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Domestic partnerships still valid, necessary

by Zak Szymanski

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For many people, California's same-sex marriage victory was the crown jewel in the struggle for gay equality. Informed by rhetoric that has often referred to domestic partnership as a lesser system of family recognition – and inspired by their own cultural and religious traditions – gay couples hoping to marry have stopped at nothing to secure the right to say "I do."

So it may come as a surprise that LGBT legal experts say same-sex couples who are registered as domestic partners may want to retain that status even after they get married, and even if same-sex marriage withstands a challenge by a ballot initiative in November.

In fact, some same-sex couples who never registered may want to consider registering as domestic partners before and in addition to their planned nuptials.

"There are good reasons that people should be keeping their domestic partnerships," said Jennifer Pizer, senior counsel for Lambda Legal Defense and Education Fund in Southern California, one of the key groups behind the California same-sex marriage victory. "The landscape is a checkerboard right now for gay and lesbian couples, with states respecting different kinds of legal status. And that puts a burden on couples to use a belt-and-suspenders approach."

Kate Kendell, executive director of San Francisco-based National Center for Lesbian Rights, another key player in the state marriage case, agreed.

NCLR, Lambda Legal, and other groups – anticipating an influx of inquiries from couples with questions about their legal status – have set up a "Frequently Asked Questions" link on their Web sites, addressing some of the issues related to the overlap of marriage and domestic partnership.

The two state-sanctioned systems are practically identical – California's comprehensive domestic partnership system provides virtually all of the legal and state tax benefits that are provided through marriage. But both systems also carry a different set of challenges that the other may help to mitigate.

It's almost impossible to give a universal answer to individual scenarios, the legal groups note, and their insights and observations should not be taken as legal advice.

But generally, said Kendell, couples who intend to get married – and who have been legally advised that marriage will benefit their relationship – also stand to benefit from domestic partnership as it currently stands (the reverse is not necessarily true).

Even after getting married, domestic partnership may actually provide more flexibility for gay couples, in the form of portable legal protections when traveling to states that don't recognize same-sex marriage.

"There are a number of states, including Oregon and Washington, that respect domestic partnerships but don't recognize same-sex marriage," said Pizer, noting that both of those states have enacted legislation that recognizes "substantially equivalent" domestic partnerships from other areas, but both states also have passed gay marriage bans.

Such states would not honor a California same-sex marriage, she said, but they would honor a California domestic partnership, though the specific rights attached would vary from state to state.

"So for people that are likely to do any traveling to states that don't respect marriages but do respect domestic partnership, they should have both of those statuses," said Pizer. "If you're registered in California and visit Washington, you receive through that domestic partnership system the full range of Washington rights. It's not as complete as California's, but the visitor gets the same rights as residents – whatever they are, you get them."

Other states, like Massachusetts and New York, will recognize California marriage but have nothing in place to acknowledge statewide domestic partnership.

"For people who travel, your legal rights could be changing every time you cross a state line," said Pizer.

Few differences – for now

At the moment, there is theoretically no practical impact that getting married will have on most state-registered domestic partners who live in California. A couple of small gaps remain. State employees who are domestic partners are not entitled to long-term disability benefits, according to Pizer. Members of the Coastal Commission have certain requirements when doing business with a spouse, and these provisions do not extend to domestic partnerships.

But other than that, the last major hurdle – securing state tax benefits so that same-sex couples can transfer property to each other without incurring a penalty – took effect as part of the statewide domestic partner system this year.

That means major decisions, such as transferring property, or applying for income-based programs, will not be affected if state-registered domestic partners decide not to marry.

"If couples have registered as domestic partners, then they have already subjected themselves to some degree to community property requirements," said Kendell.

On the other hand, noted Kendell, couples who are good candidates for domestic partnership may not want to marry, for a variety of reasons, including their bi-national status or military service. The rights attached to same-sex marriage do not also come with federal protections, leaving many people vulnerable if their same-sex marriage were to become known.

But many of the couples who opted out of statewide domestic partnership did so for economic reasons.

When California implemented a long list of marriage-like rights to the system in 2005, it meant couples' incomes could be jointly assessed when determining eligibility for public benefits. Suddenly, same-sex couples who received medications through the AIDS Drug Assistance Program, for instance, found that registering as partners with the state would actually cost them more than it would help them.

For these couples, neither the statewide registry nor state marriage may make sense, as both have the same economic consequences on their benefits. They may instead find that city and county domestic partnership registries and/or a series of contracts and court orders provide the best way to care for their families.

San Francisco's registry provides an inclusive definition of family – one that covers gay and straight couples and economically interdependent relationships such as opposite-sex queer co-parents or caregivers.

"If you look at the definition there's nothing that mandates romantic involvement," said Craig Dziedzic, manager of the city of San Francisco's Assessor-Recorder office, who agrees there's no reason to dissolve a domestic partnership when marrying, "as long as it's the same person," he added.

San Francisco's city registry provides health benefits to city employees. It's also voluntarily used by some employers as proof of domestic partnership. But beyond that, it carries few benefits for people who do not work for San Francisco government.

The system once carried an exemption for property value reassessment when domestic partners transferred property to each other, something that potentially saved city-registered same-sex couples tens of thousands of dollars in taxes. But now that the statewide domestic partner system extends this same benefit to state-registered couples, said Dzedzic, citywide registration will not be sufficient to secure these benefits. State Senator Carole Migden's SB 153, proposed this year, extends this benefit to co-owners of a home and if passed could remedy the situation for those who fall through the cracks.

Regardless of whether a couple decides to marry or register, many couples should also consider securing court orders to validate their relationships with their children, and to ensure that their wishes are carried out, said Pizer.

"Even married couples may need to do a step-parent adoption, so that they have a court judgment, which is most likely to be respected by other states," said Pizer. "These judgments are likely to be respected even by states that don't respect the parents' relationship."

Court adoptions also legally withstand the breakup or divorce of a couple, she said. But without legal adoption, maintaining a relationship with a non-biological child after a breakup "may be difficult to impossible."

Other safeguards: drawing up a will, and documenting medical wishes, even after marriage. Such actions help to cover people when they travel or move from state to state.

Couples have a range of options under the legal system without getting registered or married at all, but such flexibility is generally a bit more expensive and time-consuming.

"The more you break apart protections into separate components that give more choice, the more expensive it's likely to be," said Pizer, referencing the attorneys and court proceedings required. "It's a trade-off between flexibility on one hand and efficiency on the other."

Still, cafeteria-style rights instead of marriage or domestic partnership may be the smarter choice for some couples.

"Couples should look at the range of issues that affect them and make a decision about their legal status on all the issues, not just based on one," said Pizer.

No marriage – no respect?

The legal differences may be insignificant, but there is a growing concern among LGBT community members that unmarried, registered domestic partners will be subject to discrimination, based upon the familiarity and cultural significance of marriage. It's a concern that LGBT advocates said they will be ready to address – and to defend against.

The cultural significance may spill over into how employers and institutions treat unmarried families.

"What makes this transitional time so interesting is that for a long time we have been arguing that marriage has social meaning. It's an important part of why people get married," said Pizer. "And even though domestic partnership has the same state rights, people have had a hard time arguing for them. They've had to fight to make decisions in hospitals. The legal distinctions are tiny, but there's such a response to marriage. It just proves what we've been saying is true."

Such social recognition of marriage, however, does not mean LGBT groups will not fight for continued domestic partnership recognition.

"The work for marriage should be one part of an overall body of work to insist upon respect for all families. This work is not about seeking only one approved way and leaving people out in the cold. Domestic partners have rights – and that needs to be enforced," said Pizer, who pointed to

Massachusetts as an example of where domestic partnerships were further marginalized after same-sex marriage became legal in that state.

After Massachusetts made same-sex marriage legal in 2004, companies like IBM and the *Boston Globe* – which previously offered domestic partner benefits only to same-sex couples – rescinded their DP benefits and instead required that employees seeking benefits get married.

The companies' reasoning was that DP benefits were added to address marriage inequality, a gap that they say ceased to exist after same-sex marriage became legal. National LGBT groups disagreed, noting that same-sex marriage is not federally recognized, that state same-sex marriages are often challenged, and that many families – of all sexualities – do not wish to or cannot get married.

"There's a worry that we may see that. I hope that we don't see that," said Pizer. "At that point it would be incumbent upon all of us to say that nobody should be pressured to get married. It's marital status discrimination and employers shouldn't be doing that, period."

Many LGBT groups are taking a "wait and see" approach to how California employers handle their domestic partner benefits.

"I think it's early. My own personal observation is that there has been a lot of positive response [to same-sex marriage], and it's reasonable to give business communities the benefit of the doubt that they will do the right thing," said Roberta Sklar, communications director for the National Gay and Lesbian Task Force. "Domestic partnership is still in place, so there's no reason it should be automatically negated. There's a baseline assumption of good will, and we don't want to be proved otherwise."

The Human Rights Campaign is taking some proactive steps, according to Daryl Herrschaft, director of the organization's Workplace Project, and is currently drafting guidelines that encourage employers to maintain their domestic partnership benefits in states that have legal same-sex marriage.

"We don't recommend that companies scrap their domestic partner systems, for a number of reasons," said Herrschaft, who noted that employees who want to transfer to other company locations may not have their marriage benefits follow them, and that as "a matter of workplace diversity" it can be limiting to define families only by marriage-like arrangements. Many companies, he said, are adopting an "employee plus one" policy to account for situations like children taking care of older parents.

"At the end of the day we're looking for fairness, and if marriage is a way to ensure that fairness for all of your employees, then there's no theoretical opposition," said Herrschaft. "But it's just not clear that's going to be the case across the board."

Most employers – more than 60 percent – offer domestic partner benefits to opposite-sex couples as well as same-sex couples, according to HRC. At these companies, gay marriage is not likely to threaten workplace benefits, because such domestic partner benefits were never dependent upon the inability to marry.

California-based Google, for instance, will provide benefits to same-sex married couples and continue to honor same-sex domestic partnerships, just as it does for opposite-sex employees.

"We cover opposite-sex and same-sex partners now, and no registration is necessary," according to a spokesperson in Google's press department. "We respond to our employees and to what they consider to be family."

LGBT groups say they are waiting to see what California employers with more restrictive benefits will do, and that they hope employers who only provide same-sex domestic partnership benefits will continue to honor them.

Doing so may seem like offering gay employees more benefit options, said Pizer, but employers should take into account the full picture of how same-sex marriage continues to be treated differently than opposite-sex marriage nationwide.

"If people are not in the same circumstance, don't treat them as if they are," said Pizer, who has a response to those who think offering both domestic partnership and marriage to same-sex couples amounts to "special rights."

"Hold that thought for another number of years," she said. "At some point down the line it may be reasonable to say."