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REPRESENTING SAME-SEX FAMILIES IN CALIFORNIA AFTER WINDSOR AND PERRY

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On June 26, 2013, the United States Supreme Court issued its historic rulings in the companion cases of *United States v. Windsor* (2013) 133 S.Ct. 2675 and *Hollingsworth v. Perry* (2013) 133 S.Ct. 2652. With these two decisions, the Court erased the final differences between the legal statuses of California's same sex couples and California's different sex couples. However, while some aspects of family law practice unquestionably have become simpler as a result of these historic rulings, significant complexity remains for attorneys representing same sex couples and their children in the family courts. This article will endeavor to address some of the remaining challenges facing family law attorneys providing legal services to California's lesbian and gay families.

I. FIGURING OUT YOUR CLIENT'S STATUS

The first area of complexity facing family law attorneys in same sex dissolutions is to accurately identify the marital/domestic partnership status of one's client. A family law attorney can go through his or her entire career without ever encountering a heterosexual client who legitimately does not know whether or not she is married. In the lesbian and gay community, this is not true. Given the myriad different statuses available to lesbian and gay couples over the past decade, and the speed with which these statuses and their legal meanings have changed, many clients will be completely unable to provide accurate information to their attorneys regarding their legal situations. It is the job of the attorney to ask enough of the right questions to help the clients figure this out.

Prior to the *Perry* ruling, a lesbian or gay man in California could occupy any one or more of at least eight different legal statuses: (1) unmarried and unregistered; (2) in a California domestic partnership created by an entity other than the State of California (e.g. a city or county domestic partnership, or an employer-created domestic partnership); (3) in a California state registered domestic partnership (SRDP); (4) in a 2004 San Francisco City Hall marriage (later declared void by the California Supreme Court, so this accords no current legal status although this client will have a facially valid marriage license to show you); (5) married in another state or country

prior to enactment of Prop 8 (considered a marriage under California law, even during the years when Prop 8 was in effect); (6) married in California during the 2008 window between *In re Marriage Decisions* and the passage of Prop 8 (considered a marriage under California law, even during the Prop 8 years); (7) married in another state or country after enactment of Prop 8 (a marital equivalent under Family Code section 308(c), carrying all the rights and obligations of marriage, but without access to marital nomenclature prior to the *Perry* ruling of 6/26/2013); (8) registered as a domestic partner or in a civil union from another state than California (treated as a California RDP under Family Code § 299.2 as long as the state's domestic partnership/civil union is "substantially equivalent" to a California domestic partnership).

II. ADDRESSING MULTIPLE STATUSES

It is important to note here that none of the above statuses (except for "unmarried and unregistered") is mutually exclusive of the others. A same sex couple may well have registered as domestic partners in California, entered into a civil union in Vermont, *and* married in Canada. And, just to make sure they were truly married, they may have married again under California law during 2008, or since the *Perry* decision. Which raises several thought-provoking legal issues for an attorney handling a dissolution.

Adam and Bruce are a gay couple who have been together for 33 years and reside in San Francisco. They held a wedding in 1990, on their 10 year anniversary, to which they invited their friends and family. Rings were exchanged at this time. When Vermont started allowing same sex couples to enter into Civil Unions in 2000, they flew to VT to admire the foliage and enter into a CU. When Massachusetts legalized marriage for same sex couples in 2004, they got married during a festive weekend in Provincetown. When California made state-registered domestic partnerships equivalent to marriages in 2005, they registered with the Secretary of State's Office as Domestic Partners. When the California Supreme Court ruled that same sex couples had a constitutional right to marry in 2008, they married again in the splendor of San Francisco City Hall.

- *Now, sadly, they are breaking up. What is their legal status? What is their Date of Marriage? How many separate relationships must be pled in their Petition for Dissolution?*

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Take the example of Adam and Bruce, outlined above. A family law attorney will have a choice of at least 5 different dates for the "date of marriage." Many California attorneys will want to use the 2004 Massachusetts marriage as the key date on the dissolution petition, while others may not list a marriage date prior to the marriage first recognized by California in 2008. In reality, I believe the appropriate "date of marriage" for Adam and Bruce, in a 2014 California dissolution action, is the 2000 date upon which they entered into their Vermont Civil Union, since that is the date upon which they first entered into a California-recognized marital equivalent relationship. The fact that the Civil Union was not recognized as a marriage equivalent in California until 2005 (when AB 205 went into effect, retroactively transforming all California domestic partnerships and their equivalents into marriage-equivalent relationships) should not make a difference now that the Vermont Civil Union unquestionably will be recognized by a California court.

But Adam and Bruce are unlikely to have a clue what date to use on their dissolution petition – and, if the dissolution is not highly amicable, the one who would stand to benefit financially from a longer marriage may want to date the marriage all the way back to their wedding in 1990 (which may, in fact, be the most equitable answer depending on the circumstances), while the other likely will want to push the date out to 2008. Family law attorneys representing clients like Adam or Bruce will need to fully understand the number and types of relationships their clients have entered into and help their clients determine what, in fact, is the operative "date of marriage" for California dissolution purposes.

One other note about Adam and Bruce: a dissolution of their marriage *will* effectively dissolve both the Massachusetts marriage and the California marriage, but it *will not* dissolve either their California domestic partnership or their Vermont Civil Union. Each of those relationships will need to be separately pled in the petition and response, and separately adjudged dissolved in the Judgment. Listing each separate marital-equivalent relationship with particularity in the pleadings, and requesting dissolution of each and every one of these relationships (whether through use of an FL-103 that allows one to check appropriate boxes for dissolving *both* a domestic partnership and a marriage or through listing the plea for dissolution of the other relationship (e.g. an out-of-state Civil Union) as an "other order requested" on FL-103, section 7(j)) is essential to actually ending the legal relationship between the parties and allowing each of them to once again hold the status of "single."

III. MARRIAGE vs. DOMESTIC PARTNERSHIP

Same-sex married couples in California already had all the same rights and responsibilities as different-sex married spouses under California law prior to the United States Supreme Court's decisions in *Perry* and *Windsor* (although some of the marriages could not be *called* marriages after Prop 8). The problem for same-sex married couples prior to the Supreme Court's decisions stemmed from lack of federal recognition. However, now that federal agencies,

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including the IRS, must treat all married couples as married regardless of sex or sexual orientation, same-sex spouses who are divorcing can access QDROs, face no taxation of assets transferred in divorce, and will be entitled to deduct spousal support payments on federal tax returns to the same extent different-sex couples are. Divorce should now operate exactly the same way for same-sex and different-sex marital spouses in California.

While married same-sex couples residing in California now are in a status exactly equivalent to that of married different-sex couples, the same cannot be said of couples in state registered domestic partnerships. California is not converting domestic partnerships into marriages, and domestic partnerships still are not generally recognized under federal law. What this means is that same-sex couples have a choice: they can be married for both state and federal purposes by marrying, or by *both* registering as domestic partners and marrying; but if they want to remain federally "single" but enjoy the benefits of being married under California state law, they can accomplish this by only registering as domestic partners.[1]

There are several circumstances under which it may be useful to a couple to have state protections without being federally-recognized spouses. These include people who are in need of federal student loans or other needs-based aid (since their domestic partner's income will not be taken into consideration but their marital spouse's almost certainly would); and people who will need to complete an adoption to secure the second spouse's legal relationship with their children. Because the federal income tax credit is not available when one is adopting the child of ones (federally recognized) spouse, registered domestic partners are able to benefit from this credit while marital spouses are not. Family law attorneys consulting with lesbians and gay men about the legal consequences of their decisions to register or marry need to be aware of these issues.

IV. ISSUES FOR SAME-SEX COUPLES WITH CHILDREN

Despite all efforts by the State of California and the federal government, same-sex married couples still do not enjoy the same level of national protection as different-sex married couples. This is because a majority of states continue to refuse to recognize the marriages of same-sex couples. This means that, when a same-sex couple goes on a summer cross-country road trip

[1] It appears to me that there is a constitutional problem with same-sex couples having the option of choosing between multiple statuses while different-sex couples do not. Now that we have achieved full marriage equality in California, I expect the state *either* to do away with state domestic partnerships or to open them up to everyone. I am optimistic that California will opt for the second option, given that a secondary purpose of our domestic partnership laws has been to provide protection to California's senior citizens of any sexual orientation who want their intimate relationships recognized without suffering the loss of federal financial benefits on which they depend.

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(as we all are obligated to do at least once in our lives), whether or not they are legally married is subject to change each time they cross a state border.

For lesbian spouses having children together, the non-birth mother will be presumed to be the child's second parent from the moment of birth pursuant to Family Code section 7611(a), which creates a rebuttable presumption of parentage any time the "presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage."[2] However, this presumption only will protect the parent-child relationship between the non-birth mother and the child in states that recognize the mothers' marriage – therefore, without an adoption, on that same cross-country road trip the question of whether or not the non-biological mother is recognized as a parent also will be subject to change each time the family crosses into a new state. Because this situation is intolerable to most parents, every lesbian or gay couple raising children together should be strongly encouraged to be proactive about making sure that each parent has a durable legal relationship with their child, independent of their relationship with each other and reflected in a court judgment that will be subject to full faith and credit around the country and the globe.

Family law attorneys assisting same-sex couples with dissolutions of their domestic partnerships and/or marriages *must* be mindful of the risks of dissolving the adult union without securing parental rights for the non-biological parent. Where a dissolution action is underway, a separate legal action to establish a parental relationship should not be necessary; but clear and unequivocal parental orders should be included in any dissolution involving a same-sex couple with children, in addition to custody, support and time share orders. Further, these orders should be based on more than just the marital presumption, out of concern that a state hostile to same-sex unions also will be hostile to recognition of parent-child relationships based exclusively on recognition of the union. This should not pose a significant problem, since the 7611(d) parenting presumption that arises from receiving a child into one's home and holding the child out as one's own will almost always apply in these cases, as will our Supreme Court's ruling in *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 and its progeny.

[2] California's version of the Uniform Parentage Act, codified at Family Code section 7600 et seq, was amended to accurately reflect the gender neutrality of many of its provisions effective January 1, 2014.

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V. CALIFORNIA FAMILY LAW REPRESENTATION OF OUT-OF-STATE COUPLES

As a usual matter, California courts only have jurisdiction to adjudicate dissolutions if at least one of the spouses has resided in California for at least six months preceding filing. However, in recognition of the fact that many same-sex couples travel to California to marry and then return to home states that do not recognize their marriages, effective January 1, 2012 our Legislature amended Family Code section 2320 to provide jurisdiction in California to dissolve the marriages of some out-of-state married couples.[3]

Pursuant to Family Code section 2320(b), "a judgment for dissolution … between persons of the same sex may be entered, even if neither spouse is a resident of, or maintains a domicile in, this state at the time the proceedings are filed, if the following apply: (A) The marriage was entered in California. (B) Neither party to the marriage resides in a jurisdiction that will dissolve the marriage." The statute creates a rebuttable presumption that a state that will not recognize the marriage also will not dissolve it; provides for venue in the same county where the marriage was solemnized; and states that the dissolution "shall be adjudicated in accordance with California law."

While it is clear that California has jurisdiction under 2320(b) to dissolve a same-sex marital union and return the parties to their prior status as "single," the question of what else a California court can do for divorcing non-resident couples remains open. I am not aware of anything to prevent a California court, adjudicating a dissolution "in accordance with California law," from entering appropriate spousal support orders; nor am I aware of any reason that the court cannot adjudicate an asset division consistent with our state's community property laws. Things get somewhat more problematic when orders are needed to divide real property located in another state; and – while our courts may have jurisdiction to determine that a child is a "child of the marriage," with a parent-child relationship with both spouses – our Superior Courts' subject matter jurisdiction is most clearly limited (because of the UCCJEA and UIFSA) when it comes to issues of child custody and support.

The details of what our courts can – and cannot – accomplish for non-resident same-sex divorcing couples will need to be fleshed out in the courts and Legislature over the coming years. Given this complexity, it is highly advisable for family law attorneys providing counsel to out-of-state same-sex couples contemplating marriage in California to suggest pre-marital agreements that can resolve some of these potential problems in advance.

[3] California already had jurisdiction to dissolve California registered domestic partnerships under Family Code section 299(d).

VI. CONCLUSION

2013 was a historic year for same-sex couples and their families, with unprecedented strides toward true national marriage equality. However, as with so many things, the devil is in the details. As the laws around the country continue to change, and this area of law continues to develop, it remains incumbent upon family law attorneys providing representation to same-sex couples in California to remain on top of these developments and changes. Thankfully, here in California we have wonderful organizations such as the National Center for Lesbian Rights and Lambda Legal to look to for guidance; and family law attorneys are well-advised to turn to these organizations for assistance when encountering unfamiliar problems and to obtain the most up-to-date information as issues continue to develop.

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