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## **DOMESTIC PARTNERSHIPS: RIGHTS, RESPONSIBILITIES AND LIMITATIONS**

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### **INTRODUCTION**

The institution of marriage provides a package of rights to people in relationships recognized by the law. By participating in a state-recognized union, couples receive a range of government protections including tax benefits, employment benefits, probate designations, property rights, and dissolution and support guidelines. [No. 1]

Over the past three decades the number of persons choosing to live together as couples in committed relationships without the benefits of state-recognized marriage has greatly increased. This trend is reflected in data from the United States Census Bureau's 1990 survey which found that approximately 2.6 million of the nation's 91 million households are unmarried heterosexual couples, and an additional 1.6 million are unmarried couples of the same sex. [No. 2] In addition, it is estimated that approximately one million of these households have children under the age of 15. [No. 3] Such data confirms the growing number of non-traditional relationships and families in the United States.

These relationships challenge traditional family law and produce a collection of novel legal issues which arise in numerous situations including: (1) the distribution of property or the custody of children upon dissolution of the partners' relationship; (2) the relationship of one partner with other family members upon the death or disability of the

other partner; and (3) how disputes with third parties are resolved (for example, when one partner seeks benefits traditionally accorded to married couples or when a creditor attempts to hold a partner liable for one partner's debts). [No. 4]

The term by which the relationship of unmarried partners has come to be known is "domestic partners." In response to pressure from gay rights advocates and other concerned parties, some cities and businesses throughout the United States have begun to recognize such partnerships through the passage of municipal domestic partner legislation and the development of corporate benefits programs for domestic partners. [No. 5] No state legislatures, however, have passed domestic partnership legislation, although the California legislature passed a state-wide domestic partnership bill in September, 1994 which was then vetoed by Governor Wilson.

This report provides an overview of current municipal domestic partnership laws beginning with a general discussion of the definition of domestic partners and then examining the rights and responsibilities of such partnerships, using the City of San Francisco's ordinance as a framework. In addition, this paper examines the inherent limitations of defining a partnership on a municipal level rather than on a state or federal level. It then briefly explores the role of the courts in limiting or expanding the rights and responsibilities of persons in non-traditional relationships. Finally, the report proposes a model ordinance.

Alternative methods used to establish a legally recognized relationship between partners, such as adult adoption or various forms of co-habitation contracts, are viable options, but are not explored in this paper.

## ANALYSIS

### THE MUNICIPAL ORDINANCES

#### 1. [An Overview](#)

Over the past decade, more than two dozen cities in the United States and Canada, including Los Angeles, San Francisco, Seattle, Vancouver, Minneapolis, Toronto and New York City, have passed some form of domestic partnership legislation. (See Appendix B, Table of Benefits Offered Through Selected Municipal and County Domestic Partnership Ordinances.) Two fundamental issues are covered by every domestic partnership law: (1) the definition of "domestic partner" and (2) the benefits granted to those recognized by the law. [No. 6]

The municipal ordinances vary widely in their coverage of these areas, as well as in their definitions of the partners' responsibilities to each other. [No. 7]

While varying widely in the above three areas, the majority of domestic partnership ordinances adopted to date in American cities are relatively similar in other respects. Most of these ordinances provide for some system of registration and dissolution of the partnerships. In addition, most ordinances require preregistration co-habitation for a minimum period of time, as well as an imposed waiting period between the termination of a previous domestic partnership and the registration of a new one. [No. 8] Regardless of these requirements, most ordinances provide no specific benefits beyond the right to proclaim publicly the existence of the relationship. [No. 9] Several ordinances, however,

do provide benefits for the domestic partners of city employees equal to those provided for the spouses of city employees. [No. 10]

Although there are different approaches or forms of the municipal domestic partnership ordinances currently in place, critics have asserted that all of these ordinances fail to recognize the greater rights and responsibilities associated with state-recognized marriage. [No. 11] In addition, such critics describe domestic partnership as limited to enactment by "good samaritan" employers or municipalities, who choose to adopt a system to recognize some of their employees' needs for equivalent benefits. [No. 12]

## **2. Definition of "Domestic Partners"**

There is no national agreement on the definition for "domestic partners." The City of San Francisco's ordinance defines such persons as "two people who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." New York City's ordinance defines domestic partners as "two people . . . who have a close and committed personal relationship involving shared responsibilities." [No. 13] A Washington, D.C. domestic partnership ordinance passed in 1991 confers such status on people who "share a residence within a context of a committed relationship." [No. 14] A Minneapolis ordinance defines the term as people who are "each other's sole domestic partner and neither has a different domestic partner" and that they "share the common necessities of life and are responsible for each other's welfare." [No. 15]

While understanding that even the definition of domestic partner varies among the ordinances, one model, the San Francisco Municipal Ordinance, will be used here as a framework for a benefits and responsibilities analysis. Although differences exist between the ordinances, for purposes of this analysis the San Francisco ordinance provides an adequate and representative framework.

## **BENEFITS AND RESPONSIBILITIES ANALYSIS PURSUANT TO THE SAN FRANCISCO MUNICIPAL ORDINANCE**

To qualify for domestic partnership, two persons must live together and be 18 or over. Neither partner can be married to anyone else or have a different domestic partner. In addition, there is a six month waiting period between the dissolution of a prior partnership and the filing for a new partnership, unless the prior partnership ended due to the death of one partner. While one does not need to live in San Francisco to file for domestic partnership in the city, at least one partner must work in the city to qualify for filing. And, the two individuals must not be related to each other as a parent, child, sister, brother, aunt, uncle, niece, nephew, grandparent or grandchild. [No. 16]

### **1. Benefits Accruing to Each Partner**

The benefits received by each partner are severely limited since the union is only recognized on a municipal basis. Thus, while the law establishes a system which companies, stores, other businesses and unions may use to grant municipally-recognized domestic partners such benefits as family discounts, leave policies, and health plans, it does not require these entities to offer domestic partners the same benefits they offer to married couples. [No. 17]

## **2. Partners' Responsibilities to Each Other**

By signing a domestic partnership agreement, each partner is made responsible for the other's basic living expenses. [No. 18] The law defines such expenses to include basic food and shelter. [No. 19] Under the law, each partner must ensure each other's provision for these basic living expenses. As a result of this duty, one may be responsible to pay a creditor if one's partner receives basic food or shelter on credit. [No. 20]

## **3. Dissolution of the Partnership**

A domestic partnership ends when: (1) one partner sends the other a written notice that he or she has ended the partnership; or (2) one of the partners dies; or (3) one of the partners marries or the partners stop living together (for any amount of time). [No. 21]

A domestic partner is no longer liable for the partner's basic living expenses incurred subsequent to the dissolution. [No. 22]

## **INHERENT LIMITATIONS ON THE SCOPE OF A PARTNERSHIP RECOGNIZED ON A MUNICIPAL-ONLY BASIS**

In an analysis of domestic partnership law, it is critical to recognize the inherent limitations on any ordinance passed by a local rather than a state government. State law is controlling in this area, as courts have repeatedly held that states, and not the federal government, have the power to define civil status. [No. 23] This greatly limits the influence of municipal domestic partnership ordinances since no states have currently passed such legislation, and most family and relationship issues are governed by state laws. [No. 24] Thus, once a state domestic partnership law is enacted, case law involving marital obligations could then be extended to domestic partnership law. [No. 25] Under this analysis, the passage of state domestic partnership legislation is critical to elevating such partnerships to a greater parity with the institution of marriage.

While it is clear that municipalities must uphold state law and recognize relationships granted under those laws, it is less clear to what degree cities may recognize relationships that are not recognized by state law. [No. 26]

## **1. Overview of Municipal Government Powers**

Traditionally, states have been viewed as having complete control over local governments. Under this theory, local governments have no rights against their states under either the state or federal constitution, leaving the local government without any inherent right to self-government. [No. 27]

Approximately 41 states have diverted from the traditional approach and have granted greater power to local governments through constitutional amendments or statutes granting home rule. [No. 28] There are two types of home rule: (1) "imperio in imperium" which treats a municipality as a state within a state, with full police power regarding local concerns and some immunity from state legislature review, and (2) the "legislative" model which is a grant of power from the state legislature and is thus limited by the legislature's own power, leaving the legislature with the power to alter or deny any power granted. [No. 29]

Accordingly, cities may not enact local laws that conflict with state statutes or regulations if the cities are in non-home rule states or in legislative home rule states. Cities in jurisdictions with the greatest latitude, imperio home rule, may only enact legislation that conflicts with state law if it relates to a matter of primarily local concern. [No. 30]

This structure greatly limits the ability of municipalities to pass ordinances which expand or create rights beyond those created by the state. Thus, any legislation passed only on a municipal basis is inherently limited in its application. Modern domestic partnership ordinances passed by cities and counties in the United States are confined within the limits of the power-granting entity (i.e. the city or county government).

Due to the limited rights and responsibilities provided for in current domestic partnership ordinances, domestic partners should consider taking additional steps to further define the scope of their relationship and provide for one another. These additional steps include executing: (1) a will or other estate planning instrument to ensure that each partner receives the appropriate property upon the death of the other partner, and (2) a durable power of attorney for health care to ensure that one's partner can make medical decisions if the other partner becomes ill. [No. 31] Such steps need to be considered because of the inherent lack of protection and security provided by current municipally-based domestic partnership ordinances.

## **2. The Role of the Courts**

Many unmarried partners have looked to the state courts seeking protection for and recognition of their relationships. Cases have reached the state courts on numerous issues, including recognition of same-sex marriage [No. 32] and inheritance rights, as well as child custody disputes between same-sex partners. No state court has yet recognized a same-sex marriage, and decisions regarding other areas such as property or child custody disputes are varied and inconsistent. This inconsistency results from the courts maneuvering to fill in the gaps due to the limited recognition of municipal ordinances, and the lack of state recognized domestic partnerships or same-sex marriage.

### **(a) Recent Cases and Settlements Regarding Domestic Partners' Rights**

In July, 1989, the New York Court of Appeals ruled in Braschi v. Stahl Associates [No. 33] that a gay man was considered a "family member" within the meaning of New York City's Rent, Rehabilitation and Eviction Regulations. [No. 34] Thus, Braschi could not be evicted from the rent-controlled apartment he had shared with his partner, the deceased tenant. This ruling was based on the provision of the New York City regulations cited above, which provides "that family members who reside continuously . . . with the tenant of record, continue as rent-controlled tenants even after the tenant of record dies or vacates the premises." [No. 35] Braschi is a landmark case as it was the first time in U.S. legal history that the highest court in any state determined that a gay couple was found to be the legal equivalent of a family. [No. 36]

Following Braschi, however, in 1991 the same court refused to recognize a member of a lesbian couple as a parent for purposes of child custody under New York's Domestic Relations Law. [No. 37] In Alison D. v. Virginia M., [No. 38] the Court of Appeals upheld two lower court decisions which refused to recognize that a lesbian had any parental right to visitation under New York's Domestic Relations Law, even though she had fully



participated in the process of raising and supporting the couple's child for three years following his birth. [No. 39] Unlike the court's reasoning in Braschi regarding the definition of "family," the court in Alison D. based its decision on a narrow definition of the term "parent" within the meaning of the Domestic Relations statute. By finding that the state legislature did not intend to include such persons within the definition of "parent" for purposes of the statute, the court denied visitation rights to Alison D. and referred to her as a "biological stranger" in the opinion. [No. 40]

More recently, a settlement was reached in a New York case involving a claim by a gay man for the right to inherit a co-op apartment, as a surviving partner of a deceased co-op member. In the settlement, as recently reported in the New York Times, the Sutton Place Co-op agreed to amend its leases so that apartments may be transferred or bequeathed to domestic partners just as they are to married spouses. [No. 41] As a result of the 1994 settlement, the cooperative's new proposed lease defines "domestic partners" as those who have registered their relationship with the city or who fit the definition under existing court rulings and housing regulations. [No. 42] Although the settlement does not technically establish legal precedent as it is not a court decision, the settlement could potentially have great influence on the rights of ownership in New York City cooperatives. A lawyer and vice president of the Council of New York Cooperatives described the potential impact by stating that he "would now advise any co-op to treat a 'domestic partner' of one of its shareholders in exactly the same manner as it would treat a 'spouse'." [No. 43]

Thus, as evidenced in the above discussion, absent a clear definition of the rights and responsibilities of domestic partners or unmarried partners, the courts have difficulty defining and applying such rights in a consistent manner. This void allows settlements to be reached that may alternate between protecting or ignoring the rights of domestic partners. Statewide domestic partnership laws could provide a solution to this inconsistent treatment under the law.

### **3. The Greater Protections Available Through State Legislation**

The passage of a statewide domestic partnership law would provide greater protections to people registering under the statute. The California legislature passed a statewide domestic partnership law, Assembly Bill 2810, which was vetoed by Governor Wilson in September, 1994. This bill would have provided additional statewide protections to domestic partners. This protection is necessary in California, a home rule state. As provided for in California's constitution, home rule is limited to allowing municipalities to "make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." [No. 44]

Assembly Bill 2810 (A.B. 2810) would have created a statewide registry for domestic partners in the Secretary of State's office, afforded partners hospital visitation rights and conservatorship rights similar to those afforded married couples, and provided that domestic partners be included in the state statutory will form. [No. 45] These provisions would have been accomplished by amendments to California's Health & Safety Code and the Probate Code. By amending these provisions, A.B. 2810 would have created a strong civil status on the state level for domestic partnerships, providing protections for such partnerships to a level which local governments cannot provide.

As no states currently recognize domestic partnerships, municipal and county ordinances must be developed in the most effective manner possible to grant and ensure domestic partner rights. A clear model would provide guidance for the development and implementation of domestic partnership ordinances.

## **PROPOSAL FOR A MODEL MUNICIPAL DOMESTIC PARTNERSHIP ORDINANCE**

Even though municipally-based recognition of domestic partnerships provides limited protections, it is still an important step in the process of recognizing non-traditional relationships. To best serve couples seeking a domestic partnership, legislation should have the goals of (1) promoting personal choice within stable intimate relationships; (2) assisting the parties in defining their relationship, thus making them better aware of their rights and obligations; and (3) assisting the courts, when necessary, to define relationships and equitably resolve disputes between the parties and with third parties. [No. 46] As provided in Appendix A and as outlined below, the authors of a recent, extensive law review article, Craig Bowman and Blake Cornish, provide a model ordinance that considers many of the crucial issues and provides some extremely useful suggestions and solutions to the various problems encountered in drafting a domestic partnership law.

### **1. Basic Issues**

To reach the general goals listed above, the following issues should be considered in drafting domestic partnership legislation: (1) primary issues (registration process, eligibility, termination procedures); (2) rights between the parties (support obligations, power of attorney, inheritance); (3) rights and obligations involving third parties (worker's compensation, taxes, calculation of assets and income for public benefits, employee benefits, other private benefits (e.g., family discounts), responsibility for necessities and debts of partner, standing for tort actions (e.g., loss of consortium and wrongful death); and (4) parenting rights (foster parent rights, adoption rights, co-parent rights). [No. 47]

While some of the above issues are beyond the scope of municipal authority, they should still be considered due to the impact such legislation may have on securing rights for domestic partners through the courts and in other areas. Although some of these issues are not relevant to municipal legislation, they are directly relevant to state legislation. Currently, no domestic partnership ordinance considers all of these issues. [No. 48]

### **2. Section-by Section Analysis of a Model Ordinance**

In drafting a model ordinance the following sections should be developed with language which provides the greatest protections and in consideration of the state law governing the municipality. Sections to be drafted include: (1) purpose; (2) eligible parties; (3) registration and records; (4) responsibilities of the parties; (5) rights of succession; (6) durable power of attorney; (7) prohibition of discrimination; (8) parental rights; and (9) termination. [No. 49]

## **CONCLUSION**

Domestic partnership ordinances enacted by local governments (i.e. municipalities and

counties) are narrow in scope due to the inherent limits on the authority of the grantor, and due to courts confirming repeatedly that only the state government has the power to determine civil status. Local government domestic partner ordinances, however, can be viewed as a first and important step in procuring the same rights for domestic partners as those rights afforded to married couples.

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## NOTES

[No. 1] Lisa R. Zimmer, Note, Family, Marriage, and the Same-Sex Couple, 12 Cardozo L. Rev. 681, WL 1(1990). More specifically, state-recognized married couples are granted the following list of rights and benefits:

Rights to spousal shares of marital property upon death of one partner; tax benefits (including joint income tax returns, dependency deductions, gift tax exemptions, and exemptions for alimony and property settlements); rights in tort law (including emotional distress, wrongful death actions, and loss of consortium); rights in criminal law (including immunity from compelled testimony and the marital communication privilege); non-exclusion under zoning laws; visitation privileges in hospitals and other institutions; authority to make decisions for an ill spouse; employee benefits for spouses (including Social Security and veterans payments to spouses, workers compensation for those whose spouses move for job-related reasons); lower fees for married couples (including automobile and life insurance, family travel rates, and family memberships); immigration benefits; and draft exemptions.

William B. Rubenstein, Legal Issues Facing the Non-Traditional Family, WL 49, Practising Law Institute Tax Law and Estate Planning Course Handbook Series (April-May, 1994).

[No. 2] Mary Rowland, Your Own Account; Hurdles for Unmarried Partners, N.Y. Times, May 22, 1994, 3, at 15.

[No. 3] Id.

[No. 4] Craig A. Bowman and Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 93 Colum. L. Rev. 1164, (1992). (See full reproduction of article in Appendix A.)

[No. 5] A current list of cities and counties offering some domestic partnership recognition or benefits for its employees consists of approximately 30 entities, including, in California: Alameda County; Berkeley; Laguna Beach; Los Angeles; Marin County; San Francisco, San Mateo; Santa Cruz; and, West Hollywood. Cities and counties outside of California include: Hartford, Connecticut; Atlanta, Georgia; Chicago, Illinois; Tacoma Park, Maryland; Boston, Massachusetts; Cambridge, Massachusetts; Ann Arbor, Michigan; East Lansing, Michigan; Minneapolis, Minnesota; Ithaca, New York; New York, New York; Travis County, Texas; Burlington, Vermont; Seattle, Washington; and, Madison, Wisconsin. Hayden Curry et al., A Legal Guide for Lesbian and Gay Couples 1-10 - 1-11 (1994). See also Appendix B, Table of Benefits Offered Through Selected Municipal and County Domestic Partnership Ordinances.

Private companies and organizations offering domestic partner benefits include:



American Friends Committee; American Psychological Association; Ben & Jerry's Homemade; Blue Cross-Blue Shield; Episcopal Diocese of Newark, New Jersey; Home Box Office; Levi Strauss & Co.; Lotus Development Corp.; MCA (owner of Universal Studios); Microsoft Corporation; San Francisco law firms: Orrick, Herrington & Sutcliffe; Pillsbury, Madison & Sutro; Heller, Ehrman, White & McAuliffe; Howard, Rice, Nemerovski, Canady, Robertson, Falk & Rabin; Morrison & Foerster; and Cooley, Godward, Castro, Huddleson & Tatum; Seattle Times; Viacom; and the Village Voice. Curry, supra at 1-12.

In addition, approximately 30 colleges and universities offer some version of domestic partnership benefits to staff or students, or both. The list of major schools includes: Brown University; Columbia University; Harvard University; New York University; North Dakota University; Northeastern University; Princeton University; Smith College; Stanford University; University of Colorado; University of Michigan; University of Oregon and University of Pennsylvania, among others. Id. at 1-13.

[No. 6] Rubenstein, supra note 1, at WL 10.

[No. 7] Id. at WL 53, n. 1.

[No. 8] Bowman, supra note 4, at 1191.

[No. 9] Id.

[No. 10] Id.

[No. 11] Zimmer, supra note 1 at WL 6.

[No. 12] Id.

[No. 13] Id., WL 21 n.66.

[No. 14] Ann Belser, Rights, Privileges, and Gay Lovers, Advocate, Feb. 1992, at 56.

[No. 15] Id. at 56.

[No. 16] ACLU, Domestic Partnership Information Packet at 10 (undated). (Full document provided in Appendix C.)

[No. 17] ACLU, supra at 8.

[No. 18] San Francisco, Cal., Administrative Code, ch. 62, 62.2(a) (1991). (Appendix D.)

[No. 19] Id., at 62.2(c).

[No. 20] ACLU, supra note 16, at 8.

[No. 21] San Francisco, Cal. supra note 18 at 62.4.

[No. 22] Id. at 62.6.

[No. 23] Bowman, supra note 4, at 1198 (citations omitted).

[No. 24] Rubenstein, supra note 1, at WL 10.

- [No. 25] Mary N. Cameli, Note, Extending Family Benefits to Gay Men and Lesbian Women, 68 Chi.-Kent L. Rev. 447, 473 (1992).
- [No. 26] Id.
- [No. 27] Bowman, supra note 4 at 1198 - 1199.
- [No. 28] Id.
- [No. 29] Id.
- [No. 30] Id.
- [No. 31] ACLU, supra note 16, at 8.
- [No. 32] See Curry, supra note 5, at 1-3 - 1-8 for a summary of cases.
- [No. 33] Braschi v. Stahl Assoc. Co., 143 A.D.2d 44, 531 N.Y.S. 2d 562 (1st Dept. 1988).
- [No. 34] Rubenstein, supra note 1, at WL 11.
- [No. 35] Id.
- [No. 36] Id.
- [No. 37] Id. at WL 13.
- [No. 38] Alison D. v. Virginia M., 155 A.D. 2d 11, 552 N.Y.S. 2d 321 (2d Dept. 1990).
- [No. 39] Id.
- [No. 40] Id.
- [No. 41] David W. Dunlap, End of Co-op Dispute Hailed as Victory for Gay Couples, N.Y. Times, November 17, 1994, B at 3.
- [No. 42] Id.
- [No. 43] Id.
- [No. 44] Bowman, supra note 4, at 1199.
- [No. 45] California Committee Analysis Report, A.B. 2810, STATENET, Aug. 15, 1994.
- [No. 46] Bowman, supra note 4 at 1186.
- [No. 47] Id. at 1188.
- [No. 48] Id.
- [No. 49] For full analysis, see Bowman, supra, note 4 at 1203 (reproduced in Appendix A). Authors provide a proposed model domestic partnership bill. Text contains model language followed by commentary explaining the need for the specific language and identifying alternatives and areas of state law that should be researched prior to drafting

an ordinance for a local government.

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