, "If one chooses to forgo those protections for all sorts of what might be good reasons, the legal system loses all sympathy. The essential position is, 'You didn't take the proper steps to protect yourself . . . you lose.'"⁷² The cases reviewed below addressed some of these questions.

B. Termination Changes Dramatically

The new law also radically alters the manner in which domestic partnerships must be terminated.⁷³ The 1999 Act permitted one partner to unilaterally terminate the partnership simply by giving notice of termination to the state and to the other partner.⁷⁴ In contrast, CDPRA requires a process of termination which is modeled after marital dissolution law and procedure.⁷⁵ A Petition to terminate the domestic partnership must be filed with a superior court and served upon the responding partner.⁷⁶ Upon stipulation or after trial, a Decree dissolving the domestic partnership must be issued by the court.⁷⁷

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, L.A. TIMES, Sept. 20, 2003, at A1.

71. Rona Marech, *Gays Cautious About New Partners Law; Some Opt Out, Fearing Legal or Financial Troubles*, S.F. CHRON., Sept. 20, 2004, at A1.

72. *Id.*

73. Compare CAL. FAM. CODE § 299(a) (West 2005), with CAL. FAM. CODE § 299(a) (West 1999).

74. § 299(a) (West 1999).

75. Meghan Gavin, *The Domestic Partners Rights and Responsibilities Act of 2003: California Extends Significant Protections to Registered Domestic Partners and their Families*, 35 MCGEORGE L. REV. 482, 489 (2004).

76. SECRETARY OF STATE, STATE OF CALIFORNIA, TERMINATING A CALIFORNIA REGISTERED DOMESTIC PARTNERSHIP 3 (2006), available at http://www.sos.ca.gov/dpregistry/forms/sf-dp_termbrochure.pdf.

77. *Id.* at 4.

One difference between marital dissolution and partnership termination is jurisdictional.⁷⁸ While spouses must establish residency to satisfy statutory jurisdictional requirements,⁷⁹ domestic partners can terminate their partnership even where one or both partners have ceased to be California residents.⁸⁰ This unique jurisdictional right is addressed in the Declaration of Domestic Partnership,⁸¹ which must be filed by the partners with the Secretary of State.⁸² Each Declaration must include the proviso that each partner consents:

to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, this state.⁸³

Given the present state of the law in other states, which neither recognizes domestic partnerships nor assists in the termination of formalized gay relationships, there is good reason for this jurisdictional stipulation. It addresses the likelihood that registered partners who leave California and later elect to terminate their domestic partnership would otherwise have no legal means to terminate.⁸⁴

CDPRRA requires court involvement in the termination of domestic partnerships which have been registered for more than five years.⁸⁵ If at its end, the partnership has been registered for less than five years, the partners may stipulate to dissolve their partnership without court action.⁸⁶ In cases of stipulated termination, if the partners otherwise qualify under a set of requirements, they may terminate by filing a Notice of Termination with the Secretary of State.⁸⁷ To qualify for a non-judicial termination by filing, there can be no children of the relationship, there can be no children adopted after the registration, and neither partner can be pregnant.⁸⁸ Neither partner can have any

78. Compare CAL. FAM. CODE § 298(c) (West 2003), with CAL. FAM. CODE § 2320 (West 2004).

79. § 2320.

80. § 298(c).

81. *Id.*

82. § 297(b).

83. § 298(c).

84. *Id.*

85. § 299(a)(3).

86. *Id.*

87. § 299.3(a)(1) and (3).

88. § 299(2).

interest in real property, other than a residential lease.⁸⁹ At the time of termination, the partners cannot have unpaid obligations in excess of \$4000,⁹⁰ and the total fair market value of community assets (excluding encumbrances, automobiles, and deferred compensation or retirement plans) must be less than \$25,000.⁹¹ Neither partner can have separate property assets in excess of \$25,000.⁹² Finally, the partners must waive rights to support.⁹³

Termination of domestic partnership by filing with the Secretary of State is effective six months after the filing date, unless a party chooses to revoke the termination within that period by notifying their partner and the state.⁹⁴ Termination by notice is treated the same way as a judgment of dissolution.⁹⁵ As is the case with decrees dissolving marriages, filing a notice of termination with the state does not necessarily inhibit the ability of either party to file an action in superior court to set aside the termination based on "fraud, duress, mistake, or any other ground recognized at law or in equity."⁹⁶ "A court may . . . declare the termination of the domestic partnership null and void upon proof that the parties did not meet the requirements [noted above] . . ."⁹⁷

C. Did the Law Cause More Terminations or Fewer Registrations?

Records provided by the California Secretary of State show that in 2000, the first year that partners could register, nearly 5000 partnerships were created.⁹⁸ The same year, fifty-two were terminated.⁹⁹ Partnerships continued to be registered in successive years; however, an increasing number of terminations occurred in 2003, when CDPRA was being proposed.¹⁰⁰ In 2004, before CDPRA became effective in 2005, a record 2513 terminations were filed.¹⁰¹ One can

89. § 299(4). The lease cannot include an option to buy the property and the lease must terminate within a year of the filing date. § 299(a)(4)(B).

90. § 299(5) (referring to Summary Dissolution of Marriage, CAL. FAM. LAW CODE § 2400(6)). The limitation of \$4,000 is determined after the partnership is registered and excludes the unpaid obligation related to an automobile or the remaining balance on the leased residence. § 299(a); § 2400.

91. § 299(6) (referring to CAL. FAM. LAW CODE § 2400(7), which provides the same rules as a Summary Dissolution of Marriage).

92. *Id.* (excluding automobiles).

93. § 299(a)(8).

94. § 299(b).

95. *Id.*

96. § 299(c).

97. *Id.*

98. E-mail from Sandra Snell, *supra* note 3.

99. *Id.*

100. *Id.*

101. *Id.*

only guess whether the change in the law encouraged more terminations. If that is the case, it is also interesting to find that the number of declarations after CDPRA became effective has remained the same, despite the changes in the law.¹⁰² The chart below summarizes the data from 2000 through 2006.¹⁰³

Year	Declarations	Terminations	Total Partnerships
2000	4894	52	4842
2001	3980	153	8669
2002	8187	296	16,560
2003	6596	733	22,423
2004	5615	2513	25,525
2005	6202	511	31,216
2006	6038	493	36,762

III. JUDICIAL INTERPRETATION

CDPRA raises many questions. Is CDPRA a “shadow”¹⁰⁴ or “counterfeit” marriage statute?¹⁰⁵ Does it affect partners only, or does it dovetail with civil rights legislation to impact nonpartners?¹⁰⁶ Are CDPRA’s registration requirements to be strictly or liberally construed?¹⁰⁷ Three recent cases help to resolve these questions,¹⁰⁸ which are critical to the viability, scope, and enforcement of domestic partnership law. They are discussed below.

A. Is CDPRA Recognition of Gay Marriage?

In 2000, a majority of California voters approved “Proposition 22,” a voter initiative which was placed on the ballot and, when passed,

102. *Id.*

103. *Id.*

104. Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1561 (2004); see generally *Knight v. Super. Ct. (Schwarzenegger)*, 128 Cal. App. 4th 14, 31, 26 Cal. Rptr. 3d 687, 700 (Cal. Ct. App. 2005).

105. See *Knight*, 128 Cal. App. 4th at 31, 26 Cal. Rptr. 3d at 700 (stating “the numerous dissimilarities between the two types of unions disclose that the legislature has not created a ‘same-sex marriage’ under the guise of another name”).

106. See *Koebke v. Bernardo Heights County Club*, 36 Cal. 4th 824, 831, 115 P.3d 1212, 1213 (Cal. Ct. App. 2005).

107. See *Velez v. Smith*, 142 Cal. App. 4th 1154, 1163-69, 48 Cal. Rptr. 3d 642, 647-53 (Cal. Ct. App. 2006).

108. See *Knight*, 128 Cal. App. 4th at 14, 26 Cal. Rptr. 3d at 687; *Koebke*, 36 Cal. 4th at 824, 115 P.3d at 1212; *Velez*, 142 Cal. App. 4th at 1154, 48 Cal. Rptr. 3d at 642.

was codified as Family Code Section 308.5.¹⁰⁹ "Proposition 22," known as the "Defense of Marriage Act,"¹¹⁰ became effective March 8, 2000.¹¹¹ The initiative provided, "Only marriage between a man and a woman is valid or recognized in California."¹¹²

In the context of Proposition 22, the Legislature approved CDPRA.¹¹³ Even as CDPRA was making its way through the halls of the California legislature in Sacramento, gay marriage opponents, led by William Knight, prepared a lawsuit for declaratory and injunctive relief with the intent of striking CDPRA down just as it was to become effective.¹¹⁴

The suit sought injunctive and declaratory relief. It attempted to block the passage and implementation of CDPRA,¹¹⁵ because the new law provided that registered domestic partners would "have the same rights, protections, and benefits . . . as are granted to . . . spouses."¹¹⁶ The lawsuit contended that CDPRA constituted an unconstitutional legislative amendment of Proposition 22, the "Defense of Marriage" statute.¹¹⁷ In other words, the suit asserted CDPRA established a "shadow institution of marriage."¹¹⁸ The trial judge denied the requested relief, and the case was appealed.¹¹⁹ A month before CDPRA was to take effect, the Third District Court of Appeals declined Knight's request for an injunction.¹²⁰

If CDPRA's stated goal is to extend to registered domestic partners the "rights and responsibility of spouses,"¹²¹ is it not a shadow

109. CAL. FAM. CODE § 308.5 (West 2000) (describing the statute's historical and statutory notes).

110. 2000 CALIFORNIA PRIMARY ELECTION INFORMATION GUIDE 132, § 1, *available at* http://primary2000.sos.ca.gov/VoterGuide/text_index.htm.

111. *Id.*

112. 2000 CALIFORNIA PRIMARY ELECTION VOTER INFORMATION GUIDE: TEXT OF PROPOSED LAW, PROPOSITION 22, *available at* http://primary2000.sos.ca.gov/VoterGuide/pdf/text_22_29.pdf; 2000 CALIFORNIA PRIMARY ELECTION VOTER INFORMATION GUIDE INDEX, *available at* http://primary2000.sos.ca.gov/VoterGuide/text_index.htm. The Secretary of State's online Initiative Update as of November 30, 2006, states voter initiative 1223, which proposed a Constitutional amendment eliminating domestic partnership rights, failed to qualify for ballot placement. Voter Guide, <http://vote2006.sos.ca.gov/voterguide/> (last visited Nov. 7, 2007).

113. *See Knight*, 128 Cal. App. 4th at 31, 26 Cal. Rptr. 3d at 700.

114. *Id.* at 17, 18, 26 Cal. Rptr. 3d at 689; *see also Knight v. Super. Ct.* (Schwarzenegger) No. 03AS0584 (Super. Ct. of Sacramento County, 2004).

115. *Knight*, 128 Cal. App. 4th at 17-18, 26 Cal. Rptr. 3d at 689.

116. CAL. FAM. CODE § 297.5(a) (West 2003).

117. *Knight*, 128 Cal. App. 4th at 18, 26 Cal. Rptr. 3d at 689.

118. Blumberg, *supra* note 104, at 1557.

119. *Knight*, 128 Cal. App. 4th at 18, 26 Cal. Rptr. 3d at 689.

120. *Id.* at 32, 26 Cal. Rptr. 3d at 700.

121. CAL. FAM. CODE § 297.5(a) (West 2004).

marriage act,¹²² passed to enable gay and lesbian partners to marry under a different name?¹²³ This was the issue on appeal in *Knight v. Superior Court (Schwarzenegger)*.¹²⁴

The Court affirmed the trial court's ruling that CDPRA was not "'same-sex marriage' under the guise of another name."¹²⁵ The Court based its decision first on its observation that Proposition 22 did not limit or forbid domestic partner legislation, only gay marriage.¹²⁶ The court held that to further California's interest in "family stability" and "civilized society," the legislature was entitled to pass an act which defined domestic partners' "fundamental rights and responsibilities,"¹²⁷ and which granted some rights to domestic partners, which were also granted to married persons.¹²⁸ The court found that the fact that some rights to be enjoyed by domestic partners were also enjoyed by married persons did not violate the "Defense of Marriage Act."¹²⁹

The appellate court's second and more controversial basis for upholding the trial court's decision was its conclusion that significant non-semantic differences remained between marriages and domestic partner unions under CDPRA.¹³⁰ The court pointed out that domestic partners are "not entitled to numerous benefits provided to married couples by the federal government, such as marital benefits relating to Social Security, Medicare, federal housing, food stamps, veterans' benefits, military benefits, and federal employment benefit laws."¹³¹ The court also observed these differences: domestic partners may not form a union if either is under eighteen years of age, whereas in some cases a person under the age of eighteen may marry;¹³² married persons need not share a common residence,¹³³ whereas a common residence is a requirement to register as a domestic partnership;¹³⁴ domestic partnership formation requires only registration,¹³⁵

122. Blumberg, *supra* note 104, at 1556.

123. *Knight v. Super. Ct. (Schwarzenegger)* No. 03AS0584 (Super. Ct. of Sacramento County, 2004).

124. *Id.* at *1.

125. *Id.* at *5.

126. *Knight*, 128 Cal. App. at 26, 26 Cal. Rptr. 3d at 696.

127. *Id.* at 29, 26 Cal. Rptr. 3d at 698.

128. *Id.*

129. *Id.* at 17, 26 Cal. Rptr. 3d at 690.

130. *Id.* at 30, 26 Cal. Rptr. 3d at 699.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

whereas marriage requires a license and solemnization;¹³⁶ some domestic partnerships may terminate extra-judicially, whereas a marriage may not be annulled or dissolved without a court order. The court reasoned, "These factors indicate marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership."¹³⁷

The court also observed that CDPRA did not permit domestic partners to file joint state income tax returns.¹³⁸ However, on August 23, 2006, the State Assembly passed a bill (S.B. 1827)¹³⁹ allowing domestic partners to file joint state income tax returns.¹⁴⁰ This bill was presented by the author of the 1999 Act, state Senator Carole Migden, D-San Francisco.¹⁴¹ In a rancorous debate of the bill, Assemblyman Jay La Seur, a Republican from La Mesa, argued that restrictions on filing joint state tax returns was the last difference between domestic partnership and marriage.¹⁴² Governor Schwarzenegger signed this bill into law on September 29, 2006.¹⁴³

As controversial as the court's decision has been, the issue has been resolved for now: CDPRA stands as legislation, which did not create a "shadow" or "counterfeit" marriage, in violation of the "Defense of Marriage Act."¹⁴⁴

136. *Id.* at 31, 26 Cal. Rptr. 3d at 699.

137. *Id.*

138. *Id.* at 21, 26 Cal. Rptr. 3d at 691, 696 (referring to CAL. FAM. CODE § 297.5(g)).

139. See CAROLE MIDGEN, TAXATION: DOMESTIC PARTNERS, S.B. No. 1827, available at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1801-1850/sb_1827_bill_200609030_history.html (indicating S.B. 1827's history as recorded by the California Legislature).

140. 2006 Cal. Stat. Ch. 802, amending CAL. FAM. CODE § 297.5, and amending REV. & TAX CODE §§ 17024.5 and 18521, (Chaptered (Chpt. 802) Sept. 30, 2006).

141. See MIDGEN, *supra* note 139.

142. Greg Lucas, *Assembly Rancor Over Domestic Partners Measure*, S.F. CHRON., Aug. 24, 2006, at B2.

143. Codified by CAL. FAM. CODE § 308.5 (West 2007).

144. See generally *Knight*, 128 Cal. App. at 14, 26 Cal. Rptr. 3d at 687. The decision in one case, yet to be decided, may impact CDPRA. In the case of *In re Marriage Cases*, 143 Cal. App. 873, 49 Ca. Rptr. 3d 675 (Cal. Ct. App. 2006) (six consolidated appeals). Campaign for Cal. Families v. Newsom (S.F. City & County Super. Ct. No. CGC-04-428794); Clinton v. State of California (S.F. City & County Super. Ct. No. CGC-04-429548); City and County of San Francisco v. State of California (S.F. City & County Super. Ct. No. CGC-04-429539); Proposition 22 Legal Def. and Educ. Fund v. City and County of San Francisco (S.F. City & County Super. Ct. No. CPF-04-503943); Tyler v. State of California (L.A. County Super. Ct. No. BS-088506); Woo v. Lockyer (S.F. City & County Super. Ct. No. CGC-04-504038). The legal issue presented in these appeals is straightforward: did the trial court err when it concluded Family Code statutes defining civil marriage as the union between a man and a woman are unconstitutional? Does requiring gay unions to register under CDPRA instead of permitting them to marry violate due process and equal protection? The Court of Appeals found no constitutional violation. The California Supreme Court granted all six petitions for review,

B. Does CDPRA Establish Unanticipated Civil Rights for Domestic Partners in Business and Social Contexts?

The rights conferred upon domestic partners by CDPRA are rights and obligations which were designed to be exercised within the context of a domestic partnership household.¹⁴⁵ The new law concerns itself with how domestic partners may form a domestic partnership,¹⁴⁶ how they may share in each other's lives during the life of the partnership,¹⁴⁷ and how domestic partners may now turn to a judicial process for terminating their partnerships and dividing their property and debt.¹⁴⁸ Registered partners themselves have an array of rights and obligations similar to the rights and responsibilities heretofore known only to spouses.¹⁴⁹

What was unclear before the passage of CDPRA was how it might impact not only domestic partners, but also non-domestic partners interacting with domestic partners in social and business contexts,¹⁵⁰ many of whom opposed the legislation and the gay and lesbian relationships recognized by the new law.¹⁵¹ A clear example of the new law's impact, and its social and business consequences, is *Koebke v. Bernardo Heights Country Club*.¹⁵²

In *Koebke*, Birgit Koebke purchased a membership at the Bernardo Heights Country Club.¹⁵³ The Club's bylaws permitted spouses to golf on an unlimited basis for free.¹⁵⁴ When Birgit asked the Club to permit Birgit's lesbian partner, Kendall, to golf at the Club on this basis, the Club declined.¹⁵⁵ Instead, the Board had its attorney provide Birgit with a written denial and an explanation of the fact that the Club was a "family-oriented organization."¹⁵⁶

In response to the Club's actions, Birgit and Kendall filed suit against the Club.¹⁵⁷ Their complaint alleged violations of the Unruh Civil Rights Act,¹⁵⁸ which provides that all persons are entitled to

149 P.3d 737, 53 Cal. Rptr. 3d 317 (2006).

145. See CAL. FAM. CODE § 297.5 (West 2004).

146. *Id.*

147. *Id.*

148. See generally § 299.

149. See *id.* at § 297.5.

150. See *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 115 P.3d 1212 (Cal. Ct. App. 2005).

151. *Id.*

152. *Id.*

153. *Id.* at 832, 115 P.3d at 1214.

154. *Id.* at 833, 115 P.3d at 1214-15.

155. *Id.* at 834, 115 P.3d at 1215.

156. *Id.* at 835, 115 P.3d at 1216.

157. *Id.* at 832, 115 P.3d at 1214.

158. *Id.*

full and equal accommodations, facilities, or services in all business establishments, regardless of sex, race, color, or religion.¹⁵⁹ They alleged discrimination because of their sex, sexual orientation, and marital status.¹⁶⁰ Birgit and Kendall had registered their domestic partnership with the State, and with the City of San Diego under the 1999 Domestic Partnership Act.¹⁶¹ When CDPRA became effective, they registered under the new law as well.¹⁶²

The State Supreme Court found no violations of rights under the 1999 Domestic Partnership Act.¹⁶³ However, when a subsequent filing alerted the Court to the fact that the complainants had registered under CDPRA,¹⁶⁴ the Court held that their allegations, if proven, were sufficient to establish a claim under the Unruh Act, because they were registered partners under CDPRA.¹⁶⁵ The Court based its holding on the fact that one of the expressed purposes of CDPRA was to reduce discrimination on the basis of sex and sexual orientation.¹⁶⁶ The Court went much further, ruling that denying domestic partners protection from discrimination does not further the state's policy favoring marriage,¹⁶⁷ and that the state has a comparable policy that favors domestic partnerships,¹⁶⁸ precluding businesses from discrimination against registered domestic partners.¹⁶⁹ Moreover, the Court found that the Club had not established any legitimate business interest in discriminating against the complainants¹⁷⁰ or in maintaining a "family-friendly environment."¹⁷¹ It is unclear how many legislators who voted in favor of CDPRA anticipated the holding in *Koebke*.¹⁷² In *Koebke*, the court construed CDPRA to require society to invite gay and lesbian partners into their businesses and private clubs,¹⁷³ because the new law's purpose is to see to it that registered partners are free from discrimination to the same extent spouses are free from discrimination.¹⁷⁴ This is not incremental legislative progress. This is dramatic social change. -

159. CAL. CIV. CODE § 51(b) (West 2006).

160. *Koebke*, at 832, 115 P.3d at 1214.

161. *Id.* at 833, 115 P.3d at 1215.

162. *Id.*

163. *Id.* at 831-32, 115 P.3d at 1214.

164. *Id.* at 832, 115 P.3d at 1214.

165. *Id.*

166. *Id.* at 838, 115 P.3d at 1218.

167. *Id.* at 838-39, 115 P.3d at 1218.

168. *Id.* at 839, 115 P.3d at 1219.

169. *Id.*

170. *Id.* at 847, 115 P.3d at 1224.

171. *Id.*

172. *Id.* at 847, 115 P.3d at 1224.

173. *Id.*

174. *Id.* at 847, 849, 115 P.3d at 1225, 1226.

C. Are the Remedies in CDPRA Available to Non-Registered Partners?

It is clear that CDPRA vests registered domestic partners with significant rights in business and social contexts,¹⁷⁵ and also in the context of relationship termination.¹⁷⁶ What was not clear until *Velez v. Smith*¹⁷⁷ was whether CDPRA's rights and remedies were available to domestic partners who had not properly registered with the state as required under the 1999 Act, and under CDPRA.¹⁷⁸

In 1989, Lena Velez and Krista Smith began a domestic relationship.¹⁷⁹ They attended a public ceremony, exchanged vows, and exchanged a domestic partnership ceremony certificate.¹⁸⁰ They lived together, and acquired real and personal property together, including a home, cars, pensions, insurance, and pets.¹⁸¹ They shared bank accounts and living expenses.¹⁸² After Velez became ill with multiple sclerosis,¹⁸³ Smith listed her as an alternative payee of her retirement benefits.¹⁸⁴ Although Velez and Smith filed a Declaration with the City and County of San Francisco in 1994, and again in 1996,¹⁸⁵ they never registered their domestic partnership with the Secretary of State.¹⁸⁶

In 2004, Smith sought to end the relationship.¹⁸⁷ She filed and served a "Notice for Ending a Domestic Partnership."¹⁸⁸ In response, Velez commenced a family court action for dissolution of domestic partnership in superior court.¹⁸⁹ In 2005, Velez filed an Amended Petition seeking division of partnership property,¹⁹⁰ "putative domestic partner rights,"¹⁹¹ and attorney's fees.¹⁹² At this time, Velez was ill and unemployed,¹⁹³ and her Petition asked the court to order Smith to

175. See generally CAL. FAM. CODE § 297.5 (West 2004).

176. See generally § 299.

177. *Velez v. Smith*, 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642 (Cal. Ct. App. 2006).

178. *Id.*

179. *Id.* at 1158, 48 Cal. Rptr. 3d at 644.

180. *Id.*

181. *Id.* at 1159, 48 Cal. Rptr. 3d at 645.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 1170, 48 Cal. Rptr. 3d at 654.

187. *Id.*

188. *Id.*

189. *Id.* at 1160, 48 Cal. Rptr. 3d at 645.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

pay support.¹⁹⁴ When the trial court dismissed Velez's Petition, she appealed.¹⁹⁵

In its September 12, 2006, decision,¹⁹⁶ the court recognized that the remedies sought by Velez, including property division and support, were conferred upon registered domestic partners by CDPRA.¹⁹⁷ Velez asked the court to apply the rights enjoyed by properly registered domestic partners under CDPRA to her relationship "retroactively,"¹⁹⁸ notwithstanding her failure to register as required by state law.¹⁹⁹ Velez asserted that her domestic partnership registration with the City and County of San Francisco under local ordinances justified applying the provisions of CDPRA,²⁰⁰ and that failure to file a Declaration with the Secretary of State under CDPRA should not constitute a jurisdictional prerequisite to her suit.²⁰¹ She asked that CDPRA be given "retrospective application" to her domestic partnership.²⁰²

If there was any question as to the absolute nature of CDPRA's registration requirements, the court clearly answered it, holding that Velez's failure to register a Declaration with the Secretary of State doomed her Petition to dismissal.²⁰³ The court held that compliance with the registration requirements under state law are necessary for the courts to have jurisdiction to provide remedies or terminate the status of a domestic partnership.²⁰⁴

Velez also asked the court to rule that under CDPRA, the quasi-marital rights conferred upon putative spouses by Family Code Section 2251²⁰⁵ should by analogy be extended to putative domestic partners²⁰⁶ because CDPRA seeks to create "substantial legal equality between domestic partners and spouses."²⁰⁷ The court declined to extend putative spouse theories to domestic partners, holding that if the legislature had intended the existence of a putative partner doctrine, it would have done so specifically in

194. *Id.* at 1159, 48 Cal. Rptr. 3d at 645.

195. *Id.*

196. *Id.* at 1154, 48 Cal. Rptr. 3d at 642.

197. *Id.* at 1165, 48 Cal. Rptr. 3d at 650.

198. *Id.* at 1162, 48 Cal. Rptr. 3d at 647.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1165, 1166, 48 Cal. Rptr. 3d at 650.

204. *Id.* at 1169, 48 Cal. Rptr. 3d at 653 (holding the domestic partnership, if any, between Velez and Smith had been properly terminated by Smith's Notice of Termination).

205. *Id.* at 1172, 48 Cal. Rptr. 3d at 656.

206. *Id.*

207. *Id.*

CDPRRA.²⁰⁸ The court invited Velez to bring an action for breach of contract in civil court under *Marvin v. Marvin*.²⁰⁹ Given the burden of proof necessary to establish a contractual promise of support²¹⁰ and the expense of a civil trial,²¹¹ this invitation was probably of little help to Velez. The trial court's dismissal of Velez's Petition under CDPRRA was affirmed;²¹² CDPRRA's rights and remedies are available only to partners who properly register.²¹³

CONCLUSION

At first, in California, domestic partnership law grew incrementally. For five years, California's lawmakers discussed, debated, and only gradually enacted legislation which seemed to intend an incremental expansion of rights for gay and lesbian partners.²¹⁴ Then, in the three cases discussed above, the judiciary dramatically changed the playing field.²¹⁵ Under *Knight*, CDPRRA is immune from challenges as a shadow marriage statute.²¹⁶ Under *Velez*, the remarkable rights and remedies under CDPRRA are available only to partners who follow the registration requirements established in the statute.²¹⁷ Finally, the *Koebke* decision requires that in business and social situations, society may no longer exclude gay and lesbian partners.²¹⁸

Under these cases, CDPRRA stands as a constitutional tool of dramatic social change, effectuating the legislature's explicit intent: "[t]o substantially equalize the status of registered domestic partners and spouses."²¹⁹

208. *Id.* at 1174, 48 Cal. Rptr. 3d at 657.

209. *Id.* at 1175, 48 Cal. Rptr. 3d at 658; *Marvin v. Marvin*, 18 Cal. 3d 660 (1976).

210. *Id.* at 1175, 48 Cal. Rptr. 3d at 658, 659.

211. *Id.* at 1172, 48 Cal. Rptr. 3d at 656.

212. *Id.* at 1177, 48 Cal. Rptr. 3d at 660.

213. *Id.* at 1162, 48 Cal. Rptr. 3d at 647.

214. See CAL. FAM. CODE §§ 297, 297.5, 298, 299, 2400 (West 2004).

215. See, e.g., *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 115 P.3d 1212 (Cal. Ct. App. 2005); *Knight v. Super. Ct.*, 128 Cal. App. 4th 14, 26 Cal. Rptr. 3d 687 (2005); *Velez*, 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642.

216. *Knight*, at 30, Cal. Rptr. 3d at 699.

217. *Velez*, at 1162, 48 Cal. Rptr. 3d at 647.

218. *Koebke*, 36 Cal. 4th 824, 839, 115 P.3d 1212, 1219 (Cal. Ct. App. 2005).

219. See *id.*, at 836, 115 P.3d at 1217.