

A Primer on Civil Unions

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Digest: *This paper is intended to serve as a brief primer on issues relating to civil unions. The paper examines California's existing domestic partnership system as created by AB 26 (Migden) of 1999 and the recent rights granted by AB 25 (Migden) of 2001. The paper also discusses current state law and constitutional issues, including the federal "Defense of Marriage Act (DOMA)" and mini-DOMAs passed by the States, including California. The paper explores approaches other states and countries have taken in this area, including permitting same-sex couples to enter into civil unions, creating domestic partnership registries, and providing a range of benefits for same-sex couples known as "reciprocal beneficiaries." Only one country permits same-sex marriage while many other states have explicitly prohibited same-sex marriage and its recognition. All of these approaches are discussed in the paper. Finally, the paper explores the policy considerations raised by AB 1338 (Koretz).*

INTRODUCTION – AB 1338 (KORETZ)

On February 23, 2001, Assemblyman Paul Koretz introduced AB 1338, the California Family Protection Act. This legislation would permit same-sex couples to formalize their relationships by entering into civil unions in California. AB 1338 would take California substantially farther down the road toward granting same-sex couples the same legal rights available to opposite-sex couples under the state's marriage laws. The measure provides that a partner in a civil union shall have all the same rights, protections, benefits, and responsibilities as those granted to a spouse in a civil marriage, and provides that any state statute that applies to a formerly married person shall also apply to a person who was formerly a spouse in a civil union. Under the measure, any state statute that applies to a widow or widower shall also apply to a person who was a spouse in a civil union where the spouse is deceased.

The measure also provides that the right of spouses in a civil union with respect to a child of either of them shall be the same as those of married spouses. In addition, the dissolution of a civil union shall follow the same procedures and be subject to the same substantive rights and obligations as apply to the dissolution of a marriage. The bill contains various legislative findings and declarations and also states that it is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect or the legal consequences of those relationships, including the registration of domestic partnerships, enforcement of palimony agreements, enforcement of powers of attorney, or appointment of conservators or guardians.

WHO CAN MARRY IN CALIFORNIA?

Current California law regulating who can marry provides that marriage is "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."² While no particular form for the ceremony of marriage is required to solemnize a marriage, the parties must declare that they take each other as husband and wife in the presence of the person solemnizing the marriage and the necessary witnesses.³ Applicants seeking a marriage license must meet the following additional requirements: the applicants must be a man and a woman, they must not be already married, they generally must be over 18 years of age, and they may not be closely related by blood.⁴

DOMESTIC PARTNERSHIPS FIRST RECOGNIZED BY CALIFORNIA IN 2000

In 1999, the Legislature passed and Governor Davis signed into law AB 26 (Migden), 1999 Stats., Ch. 588, California's first domestic partnership statute. Thus, domestic partnerships have only been recognized by this state since the year 2000, when the measure took effect. This statute, which forms the backbone of California's domestic partnership law, was substantially broadened recently when Governor Davis signed AB 25 (Migden) of 2001.

California's domestic partnership statute defines domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring" and who file a Declaration of Domestic Partnership with the Secretary of State.⁵ The only persons who may register as domestic partners are same-sex couples over the age of 18, or opposite sex couples where one of the partners is over the age of 62, who are not blood relatives, not married to others, not members of another domestic partnership, who share a common residence, and agree to be jointly responsible for each other's basic living expenses incurred during the partnership.⁶

As the first step in 1999, AB 26 narrowly defined the legal effect of creating a domestic partnership and expressly contained a continuing legal constraint that registration in California of a domestic partnership does not establish any rights except those specifically provided in legislation, and at any time that the partnership is terminated the partners shall incur none of the obligations to each other established by law.⁷ Thus, unlike with marriage where rights such as spousal support may continue upon its termination, under California's domestic partnership law no such legal rights and duties continue upon a termination of the domestic partnership relationship.⁸ In the 2001 Legislative Session, earlier versions of AB 25 contained a provision granting to domestic partners the right to inherit property from a deceased partner in the same manner as a spouse inheriting under the intestate succession laws of the State. This provision was deleted as a result of negotiations between interested parties.⁹

Specific Rights Currently Granted Under California's Domestic Partnership Law. Under the scheme created by AB 26, registered domestic partners were granted limited rights in the areas of hospital visitation¹⁰ and health benefits if one of the partners is a state employee.¹¹ This past October, the Governor signed AB 25, which conferred over a dozen new legal rights, privileges and standing on all registered domestic partners, including, among other things:

- ✓ The right to recover damages for negligent infliction of emotional distress;
- ✓ The right to assert a cause of action for wrongful death;
- ✓ The right of a domestic partner to adopt a child of his or her partner as a stepparent;
- ✓ The right to make health care decisions for an incapacitated partner;
- ✓ The right to be appointed as administrator of decedent's estate, in the same manner and priority as a spouse;
- ✓ The right to use employee sick leave to attend to an illness of his or her partner or his or her partner's child and the right not to be discriminated against for the use of sick leave to attend to an illness of his or her partner or partner's child; and
- ✓ The right to file a claim for disability benefits for his or her partner, in the same manner as a spouse may file such a claim.¹²

LOCAL DOMESTIC PARTNERSHIP BENEFITS: In addition, hundreds of cities and municipalities, colleges and universities, private employers, and labor unions recognize and/or provide benefits to domestic partners. These benefits vary widely, ranging from employer-provided health insurance for the domestic partner of the beneficiary and bereavement and sick leave to membership at a gym for domestic partners.

In California, among the local governments with domestic partnership policies are the Cities of Alameda, Berkeley, Laguna Beach, Los Angeles, Oakland, Petaluma, Sacramento, San Diego, Santa Barbara, Santa Cruz, West Hollywood, City and County of San Francisco, the Counties of Los Angeles, Marin, San Mateo and Santa Cruz, and the Santa Cruz Metro Transit System. Ten university systems, including the University of California, have similar policies. In addition, in California's private sector, over 100 for-profit, not-for-profit and union organizations have chosen to provide benefits to domestic partners.

USE OF PRIVATE CONTRACTUAL AGREEMENTS TO PROVIDE RIGHTS TO SAME-SEX COUPLES

Private contractual agreements may be used by same-sex couples to govern the rights and obligations of their relationships. Using property agreements and private contracts does not, however, provide a same-sex couple with unlimited rights. Such agreements are limited in effect. For example, private contracts have no legal effect on benefits granted by the state such as tax benefits and other obligations including, parentage, custody and visitation arrangements, and child support obligations.¹³

In a recent article, family law practitioner Kitty Mak noted that same-sex couples may contract to "characterize earnings during the partnership according to community property law, designate equal management and control of property acquired during the partnership, create a right to

support after dissolution of the partnership, and create a right to reimbursement for expenses paid to educate a partner during the course of the partnership."¹⁴ Mak also notes what contracts may *not* be used for: to permit a partner to inherit 100% of the community property and 50% of the separate property when a partner dies intestate and to create a right to claim the marital or spousal communication privileges.¹⁵

Whether or not the law would intervene to protect unmarried partners who enter into private contractual agreements to govern the rights and obligations of their relationships is dependent on whether an enforceable written or oral contract is found to exist. In *Marvin v. Marvin* the court held that agreements between non-marital partners would fail only to the extent that they rest on an explicit consideration of meretricious sexual services.¹⁶ In *Whorton v. Dillingham*, the court upheld a contract between an unmarried couple relating to earnings and property rights, noting that even if sexual services are part of the relationship, the portion of the contract supported by independent consideration will be enforced.¹⁷ In *Jones v. Daly*, however, the court found that the performance of meretricious sexual services was an inseparable part of the consideration for the agreement, leaving the court no choice but to find the agreement unenforceable.¹⁸ As a result, advocates argue that "contracting is not an adequate substitute for marriage law."¹⁹

CONGRESSIONAL ACTION: THE DEFENSE OF MARRIAGE ACT – NO RECOGNITION OF SAME-SEX MARRIAGES

In 1996, Congress passed and President Clinton signed into law H.R. 3396, the "Defense of Marriage Act (DOMA)," which allows states to refuse to recognize same-sex marriages should they ever become legal in another state.²⁰ Specifically, DOMA states that "no State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."²¹ DOMA goes on to define "marriage," for purposes of Federal law, as a legal union between one man and one woman as husband and wife.²² With respect to Federal law and programs, this definition of marriage is controlling.²³

Purpose of DOMA. The Judiciary Committee report on H.R. 3396 stated that the measure had two primary purposes: "The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."²⁴

DOMA's Direct Response to Hawaii: *Baehr v. Lewin*. The House report further stated that H.R. 3396 was a needed response to a "very particular development in the State of Hawaii."²⁵ In 1993, the Hawaii Supreme Court required the State to meet the strict scrutiny standard in justifying its ban on same-sex marriages.²⁶ In *Baehr v. Lewin*, the court remanded the case back to the trial court, requiring that the State "overcome the presumption that [the ban] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly

drawn to avoid unnecessary abridgements of constitutional rights."²⁷ It was at this point that Congress acted, believing that "the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples."²⁸

Federal Action Arguably Premature. While the trial court entered judgment in favor of the plaintiffs – three same-sex couples denied marriage licenses – and against the state under the standard enunciated by the Supreme Court,²⁹ the trial court ruling, holding that Hawaii's ban on same-sex marriages violated the equal protection clause of the state constitution, was ultimately reversed. On appeal to the Hawaii Supreme Court, the plaintiffs' claims were declared moot following voter approval of a constitutional amendment formally restricting marital status to opposite-sex couples.³⁰ As a result, no state permits same-sex couples to marry. Nevertheless, as noted below, several states, including California, have taken up Congress' invitation to formally refuse to recognize same-sex marriages by passing "mini-DOMAs." These actions, which officially recognize as valid only marriages between a male and a female, are explained in more detail below.

PROPOSITION 22: CALIFORNIA'S DEFENSE OF MARRIAGE ACT

On March 7, 2000, California joined a number of other states in enacting a "mini-DOMA" when voters passed Proposition 22, the California Defense of Marriage Act, by a margin of 61.4–38.6%.³¹ Proposition 22 added Section 308.5 to the Family Code, to read: "Only marriage between a man and a woman is valid or recognized in California." Proposition 22 did nothing to change who may marry in California. Instead, it restricted the kind of marriage that may be recognized in California to a marriage between a man and a woman.

Under the general rule for determining the validity of a marriage, known as *lex celebrationis*, a marriage is valid if it is valid according to the law of the place where it was celebrated.³² California law specifically provides "[a] marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."³³ Proposition 22 altered this policy with respect to marriages of same-sex couples.³⁴ Passage of the initiative means that if a same-sex couple, legally married in another state, moves to California, their valid marriage will not be recognized in California.³⁵

Arguments For and Against Proposition 22. Supporters of Proposition 22 asserted that its purpose was to prevent California from recognizing same-sex marriages entered into in another state. One supporter stated that "... judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman."³⁶

Opponents of Proposition 22 noted that voting against the proposition would not legalize same-sex marriage in California and further argued that the initiative unfairly singled out one group for discrimination.³⁷ Opponents also contended that basic values such as "keeping government out of our personal lives [and] respecting each other's privacy" necessitated a "no" vote on the initiative.³⁸

Enacting Civil Unions Under Proposition 22. One issue raised by the enactment of mini-DOMAs, such as Proposition 22, across the country is whether the existence of a mini-DOMA precludes a state from enacting civil unions for same-sex couples. In other words, are civil unions between same-sex couples precluded because a state has refused to recognize marriages other than those between a man and a woman? And, may California enact a system permitting same-sex couples to enter into civil unions after the passage of Proposition 22?

Opponents of civil unions argue that the enactment of Proposition 22 precludes California from creating a civil union system. Because the initiative limited recognition of out-of-state marriages to only those between a man and a woman, they argue that the state may not enact civil unions for same-sex couples, with virtually all of the rights and benefits of marriage.

In response, proponents of civil unions argue that the existence of an anti-marriage law does not preclude a state from "providing legal protection to spouses in a civil union. Those laws forbid marriage of, or the recognition of marriages of, same-sex couples. It follows then that this does not exempt a state from recognizing the civil unions, or the 'family' or 'next of kin' or 'dependent' relationship of the spouses in a civil union. In other words, even if a state has withheld the word 'marriage' from same-sex couples, it is fair to argue that it has not withheld and may not withhold the state-created rights and benefits of marriage from those families. Moreover, anti-gay and anti-marriage laws fly in the face of numerous constitutional guarantees. We cannot guarantee that all courts or policy makers will see this issue the way we do, but the record is replete in most states with these laws that they were trying to prevent same-sex couples from marrying, and were not withholding rights, protections and responsibilities from gay and lesbian couples."³⁹

Will Civil Unions Be Recognized By Other States? Another issue raised in the debate revolves around the portability of civil unions. For example, if California were to enact civil unions and a same-sex couple from Nevada (a state that has enacted a "mini-DOMA," as noted below) entered into such a union here in California, would Nevada be required to recognize the union?

The issue has been receiving attention lately because most of the same-sex couples entering into Vermont civil unions are from out of state. As noted in more detail below, the Vermont Civil Union Review Commission reported that 78% of the parties to a civil union were from other states and countries.⁴⁰ This high number of out-of-state couples entering into Vermont civil unions raises questions about whether the unions will be recognized by other states.

The issue is so new that there is little existing case law on point, although the law appears to be developing. Two lawsuits have been filed as a result of the Vermont law. In Massachusetts, seven same-sex couples, including two men who participated in a Vermont civil union, are suing the state for the right to marry. And, in a Georgia custody battle, a woman has asserted that her partner should be considered the legal equivalent of a spouse because they entered into a civil union in Vermont. The lower court disagreed and ruled in favor of the ex-husband. The case is currently pending in the Georgia Court of Appeals.⁴¹

WHAT ARE OTHER STATES DOING?

VERMONT – CIVIL UNIONS: As explained in more detail below, in December 1999, the Vermont Supreme Court ruled in *Baker v. State* that the state has a constitutional obligation to extend to same-sex couples the common benefit, protection, and security that Vermont marriage law provides opposite-sex couples.⁴²

Baker v. State. In *Baker*, the Vermont Supreme Court based its decision on the Common Benefits Clause of the Vermont Constitution which provides:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.⁴³

The plaintiffs in the case, three same-sex couples denied marriage licenses, argued that the state's refusal to grant them marriage licenses based on their sex violated their right to the common benefit and protection of the law guaranteed by the Common Benefits Clause.⁴⁴ They asserted that the exclusion deprived them of numerous legal benefits and protections accorded to married couples, including, among other things, access to a spouse's medical, life, and disability insurance, hospital visitation, spousal support, and intestate succession. Although the plaintiffs raised additional arguments based on both the United States and Vermont Constitutions, the court found that its resolution of the Common Benefits claim eliminated the necessity to address them.⁴⁵

In emphasizing that its decision was based on the Vermont Constitution and not its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the court noted that the Common Benefits Clause provides broad principles informing an analysis of the constitutionality of a given statute under the clause. Most important is the clause's principle of inclusion. On this point, the court stated: "The affirmative right to the 'common benefits and protections' of government and the corollary proscription of favoritism in the distribution of public 'emoluments and advantages' reflect the framers' overarching objective 'not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have an equal share in the fruits of the common enterprise.'"⁴⁶

The court carefully analyzed the constitutionality of Vermont's marriage laws under the Common Benefits Clause and ascertained each of the state's asserted purposes for excluding some Vermonters from the benefits and protections of the state's marriage laws. The court concluded that "in light of the history, logic, and experience ... none of the interests asserted by the state provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."⁴⁷

In *Baker*, the court explicitly declined to hold that the plaintiffs were entitled to a marriage license. Instead, the court focused on the consequences of formally excluding same-sex couples from the common benefits and protections that flow from marriage under Vermont law.⁴⁸ The court further provided that its holding could take "the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative"⁴⁹

and left to the Legislature the decision of how best to craft a constitutionally permissible response.

The Legislative Response: Civil Unions. In response to the Supreme Court's decision in *Baker v. State*, the Vermont State Legislature enacted legislation, upon which AB 1338 is based, allowing same-sex couples to enter into civil unions that carry many of the benefits and responsibilities of traditional marriages. Under the law, which was debated at length and went into effect on July 1, 2000, a couple must meet the following requirements in order to be joined in a civil union:

- 1) Neither party may be a party to another civil union, marriage, or legal reciprocal beneficiary relationship;
- 2) The couple must be of the same sex and therefore excluded from civil marriage;
- 3) The couple cannot be close family members, as specified;
- 4) Both parties must be at least 18 years of age and of sound mind; and
- 5) Neither party may be under guardianship, unless the guardian consents in writing.⁵⁰

Under the law, couples do not need to be Vermont residents to form civil unions in Vermont. As with marriage, no blood test or waiting period is required to enter into a civil union. In order to be joined in a civil union, a couple must first obtain a license from a Vermont town clerk and then, within 60 days, the civil union must be certified by an authorized official: a judge, justice of the peace or member of the clergy.⁵¹

Parties to a civil union are given all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.⁵² The law provides that partners in a civil union are eligible for 300 state benefits given to married couples covering every phase of life. Under the new law, partners can transfer property, make medical decisions for each other, inherit estates and oversee one another's burials. For purposes of state income taxes, parties to a civil union are taxed in the same manner as married persons.

In addition, Vermont same-sex couples who enter into a civil union are subject to burdens similar to those of married couples. Partners who want to end their civil union have to go through a dissolution proceeding in family court, similar to divorce proceedings. Furthermore, all laws relating to domestic relations, including annulment, separation and divorce, child custody and support and property division and maintenance apply to parties to a civil union.⁵³ Parties to a civil union are responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.⁵⁴

Since Vermont's civil unions law went into effect, state officials have recorded more than 2,700 civil unions. Of these, about 600 were between residents of Vermont and the remainder between couples from out of state.⁵⁵ Women have outnumbered men by about two to one.⁵⁶ The issue still resonates with legislators: after Republicans took control of the state House of

Representatives, the House passed several anti-civil union measures, but all were blocked by the Democratic-controlled Senate.

Other States. At this time, Vermont is the only state permitting same-sex couples to enter into civil unions. *The Washington Post* reported recently that at least five other state legislatures have considered a gay marriage bill or one similar to Vermont's civil union law. These states include Rhode Island, Connecticut, Washington, Hawaii and California.⁵⁷ In Hawaii, a measure providing for civil unions was referred to the Judiciary and Hawaiian Affairs Committee where it was put over until the 2002 Session.⁵⁸ Under the measure, opposite-sex couples may enter into civil unions as well; the measure does not limit civil unions to same-sex couples.⁵⁹ In other states, efforts are underway to either amend state constitutions or pass laws preventing civil unions or similar statutes in Nebraska, Massachusetts and Maine.⁶⁰

DOMESTIC PARTNERSHIPS: A number of states, including California as noted above, have enacted and implemented domestic partner registries and other laws relating to the extension of traditional marital benefits to same-sex couples. These states include Connecticut, Hawaii, Oregon, Massachusetts, New York, Vermont, Washington and the District of Columbia.⁶¹ A number of municipalities have created domestic partnership registries on a local basis, including, among others, Ann Arbor, Michigan; Atlanta, Georgia; Austin, Texas; Boulder, Colorado; Broward County, Florida; Chapel Hill, North Carolina; East Lansing, Michigan; Iowa City, Iowa; Madison, Wisconsin; Minneapolis, Minnesota; New Orleans, Louisiana; Oak Park, Illinois; Philadelphia, Pennsylvania; and St. Louis, Missouri.⁶²

RECIPROCAL BENEFICIARIES: Both Hawaii and Vermont have enacted laws extending certain benefits to same-sex couples as "reciprocal beneficiaries." Similar to domestic partnerships, in Hawaii, the package of benefits extends 70 rights and responsibilities to couples who are legally prohibited from marrying. The measure is not restricted to same-sex couples. In fact, the law contains findings which provide that others may also take advantage of the bill's protections, stating "for example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender."⁶³ Among the benefits provided under the law are inheritance rights, the right to bring claims for wrongful death and other torts, public employee health and retirement benefits for domestic partners, and the right to consent to postmortem exams.

In Vermont, two persons who are blood relatives or related by adoption and prohibited from establishing a civil union or marriage with the other party may enter into a reciprocal beneficiaries relationship.⁶⁴ Reciprocal beneficiaries receive the benefits and protections granted to spouses in specified areas, including, among other things, hospital visitation, medical decision-making, durable power of attorney for health care and terminal care documents, and patient's bill of rights.

MINI-DOMAs: At this time, 35 states, including California, as noted above, have taken up Congress' invitation to formally refuse to recognize same-sex marriages. Known as "mini-DOMAs," the actions officially recognize as valid only marriages between a male and a female. These states are: Alabama, Alaska, Arizona, Arkansas, Delaware, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan,

Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia.⁶⁵

Three of these states, Hawaii, Alabama and Nebraska have gone beyond legislative action and have passed constitutional amendments on the subject. No state recognizes same-sex marriage.

WHAT ARE OTHER COUNTRIES DOING?

MARRIAGE: The Netherlands is the only country in the world that permits same-sex couples to marry. The law, which went into effect April 1, 2001, eliminates all references to gender in laws governing matrimony, divorce, and adoption and "[goes] so far as to amend the dictionary to eliminate references to 'man and woman' in the definition of marriage."⁶⁶ Under the new law, same-sex couples are provided the full range of protections, responsibilities, and benefits that come with civil marriage. As with heterosexual couples seeking to marry, the law requires that at least one partner be a Dutch citizen or resident foreigner. And, like a heterosexual married couple, a same-sex couple seeking to end their relationship must divorce through the courts.

REGISTERED PARTNERSHIPS: Several countries have enacted a new marital status, known as registered partnership, that offers most of the benefits and protections of civil marriage. Denmark was the first country to offer such a benefit, enacting registered partner status in 1989.⁶⁷ Other Northern European countries soon followed. First, Norway and then Greenland, Sweden, Iceland, the Netherlands, and Germany. A treaty was signed in 1995 by the Scandinavian countries promising to recognize and honor each other's registered partnerships.⁶⁸

Similar to domestic partnership status, a registered partnership entitles its members to specified benefits often associated with civil marriage. A fact sheet on the system notes that registered partnerships differ from marriage in that, among other things, registered partners often cannot adopt non-related children or even each other's children and cannot have an "official" church wedding in the country's established national church.⁶⁹

At this time, several other countries are considering similar legislation, including Belgium, the Czech Republic, Finland, Luxembourg, New Zealand, Portugal, Spain, and Switzerland.⁷⁰

EXTENSION OF CERTAIN BENEFITS: Many countries have extended certain benefits and protections of marriage to same-sex couples. For example, in 1998, the French government created a form of marital status for same-sex couples called "civil solidarity pacts" which permit these couples to receive certain tax, inheritance and social security rights.⁷¹ In Austria, the parliament declared same-sex partners to be "next-of-kin" who cannot be forced to testify against members of their family.⁷² And, in 1996, Hungary enacted legislation granting inheritance rights to same-sex couples.⁷³ In Canada, the Supreme Court ruled that where protections are granted to "spouses," they must also be granted to same-sex couples.⁷⁴

POLICY CONSIDERATIONS

In support of AB 1338, the author states:

Establishing and respecting civil unions, and providing the rights, protections, benefits and responsibilities of being spouses in a civil union would further California's interest in encouraging close and caring families and promoting stable and lasting family relationships. The availability of a civil union will protect family members from economic and social consequences of abandonment, divorce, the death of loved ones, and other life crises.

The equivalent legal recognition of a civil union will protect these couples, the children they are raising, third parties, and the state against numerous harms and costs; would reduce discrimination on the bases of sex and sexual orientation; and would provide such couples the opportunity to obtain rights, protections, benefits and responsibilities currently afforded only to different-sex couples by California's civil marriage laws.

Several opponents of AB 1338 have written to the Committee expressing concern with the measure. The Committee on Moral Concerns opposes the bill arguing that "California voters decided against gay and lesbian marriages with the passage of Proposition 22. Legalizing civil unions violates the will of the people." On this same point, the Capitol Resource Institute states that the bill "thumps its nose at 62% of California voters who overwhelmingly voted to retain the historic definition and meaning of marriage as being between one man and one woman."

Proponents of the measure in turn argue:

[AB 1338] does not pertain to or affect marriage in any way or the parties who may marry under California law and therefore does not violate the spirit of Proposition 22. Proposition 22 does not affect civil unions: it simply restricted the definition of the word "marriage" in California law. Proponents of the [initiative] were very clear that they did NOT intend to authorize any form of discrimination, restrict laws that protect same-gender couples, or prevent further laws that did not alter the definition of marriage.

The Knight Initiative was about whether California would have to recognize and treat as valid same-sex marriages that might at some point be legalized in other states. The Family Protection Act of 2001 is about something altogether different: not whether California should recognize same sex marriages entered in other states, but whether California will allow same sex couples to enter civil unions (rather than marriages) in this state.

Additionally, advocates point out that the right to marry has been recognized as a fundamental civil right under the federal and state constitutions.⁷⁵

Opponents argue that AB 1338 will not further the state's interest in strengthening families because it will encourage divorce and defection to same-sex relationships and because the alleged harms and costs of failing to extend benefits are illusory. The Capitol Resource Institute notes "the bill says 'without the legal rights, protections, benefits and responsibilities associated

with civil marriage, same-sex couples, and the children they are raising, suffer numerous obstacles and hardships, which directly harms them, and leads to numerous harms and costs to third parties and to the state.' It doesn't specify what those harms are or how they affect 'third parties' or 'the state.'" Opponents also contend that same-sex relationships should not be encouraged and that such families are not ideal environments for raising children.

Proponents respond that there is no evidence to support the fears of defection to homosexuality, nor of any potential detriment to children being raised within homosexual households.⁷⁶ Advocates further assert that the same considerations which inhibit heterosexual couples from committing to marriage, will also inhibit same-sex couples. The rights, protections and responsibilities of marriage are weighty, they argue, no matter the gender of the involved adults.

Opponents also invoke morality based arguments. They argue that civil unions will further confuse our youth, that civil unions breach God's scripture, that the state has no vested interest in promoting civil unions since same-sex couples cannot procreate and that allowing civil unions will lead to further erosion of family values potentially leading to sanctioned polygamy and incest. In support of these arguments, the Committee on Moral Concerns asserts:

We believe minimizing human suffering and the Judeo-Christian ethic are inseparable. For those who don't, the bill also rejects human suffering as a basis for legislation. If it's okay for gays and lesbians to marry, it's obviously okay to pursue gay and lesbian activities. But male homosexuality is the most dangerous lifestyle in America (followed closely by heroin addiction). And lesbians lose about 20 years from the average female life span. One of the historically most sinful is also one of the most dangerous.

Proponents in turn urge passage of the measure so that the personal and societal importance that normally attaches to marriage may be extended to same-sex couples and the children they are raising. On this point, the American Civil Liberties Union states:

Gay and lesbian couples who choose to make a lifetime commitment to each other should not be discriminated against and should not be deprived of the same rights, protections, benefits and responsibilities that are granted to, different-sex couples who choose to marry. Approximately 400,000 same-sex couples reside in California, many of whom are raising children together. Without these legal rights, protections, benefits and responsibilities, gay and lesbian families suffer numerous obstacles and hardships that immensely harm them and lead to serious problems and costs to third parties and to the state.

AB 1338 helps California move closer to fulfilling the promises of inalienable rights, liberty and equality. It upholds the state's interest in encouraging close and caring families, promotes stable and lasting family relationships, and protects all families from the economic and social consequences of major life crises.

Finally, some gay and lesbian rights advocates argue that the measure does not go far enough. On this point, Marriage Equality California (MECA) states:

We support [AB 1338] as a positive incremental step forward. It would reduce discrimination in state law, by giving same-sex families some of the many protections that state law now offers only to mixed-sex families. Income taxes, child custody and adoption, alimony, and more—all would be handled more fairly. However, we should be clear that civil unions are not equal to civil marriage.

MECA stands for government ending discrimination, by recognizing the right of same-sex couples to access civil marriage. This bill, for all its merits, does not achieve this, nor does it claim to. AB 1338 does not bring marriage. Therefore MECA will continue to focus instead on the long-term goal of achieving equal access to civil marriage. ... MECA will not settle for anything short of a complete end to marriage discrimination. Any Civil Unions institution falls short of the full rights and responsibilities of civil marriage. It cannot trigger the 1049 federal laws that depend on marital status, and its portability from state to state is in question.

Thus, important policy considerations inform the debate surrounding AB 1338 and its creation of civil unions in California.

¹ Committee counsel would like to thank Barbara Bell for her helpful research on this issue.

² Family Code § 300.

³ Family Code § 420.

⁴ Family Code §§ 301, 302, 2200.

⁵ Family Code § 297.

⁶ *Id.*

⁷ Family Code § 299.5.

⁸ A domestic partnership is terminated when any of the following occur: one partner gives or sends to the other partner a written notice by certified mail that he or she is terminating the partnership, one of the domestic partners dies, one of the domestic partners marries, or the domestic partners no longer have a common residence. Family Code § 299.

⁹ See Assembly Bill 25 (Migden) of 2001, September 7, 2001 amendments.

¹⁰ Health and Safety Code § 1261.

¹¹ Government Code §§ 22867 et seq.

¹² In addition to the rights noted in the text above, the following rights were also extended to all registered domestic partners under AB 25: (1) The right to receive continued health care coverage (including the right of his or her child to receive coverage) because he or she is a surviving beneficiary of the deceased employee or annuitant; (2) The right to nominate a conservator, be nominated as conservator, oppose, participate, file various petitions in the conservatorship, and to receive all notices relevant to conservatorship proceedings, including temporary conservatorships, involving his or her domestic partner; (3) The right and priority of his or her nominee to be appointed conservator equal to the right and priority of a nominee of a spouse; (4) The right to be treated the same as a spouse in a statutory will; (5) If he or she predeceased the decedent, the right of his or her children, parents, brothers and sisters to be appointed as administrator of decedent's estate, in the same manner and priority as the children, parents, brothers and sisters of a predeceased spouse; and (6) The right to unemployment insurance benefits for leaving employment to join his or her domestic partner at a remote location to which commuting to work is impractical and a transfer of employment is not available.

¹³ Kitty Mak, *Partners in Law*, 24 Los Angeles Lawyer 35 (July/August 2001).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Marvin v. Marvin* (1976) 18 Cal.3d 660.

¹⁷ *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447.

¹⁸ *Jones v. Daly* (1981) 122 Cal.App.3d 500.

¹⁹ Michael S. Wald, The Stanford Institute for Research on Women and Gender, The Stanford Center on Adolescence, "Same-Sex Couples: Marriage, Families, and Children. An Analysis of Proposition 22, the Knight Initiative," at 15 (1999).

²⁰ Commentators have criticized DOMA, arguing that the act is unconstitutional for three reasons. First, critics argue that DOMA constitutes unprecedented federal intrusion into an area – marriage – traditionally reserved to the states. As a result, these critics assert, DOMA violates the Tenth Amendment. Second, opponents argue that the act is an unprecedented attempt to circumvent the U.S. Constitution's Full Faith and Credit Clause because, they argue, Congress does not have the power to limit the full faith and credit granted by the states. Third, critics assert that the act runs afoul of other constitutional protections, including the right to marry and the right to travel as well as the Equal Protection and Privileges and Immunities Clauses. *See, e.g.*, Evan Wolfson and Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 Quinnipiac L. Rev. 221 (1996); Heather Hamilton, *Comment: The Defense of Marriage Act: A Critical Analysis of its Constitutionality Under the Full Faith and Credit Clause*, 47 DePaul L. Rev. 943 (1998); Jennie R. Shuki-Kunze, *Note: The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 Case W. Res. 351 (1998). *But see* Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 Creighton L. Rev. 409 (1998). At this point, DOMA has not yet been challenged in court largely because no state currently permits same-sex couples to enter into civil marriages. As a result, no individuals have been harmed and therefore they likely would not be found to have standing to challenge the act.

²¹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C).

²² *Id.*

²³ The U.S. General Accounting Office has identified 1,049 federal protections, benefits and responsibilities available only to married couples. *Defense of Marriage Act*, U.S. General Accounting Office, GAO/OGC-97-16 (1997); *See, also Marriage Fact Sheet*, Gay & Lesbian Advocates & Defenders, at 14 (September 2000).

²⁴ H. Rep. No. 104-664, at 2 (1996).

²⁵ *Id.*

²⁶ *Baehr v. Lewin* (1993) 74 Haw. 530.

²⁷ *Id.*

²⁸ H. Rep. No. 104-664, at 2.

²⁹ *Baehr v. Miike* (1996) No. 91-1394, 1st Cir. Ct. Hawaii.

³⁰ *Baehr v. Miike* (1999) 92 Haw. 634.

³¹ *See* <http://Primary2000.ss.ca.gov/returns/prop/00.htm>.

³² H. Rep. No. 104-664, at 8. The Committee Report noted also that an important exception to this general rule exists. As stated in the Restatement of Conflicts, "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." *Restatement (Second) of Conflicts of Law* § 283(2) (1971). Based on this, some opponents of DOMA have argued that the act was unnecessary because it attempts to give states a power they already possess under the exception. *See* Jennie R. Shuki-Kunze, *supra* note 20, at 375.

³³ Family Code § 308.

³⁴ *See* Michael S. Wald, *supra* note 19, at v (1999).

³⁵ *Id.* at 2. Professor Wald's paper further discusses the impact of failing to recognize marriages validly entered into in other states and notes that "California courts have always recognized marriages legally entered into in other states, even if the persons would be unable to marry in California." *Id. See, e.g., McDonald v. McDonald* (1936) 6 Cal.2d 457 (holding that, although at the time of the marriage the wife was a minor and failed to procure consent from a parent or guardian, because the marriage was valid in Nevada, it was to be considered a binding and valid marriage in California), *In re Marriage of Smyklo* (1986) 180 Cal.App.3d (holding that common law marriage valid under Alabama law is entitled to be recognized under California law), *In re Dalip Sing Bir's Estate* (1948) 83 Cal.App.2d 256 (holding that two wives of decedent should share equally in his estate where polygamous marriage valid in India and where only the question of descent of property is at issue).

³⁶ Proposition 22 ballot measure, Miriam G. Santacruz, Argument in Favor of Proposition 22, March 2000.

³⁷ Proposition 22 ballot measure, Argument Against Proposition 22, March 2000.

³⁸ *Id.*

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- ³⁹ See *A Historic Victory: Civil Unions for Same-Sex Couples – What's Next!* Joint publication of Lambda Legal Defense and Education Fund, Gay & Lesbian Advocates & Defenders, National Center for Lesbian Rights, and ACLU Lesbian and Gay Rights Project (2000).
- ⁴⁰ *Report of the Vermont Civil Union Review Commission*, at 7 (January 2001).
- ⁴¹ See "Civil Unions Blur at Vermont's State Line," *USA TODAY*, July 10, 2001.
- ⁴² *Baker v. State* (1999) 170 Vt. 194, 228. For an excellent discussion of the Vermont case, see *Marriage Fact Sheet*, Gay & Lesbian Advocates & Defenders, *supra* note 23, at 6 (2000).
- ⁴³ Vt. Const. Ch. I, Art. 7.
- ⁴⁴ *Baker* at 201.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.* at 208, citing W. Adams, *The First American Constitutions* 188 (1980).
- ⁴⁷ *Id.* at 224.
- ⁴⁸ *Id.*
- ⁴⁹ *Id.* at 197.
- ⁵⁰ 18 V.S.A. §§ 1201 et. seq.
- ⁵¹ 18 V.S.A. § 5160.
- ⁵² 18 V.S.A. § 1204.
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ "With Vermont in the Lead, Controversy Progresses; Battle Over Same-Sex Unions Moves to Other States," *The Washington Post*, p.A3, September 4, 2001. See, also *Report of the Vermont Civil Union Review Commission*, *supra* note 40 (January 2001).
- ⁵⁶ "Quiet Anniversary for Civil Unions," *The New York Times*, p.A14, July 31, 2001.
- ⁵⁷ "With Vermont in the Lead, Controversy Progresses; Battle Over Same-Sex Unions Moves to Other States," *supra* note 55 (September 4, 2001).
- ⁵⁸ See <http://www.capitol.hawaii.gov/site1/docs/getstatus2.asp?billno=HB1468>.
- ⁵⁹ H.B. 1468, House of Representatives, Twenty-first Legislature, State of Hawaii (2001).
- ⁶⁰ "Five States Consider Following Vt.'s Lead on Civil Unions," *Rutland Herald*, August 8, 2001. On a national level, a group called Alliance for Marriage has drafted a constitutional amendment defining marriage as between a man and a woman. The group's "Federal Marriage Amendment" states: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." See <http://www.allianceformarriage.org/reports/fma/amendment.htm>.
- ⁶¹ For a list of domestic partner registry listings, see <http://www.lambdalegal.org>.
- ⁶² See <http://www.aclu.org/issues/gay/dpstate.html>.
- ⁶³ HRS § 572C-2.
- ⁶⁴ 18 V.S.A. § 1301 et seq.
- ⁶⁵ "State Laws Affecting Lesbians and Gays," LEGISBRIEF, National Conference of State Legislatures, Vol. 9, No. 23 (April/May 2001).
- ⁶⁶ "Four Gay Couples Tie the Knot; Law Allowing Same-sex Marriages Takes Effect in Netherlands," *The Sacramento Bee*, p.A15, April 1, 2001.
- ⁶⁷ "International Recognition of Same-sex Partnerships," Lambda Legal Defense and Education Fund (March 30, 2001).
- ⁶⁸ *Id.*
- ⁶⁹ *Id.*
- ⁷⁰ *Id.*
- ⁷¹ "Gay Partnerships Around the World," *The Independent* p.3, September 6, 2001.
- ⁷² *Marriage Fact Sheet*, Gay & Lesbian Advocates & Defenders, *supra* note 23, at 5 (2000).
- ⁷³ *Id.*
- ⁷⁴ "International Recognition of Same-sex Partnerships," Lambda Legal Defense and Education Fund, *supra* note 67.
- ⁷⁵ See, e.g., *Turner v. Safley* 482 U.S. 78 (1987); *Zablocki v. Redhail* 434 U.S. 374 (1978); *Loving v. Virginia* 388 U.S. 1 (1967); *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252.
- ⁷⁶ See, e.g., Michael S. Wald, *supra* note 19, at 11.