

Dissolving Same-Sex Marital Unions in California Welcome to Our World

By Deborah H. Wald, Attorney at Law

The frequent changes in California marital law regarding same-sex couples have left such couples seeking marital dissolutions--and their lawyers--in a state of confusion.

To briefly recap: In May 2008, the California Supreme Court ruled in *In re Marriage Cases* that it was unconstitutional to deny same-sex couples the right to marry. From June 16, 2008, (when that decision went into effect) through November 4, 2008, same-sex couples from California and beyond were able to enter into legally recognized marriages throughout the state. Then, on November 4, 2008, California voters passed Proposition 8, which amended the California Constitution, effective November 5, 2008, to provide that only a marriage between one man and one woman is valid or recognized in California. Since November 5, 2008, same-sex couples have not been allowed to marry in the state of California, but an estimated 18,000 same-sex couples had married during the interim.

On May 26, 2009, the California Supreme Court upheld the constitutionality of Proposition 8 in *Strauss v. Horton*. In its ruling, the court found that Proposition 8 did, in fact, preclude marriages by same-sex couples beginning on November 5, 2008; however, the court also found that all marriages entered into in California between June 16 and November 5, 2008, in reliance on the court's previous ruling, remained legally valid and recognized.

The court further found that although it was constitutional to deny same-sex couples access to the word "marriage" to describe their legal unions, it was unconstitutional to deny same-sex couples access to all the rights, benefits, and responsibilities associated with marriage. In

other words, the court held that Proposition 8 had only denied same-sex couples access to the nomenclature of marriage. In a footnote to that decision, the court declined to rule on whether California would continue to recognize marriages entered into in other states, but not "formally recognized" in California prior to November 5, 2008, on the ground that no such marriages were before the court.

Finally, on October 1, 2009, our Governor signed a bill into law that provides that all marriages entered into by same-sex couples prior to November 5, 2008, will continue to be recognized *as marriages* by the state of California; and that all marriages entered into after November 5, 2008 in other jurisdictions will entitle the couple entering into that union to the rights, benefits and responsibilities associated with marriage. This law is scheduled to go into effect on January 1, 2010.

So what are same-sex couples to do when seeking marital dissolutions in California? There is no question that same-sex couples married in California between June 16 and November 5, 2008, may obtain marital dissolutions in California, assuming that jurisdictional requirements are met. There also is no question that prior to passage of Proposition 8, California courts were routinely granting divorces for same-sex couples married outside of California, regardless of when and where the couple had married. In other words, even though same-sex couples were not legally allowed to marry in California prior to June 16, 2008, California courts did not hesitate to grant divorces as needed to same-sex couples married before that date in other jurisdictions, such as Massachusetts or Canada, during the period from June to November when marriages of same-sex couples were legally allowed in California.

Given that prior to passage of Proposition 8 no distinction was made by California courts based on where the marriage was solemnized, I believe that California family courts will continue to divorce same-sex couples who were legally married anywhere prior to November 5, 2008,

as long as the California courts have jurisdiction over both the action and the parties.

In *In re Marriage Cases*, the California Supreme Court held that our state Privileges & Immunities Clause precludes our courts from differentiating between in-state and out-of-state marriages. I, therefore, am confident that California family courts will treat *all* marriages entered into by same-sex couples before November 5, 2008, equally, regardless of when and where they were solemnized.

What about California's ability to divorce same-sex couples married in other states after passage of Proposition 8? Although these couples should be able to get divorced in California if California has jurisdiction, figuring out exactly how to do these dissolutions is going to be a bit more complicated.

The California Supreme Court said clearly, in *Strauss v. Horton*, that Proposition 8 was only about nomenclature. In other words, California courts should still be able to address the rights and responsibilities of marriage in a dissolution proceeding, including dividing property, addressing custody issues, and making support orders. However, as a practical matter, California uses one set of forms created by our state judicial council for marital dissolutions, and a separate set of forms for domestic partnership dissolutions. An out-of-state marriage entered into by same-sex partners after November 5, 2008, will not be a domestic partnership; it will be a marriage. At the same time, however, there is an issue about whether we can call it a marriage, even in the context of divorce, pursuant to Proposition 8, as interpreted by the California Supreme Court.

Given that our Family Code appears to preclude us from treating an out-of-state marriage as a domestic partnership (Family Code § 299.2), it is our intention at my law firm to file marital dissolution forms for our same-sex marital couples seeking divorce, regardless of when and where

they were married, and simply modify the forms as necessary to satisfy the courts.

Confused? Welcome to California!

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This article is a preprint of an article to be published in the ABA Section of Family Law Family, Advocate, Winter Vol. 32, No.3