California's Domestic Partnership Law: Incremental Progress or Dramatic Social Change?

Carol A. Docan

Richard F. Sperling

Repository Citation

Copyright © 2007 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/wmjowl
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.

INTRODUCTION

I. DOMESTIC PARTNERSHIP ACT OF 1999 AND INCREMENTAL CHANGES
   A. Formation
   B. Rights and Responsibilities
   C. Termination
   D. Incremental Changes — Additional Rights

II. CALIFORNIA DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT (CDPRRA) OF 2003
   A. A Need to Notify Partners
   B. Termination Changes Dramatically
   C. Did the Law Cause More Terminations or Fewer Registrations?

III. JUDICIAL INTERPRETATION
   A. Is CDPRRA Recognition of Gay Marriage?
   B. Does CDPRRA Establish Unanticipated Civil Rights for Domestic Partners in Business and Social Contexts?
   C. Are the Remedies in CDPRRA Available to Non-Registered Partners?

CONCLUSION

* Carol A. Docan is a Distinguished Professor of Business Law, College of Business and Economics, California State University, Northridge.
** Richard F. Sperling is a practicing attorney and a Lecturer in Business Law, College of Business and Economics, California State University, Northridge.
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. Legislation recognizing registered domestic partnerships was first passed eight years ago, and each year, the number of partners registering has increased. At first, California granted rights and duties to domestic partners incrementally. 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.

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, 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).
one another's lives in an intimate and committed relationship of mutual caring.' 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. Those eligible to become partners were required to be at least eighteen years of age, capable of consenting, not related by blood in a way that would prevent them from being married to each other in California, not married, nor a partner of another domestic partnership that had not yet been terminated. The law provided that same-sex or opposite-sex couples could become partners; however, opposite-sex couples were required to be over the age of sixty-two and eligible for old age Social Security benefits. The law was later amended to permit a partnership if only one partner was over the age of sixty-two.

A privacy issue has been raised just by the process of registering a domestic partnership. The law requires domestic partners to provide a mailing address with their Declaration of Domestic Partnership. 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.

---

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).
10. § 297(b)(7).
11. § 297(b)(4).
12. § 297(b)(3).
13. Id.; § 299.
15. § 297 (b)(6)(B).
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.\textsuperscript{20} More than speculation is required; the partners requesting anonymity must show actual proof of invasion of privacy.\textsuperscript{21}

\textbf{B. Rights and Responsibilities}

The 1999 Act provided that domestic partners must agree to “share the same residence”\textsuperscript{22} and “be jointly responsible for each other’s basic living expenses,”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{25} Once registered, domestic partners also gained hospital visitation rights,\textsuperscript{26} and state employees were entitled to enroll their partners in health benefit programs.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{21} \textit{Id.} at 5-6.
\textsuperscript{22} \textsc{Cal. Fam. Code} § 297(c) (Deering 1999).
\textsuperscript{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. \textit{Id.} In addition, “[d]omestic partners do not cease to have a common residence if one leaves the common residence but intends to return.” \textit{Id.}
\textsuperscript{24} § 297(d). Medical expenses are included “if some or all of the [medical] cost is paid as a benefit” to a domestic partner. \textit{Id.}
\textsuperscript{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. \textit{Id.}
\textsuperscript{26} \textsc{Cal. Health & Safety Code} § 1261(a) (West 2007).
\textsuperscript{27} § 1374.58; \textsc{Cal. Ins. Code} § 10121.7 (West 2007); \textsc{Cal. Gov’t Code} § 22867-22868, 22871.3, 22873, 22876-22877 (West 2007).
\textsuperscript{28} \textsc{Cal. Fam. Code} § 299.5(c) (Deering 1999).
\textsuperscript{29} § 299.5(d).
assigned to each partner. Finally, the statute specifically provided that a domestic partnership did not change a partner's individual income tax or estate tax liability.

C. Termination

A domestic partnership would terminate if one partner died or married, if the partners no longer had a common residence, or when one partner chose to terminate the relationship. The partner terminating the relationship was not required to state a reason for the change of status. Terminations were permitted without judicial petition, decree, or process. 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." The California Secretary of State maintained a record of the number of declarations and terminations filed each month.

D. Incremental Changes — Additional Rights

The Act was amended, and several new laws were enacted in succeeding years, which provided additional rights for registered domestic partners incrementally. Those rights included the right to sue for wrongful death or infliction of emotional distress for the death or injury of a partner, the right to use employee sick leave to care for an ill partner or partner's child, the right to make medical decisions on behalf of an incapacitated partner, 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.
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, \(^4^4\) and the right to adopt a partner's child as a stepparent. \(^4^5\) Laws were also enacted giving domestic partners the right to be appointed as the conservator of an incapacitated partner, \(^4^6\) a right of inheritance from a partner who died intestate, \(^4^7\) and the right to receive six weeks of paid family leave to care for a domestic partner or a partner's child. \(^4^8\)

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

In 2003, California enacted the California Domestic Partner Rights and Responsibilities Act (CDPRRA), \(^4^9\) which imposed new responsibilities and granted new privileges to domestic partners similar to those enjoyed by married couples. \(^5^0\) It also radically changed the legal process required to terminate a domestic partnership. \(^5^1\) 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. \(^5^2\)

While eligibility of those who could become partners did not change, \(^5^3\) 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." \(^5^4\) The California legislature intended to provide domestic partners with the right to financial support during and after the relationship terminated, \(^5^5\) the

\(^4^4\) CAL. UNEMP. INS. CODE §§ 1030(a)(4), 1032(c), 1256, 2705.1 (Deering 2003).
\(^4^5\) CAL. FAM. CODE § 9000(b) (Deering 2001).
\(^4^6\) CAL. PROB. CODE §§ 37(b), 1813.1(a)(1) (Deering 2001).
\(^4^7\) §§ 6401(c), 6402 (West 2001).
\(^4^8\) CAL. UNEMP. INS. CODE § 3301 (West 2004).
\(^4^9\) CAL. FAM. CODE § 297.5 (West 2004).
\(^5^0\) Id.
\(^5^1\) See § 299.
\(^5^3\) CAL. FAM. CODE § 297.5 (West 2004).
\(^5^4\) § 297.5 (a) (emphasis added).
\(^5^5\) § 297.5(k)(1) (West 2007).
right of joint ownership of property similar to community property,\textsuperscript{56} the equitable division of the partnership's property upon termination of the partnership,\textsuperscript{57} the rights of custody, support and visitation of the children of either or both partners,\textsuperscript{58} and mutual responsibility for debts to third parties incurred during the partnership.\textsuperscript{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.\textsuperscript{60} Accordingly, the effective date of CDPRRA was deliberately delayed for more than a year.\textsuperscript{61} The Secretary of State mailed letters on three separate occasions,\textsuperscript{62} to all registered domestic partners briefly summarizing the changes and advised them to evaluate their legal positions and choices.\textsuperscript{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 State\textsuperscript{64}

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

\textsuperscript{56} Id.
\textsuperscript{57} See § 297.5(k)(1).
\textsuperscript{58} §§ 297.5(a), 299(d).
\textsuperscript{59} § 297.5(k)(1) (Deering 2007).
\textsuperscript{60} § 299.3 (West 2004).
\textsuperscript{61} Id.
\textsuperscript{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.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
“[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, CDPRRA 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.
72. Id.
73. Compare CAL. FAM. CODE § 299(a) (West 2005), with CAL. FAM. CODE § 299(a) (West 1999).
74. § 299(a) (West 1999).
77. Id. at 4.
One difference between marital dissolution and partnership termination is jurisdictional. While spouses must establish residency to satisfy statutory jurisdictional requirements, domestic partners can terminate their partnership even where one or both partners have ceased to be California residents. This unique jurisdictional right is addressed in the Declaration of Domestic Partnership, which must be filed by the partners with the Secretary of State. 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.

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.

CDPRRA requires court involvement in the termination of domestic partnerships which have been registered for more than five years. 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. 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. 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. Neither partner can have any

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. At the time of termination, the partners cannot have unpaid obligations in excess of $4,000 and the total fair market value of community assets (excluding encumbrances, automobiles, and deferred compensation or retirement plans) must be less than $25,000. Neither partner can have separate property assets in excess of $25,000. Finally, the partners must waive rights to support.

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. Termination by notice is treated the same way as a judgment of dissolution. 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." "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] . . . ."

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. The same year, fifty-two were terminated. Partnerships continued to be registered in successive years; however, an increasing number of terminations occurred in 2003, when CDPRRA was being proposed. In 2004, before CDPRRA became effective in 2005, a record 2513 terminations were filed. 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 CDPRRA became effective has remained the same, despite the changes in the law.\textsuperscript{102} The chart below summarizes the data from 2000 through 2006.\textsuperscript{103}

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

III. JUDICIAL INTERPRETATION

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

A. Is CDPRRA 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,

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{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”).
\textsuperscript{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.\textsuperscript{109} "Proposition 22," known as the "Defense of Marriage Act,"\textsuperscript{110} became effective March 8, 2000.\textsuperscript{111} The initiative provided, "Only marriage between a man and a woman is valid or recognized in California."\textsuperscript{112}

In the context of Proposition 22, the Legislature approved CDPRRA.\textsuperscript{113} Even as CDPRRA 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 CDPRRA down just as it was to become effective.\textsuperscript{114}

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

If CDPRRA’s stated goal is to extend to registered domestic partners the “rights and responsibility of spouses,”\textsuperscript{121} is it not a shadow
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 CDPRRA 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 CDPRRA.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.
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;\textsuperscript{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."\textsuperscript{137}

The court also observed that CDPRRA did not permit domestic partners to file joint state income tax returns.\textsuperscript{138} However, on August 23, 2006, the State Assembly passed a bill (S.B. 1827)\textsuperscript{139} allowing domestic partners to file joint state income tax returns.\textsuperscript{140} This bill was presented by the author of the 1999 Act, state Senator Carole Migden, D-San Francisco.\textsuperscript{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.\textsuperscript{142} Governor Schwarzenegger signed this bill into law on September 29, 2006.\textsuperscript{143}

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

\textsuperscript{136} Id. at 31, 26 Cal. Rptr. 3d at 699.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 21, 26 Cal. Rptr. 3d at 691, 696 (referring to CAL. FAM. CODE § 297.5(g)).
\textsuperscript{141} See MIGDEN, supra note 139.
\textsuperscript{143} Codified by CAL. FAM. CODE § 308.5 (West 2007).
\textsuperscript{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 CDPRRA. 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 CDPRRA 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 CDPRRA Establish Unanticipated Civil Rights for Domestic Partners in Business and Social Contexts?

The rights conferred upon domestic partners by CDPRRA 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 CDPRRA 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

---

145. See CAL. FAM. CODE § 297.5 (West 2004).
146. Id.
147. Id.
148. See generally § 299.
149. See id. at § 297.5.
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.\textsuperscript{159} They alleged discrimination because of their sex, sexual orientation, and marital status.\textsuperscript{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.\textsuperscript{161} When CDPRRA became effective, they registered under the new law as well.\textsuperscript{162}

The State Supreme Court found no violations of rights under the 1999 Domestic Partnership Act.\textsuperscript{163} However, when a subsequent filing alerted the Court to the fact that the complainants had registered under CDPRRA,\textsuperscript{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 CDPRRA.\textsuperscript{165} The Court based its holding on the fact that one of the expressed purposes of CDPRRA was to reduce discrimination on the basis of sex and sexual orientation.\textsuperscript{166} The Court went much further, ruling that denying domestic partners protection from discrimination does not further the state’s policy favoring marriage,\textsuperscript{167} and that the state has a comparable policy that favors domestic partnerships,\textsuperscript{168} precluding businesses from discrimination against registered domestic partners.\textsuperscript{169} Moreover, the Court found that the Club had not established any legitimate business interest in discriminating against the complainants\textsuperscript{170} or in maintaining a “family-friendly environment.”\textsuperscript{171} It is unclear how many legislators who voted in favor of CDPRRA anticipated the holding in Koebke.\textsuperscript{172} In Koebke, the court construed CDPRRA to require society to invite gay and lesbian partners into their businesses and private clubs,\textsuperscript{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.\textsuperscript{174} This is not incremental legislative progress. This is dramatic social change.

\textsuperscript{159} Cal. CIV. CODE § 51(b) (West 2006).
\textsuperscript{160} Koebke, at 832, 115 P.3d at 1214.
\textsuperscript{161} Id. at 833, 115 P.3d at 1215.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 831-32, 115 P.3d at 1214.
\textsuperscript{164} Id. at 832, 115 P.3d at 1214.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 838, 115 P.3d at 1218.
\textsuperscript{167} Id. at 838-39, 115 P.3d at 1218.
\textsuperscript{168} Id. at 839, 115 P.3d at 1219.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 847, 115 P.3d at 1224.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 847, 115 P.3d at 1224.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 847, 849, 115 P.3d at 1225, 1226.
C. Are the Remedies in CDPRRA Available to Non-Registered Partners?

It is clear that CDPRRA vests registered domestic partners with significant rights in business and social contexts, and also in the context of relationship termination. What was not clear until Velez v. Smith was whether CDPRRA'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 CDPRRA.

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

In 2004, Smith sought to end the relationship. She filed and served a "Notice for Ending a Domestic Partnership." In response, Velez commenced a family court action for dissolution of domestic partnership in superior court. In 2005, Velez filed an Amended Petition seeking division of partnership property, "putative domestic partner rights," and attorney's fees. At this time, Velez was ill and unemployed, and her Petition asked the court to order Smith to
pay support.\textsuperscript{194} When the trial court dismissed Velez's Petition, she appealed.\textsuperscript{195}

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

If there was any question as to the absolute nature of CDPRRA'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.\textsuperscript{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.\textsuperscript{204}

Velez also asked the court to rule that under CDPRRA, the quasi-marital rights conferred upon putative spouses by Family Code Section 2251205 should by analogy be extended to putative domestic partners\textsuperscript{206} because CDPRRA seeks to create "substantial legal equality between domestic partners and spouses."\textsuperscript{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

\begin{itemize}
\item \textsuperscript{194} {Id.} at 1159, 48 Cal. Rptr. 3d at 645.
\item \textsuperscript{195} {Id.}
\item \textsuperscript{196} {Id.} at 1154, 48 Cal. Rptr. 3d at 642.
\item \textsuperscript{197} {Id.} at 1165, 48 Cal. Rptr. 3d at 650.
\item \textsuperscript{198} {Id.} at 1162, 48 Cal. Rptr. 3d at 647.
\item \textsuperscript{199} {Id.}
\item \textsuperscript{200} {Id.}
\item \textsuperscript{201} {Id.}
\item \textsuperscript{202} {Id.}
\item \textsuperscript{203} {Id.} at 1165, 1166, 48 Cal. Rptr. 3d at 650.
\item \textsuperscript{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).
\item \textsuperscript{205} {Id.} at 1172, 48 Cal. Rptr. 3d at 656.
\item \textsuperscript{206} {Id.}
\item \textsuperscript{207} {Id.}
\end{itemize}
CALIFORNIA'S DOMESTIC PARTNERSHIP LAW

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

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. Then, in the three cases discussed above, the judiciary dramatically changed the playing field. Under Knight, CDPRRA is immune from challenges as a shadow marriage statute. Under Velez, the remarkable rights and remedies under CDPRRA are available only to partners who follow the registration requirements established in the statute. Finally, the Koebke decision requires that in business and social situations, society may no longer exclude gay and lesbian partners.

Under these cases, CDPRRA stands as a constitutional tool of dramatic social change, effectuating the legislature’s explicit intent: “to substantially equalize the status of registered domestic partners and spouses.”

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.
216. Knight, at 30, Cal. Rptr. 3d at 699.
217. Velez, at 1162, 48 Cal. Rptr. 3d at 647.
219. See id., at 836, 115 P.3d at 1217.