21st CENTURY ISSUES DEALING WITH NONTRADITIONAL RELATIONSHIPS: DIVIDING PROPERTY BETWEEN UNMARRIED PERSONS

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TABLE OF CONTENTS

I. INTRODUCTION....1

II. CURRENT STATE OF THE LAW WITHIN TEXAS....1
A. Property Division between Married Heterosexual Couples on DIVORCE....1
1. Texas Family Code Title 1, §§3.001-9.302 and Case law....1
2. U.S. Constitution, Article IV, §1 Full Faith & Credit (FF&C), and Comity as to Registered Judgments....1
B. Property Division between Married Homosexual Couples on DIVORCE....1
1. Texas Constitution, Article 1, Bill of Rights Section 32 (aka Texas DOMA) v. Full Faith & Credit Clause and Comity....1
2. Texas Family Codes §2.001 & 6.204(c)....1
C. Property Division between Unmarried Couples....2
1. Texas Constitution Article 1, Bill of Rights, Section 32, (aka Texas DOMA) v. Full Faith & Credit Clause and Comity....2
2. Texas Family Code §2.001 and §6.204(c) v. Contractual, Equitable, and Tort Remedies....2

III. CURRENT STATE OF THE LAW BEYOND TEXAS....4
A. Property Division between Married Heterosexual Couples on DIVORCE....4
1. U.S. Constitution, Article IV §1 Full Faith & Credit (FF&C), and Comity as to Registered Judgments....4
2. Statutory Authority....4
B. Property Division between Married Homosexual Couples on DIVORCE....4
1. Full Faith & Credit with Exceptions v. Federal and State DOMAs....4
2. Massachusetts and Foreign Jurisdictions....4
C. Property Division between Unmarried Couples Regardless of Sex....5
1. Worldwide Overview....5
2. The United States - U.S. Constitution, Article IV §1 Full Faith & Credit (FF&C), and Comity as to Registered Judgments, with Exceptions....5

IV. ANALYSIS OF TRENDS....10

V. OUR CLEVER LEGISLATURE....11
A. Ambiguities between Statutory Authority and "Public Policy"....11
B. QUESTIONABLE Options for Would-be Same-sex Spouses in Texas....12
C. Legal Transsexual Marriages in Texas....13
D. Requirement of a "Woman", ..."if any"....14
E. No "Proof of Sex" Required....14

VI. SCIENCE AND TECHNOLOGY AND FUTURE PROPERTY RIGHTS....15

VII. CONCLUSION....15

VIII. APPENDICES....16

IX. PARTIAL BIBLIOGRAPHY

21ST CENTURY ISSUES DEALING WITH NONTRADITIONAL RELATIONSHIPS: DIVIDING PROPERTY BETWEEN UNMARRIED PERSONS

I. INTRODUCTION

Welcome to the 21st Century.

Time marches on, at the same speed as usual, but the world still seems to be speeding up as technological developments and communications advances appear to accelerate the process.

Just as beauty lies in the eye of the beholder, the societal changes we have seen over the last 20 years (and can expect to see in the next few years) can be seen either as amazing social evolution or as befuddling social deterioration, depending on one's perspective, political orientation, and/or religious viewpoint. As far as property division is concerned, historically as recently as 1900 in the United States, married women were still treated legally as being property in some states, which unlike fixtures would not necessarily stay in the house upon divorce. As vestiges of their former status as "property" under English Common Law, women even at present are "given away" in marriage (with or without a dowery) by their fathers to their husbands, as the wife simultaneously "gives up" her maiden name. Women were only "given" the right to vote in Federal elections in this country through enactment of the 17th Amendment in 1920, a full fifty years after black males were given the right to vote through the 15th Amendment to the U.S. Constitution effective in 1870. Only seven years before that, President Lincoln's wartime Emancipation Proclamation had abolished slavery in the Confederate states, including Texas, where slaves constituted property as a matter of law. Even as we meet, the law continues to evolve across the country in ways that will predictably affect our Zealous representation of clientele in property divisions.

As attorneys, we should not expect to be paid for our foresight if we consciously ignore clear trends in society which will inevitably be reflected in the law sooner or later. Even if our clients may wish to mimic the limited outlook of an ostrich with its head in the sand, and may indeed instruct us to defend their right to do so while they ignore reality, we still owe a duty to these clients to advise them of all of their legal options as well as the reasonably foreseeable consequences of their chosen course of conduct. The purpose of this paper will be to discuss trends and anticipate developments in property division in Family law and domestic relations matters in relation to the current state of the law in Texas, in order to better consider the potential consequences for our present and future clientele.

II. CURRENT STATE OF THE LAW WITHIN TEXAS

A. Property Division between Married Heterosexual Couples on DIVORCE

1. Texas Family Code Title 1, §§3.001-9.302 (and case law based thereon) For traditional relationships:

a. Title 1, and its supporting case law set forth the law in Texas on property division under this scenario. Unresolved issues on characterization of stock options on divorce are expected to be addressed in the next legislative session.

2. U.S. Constitution, Article IV, §1 Full Faith & Credit (FF&C), and Comity as to Registered Judgments

a. Article IV, §1 of the U.S. Constitution provides that:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state and the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."

This clause is generally followed in regard to heterosexual marriages. The principle of comity between states also generally applies, defined as "[T]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979.

B. Property Division between Married Homosexual Couples on DIVORCE

1. Texas Constitution – Article 1. Bill of Rights – Section 32 – Marriage ("Defense of Marriage Act," aka "DOMA")

The Texas Constitution by its DOMA, passed in 1996, would for all intents and purposes un-marry a same-sex couple defined as such by voiding their marriages and dismissing their case without relief. It provides as follows:

> "a. Marriage in this state shall consist only of the union of one man and one woman.
>
> b. This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."

Accordingly, Texas DOMA trumps FF&C and principals of comity.

2. Texas Family Code §2.001 and §6.204(c)

a. Texas Family Code sections 2.001 & 6.204(c) provide that not only can no marriage license be issued for a same-sex couple in this state, but also provide that if a same-sex couple obtains one anywhere else in the world and brings it here, it won't be any good in Texas, since it would be void as

against public policy, as an exception to and regardless of Family Code §1.101 "EVERY MARRIAGE PRESUMED VALID".

b. Texas Family Code §6.204(c) also provides the same result for any couple joined (elsewhere) in a civil union, regardless of sex of either party.

C. Property Division between Unmarried Couples

1. Texas Constitution Article 1, Bill of Rights, Section 32, (aka Texas DOMA) v. Full Faith & Credit Clause and Comity

See explanation in B1 above also applicable under these facts.

2. Texas Family Code §2.001 and §6.204(c) v. Contractual, Equitable, and Tort Remedies

a. Furthermore, Texas Family Code sections 2.001 & 6.204(c) provide that no marriage license can be issued for a same-sex couple in this state, but also provide that if a same-sex couple obtains one anywhere else in the world and brings it here, it won't be any good in Texas, since it would be void as against public policy, as an exception to and regardless of Family Code §1.101 "EVERY MARRIAGE PRESUMED VALID". Therefore, even a same-sex couple who were legally married in another jurisdiction would be treated as unmarried under Texas law.

b. Texas Family Code §6.204(c) also provides the same result for any couple joined (elsewhere) in a civil union, regardless of sex of either party.

A same-sex couple may not legally obtain a ceremonial marriage license in Texas due to the following Family Code provision:

"§ 2.001. Marriage License.

1. (a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state. (b) A license may not be issued for the marriage of persons of the same sex."

Therefore, a homosexual couple legally married in any jurisdiction that recognizes such a marriage would find their marriage to be void in Texas as a matter of law. As a result, their legal status within Texas would be that of unmarried persons. Nor does Texas recognize any civil unions of unmarried persons, however designated.

In 2003, the Texas Family Code was amended to include the following provisions regarding civil unions and same-sex marriages:

"§ 6.204. Recognition Of Same-sex Marriage Or Civil Union.

1. (a) In this section, "civil union" means any relationship status other than marriage that:

(1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage. (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state. (c) The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction."

A. Property Claims

No "community" will legally exist. Therefore, community property laws will apply and a suit to divide any property cannot be filed in the family court. The civil court available to divide the property at issue would depend on the value of the property, subject to the jurisdiction of that particular court. Palimony suits (however designated) are subject to summary judgment dismissal; see Zaremba v. Cliburn, 949 S.W.2d 822 (Tex.App.-Ft. Worth, 1997, writ denied). Zaremba had claimed an informal partnership to which she had contributed various domestic services. Partly based on the Zaremba ruling, Barbara Armstrong in her 2005 paper OUT OF THE CLOSET AND OUT OF THE CODE made the following recommendations which would be applicable for division of property between any unmarried couple in civil court in Texas, based on the current state of the law, which recommendations are included herein with her permission.

"It is imperative to show the Court that the parties were engaged in a confidential relationship; for example, with regard to finances of the parties and any businesses the parties were engaged in together, to be outside of the statute of frauds provision. In other words, don't ask for any portion of the income of the other party and make sure your action can be separated from the issue of cohabitation if there is no written agreement. Your client most likely has three types of property in controversy:

1) real property;
2) bank accounts; and
3) personalty/vehicles.

1. Real Property

When title to real property is only in one person's name, a suit for a constructive trust and request for partition is a good place to start. Remember that property ownership outside of marriage is determined by the inception of title rule. Inception occurs when a party first has a right of claim to the property, i.e., when title is first vested. McClary v. Thompson, 658 S.W.3d at 829 (Tex. App. – Fort Worth 2002, pet. denied); Smith v. Smith, 22 S.W.3d 140, 145

(Tex.App.-Houston [14th Dist.] 2000, no pet.) (op. on reh'g). In general, the owner of real property is the person in whose name title was taken at the time of purchase. The theory successfully asserted in one trial court case, not appealed, was that even if your client's name is not on the title, if your client has expended individual funds on the property in the form of mortgage payments, improvements or payment of taxes and insurance, your client has a justiciable interest in the property. When your client is not the person in whose name title was taken, the best option is to ask the court to impose a constructive trust on the property and name the other party as constructive trustee for your client's interest. A constructive trust is the imposition of a trust by the Court when the Court finds that a party has an interest in an item, for example, property or a business, but that the party has no stated ownership rights. The Court can impose a constructive trust– and that trust acknowledges the party's interest and creates a duty for the other party to be accountable, as constructive trustee, to the other party. Also, it would be wise to investigate the possibility of filing a lis pendens on the real property so your client's interest is protected from sale by the title holder during the pendency of your suit. Make it clear in your lawsuit the terms under which the property was purchased and know how much money your client has expended on it; either in the form of monthly payments, improvements, or other contributions. Use the tracing methods as you would in a traditional dissolution matter to exemplify the amounts owed to your client. Your client is requesting to recover financially based on the other party's breach of the confidential and fiduciary relationship between them. Your requested relief for real property should include a request for partition. Since houses can't be partitioned, your aim here is for the real estate to be sold. Once you have a constructive trust in place, get a receiver appointed to sell the property and direct that the proceeds of the sale be held by the receiver until the judicial determination of how they are to be distributed. Remember too, that if two or more persons contribute to the down payment of the property and payment of the debt on the property, the holding in Gleich v. Bongio, 9 SW2d, 881, (Tex 1937) can guide you to apply principles of joint tenancy to the true ownership interest. (Hey, family law to the rescue!)

2. Bank Accounts The cause of action on money taken from joint bank accounts is best pled under conversion. Retaining property belonging to another with the intent to deny the owner rightful use and possession is theft and conversion. The applicable law here is located in the Probate Code. Regardless of the cohabitation of the parties, the funds of persons authorized as signatories and owners of a joint account belong "...during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." Tex. Probate Code Ann. §438 (a) (West 1999). Therefore, it would be unlawful for your client's partner to withdraw one hundred percent (100%) of the funds on deposit from a joint account if both parties contributed to the deposits of that account. Ask if your client has any deposit slips, direct deposit pay receipts, or cancelled checks, that evidence the amount of money your client deposited to the joint account. These items can show the percentage of ownership your client has in the now empty account and what the Court needs to award your client to make him or her whole. Have your client gather all the monthly bank statements from the account and create demonstrative trial aids so the Court can follow all deposits and expenditures of the account.

3. Personalty/Vehicles Personalty and vehicles can also fall under an action for conversion. The Penal Code defines theft as an offense where a person "unlawfully appropriates property with intent to deprive the owner of property....(b) Appropriation of property is unlawful if: (1) it is without the owner's effective consent;... § 31.03. (West 1999). So even if the contents of the house were voluntarily placed in the residence by your client, once your client requests their return and is denied his or her property, the partner has now committed theft. If your client's partner should decide to have a garage sale and sell your client's belongings, then conversion has occurred. One creative pleading regarding the personalty in a residence when the parties were not married appeared in the form of an Application for Reentry. In that case, the parties had been denied a common law marriage by the family Court. The party who did not own the real property claimed in her civil pleading that the home owner was her landlord, presumably with a tenancy at sufferance, and he had evicted her without the required notice or hearing under the law. She requested a restraining order to keep him from disposing of her personalty and requested the Court issue an order of reentry to allow her to return to the home to retrieve her personal property. This litigant had made no financial contributions to the real property, so she could not, and did not, claim any real property ownership interest. ... Another theory to consider to include in the civil pleadings is asserting a partnership or joint venture. In that scenario, the parties entered into a joint venture or partnership and each purchased assets or contributed financially in furtherance of the partnership. You should be sure and state that your client has performed all his/her duties as required and that the other party has breached the agreement. You can request the court order an audit of the assets of the joint venture, including all receipts, expenditures and business property, and that the partnership be dissolved pursuant to the Texas Revised Partnership

Act. This way, you get a complete accounting of the expenditures of each partner, for ownership and profit purposes, and then the partnership ceases to exist. Also, a claim for breach of fiduciary duty by the partner is worthy of mention here. A claim for breach of fiduciary duty puts the onus on the other party to show that he/she has acted in an appropriate manner as any prudent business partner. With the burden shifted to the other party, you have now forced him/her to put on evidence as to his/her practices with regard to distributing profits, handling investments and the like. The typical scenario for a vehicle is that your client has a loan on the car and it is titled in your client's name, but his/her former partner is in possession of the vehicle. If your client can get possession of it, he/she owns it and can refuse to deliver it to the other party. A second scenario is no loan, and the vehicle is still titled in your client's name. Your client in either of the first two cases can use the approved self-help recovery methods (making sure not to breach the peace)or call a company to locate the vehicle and have it towed to your client. A third situation is your client is making payments on a vehicle titled in the partner's name. Obviously, inception of title says that the vehicle is owned by the person whose name is on the title and your client will most likely be denied any reimbursement of payments made under the theory that such payments were probably "gifts" to the partner. Remember to plead all remedies available at law and in equity as this allows the Court's "do-right" meter to jump into action and can give the Judge the ability to do the right thing and hang his or her judicial hat on the equity plea. If you are lucky enough to have contact with your client before everything has headed south, consider advising your client to have a written agreement to avoid these situations. For example, with some modifications, you can use the cohabitation agreement contained in the Family Law Practice Manual. Remember a cohabitation agreement specifically states that the parties do not want to create a marriage relationship. The terms of the agreement can clarify ownership if one party advances funds but title is in the other party's name. You may want to include, as a term of the agreements, that before suit is filed, the parties participate in mediation or binding arbitration."
OUT OF THE CLOSET AND OUT OF THE CODE
by Barbara A. Armstrong, 2005 State Bar of Texas 28th Annual Marriage Dissolution Institute, Ch. 14.

III. CURRENT STATE OF THE LAW BEYOND TEXAS

A. Property Division between Married Heterosexual Couples on DIVORCE

1. U.S. Constitution, Article IV §1 Full Faith & Credit (FF&C), and Comity as to Registered Judgments (for traditional relationships)

Full Faith & Credit will apply to orders issued in traditional relationships.

2. Statutory Authority

Each individual jurisdiction should be reviewed as applicable.

B. Property Division between Married Homosexual Couples on DIVORCE

1. Full Faith & Credit with Exceptions v. Federal and State DOMAs

DOMAs will trump Full Faith & Credit as an exception for strong public policy reasons.

2 Massachusetts and Foreign Jurisdictions

a. Massachusetts is currently the only state to have legalized same-sex marriage per se. The Supreme Judicial Court of Massachusetts has held that restricting marriage limited to opposite-sex couples violated principles "of individual liberty and equality under law protected by the Massachusetts Constitution." Goodridge v Department of Public Health, *798 N.E.2nd 941 (Mass. 2003)*. Furthermore, the court stated that:

> "If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities." Id. at 965".

The Rhode Island Attorney General has stated that "Rhode Island will recognize same-sex marriages lawfully performed in Massachusetts as marriages in Rhode Island". See "Rhode Island Steps Toward Recognizing Same-Sex Marriage" by Katie Zezima, The New York Times, February 22, 2007, (electronic version). In addition, Massachusetts will allow Rhode Island residents to marry in Massachusetts as an exception to the Massachusetts "Marriage Evasion Act".

That early 20th Century law provides that a Massachusetts marriage license can not be issued to residents of other states if such a marriage would be barred in the home state of either party. At present, only Rhode Island, Massachusetts, Connecticut, New Jersey, New York and New Mexico have no state law prohibiting same-sex marriage, although recent case law in New York held that "the New York Constitution does not compel recognition of marriage between members of the same-sex. Whether such marriages should be recognized is a question to be addressed by the legislature". See Hernandez v. Robles, 855 N.E.2d 1, N.Y. (July 6, 2006).

b. In regard to Full Faith and Credit issues as they apply to same-sex unions, the status of same-sex unions in other countries is relevant and should be considered.

The following countries currently recognize same-sex marriages:

(1.) Netherlands, as of 2001;
(2.) Belgium, as of 2003;
(3.) Spain, as of 2005;
(4.) Canada, as of 2005; and
(5.) South Africa, as of 2006.

Such marriages are legally recognized by:
(1.) Israel, as of 2006;
(2.) Aruba, as of 2007;
(3.) Netherlands Antilles, as of 2007; and
(4.) Massachusetts (U.S.A.), as of 2004,
as well as any country where same sex-marriages are legal as listed above.

c. In 2000, Canada enacted the *Modernization of Benefits and Obligations Act,* extending rights and duties under 68 Canadian federal statutes to common-law opposite-sex and same-sex couples. In June, 2005, Canada legalized same-sex marriages nationwide.

C. Property Division between Unmarried Couples Regardless of Sex

1. Worldwide Overview

See the attached Appendix "A", incorporated herein by reference.

2. The United States U.S. Constitution, Article IV §1 Full Faith & Credit (FF&C), and Comity as to Registered Judgments, with Exceptions

a. State Actions

(1.) In 1993 the Hawaii Supreme Court ruled that laws denying same-sex couples the right to marry violated state constitutional equal protection rights unless the state could show a "compelling reason" for such discrimination; (see Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993). In 1996, a Hawaiian trial court ruled that the state had no such compelling reason and the case headed back to the Hawaii Supreme Court. Voters later adopted a Constitutional amendment in 1998, before the final ruling was issued, giving the Legislature the power to restrict marriage to opposite-sex couples, thus rendering the issue moot in Hawaii for the time being. Hawaii has provided certain benefits to "reciprocal beneficiaries" since 1997.

(2.) Defense of Marriage Acts – In response to events in Hawaii, as detailed above, opponents of same-sex marriages nationwide submitted legislation in their respective states, with differing terminology intended to prevent the possibility of court decisions favoring same-sex marriage and/or legal unions in each such individual state. Such state legislation is generally referred to as a Defense of Marriage Act (DOMA), as summarized below:

(3.) On December 20th, 1999, the Vermont Supreme Court ruled in Baker v. Vermont, 744 A.2d 864 (Vt. 1999), that same-sex couples are entitled, under the state constitution's "Common Benefits Clause," to the same benefits and protections as married opposite-sex couples. In April 2005, Vermont became the first state to legalize civil unions between same-sex couples granting them almost all of the rights, benefits, protections and responsibilities accorded to married couples under law.

However, while the Vermont Legislature preserved the majesty of marriage as the "legally recognized union of one man and one woman," it also created a "separate but equal" parallel system of civil unions for same-sex couples rather than instituting limited "domestic partnership" and "reciprocal beneficiaries" laws that already existed in California and Hawaii, respectively.

(4.) On September 4, 2003 the California legislature passed an expanded domestic partnership bill, extending nearly all the legal rights of married couples to people in same-sex partnerships. This effectively transformed California's prior domestic partnerships into civil unions, effective on January 1, 2005. Attached hereto as Appendices "B" and "C", are the California Secretary of State forms for terminating a California Registered Domestic Partnership, incorporated herein by reference, for your information.

(5.) In November 2003, the Massachusetts Supreme Judicial Court ruled that barring same-sex couples from civil marriage was unconstitutional. The Massachusetts Senate then asked the Supreme Court for an advisory opinion on the constitutionality of a proposed law barring same-sex couples from marriage but creating civil unions as a separate but equal parallel legally-endorsed institution, with all of the same benefits, rights and duties of marriage. In February, 2004, the Court advised that "segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or preserve" the state's avowed governmental aim of encouraging "stable adult relationships for the good of the individual and of the community, especially its children." (Goodridge v. Department of Public Health, 998 N.E.2d 941 (Mass.2003)). Accordingly, the state of Massachusetts began issuing marriage licenses to same-sex couples beginning in May 2004. The decision could be reversed by an amendment to the state constitution, but so far no amendment barring same-sex marriage has passed in Massachusetts.

(6.) Maine passed a domestic partnership law in April of 2004, which took effect July 30, 2004.

(7.) New Jersey passed such a bill on January 8, 2004. In October, 2006, a New Jersey Supreme Court ruling advised the legislature to either redefine marriage to include same-sex couples or establish a separate-but-equal legal structure, such as civil unions, designed to give same-sex couples rights equal to those granted to heterosexual married couples. Accordingly, in late 2006, the New Jersey legislature passed a statute allowing civil unions beginning February 19, 2007.

(8.) Connecticut enacted Civil Union legislature as of October 1, 2005;

(9.) Washington, D.C. enacted a Domestic Partnership law on April 4, 2006;

(10.) New Hampshire passed a civil union bill in April 2007, to become effective January 1st, 2008;

(11.) Oregon enacted a Domestic Partnership law on May 7, 2007;

(12.) Washington passed a Domestic Partnership law on April 21, 2007, to become effective on July 21, 2007;
(13.) In Maryland, a same-sex legal division is expected imminently from the Maryland Supreme Court on an appeal by the state's Attorney General of a lower-court ruling in favor of same-sex marriage. Oral arguments were heard December 4, 2006 in Conaway v. Deane, 903 A. 2d 416 (Md. 2006).
(14.) Washington, D.C. passed a civil union bill in April 2007, to become effective January 1st, 2008;
(15.) In New Mexico, a civil union failed to pass on the last day of the 2007 legislative session. The bill is supported by Governor Richardson and will be re-submitted in 2008.
(16.) In New York, the newly-elected Governor Spitzer, who had made support of same-sex marriage part of his campaign platform, has already submitted a same-sex marriage bill. The New York Assembly passed a civil union bill on June 19, 2007 but it was tabled in the Senate.
(17.) In California, a same-sex marriage bill passed both houses of the legislature but was vetoed by "the Terminator", Governor Schwarzenegger, who pontificated that "I think that gay marriage should be between a man and a woman", thereby suggesting that his own personal theory of same-sex marriage would favor homosexuals of opposite sex entering into legal marriages (perhaps two couples at a time in joint wedding ceremonies in a sort of communal arrangement).
(18.)Currently only Alabama, California Colorado, the District of Columbia, Florida, Iowa, Indiana, Kansas, Montana, New York, Oklahoma, Rhode Island, South Carolina, Texas, Utah and Wyoming recognize informal marriages. Other states only acknowledge informal marriages created prior to certain dates, typically the date on which that state's DOMA took effect. Georgia recognizes common law marriages if created before January 1, 1997, Idaho if created before January 1, 1996, Ohio if created before October of 1991, and Pennsylvania recognizes informal non-married unions only if in existence before September, 1, 2003.
(17.)**Additional State Rights**

Some states allow additional benefits to spouses under state law, such as community-property states having forms of ownership that allow a full basis step-up on one's own share of community property on the death of a spouse (in addition to the normal step-up on spouse's assets).
(18.)**Domestic Partnerships**

Besides not having a consistent definition within the United States, a domestic partnership does NOT confer upon its participants any of 1,138 associated rights available to married persons as defined by the Federal Government. In California, the status approaches that of civil unions. In other jurisdictions it may only allow (but not require) employers to grant family employee benefits to their employees. The most common benefit of domestic partnership in the United States is the extension of employer-subsidized health insurance to the partners of employees' "domestic partners". In New York City, that city's own form of domestic partnership brings three main benefits: (1) the right to stay in a rent-controlled apartment after the domestic-partner lease-holder dies, (2) the ability to visit the domestic partner in a city hospital, jail, or morgue, and (3) the ability of city employees to obtain subsidized health insurance for their partners and the benefits of the Family Medical Leave Act, each of which would be accompanied by federal tax consequences. Pursuant to Internal Revenue Code Section 152, the value of the parties' benefit will be considered as imputed income and will be taxed to the employee.

Domestic Partnerships have been enacted into law in Maine, Washington, D.C., California, Washington (state), and Oregon.
(19.)**Civil Unions**

Civil Unions also vary in terms of benefits from state to state. New Jersey civil unions are considered as separate-but-equal to marriage relationships under state law. Currently Civil Unions have been enacted in Vermont, Connecticut, and New Jersey, and New Hampshire.

b. Federal Actions

(1.) Congress enacted the federal Defense of Marriage Act (DOMA) in 1996, which bars federal recognition of same-sex marriages and allows states to do the same, and as such, functions as an "anti-full faith and credit act" applicable to same-sex unions as well as civil unions of heterosexual couples. The Act provides 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. *P.L. No. 104-199 Stat. 2419 (1996), codified as amended at 28 U.S.C. §1738C.* In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. *Id. At §3 (a) 1996, codified as amended at 1 U.S.C. §7.*"

Since 1996, many states have passed DOMA legislation banning same-sex marriages and the recognition of same-sex marriages or civil unions formed in another jurisdiction. Traditionally, under the Full Faith and Credit clause, Article IV of the U.S. Constitution, states would generally be required to recognize and honor the public laws of other states, unless those laws are contrary to the strong public policy of that state. Article IV provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state and the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."

As shown in the charts attached as Appendices "D" and "E", incorporated herein by reference, as of the date of submission of this paper over half the States have amended their constitutions to define marriage as a relationship between a man and a woman. Only Arizona has failed to pass such a constitutional amendment upon submission (2006). Typically, such constitutional amendments have passed by a majority of between 55 and 65 percent of the popular vote.

(2.) There have been several proposals before Congress to add another amendment to the federal Constitution specifically designed to define marriage as between a man and a woman to protect states from being required to recognize same-sex "marriages" from other jurisdictions. President Bush has announced his support for such an amendment, while also allowing states to "define other arrangements", which would include civil unions or domestic partnerships. Opponents of a federal constitutional amendment cite states-rights concerns as well as support for same-sex marriages. A constitutional amendment would require approval by 2/3 of the U.S. House of Representatives and U.S. Senate and 3/4 of the state legislatures before enactment.

Of course, the Federal Government has prior experience in legislation on morality issues, most notably the 18th Amendment prohibiting sale, manufacturing and transportation of unlicensed alcoholic beverages (aka "Prohibition"), enacted in 1919 and subsequently repealed by popular demand by the 21st Amendment in 1933.

(3.) The United States **Federal Marriage Amendment (FMA)** is a proposed amendment to the United States Constitution which would state that: "Marriage in the United States of America shall consist only of the union of a man and a woman." The FMA also would prevent judicial extension of marriage-like rights to same-sex or other unmarried couples, as well as preventing people from having multiple spouses. (polygamy), regardless of issues of freedom of religion as argued by opponents of the Amendment. Two-thirds of the House of Congress must pass the proposal. Ratification of the amendment would cause the dissolution of existing same-sex marriages currently recognized in Massachusetts, since such marriages would be "any union other than the union of a man and a woman," and would thus be void.

(4.) Civil marriage is statutorily controlled by state law. Each state has defined the requirements for a valid marriage within its own borders, subject to limits set by the state's own constitution and the U.S. Constitution. Pennoyer v. Neff, 95 U.S. 714 (1877). Traditionally, a marriage was considered valid if the requirements of the marriage law of the state where the marriage took place were met. (First Restatement of Conflicts on Marriage and Legitimacy §121 (1934)). However, a state can refuse to recognize a marriage if the marriage violates a strong public policy of the state, even if the marriage was legal in the state where it was performed. States historically have used this "public policy exception" as a reason to refuse to recognize out-of-state polygamous marriages, inter-racial marriages, incestuous marriages, and/or under-age marriages.

(5.) In the past, the federal legislature has occasionally regulated marriage. In 1862 the Morrill Act made bigamy a federal crime, in response to public outrage toward Mormon polygamists in Utah during the Civil War; this was followed by a series of federal laws designed to end the practice of polygamy.

(6.) In reaction to the possibility that same-sex marriage would be legalized in Hawaii, Congress passed the Defense of Marriage Act ("DOMA"), which defined marriage as a legal union of one man and one woman, for purposes of interpreting federal laws, as previously discussed above.

(7.) Federal courts have occasionally interpreted the U.S. Constitution to overrule some state restrictions on marriage. In Loving v. Virginia, 388 US 1, 12, 87 S.Ct. 1817 (1967), the United States Supreme Court overturned state marriage laws that barred inter-racial marriages and held that:

> "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). See also Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all

the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."

On the issue of individual rights and privacy issues, the U.S. Supreme Court ruled in Lawrence v. Texas in 2003 that:

"There are other spheres of our lives existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes as autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct....The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." See Lawrence v. Texas, 539 U.S. 558 (2003).

More recently, a federal judge struck down an amendment to Nebraska's constitution that prohibited the state from granting legal protections to any 'same-sex' relationship 'similar to' marriage, although the decision did not require the state to allow same-sex marriages or civil unions. The amendment was later reinstated. See Citizens For Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006).

(8.) a. Proponents of the FMA lacked 19 votes for the 67-vote (two-thirds) majority needed to pass the amendment in the Senate in June 2006. Some Republicans joined Democrats in voting against the FMA, concerned about the verbiage and the principle of extending federal power into domestic relations areas traditionally left under state control.

b. President Bush has supported the amendment, but Vice President Cheney has declined to endorse or condemn the FMA, maintaining that same-sex marriage is an issue for the states. Northeastern Republicans generally oppose the amendment while Southern Republicans typically support it.

c. The White House partly clarified President Bush's position in a February 24, 2004 press conference with White House Press Secretary Scott McClellan, who stated that by allowing states the possibility of creating other "legal arrangements," the President specifically meant civil unions. (McClellan also stated, however, that Bush did not personally support civil unions.) (Note that Pew Research Center exit polls from the 2004 elections found that 25% of polled voters supported same-sex marriage and another 35% supported civil unions.)

(9.) Some religious groups argue that having governments decide whether a same-sex marriage should be legally binding based upon the ideology of any other religious group restricts their own religious freedom and thus violates separation of church and state principles and freedom of religion under the Federal Constitution and Bill of Rights. The Illinois DOMA statutes are currently being challenged on this basis. The FMA would also deny religions which approve of same-sex marriage to perform legally binding same-sex marriages.

(10.) According to the United States Government Accountability Office (GAO), there are a total of 1,138 provisions in which marital status helps determine benefits, rights, responsibilities and privileges of the parties. Neither "domestic partnership" nor "Civil Union" status qualify for any of these 1,138 provisions.

c. Uniform application of Full Faith and Credit

(1.) Under the Full Faith and Credit Clause of the Federal Constitution, with certain exceptions a state must honor the judgments and declarations of other states. A Texas judgment for divorce would be honored in other states because judgments are required to be enforced by out-of-state jurisdictions, regardless of whether those judgments are against the public policy of the out-of-state forum (see Williams v. North Carolina, 317 U.S. 287 (1942) (which also stated that there is no "authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliary, to the statutes of any other state").

(2.) For example, a couple who leaves Texas for Massachusetts to obtain a valid same-sex marriage (claiming to be Massachusetts residents) may not currently be granted a divorce in Texas should either party file for divorce in Texas. However, if they were subsequently divorced in Massachusetts, the state of Texas would be expected but not necessarily required to uphold the Massachusetts divorce order if the jurisdiction of the Texas Court were eventually invoked, due to the wording of the Texas DOMA. Therefore, under such a scenario, not only would same-sex married couples be treated differently depending on the state, they could also be treated differently in the same state depending upon the state in which their divorce was obtained. Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006).

(3.) Conflict of law between states in this area of law will foreseeably increase with each state that passes legislation affecting nontraditional relationships, see Miller–Jenkins v. Miller–Jenkins, 912 A. 2d 951 (Vt. 2006), cert. denied by Miller–Jenkins v. Miller–

Jenkins, 127 S. Ct. 2130 (2007), a Virginia versus Vermont case over child custody in a civil union context.

(4.) The American Bar Association (ABA) has taken a position opposing the Federal Marriage Amendment (FMA), attached hereto as Appendix "F", incorporated herein by reference.

d. Marital Rights & Benefits under Federal Law

- Right to many of ex- or late spouse's benefits, including:
  - Social Security pension(s)
  - veteran's pensions, indemnity compensation for service-connected deaths, medical care, and nursing home care, right to burial in veterans' cemeteries, educational assistance, and housing
  - survivor benefits for federal employees
  - survivor benefits for spouses of longshoremen, harbor workers, railroad workers
  - additional benefits to spouses of coal miners who die of black lung disease
  - $100,000 to spouse of any public safety officer killed in the line of duty
  - continuation of employer-sponsored health benefits
  - renewal and termination rights to spouse's copyrights on death of spouse
  - continued water rights of spouse in some circumstances
  - payment of wages and workers compensation benefits after worker death
  - making, revoking, and objecting to post-mortem anatomical gifts
- Right to benefits while married:
  - employment assistance and transitional services for spouses of members being separated from military service; continued commissary privileges
  - per diem payment to spouse for federal civil service employees when relocating
  - Indian Health Service care for spouses of Native Americans (in some circumstances)
  - sponsor husband/wife for immigration benefits
- Larger benefits under some programs if married, including:
  - veteran's disability
  - Supplemental Security Income
  - disability payments for federal employees
  - medicaid
  - property tax exemption for homes of totally disabled veterans
  - income tax deductions, credits, rates exemption, and estimates
- Joint and family-related rights:
  - joint filing of bankruptcy permitted
  - joint parenting rights, such as access to children's school records
  - family visitation rights for the spouse and non-biological children, such as to visit a spouse in a hospital or prison
  - next-of-kin status for emergency medical decisions or filing wrongful death claims
  - custodial rights to children, shared property, child support, and alimony after divorce
  - domestic violence intervention
  - access to "family only" services, such as reduced rate memberships to clubs & organizations or residency in certain neighborhoods
- Preferential hiring for spouses of veterans in government jobs
- Tax-free transfer of property between spouses (including on death) and exemption from "due-on-sale" clauses.
- Special consideration to spouses of citizens and resident aliens
- Spouse's flower sales count towards meeting the eligibility for Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act
- Threats against spouses of various federal employees is a federal crime
- Right to continue living on land purchased from spouse by National Park Service when easement granted to spouse
- Court notice of probate proceedings
- Domestic violence protection orders
- Existing homestead lease continuation of rights
- Regulation of condominium sales to owner-occupants exemption
- Funeral and bereavement leave
- Joint adoption and foster care
- Joint tax filing
- Insurance licenses, coverage, eligibility, and benefits organization of mutual benefits society
- Legal status with stepchildren
- Making spousal medical decisions
- Spousal non-resident tuition deferential waiver
- Permission to make funeral arrangements for a deceased spouse, including burial or cremation

- Right of survivorship of custodial trust
- Right to change surname upon marriage
- Right to enter into prenuptial agreement
- Right to inheritance of property
- Spousal privilege and confidential marriage communications

e. Marital Responsibilities under Federal Law

- Spousal income and assets are counted in determining need in many forms of government assistance, including:
    - veteran's medical and home care benefits
    - housing assistance
    - housing loans for veterans
    - child's education loans
    - educational loan repayment schedule
    - agricultural price supports and loans
    - eligibility for federal matching campaign funds
- Ineligible for National Affordable Housing program if spouse ever purchased a home:
- Subject to conflict-of-interest rules for many government and government-related jobs
- Ineligible to receive various survivor benefits upon remarriage

f. Potential legal conflicts

Potentially serious legal issues arise from the conflict between state domestic partnerships, civil unions, and same-sex-marriage laws on the one hand, and U.S. Federal law on the other hand, which, under the Defense of Marriage Act, explicitly does not extend Federal law recognition to those unions.

In Texas, the most apparent conflicts will arise in property division of assets and liabilities in cases in which the parties have been legally joined in a sister state or foreign country in a same-sex marriage, or a civil union, domestic partnership, registered partnership, cohabitation partnership, conventional, or other domestic relationship not recognized in Texas, regardless of the sex of the parties involved and the effect on a just and right property division when the parties status deprives them of eligibility for certain federal benefits and/or the fair market value of such.

IV. ANALYSIS OF TRENDS

A. First, the nature and definition of marriage continues to change and continues to be a source of litigation and legislation in Family Law nationwide. On one hand, interest groups for unmarried couples, whether heterosexual or homosexual, press for formal legal recognition for the status of their relationships equivalent to that accorded under federal law and state law to married couples. On the other hand, a broad spectrum of interest groups including traditional conservatives and fundamentalist Christian religious groups argue that the state(s) and the federal government should use government authority to maintain the status quo, which would include limiting use of the word "marriage" to "the union of one man and one woman (thus "protecting" the institution of marriage from same-sex couples) and also denying unmarried cohabitating couples the legal benefits incident to marriage in the name of "Family Values".

B. 1. The United States Supreme Court has held in Loving v. Virginia, 388 US 1,12, 87 S.Ct. 1817 (1967), that the right to marriage is a fundamental human right. Where "fundamental rights" are involved, the Court has held that restrictions on such rights could be justified only by a "compelling state interest," Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); See also Shapiro v. Thompson, 394 U.S. 618, 634(1969); Sherbert v. Verner, 374 U.S. 398, 406(1963). Furthermore, laws restricting those rights must be limited to only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 479 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Conecticut, 310 U.S. 296, 307-308 (1940); Eisenstadt v. Baird, 405 U.S., at 460, 463-464 (WHITE, J., concurring opinion).

2. What is the compelling state interest, if any, to preserve the state of matrimony as we now know it as opposed to adjusting its nature and/or broadening its definition? We, as Family law practitioners, perhaps better than anyone, should have noticed by now that the state of marriage is apparently not doing so well at present. If it were, we might have to find other employment. Attached hereto as Appendix "G" are partial results of a national survey conducted by the Pew Research Center as published on June 2, 2007, incorporated herein by reference, which reflect current public perceptions on issues of the importance of marriage, attitudes toward same-sex unions and cohabitation, and reasons for and against having illegitimate children, getting married and getting divorced. A review of the surveyed attitudes of the general public suggests that it would be fair to say that the state of marriage as we have known it indeed appears to be in a serious state of flux, if not outright decline.

C. Would relaxing restrictions on who could marry whom create a new pool of potential marriage candidates, thus revitalizing the business of marriage, the business of weddings, and inevitably the business of divorce? Would supercharging that entire section of our national consumer economy geared to draining dollars out of newlyweds for weddings, gifts, receptions and honeymoons, then supplying the resulting new households to be created and/or approved under new legislation creating same-sex

marriages and/or civil unions, etc., regardless of the sex of the participants, be a big business bonanza boost for Texas taxes? Should the legislature care?

D. For those who bemoan the possibility that legalizing same-sex marriage would doom the hallowed institution of "scam marriages" between closet homosexuals and unwitting heterosexual spouses, I suggest that there will always be sham marriages for reasons known only to the participants, (and their mental-health care providers, if any). Indeed, those who revel and thrive on the sensational soap-opera betrayals inevitably inherent in sham marriages can foreseeably look forward with glee to the phenomenon of "sham gay marriages" being revealed to the world on Jerry Springer's show and "Entertainment Tonight", as heretofore avowed homosexuals betray their "new" gay spouses by sampling forbidden heterosexual "fruit" on the other side of the fence in greener pastures (so to speak).

E. As an old saying goes, "Be careful what you wish for; you just might get it." By taking away the allure of forbidden fruit from same-sex couples, the incentive to sample such "fruits" and the urge to merge in matrimony may well lose its charm for some.

F. The famous ionic American philosopher-poet Dolly Parton has been widely quoted as having told the world on the "Oprah" TV Show that her personal philosophy toward same-sex couples was "I'm all for gay marriage, why shouldn't they suffer like the rest of us?" It should be noted that Ms. Parton's folk-wisdom comes from experience, since she claims to still be married after 20 years (to a person of the opposite sex). Her attitude appears to be widely accepted among the general public as well, although perhaps unspoken by many.

G. Regardless of her personal experience and background as an entertainer, an impartial observer must admit that she raises a serious legal question of profound constitutional implications that lies at the heart of an issue with nationwide dimensions and deeply-entrenched personal, political, and religious interests.

H. Why should any entire defined sub-class of citizen be legally immune from the disadvantages of marriage (including increased exposure to the transfer of wealth principle) as well as being artificially restricted from access to any legal benefits incumbent upon spouses?

I. Why shouldn't one same-sex partner be able to call their partner's bluff on claims of "I wish we could get married!".

J. If marriage as an institution should logically be limited to only opposite-sex couples in order "to encourage procreation", as "defenders of marriage as we now know it" have argued, then why are opposite-sex marriages ever allowed between octagenerarians, or sterile persons, or persons who have had hysterectomies or vasectomies, or hermaphrodites (aka "intersexuals"), or folks who don't want children and fastidiously practice multiple-birth control methods? Voluntary termination of pregnancies by married women is a legal fact as well, contrary as it may be to procreation as a goal and implied obligation of heterosexual marriages, as espoused by anyone making such a logical leap of faith. Obviously, the answer is because the societal interest has clearly been considered to be subordinate to the personal rights of the individual(s) involved, as a matter of law.

K. The following trends as alternatives to old-fashioned heterosexual marriage appear to be gaining in frequency, in volume, and in approval; with rate approval demographically proportionate with generational attitudes, with older generates by geometrically more conservative in their approval of these trends.

1. Cohabitation between unmarried couples.
2. Pregnancy out of wedlock.
3. Informal and formal domestic partnerships.
4. Civil Unions.
5. Same-sex marriages.
6. Issues regarding recognition of legal unions joined elsewhere but not valid under Texas law, including "choice of law" and "conflicts of law".
7. Transsexual case law in sex discrimination, employment discrimination, and same-sex marriage areas.
8. Homosexual adoption of adult homosexuals by their "domestic partner" as a drastic alternative designed to get legal benefits, especially in regard to employee health benefit insurance plans.
9. Sperm litigation, especially concerning rights of ownership after deposit. See Phillips v. Irons, Ill. App. 1 Dist., 2005 (Not Reported in N.E. 2d.). See also Gerber v. Hickman, Warden, 291 F. 3d 617 (9th Cir. 2002), cert. denied, and Gerber v. Hickman, 537 U.S. 1039 (2002).
10. Temporary marriages, a Muslim institution regaining popularity in Iraq and among Muslims worldwide.
11. Concubinage as an alternative to polygamy for would-be polygamists.
12. Constitutional issues regarding equal protection under law related to legal rights of unmarried couples regardless of sex and/or sexual orientation, including division of property by such couples upon dissolution of the relationship.

V. OUR CLEVER LEGISLATURE

A. Ambiguities between Statutory Authority and "Public Policy"

1. In support of a theory on our legislature's acts and/or omissions to create apparent statutory loopholes to allow same-sex marriage, one could argue that despite the legislature's clever and presently politically-correct intent not to pass any legislation dealing with divorcing a same-sex couple

(regardless of the validity of the same-sex marriage or civil union [however designated] at the time and place when it was voluntarily initiated), our clever legislature in its infinite wisdom has nonetheless still left tiny cracks open in the door to allow certain sub-classes of enterprising same-sex couples to assume the risk of entering into a same-sex marriage within the laws of the State of Texas while being placed on notice that in the event of a divorce, the State of Texas would attempt to invalidate the union "as a matter of public policy."

2. Such qualified same-sex couples who wished to proceed, oblivious of statutory "official public policy" and the current generally accepted State of the law, including those who might wish to argue for a good-faith extension modification, or reversal of existing law, could review and possibly utilize some or all of the following apparent possibly arguable loopholes in the current Texas Family Code. The Author in no way recommends any such conduct, and places the reader on notice that violations of Texas Family Code §2.004 (b)(1),(2),(3), and (4), are class C misdemeanors (see Texas Family Code § 2.004(c) regarding providing "False Information") and violations of Texas Family Code §2.004 (b) (5) & (6), and Texas Family Code §2.403 are Class A Misdemeanors (see Texas Family Code §2.004 (d) regarding providing "False Information" and Texas Family Code §2.403(b) regarding providing "False, fraudulent, or otherwise inaccurate proof of the person's identity or age under this section").

3. Therefore, the author specifically advises all readers to **NOT** "knowingly provide false information" or "false, fraudulent, or otherwise inaccurate proof of the person's identity or age" under the relevant sections cited above, nor counsel anyone else to do so.

B. QUESTIONABLE OPTIONS FOR WOULD-BE SAME-SEX SPOUSES IN TEXAS

A. Two would-be parties to a same-sex Texas marriage could conceivably proceed as follows:

1. The first party changes name legally to a gender-neutral name in this or any other state. Note that Massachusetts has no minimum residency requirements for marriage, for divorce, or for a name change. If a name change occurs in a Texas divorce case, see Texas Family Code §45.105-45.106. First party then secures a valid driver's license in the gender-neutral name as provided by law and registers the new name as provided by law, preferably with a gender-neutral photograph on it, with the Bureau of Vital Statistics, (wearing a wig and make-up if desired for the photo).

2. Texas Family Code §2.006 provides that:

> "(1) If an applicant is unable to appear personally before the county clerk to apply for a marriage license, any adult person or the other applicant may apply on behalf of the absent applicant.
>
> (2) The person applying on behalf of an absent applicant shall provide to the clerk:
>
> i. The affidavit of the absent applicant as provided by this subchapter;
> ii. Proof of the identity and age of the absent applicant as provided by this subchapter; ..."

3. Therefore, the second party appears personally before the County Clerk with any adult (proxy) person of the biological sex opposite to that of the second party. The proxy applies for the ceremonial marriage license on behalf of the first party and provides:

(1) an affidavit executed by the first party in compliance with information required on the license application form prescribed by the bureau of vital statistics, which includes "the woman's maiden surname" (see Texas Family Code §2.007; see also §2.002(5) regarding the oath of each applicant set forth in §2.004(b)(8);

(2) proof of the first party's identity in the form of a valid driver's license secured as discussed above. Note that no specific excuse for non-appearance of the first party is required unless both applicants are absent and both are represented by proxies. See Texas Family Code §2.006(c), 2.007(7). See also **Tex. Atty. Gen. Op.** No.GA-0024 (2-19-03), which states:

> "The plain language §2.006 allows *two* absent applicants to apply for a marriage license, provided that they each have an adult person apply for the license on their behalf and that person submits the affidavit required by §2.007. Therefore, the county clerk ... may issue a marriage license to the two absent applicants when each applicant follow the procedures set forth in §§2.006 and 2.007....".

4. Note also that, per Texas Family Code §2.008(b) the proxy need not take any oath. One party should consider himself to be the "man" in the relationship for purposes of the paperwork and the other should be considered to be the "woman", so to speak, for the required paperwork necessary for the clerk to honestly issue the ceremonial marriage license. As long as the couple lives happily ever after, the happy couple may avoid any questions of validity of the marriage. However, upon death or further order of the Court (contested divorce proceedings), the heir(s) in Probate Court or the Respondent in Divorce Court may raise the issue of validity of the marriage.

By that time, the law may very well have changed, and/or an estoppel argument could be raised in defense to a challenge to the validity of the marriage or standing to file a divorce. However, since no one can guarantee success on any of those possibilities, it would be prudent to have executed written contractual agreements spelling out express terms in the event of dissolution of the parties partnership regarding division of partnership assets and liabilities in light of the various resulting

constructive trusts imposed between the parties, for consideration acknowledged and benefits accepted and freely made without duress upon advice of counsel after full disclosure, with stipulations of liquidated damages to be paid in the event of any breach of fiduciary duty, waste, violation of trust agreements, etc., similar in scope and purpose to pre-marital agreements later confirmed by post-nuptial agreements (in a marital context). Of course, if the matter is contested and especially if one or both parties are a doctor, the case may be ripe for appeal as a test case for the extension, modification, or reformation of existing law.

5. Texas Family Code §2.001 mandates that:

> "(1) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state.
> (2) A license may not be issued for the marriage of persons of the same sex."

Note that the Government Code's Code Construction Act equates "may not" with "shall not".

f. Alternatively, the couple could physically go to Massachusetts, claim a Massachusetts residence address, claim to be residing in Massachusetts, perhaps get at least one Massachusetts' drivers license, get a Massachusetts marriage license, have a ceremonial Massachusetts wedding ceremony, and then subsequently reclaim official residence in Texas. The couple could later divorce in Massachusetts or any state that recognized a Massachusetts same-sex marriage (Rhode Island, Connecticut, New Jersey, New Mexico, and possibly New York), or try to get a divorce in Texas in the hope that either a sympathetic judge might grant the divorce based on federal constitutional, full faith and credit agreements, (perhaps even welcoming the potential publicity that might come with it), or the law in Texas could've changed by that time.

C. LEGAL TRANSSEXUAL MARRIAGES IN TEXAS

1. For argument's sake, note that Littleton v. Prange, 9 S.W.3d 223, 225 (Tex.App.—San Antonio 1999, pet.denied), a probate case between a transsexual male-to-female and the heir of her "deceased husband", elaborated as follows:

> "Can there be a valid marriage between a man and a person born as a man but surgically altered to have the physical characteristics of a woman? [¶] There is no dispute that [the decedent and P] went through a ceremonial marriage ritual. [¶] [P] is medically termed a transsexual ..... *At 226:* She has been surgically and chemically altered to be a woman. *At 231:* We hold, as a matter of law, that [P] is a male. As a male, [P] cannot be married to another male. Her marriage to the [the decedent] was invalid..."

2. Note also that the holding in Littleton v. Prange would necessarily validate a legal marriage between a transsexual male-to-female and "her" lesbian husband/bride/spouse, thus carving out a legally-qualified favored sub-class of lesbians for whom the State of Texas apparently feels a compelling state interest to foster the sacred institution of marriage. Likewise and conversely, Texas would also legally bless the union of any transsexual female-to-male with "his" boyfriend-bride/spouse, ostensibly to foster the stability of the institution of marriage, regardless of the amount of steroids injected and testosterone ingested by the originally "female" spouse before "she" began to bulk-up for her new identity prior to the wedding (and the possible subsequent honeymoon on the beach).

3. Perhaps many among you are no doubt by now asking yourselves "but what about hermaphrodites?" Well, I'm not surprised that you're worrying and wondering about them, because hermaphrodites aren't just in Vegas, New Orleans, carnival side shows and Fellini movies any more! They dwell among us. For all we know, we cross paths with them on a daily basis, perhaps even at the courthouse, or .... at the Advanced Family Law Seminar! And once hermaphrodites realize that they are a favored sub-class in Texas under the holding in Littleton v. Prange, in that they can legally marry either a male **OR** a female, one can expect to see many more hermaphrodites coming out of their closets and coming to Texas, thanks to our clever legislature, because no matter which sex they marry, it will be a same-sex marriage AND a heterosexual marriage, under the holding in Littleton v. Prange, and thus be blessed by the law as a legal heterosexual marriage. Since the US Supreme Court held that the right to marriage was a fundamental human right in Loving v. Virginia, 388 US 1, 12, 87 S.Ct. 1817 (1967), hermaphrodites can't be constitutionally BARRED from being married, and no matter what sex they marry, it would be considered as either a same-sex marriage or a heterosexual marriage. But don't worry, folks! Texas need not become the automatic worldwide mecca of hermaphrodite marriages. There's always Massachusetts, Canada, Spain, the Netherlands, Belgium, etc. Although there are allegedly over 54,000 true hermaphrodites in the United States, the proportional share for Texas would only be around 5,000.

4. The San Antonio Court of Appeals clearly ruled that as a matter of law, a male cannot marry another male, at least when it comes to a transsexual male-to-female marrying a male in Texas. Note that the Court could have specifically ruled that a person of one sex cannot be married to another person of the same sex, but in its wisdom chose not to do so. In contrast, Texas Family Code §2.001(enacted in 1997) states that "[a] license may not be issued for the marriage of

persons of the same-sex." Did the Court of Appeals intentionally and carefully choose its words to leave open the possibility of acknowledging lesbian marriages? Would such a female-to-female same-sex marriage be acknowledged and/or validated if the marriage of the women had occurred:

a. in another state or nation where it was legal?
b. in this state if a license had indeed been issued by the county clerk of any county in the state?
c. without a ceremonial license according to common-law statutory authority in this or any other state? or
d. pursuant to Texas Family Code §2.402 "Declaration and Registration of information marriage" which contains no proxy provisions for an absent applicant and specifically requires (at least) one "*woman's*" maiden surname, address, date of birth, place of birth, including city, county and state, and social security number, *if any*". (emphasis added)

5. In regard to the effect of such a declaration, Colburn v. State, 966 S.W. 2d 511, 514 (Tex.Crim.App.1998) states:

> "A properly recorded declaration of informal marriage constitutes *prima facia* proof of the informal marriage. Thus, the trial court may find the common law marriage proven based upon the declaration alone, but evidence may be offered rebutting the existence of the marriage as sworn to or stated in the declaration. In other words, the trial court is not bound to find a marriage as stated in the declaration when there is evidence to the contrary."

As applies to a hermaphrodite marriage as described above, the trial court could easily find "evidence to the contrary", no matter what sex a true hermaphrodite chose to marry here in Texas

D. REQUIREMENTS OF A "WOMAN", "IF ANY"

1. Note that Texas Family Code §2.402 contains no proxy provisions for an absent applicant and specifically requires (at least) one "*woman's*" maiden surname, address, date of birth, place of birth, including city, county and state, and social security number, *if any*". (emphasis added)

2. Did our clever legislature intend "if any" to refer only to the social security number, or rather to "the women's maiden surname (etc)" if any woman? If there was not "any woman" or any biological woman at least, named on the declaration, would the clerk be barred from recording the declaration in light of the ambiguities in construction inherent in §2.402? The same question arises in reference to Texas Family Code §2.007(1), "The affidavit of an absent application must include: (1) the absent applicant's full name, including the maiden surname of a female applicant, address, date of birth, including city, county, and state, citizenship, and social security number, if any;" (emphasis added), regarding "a female applicant, ... if any". Can such language be interpreted to endorse the lack of any female applicant (both applicants are males) or the presence of more than one female applicant for a license, or a transgender "female" applicant, or a transvestite, hermaphrodite, or gay hermaphrodite applicant, or some combination of the above?

3. One can see how clever the legislature has become in opening and stirring such a can of worms of sexual identity issues, so to speak, in the interest of allegedly preserving the sacred institution of marriage as we know it; or, is the writing on the wall already, written in carnival colors across Spain, the Netherlands, Belgium, Canada, etc., and Massachusetts; is this *the end of marriage as we know it?* Is this the end of that dysfunctional thing that we all serve and wish to foster? Will marriage eventually join the covered wagon, the icebox, the record player, morse code, betamax and 8-track tapes, and soon even VCRs as a cherished relic of nostalgia and butt of jokes about divorce attorneys? *I don't think so.*

4. Marriage as an institution need not wither and die. Marriage is alive, and hungry; it wants more weddings, more marriages, more souls to devour, taste-test, and digest in Divorce Court. We just need to let it grow. We shouldn't fight the future. It's like trying to stop the tides, like trying to block a runaway train going down a mountain, "a mountain of Love"; and who wants to stand in the way of love? *Let there be love.* There's no need to worry about all those hermaphrodites reproducing in Texas. They're sterile. And those gay couples could adopt many foster children who might not otherwise be adopted and may legitimize otherwise illegitimate children of legally unmarried women who choose to have children whether they are married or not. The 1990 U.S. Census report suggested that 27% of same-sex unions involving women produced children and that between 5% and 17% of unions involving two men produced children. Would society's interests be better served by more adoptions and fewer illegitimate children? Who are we to Judge?

E. NO "PROOF OF SEX" REQUIRED

1. Texas Family Code §2.403 states that "the county clerk shall require proof of the identity and age of each party to the declaration of informal marriage to be established by a certified copy of the party's birth certificate or by some certificate, license, or document issued by this state or another state, the United States, or a foreign government", but does not require proof of sex. Neither does Texas Family Code §2.002 "Application for License", which states:

> "Except as provided by Section 2.006, each person applying for a license must: (1) appear before the county clerk; (2) submit the person's proof of identity and age as provided by this

subchapter; (3) provide the information applicable to that person for which spaces are provided in the application for a marriage license; (4) mark the appropriate boxes provided in the application; and (5) take the oath printed on the application and sign the application before the county clerk."

2. Nor does Texas Family Code §2.009 "Issuance of License" (for ceremonial marriage), request proof of sex, which statute states:

"(a) Except as provided by Subsections (b) and (d), the county clerk may not issue a license if either applicant: (1) fails to provide the information required by this subchapter; (2) fails to submit proof of age and identity".

Texas Family Code §2.006(b)(2) also states that:

"(b) The person applying on behalf of an absent applicant shall provide to the clerk: (1) the affidavit of the absent applicant as provided by this subchapter; (2) proof of the identity and age of the absent applicant as provided by this subchapter."

3. Again no proof of sex is required, nor is the proxy for the absent applicant required to take any oath of any kind on behalf of either the proxy or the absent applicant, whose proof of identity can be established by presentation of a driver's license.

4. Texas Family Code §2.007(8) states that "if the absent applicant will be unable to attend the ceremony, the appointment of any adult, other than the other applicant, to act as proxy for the purpose of participating in the ceremony shall be contained in an affidavit of the applicant." Accordingly, if two same-sex people were able to secure a ceremonial license with the help of a proxy, with or without a name-change or a gender-neutral photo on a driver's license, the ceremonial wedding ceremony could also occur by proxy using an opposite-sex couple; just "for the purpose of participating in the ceremony". Of course, eventually a Probate Court or Divorce Court might find a problem with the validity of such a ceremony and the underlying marriage license.

VI. SCIENCE AND TECHNOLOGY AND THE FUTURE OF PROPERTY RIGHTS

A. The following issues involving division of property can be expected to arise in Family Law cases and each in turn will probably eventually be addressed by either case law or statute within the next 20 years, if not already addressed in some fashion:

1. Rights to human embryos, sperm, DNA, organs, and genetic coding;
2. Genetic Engineering and Programming Rights
3. Stem-cell organ-farming, source cells and by-products;
4. Cryogenic freezing of parties, corpses, body-parts, embryos, sperm, raw DNA, clone organs, and clone-aging technology;
5. Brain-harvesting & transplanting;
6. Cloning and rights to clone, clone by-products, clone organs and clone aging technology;
7. Robots, Cyborgs, and Replicants as property;
8. Wind-energy rights, water rights, wave rights, and air rights;
9. Identity rights to iris-scans, fingerprints, and other privacy rights.

B. Control over material of this nature can be viewed as control over life itself. Loss of control can result in decades of unexpected child support, as illustrated by an Illinois case between two doctors wherein the core issue was whether sperm involved in artificial insemination of the mother constituted a theft v. a "gift," courtesy of oral sex from years earlier. See Phillips v. Irons, Ill. App. 1 Dist., 2005 (Not Reported in N.E. 2d.). The Illinois Court of Appeals held that the sperm had not been stolen and indeed had been gifted to the then-married adulterous (female) recipient at the moment of deposit, regardless of her intent to utilize her mouth as a temporary sperm bank, so to speak. The Court's ruling stated that "when plaintiff 'delivered' his sperm, it was a gift – an absolute and irrevocable transfer of title to property from a donation done. There was no agreement that the original deposit would be returned upon request." See also Gerber v. Hickman, Warden, 291 F. 3d 617 (9th Cir. 2002), cert. denied, and Gerber v. Hickman, 537 U.S. 1039 (2002), on a California lawsuit overruling a Prison Warden's arguments and ruling in favor of an incarcerated prisoner's right to "procreate" using Fedex as a sperm bank delivery service.

C. The American Bar Association has already begun to address cloning issues, as attached appendix "H" demonstrates, incorporated herein by reference.

VII. CONCLUSIONS

A. What's better for Texas?

1. Pretending taxpayer homosexuals don't exist in Texas and that their money's no good in Texas anyway; or
2. Acknowledging homosexuals and informal unions already exist in Texas and encouraging the participants to spend more money here on weddings, etc.; or
3. a. Encouraging taxpayers to relocate out of state and take their money with them; while
   b. Allowing certain transsexuals to legally marry other transsexuals under current Texas law.

B. TRUE OR FALSE?

3. Transfer of wealth is good for the economy;

4. Weddings generate lots of consumer spending;
5. Consumer spending is taxed;
6. Texas needs more tax dollars;
7. Everyone should have an equal right to make themselves miserable.
8. The current situation is discriminating to a significant minority class without a compelling state interest;
9. The current situation leads to inequitable discrimination and unjust enrichment contrary to constitutionally guaranteed rights and privacy interests, it being no one else's business what consenting adults do if it harms no one else.
10. If one doesn't believe in same-sex marriage, one has the right to NOT marry someone of the same sex, but does not have the right to keep someone else from doing so.
11. Unjust discrimination protected under color of law undermines the rule of law; Prohibition of same-sex unions undermines the rule of law and the institution of marriage as well;
12. The rule of law should apply to all equally and should attempt to solve problems that are known to exist, rather than intentionally ignore growing problems in the hope that they will go away.
13. Division of property in Texas between unmarried couples will become an increasing problem.
14. Division of property in Texas between same sex-couples legally married or legally joined in civil unions, domestic partnerships, registered partnerships, etc., in sister states and foreign countries is foreseeably going to become an ever increasing problem;
15. Precedents already exist in Federal case law to legally recognize civil unions and same-sex marriages and/or prohibit discrimination on issues of sexual identity and/or gender identification in Texas on constitutional grounds;
16. Principals of separation of church and state are compromised if discriminatory religious principles are subsumed within laws prohibiting civil unions and same-sex marriages;
17. Texas is pro-business and encourages corporate relocation;
18. Many Fortune 500 companies already provide employer benefits for same-sex couples in this and/or other states;
19. Texas may eventually risk losing corporate relocations based upon current Texas laws discriminating against corporate employees as potential citizens of Texas;
20. Massachusetts or New Jersey companies with numerous same-sex union employees, officers, directors, and/or Board members could foreseeably meet internal resistance to corporate relocations to Texas because of unresolved concerns of the effect of Texas law on same-sex spouses or civil union couple employees expected to relocate.
21. Texas has a high literacy rate.
22. The writing is on the wall.
23. You may wish to read this paper.
24. Maybe next year, you can do an update.
25. The End.

Chronology of International Unmarried Unions

Year	Country	Form
1989	Denmark	Civil Union
1993	Norway	"
1995	Sweden	"
1996	Greenland	"
1996	Iceland	"
1999	France	"
2001	Germany	"
2001	Portugal	"
2002	Finland	"
2004	Luxembourg	"
2005	New Zealand	"
2005	United Kingdom	"
2005	Andorra	"
2006	Czech Republic	"
2006	Slovenia	"
2007	Switzerland	"
2007	Columbia	"
2001	Portugal	Domestic Partner
1996	Hungary	"
2003	Croatia	"
1994	Israel	Unregistered Cohabitation
1996	Hungary	"
2003	Croatia	"
1997	United States	Civil Unions in some states/regions
2003	Argentina	"
2004	Australia	"
2004	Brazil	"
2004	Italy	"
2006	Mexico	"
1998	Netherlands	Same-Sex Marriage
1998	Spain	"
1999	South Africa	"
2000	Belgium	"
2001	Canada	Civil Unions Pending Nationwide
	Australia	"
	Austria	"
	Brazil	"
	Chile	"
	Costa Rica	"
	Greece	"
	Ireland	"
	Italy	"
	Luxembourg	"
	Mexico	"
	Poland	"
	Puerto Rico	"
	United States	"
	Uruguay	"
2003	Australia	Domestic Partners in some states

TERMINATING

A

CALIFORNIA REGISTERED

DOMESTIC PARTNERSHIP

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Table of Contents

What this Brochure is About.....1

Some Important Terms You Should Know.....1

Terminating a Domestic Partnership by Notice of Termination of Domestic Partnership with the California Secretary of State.....3

Requirements for Terminating with the California Secretary of State.....3

What You Should Know About Revoking the Termination.....4

An Important Difference Between Notice of Termination with the California Secretary of State and Termination with the Superior Court.....4

Court Set-Aside.....5

Termination of Domestic Partnership by Petition of the Superior Court.....5

Petition for Dissolution of Domestic Partnership.....6

Petition for Judgment of Nullity of Domestic Partnership.....6

Terminating by Petition for Legal Separation of Domestic Partners.....6

Should You Consult an Attorney?.....7

Notice of Termination of Domestic Partnership.....Attached

What this Brochure is About

This brochure describes the requirements for terminating a California registered domestic partnership in the State of California and explains the nature and effect of termination. In certain circumstances, if all the requirements are met, partners may terminate a registered domestic partnership by preparing and filing a Notice of Termination of Domestic Partnership form with the California Secretary of State. In all other circumstances, at least one of the partners must file a petition with, and obtain a judgment from, the Superior Court in the same way that marriages are terminated.

If you wish to terminate a domestic partnership using the California Secretary of State's procedure, you must sign a form stating that you have read and understood this brochure. It is important for you to read the entire brochure very carefully. Unfortunately, it is impossible to answer every question, and this brochure is not intended to provide legal advice in your individual situation. If you have questions after you review this brochure, you should consult an attorney.

If you decide to file a Notice of Termination of Domestic Partnership, you should save this brochure for at least six months from the date the form is filed with the California Secretary of State. Either partner may revoke the termination prior to that date.

Some Important Terms You Should Know

In order to understand the nature and effect of terminating a registered domestic partnership, you will need to have at least a basic idea about some terms that are used in this brochure. Those terms are explained in this section. You should also understand that as a couple in a registered domestic partnership, there are certain things which you **own together** and there may be certain debts that you **owe together.**

Termination of Domestic Partnership

The termination of a registered domestic partnership ends the registered domestic partnership and returns the partners to the status of un-partnered persons. The partners will no longer have the rights, protections and benefits or obligations and responsibilities under the law as registered domestic partners. The process of termination will usually also divide all the community property and community obligations of the partners. Once the termination is effective, it may not be undone except in limited circumstances by order of the Superior Court.

Date of Separation

The date of separation is the date you told your partner that you wanted to terminate the domestic partnership and there was no chance of saving it. In most cases, it is the date you stopped living together, but if you have questions, you should consult an attorney.

Community Property

Community property is everything that partners own together. In most cases that includes anything that either of you earned and anything that either of you bought with those earnings after the date you registered as domestic partners but before the date of separation. This may not be the case if you have signed an agreement with your partner regarding rights to property. In that case or if you have questions, you should consult an attorney regarding community property.

Separate Property

Separate property is everything that partners own separately. In most cases, this includes anything you owned before you registered as domestic partners, anything you earned or received after the date of separation and anything you received by gift or inheritance at any time.

Fair Market Value

Except for bank accounts and cash, which are valued at their actual dollar amount, the value of community property is determined by adding together the fair market value of your possessions that are community property. Fair Market Value is an estimate of the amount of money you could get if you sold those items to a stranger at a garage sale or in the newspaper. It does not mean what you paid for those items originally or how much it would cost to replace them now. One way of estimating the Fair Market Value is to see what similar items are advertised for in the newspaper want ads. The same method is used to determine the value of Separate Property.

Community Obligations

Community obligations are the debts that partners owe together. In most cases, this includes anything you still owe on any debts either of you took on after the date you registered as domestic partners but before the date of separation. A debt is usually still a community obligation even when only one partner's name is on the loan.

Property Settlement Agreement

A property settlement agreement is an agreement in writing, signed by both partners, explaining how your community property will be divided upon termination of the domestic partnership and how much each of you will pay on the community obligations.

Petition for Dissolution of Domestic Partnership

A petition for dissolution of domestic partnership is the formal request by one partner to the Superior Court for the Court to terminate the domestic partnership. It is very similar to the petition for dissolution of marriage (a divorce).

Petition for Judgment of Nullity of Domestic Partnership

A petition for judgment of nullity of domestic partnership is the formal request by one partner to the Superior Court for the Court to determine the domestic partnership is legally invalid (void). It is very similar to the petition for judgment of nullity of marriage (an annulment).

Petition for Legal Separation of Domestic Partners

A petition for legal separation is the formal request by one partner to the Superior Court for the Court to divide the community property and debts between the partners and to make other orders regarding custody of children and financial support ***without terminating the partnership***. It is very similar to a petition for legal separation in a marriage.

Notice of Termination of Domestic Partnership

This is a form obtained from the California Secretary of State and may be filed with the California Secretary of State, in certain limited circumstances, to terminate a domestic partnership. It may only be used when the domestic partnership meets certain requirements.

Notice of Revocation of the Termination of Domestic Partnership

This is a form obtained from the California Secretary of State and may be filed with the California Secretary of State, within certain time limits, to stop a Notice of Termination of Domestic Partnership from terminating the domestic partnership.

Terminating a Domestic Partnership by Notice of Termination of Domestic Partnership with the California Secretary of State

In some circumstances, you may terminate a registered domestic partnership by filing a Notice of Termination of Domestic Partnership with the California Secretary of State. This way is easier than terminating a domestic partnership with the Superior Court, but not everybody can use it. You can terminate your domestic partnership this way only if ALL of the requirements listed below are true at the time you file the form. Even if only one of the statements is not true, you cannot terminate the domestic partnership with the California Secretary of State and you must file a petition with the Superior Court in order to terminate the domestic partnership.

Requirements for Terminating with the California Secretary of State

___ 1. We have both read this brochure and understand it.

___ 2. We both want to terminate the domestic partnership.

___ 3. We have not been registered as domestic partners more than 5 years.

___ 4. No children were born to us before or during the domestic partnership.

___ 5. We did not adopt any children during the domestic partnership.

___ 6. Neither of us is now pregnant.

___ 7. Neither of us owns any part of land or buildings.

___ 8. Neither of us is renting any land or buildings (except where one or both of us lives, and that lease does not include a purchase option and will end within one year of filing the Notice of Termination of Domestic Partnership form).

___ 9. Not counting automobile loans, our community obligations are not more than $5,000.

___ 10. Not counting automobiles, our community property is worth less than $33,000.

___ 11. Not counting automobiles, neither one of us has separate property totaling more than $33,000.

___ 12. We have prepared and signed a property settlement agreement that states how we want our possessions and obligations to be divided (OR that states we have no community property or community debts.)

___ 13. Both of us agree that we do not want money or support from the other partner except what is included in the property settlement agreement dividing the community property and community obligations.

If statements 1 through 13 listed on page 3 are all true, you may terminate the domestic partnership by filing a Notice of Termination of Domestic Partnership with the California Secretary of State. You can get the form from any California Secretary of State office or from our website at www.ss.ca.gov/dpregistry.

The Notice of Termination of Domestic Partnership must be signed by both partners and filed with the California Secretary of State. Before completing the form, please review the requirements and this brochure very carefully.

It is possible for a court to set aside and cancel a termination made through the California Secretary of State if it can be shown that all the requirements were not met at the time the form was filed. You do not have to see an attorney before filing a Notice of Termination of Domestic Partnership, but it is always in your best interest to see an attorney about ending your domestic partnership.

How Long Does It Take?

The domestic partnership will automatically end **six months after** the date the Notice of Termination of Domestic Partnership is filed with the California Secretary of State, ***as long as neither partner revokes (cancels) the termination before the end of the six-month period.***

What You Should Know About Revoking the Termination

Either partner can revoke (cancel) the termination of the domestic partnership, for any reason, at any time before the end of the six-month period that starts when the Notice of Termination of Domestic Partnership is filed with the California Secretary of State. The most common reasons to revoke the termination are because you decided to return to your partner and not terminate the domestic partnership; or because you decided to go to Court to terminate the domestic partnership; or because one of you is now pregnant.

In order to revoke the termination, you must file a Notice of Revocation of Termination of Domestic Partnership with the California Secretary of State and send a copy to your partner by first-class mail. If you decide to revoke the termination, you must do this before the end of the six-month period when the domestic partnership will automatically terminate.

Once you revoke the termination you can't cancel the revocation. If you change your mind and decide to continue with the termination, you will have to start the process again (including the six-month period) or file a petition with the Superior Court.

An Important Difference Between Notice of Termination with the California Secretary of State and Termination with the Superior Court

When you terminate a domestic partnership with the Superior Court, you have a right to a Court hearing or trial in front of a judge. If either partner is not satisfied with the judge's decision, it is possible to challenge that decision. This can be done, for example by asking for a new trial. It is also possible to appeal the decision by taking the case to a higher court. *With a Notice of Termination of Domestic Partnership, there is no trial or hearing.* Couples who choose this method of terminating the domestic partnership do not have the right to ask for a new trial or the right to appeal the case to a higher court.

Court Set-Aside

There are some cases in which a domestic partnership terminated through the California Secretary of State can be challenged and set-aside (reversed) after the six-month waiting period is over. **If you believe your termination should be set-aside after the six-month period, you should consult an attorney about this.** The court may have the power to set-aside the termination if you can show:

(1) **that the partnership did not meet all the requirements** listed on page 3 at the time the Notice of Termination of Domestic Partnership form was filed, OR

(2) **that you were treated unfairly in the Property Settlement Agreement.** This is possible if you find out that the things you agreed to give your partner were much more valuable than you thought when you filed, OR

(3) **that you signed the Notice of Termination of Domestic Partnership against your will.** This is possible if you can show that your partner used threats or other kinds of unfair pressure to get you to go along with the Property Settlement Agreement or the termination, OR

(4) **that there are serious mistakes in the original agreement.** Various kinds of other mistakes may make the termination invalid, but you will have to go to court to prove the mistakes.

You should consult with an attorney for more information about setting aside a termination. Correcting mistakes and unfairness in a termination by Notice of Termination of Domestic Partnership can be difficult, expensive, and time consuming. It is very important for both partners to be honest, cooperative, and careful when terminating the domestic partnership through the Secretary of State.

Termination of Domestic Partnership by Petition of the Superior Court

If you do not meet all the requirements described on page 3 for terminating your domestic partnership through the California Secretary of State, you must file a petition with the Superior Court in order to terminate it. This is the same process used to terminate a marriage (a divorce or annulment) or to legally separate. There are three different petitions you can file with the Court, and each has different effects. They are briefly described below.

How to Start

To start a Court process, you must complete and file a Petition for Dissolution of Domestic Partnership, a Petition for Judgment of Nullity of Domestic Partnership, or a Petition for Legal Separation of Domestic Partners with the Superior Court. You must also have a copy of the petition and the Court summons personally delivered to your domestic partner. You cannot deliver the copies yourself. You must have a friend or other adult deliver them or you can pay a service to do this.

You Can Go to Mediation or Ask for Temporary Orders

Unlike a termination with the California Secretary of State, when you file a petition with the Court, you will have the right to ask the Court to help you come to an agreement or to make temporary orders while waiting for the domestic partnership to be terminated. It is always best if both partners can reach agreement on the issues, but when you can't reach an agreement, and the matter must be resolved right away, you can ask the Court to send you to mediation (a process that will help you reach agreement) and/or to make temporary orders. Either partner may ask the Court to make temporary orders regarding property rights, support, child custody, and other areas.

Petition for Dissolution of Domestic Partnership

A petition for dissolution of domestic partnership is a formal request by one partner to the Superior Court asking the Court to terminate the domestic partnership. It is very similar to a petition for dissolution of marriage (a divorce). A judgment issued by the court in this case will terminate the domestic partnership and will restore both partners to the status of un-partnered persons. Among other things, the judgment will also decide the custody of any minor children of your domestic partnership, how your possessions and obligations will be divided, and if any support will be paid from one partner to the other.

How long does it take?

Once you have started the process, it will take *at least* six months for the Court to terminate the domestic partnership and enter a judgment in a Petition for Dissolution of Domestic Partnership. In many cases it takes longer than six months. The time it takes will depend on your particular situation and on how well you and your partner cooperate in the process.

Petition for Judgment of Nullity of Domestic Partnership

A petition for judgment of nullity of domestic partnership is the formal request by one partner to the Superior Court for the Court to declare the domestic partnership legally invalid. It is very similar to a petition for nullity of marriage (annulment). A Judgment of Nullity of Domestic Partnership issued by the court will void the domestic partnership and will restore both partners to the status of un-partnered persons. Among other things, it will decide the custody of any minor children of your domestic partnership, how your possessions and obligations will be divided, and if any support will be paid from one partner to the other.

Differences from Dissolution of Domestic Partnership

Unlike a dissolution of domestic partnership, which ends the partnership, a nullity of domestic partnership declares it void from the beginning. The Court will still decide the issues of child custody and child support the same way as a dissolution of domestic partnership, but there can be differences in how the Court divides your property and orders one partner to pay support for the other. Another difference between a dissolution of domestic partnership and a nullity of domestic partnership is that the partner asking the Court to void the domestic partnership will have to prove certain things to the court in order to get the Court to void it.

The requirements of a petition for nullity of domestic partnership are often difficult to prove and the effects are often complicated. While it is not required, you should consult an attorney before you file this petition.

How long does it take?

The time it takes will depend on your particular situation and on how well you and your partner cooperate in the process. There is no minimum time limit.

Terminating by Petition for Legal Separation of Domestic Partners

A Petition for Legal Separation of Domestic Partners is the formal request by one partner to the Superior Court for the Court to divide the community property and debts between the partners and to make other orders regarding custody of children and financial support *without terminating the partnership*. It is very similar to a petition for legal separation in a marriage.

Differences from a Dissolution of Domestic Partnership

Unlike a dissolution of domestic partnership, a legal separation of domestic partners **does not** terminate the domestic partnership and it **does not** restore the partners to the status of un-partnered persons. Until the domestic partnership is terminated, and you are restored to the status of an un-partnered person, you will not be allowed to enter into another domestic partnership or a marriage. In a legal separation, the Court will financially separate you and your domestic partner, and it will also decide the custody of any minor children of your domestic partnership, how your possessions and obligations will be divided and if any support will be paid from one partner to the other in the same way as a dissolution.

How long does it take?

The time it takes will depend on your particular situation and on how well you and your partner cooperate in the process. There is no minimum time limit.

Should You Consult an Attorney?

You do not have to see an attorney in order to terminate your domestic partnership with the California Secretary of State or with the Superior Court. However, the process can get complicated and this brochure is not intended to provide legal advice in your individual situation. It is always a good idea to seek legal advice from an attorney who knows family law before you decide to do it yourself. You may decide to hire an attorney to do all of it for you or to consult an attorney to explain your rights in your particular situation and to review your Property Settlement Agreement.

You can find organizations in your area in the yellow pages under "Attorneys" or "Attorney Referral Service" that will help you find an attorney. In many cases you will be able to find an attorney who will charge only a small fee for your first visit, or you can get information on free or low-cost legal services through the County Bar Association in your county. Court forms are available at your local courthouse or online at http://www.courtinfo.ca.gov/forms.

If you decide not to see an attorney, you should not rely on this brochure alone.
It is not intended to provide legal advice.

State of California
Secretary of State

FILE NO: _____

(Office Use Only)

NOTICE OF TERMINATION OF DOMESTIC PARTNERSHIP
(Family Code section 299)

Instructions:

1. **Complete and send to:**
   Secretary of State
   P.O. Box 942877
   Sacramento, CA 94277-0001
   (916) 653-3984
2. **There is no fee for filing this Notice of Termination**

We, the undersigned, do declare that:

We are terminating our domestic partnership. We have read and understand the brochure prepared by the Secretary of State describing the requirements, nature, and effect of terminating a domestic partnership. We also declare that all of the conditions exist as specified in Section 299(a) of the Family Code.

Secretary of State File Number (if known): _____.

_____ _____
Signature of Partner Printed Name (Last) (First) (Middle)

_____ _____
Signature of Partner Printed Name (Last) (First) (Middle)

NOTARIZATION IS REQUIRED
State of California
County of _____

On _____, before me, _____, personally

appeared _____

_____

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

_____
Signature of Notary Public

[PLACE NOTARY SEAL HERE]

RETURN TO (Enter the name and the address of the person to whom a copy of the filed document should be returned.)

NAME [ ]

ADDRESS

CITY/STATE/ZIP [ ]

APPENDIX C

Bluntberg No. 6191

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO. : FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
DOMESTIC PARTNERSHIP OF PETITIONER: RESPONDENT:	
PETITION FOR ☐ **Dissolution of Domestic Partnership** ☐ **Legal Separation of Domestic Partnership** ☐ **Nullity of Domestic Partnership** ☐ **AMENDED**	CASE NUMBER:

1. STATISTICAL FACTS
   a. Date of registration of domestic partnership or equivalent:
   b. Date of separation:
   c. Time from date of registration of domestic partnership to date of separation *(specify)*: Years Months
2. RESIDENCE (Partnerships established out of state only)
   a. ☐ Our domestic partnership was established in another state *(specify state)*:
   b. ☐ Petitioner ☐ Respondent has been a resident of this state of California for at least six months and of this county for at least three months immediately preceding the filing of this *Petition for Dissolution of Domestic Partnership*.
3. DECLARATION REGARDING MINOR CHILDREN *(include children of this relationship born prior to or during this domestic partnership or adopted during this domestic partnership)*:
   a. ☐ There are no minor children.
   b. ☐ The minor children are:

Child's name	Birthdate	Age	Sex

   ☐ Continued on Attachment 3b.
   c. If there are minor children of the petitioner and respondent, a completed *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)* (form FL-105) must be attached.
4. SEPARATE PROPERTY
   Petitioner requests that the assets and debts listed ☐ in *Property Declaration* (form FL-160) ☐ in Attachment 4 ☐ below be confirmed as separate property.

Item	Confirm to

NOTICE: You may redact (black out) social security numbers from any written material filed with the court in this case other than a form used to collect child or partner support.

DOMESTIC PARTNERSHIP OF *(Last name, first name of each party):*	CASE NUMBER:

5. DECLARATION REGARDING COMMUNITY AND QUASI-COMMUNITY ASSETS AND DEBTS AS CURRENTLY KNOWN
   a. ☐ There are no such assets or debts subject to disposition by the court in this proceeding.
   b. ☐ All such assets and debts are listed ☐ in *Property Declaration* (form FL-160) ☐ in Attachment 5b.
      ☐ below *(specify):*

6. **Petitioner requests**
   a. ☐ dissolution of the domestic partnership based on
      (1) ☐ irreconcilable differences. (Fam. Code, § 2310(a).)
      (2) ☐ incurable insanity. (Fam. Code, § 2310(b).)
   b. ☐ legal separation of the domestic partnership based on
      (1) ☐ irreconcilable differences. (Fam. Code, § 2310(a).)
      (2) ☐ incurable insanity. (Fam. Code, § 2310(b).)
   c. ☐ nullity of void domestic partnership based on
      (1) ☐ incest. (Fam. Code, § 2200.)
      (2) ☐ bigamy. (Fam. Code, § 2201.)
   d. ☐ nullity of voidable domestic partnership based on
      (1) ☐ petitioner's age at time of registration of domestic partnership. (Fam. Code, § 2210(a).)
      (2) ☐ prior existing marriage or domestic partnership. (Fam. Code, § 2210(b).)
      (3) ☐ unsound mind. (Fam. Code, § 2210(c).)
      (4) ☐ fraud. (Fam. Code, § 2210(d).)
      (5) ☐ force. (Fam. Code, § 2210(e).)
      (6) ☐ physical incapacity. (Fam. Code, § 2210(f).)

7. **Petitioner requests** that the court grant the above relief and make injunctive (including restraining) and other orders as follows:

	Petitioner	Respondent	Joint	Other
a. Legal custody of children to	☐	☐	☐	☐
b. Physical custody of children to	☐	☐	☐	☐
c. Child visitation granted to	☐	☐		☐

   As requested in form: ☐ FL-311 ☐ FL-312 ☐ FL-341(C) ☐ FL-341(D) ☐ FL-341(E) ☐ Attachment 7c.

d. ☐ Determination of parentage of any children born to the Petitioner and Respondent prior to the domestic partnership.		
e. Attorney fees and costs payable by	☐	☐
f. Partner support payable to	☐	☐

   g. ☐ Terminate court's jurisdiction (ability) to award partner support to respondent.
   h. ☐ Property rights be determined.
   i. ☐ Petitioner's former name be restored to *(specify):*
   j. ☐ Other *(specify):*

      ☐ Continued on Attachment 7j.

8. **Child support**–If there are minor children who were born to or adopted by the petitioner and respondent before or during this domestic partnership, the court will make orders for the support of the children upon request and submission of financial forms by the requesting party. An earnings assignment may be issued without further notice. Any party required to pay support must pay interest on overdue amounts at the "legal" rate, which is currently 10 percent.

9. **I HAVE READ THE RESTRAINING ORDERS ON THE BACK OF THE SUMMONS, AND I UNDERSTAND THAT THEY APPLY TO ME WHEN THIS PETITION IS FILED.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER)

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY FOR PETITIONER)

NOTICE: Dissolution or legal separation may automatically cancel the rights of a domestic partner under the other domestic partner's will, trust, retirement plan, power of attorney, pay-on-death bank account, survivorship rights to any property owned in joint tenancy, and any other similar thing. It does not automatically cancel the right of a domestic partner as beneficiary of the other partner's life insurance policy. You should review these matters, as well as any credit cards, other credit accounts, insurance polices, retirement plans, and credit reports, to determine whether they should be changed or whether you should take any other actions. However, some changes may require the agreement of your partner or a court order (see Fam. Code, §§ 231–235).

States with Statutes Defining Marriage	States with Constitutional Language Defining Marriage	States with No Provision Prohibiting Same-Sex Marriage	States with a Constitutional Amendment on ballot in 2006 that Did Not Pass
Alabama Alaska Arizona Arkansas California Colorado Delaware Florida Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland* Michigan Minnesota Mississippi Missouri Montana New Hampshire North Carolina North Dakota Ohio Oklahoma Pennsylvania South Carolina South Dakota Tennessee Texas Utah Vermont Virginia Washington West Virginia Wisconsin Wyoming *-In January 2006, a state judge found the Maryland statute unconstitutional but it remains in effect pending appeal.	Alabama Alaska Arkansas Colorado Georgia Hawaii* Idaho Kansas Kentucky Louisiana Michigan Mississippi Missouri Montana Nebraska Nevada North Dakota Ohio Oklahoma Oregon South Carolina South Dakota Tennessee Texas Utah Virginia Wisconsin *Hawaii's constitution was amended in 1998 to read "The Legislature shall have the power to reserve marriage to opposite-sex couples." The Hawaii legislature subsequently passed a law prohibiting marriage for same-sex couples.	Connecticut Massachusetts New Jersey New Mexico New York Rhode Island	Arizona
TOTALS: 41	27	6	1

http://www.ncsl.org/programs/cyf/samesextime.htm

APPENDIX D

Blumberg No. 5191

Summary of State Acts

Issues marriage licenses to same-sex couples:	Allows civil unions, providing state-level spousal rights to same-sex couples:	Statewide law provides nearly all state-level spousal rights to unmarried couples (Domestic Partnerships):	Statewide law provides some state-level spousal rights to unmarried couples and honors Foreign, Massachusetts same-sex DIVORCES:	Statewide Honors Foreign Massachusetts Same-Sex Marriages:
Massachusetts	Connecticut, Vermont, New Jersey Oregon? Washington (Stale)	California	Hawaii, Maine, District of Columbia,	Rhode Island, New York?, New Mexico New Jersey Connecticut

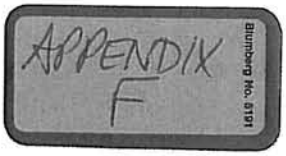
Based upon chart

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF FAMILY LAW

RECOMMENDATION

RESOLVED, That the American Bar Association opposes any federal enactment that would restrict the ability of a state to prescribe the qualifications for civil marriage between two persons within its jurisdiction or to give effect to a civil marriage validly contracted between two persons under the laws of another jurisdiction.

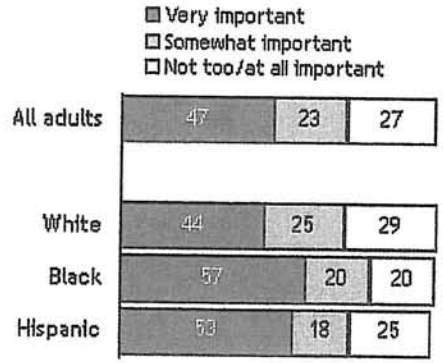


PewResearchCenter Publications

As Marriage and Parenthood Drift Apart, Public Is Concerned about Social Impact

How Important is Legal Marriage?

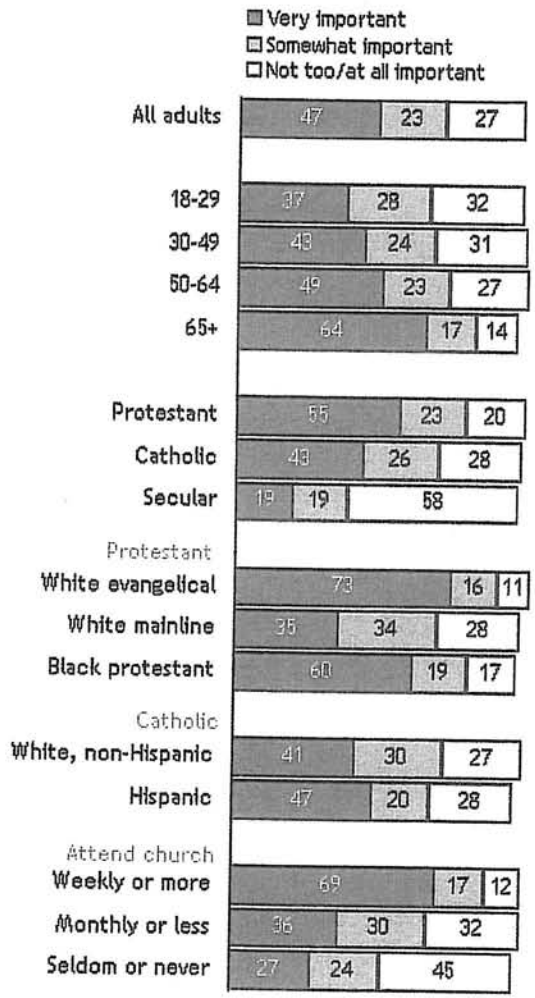
When a man and woman plan to spend the rest of their lives together as a couple, how important is it to you that they legally marry?



Notes: Whites include only non-Hispanic whites. Blacks include only non-Hispanic blacks. Hispanics are of any race. Don't know responses are not shown.

Survey Date: February 16-March 14, 2007

Back to As Marriage and Parenthood Drift Apart, Public Is Concerned about Social Impact front page



Notes: Don't know responses are not shown.

Survey Date: February 16-March 14, 2007

Back to As Marriage and Parenthood Drift Apart, Public Is Concerned about Social Impact front page

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 9-10, 2004

RESOLVED, THAT the American Bar Association supports law and public policy, both national and international, that oppose or prohibit reproductive cloning.

FURTHER RESOLVED, THAT, notwithstanding the above, the American Bar Association recognizes that attempts at reproductive cloning may have been made, are currently being made, or may be made in the near future, either in the United States or elsewhere in the world, and therefore supports national law and public policy, that:

1) Establish a presumption that a live birth resulting from such attempts is a human being;

2) Guarantee that any such human being is a person, legally separate and distinct from its biological progenitor, with all rights accorded to any other live born human being under existing law; and

3) Establishes legal parentage, including the legal rights and obligations that flow therefrom, of such person

FURTHER RESOLVED, THAT, for the purposes of this Recommendation, reproductive cloning shall be defined as the transfer of an embryo containing the nuclear genome of a single progenitor (person from whom the nuclear genome was taken or copied), living or dead, into the body of a woman, with the intent to produce, or for the purpose of producing, a living human being or human beings with that genome.