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**PRACTICAL APPLICATIONS OF THE RECENT SUPREME COURT
DECISIONS (DOMA & PROP 8) AND THE STEPS YOU NEED TO TAKE**

by Linda M. Scaparotti, Esq.¹

PROP 8 & Marriages in California: The case was decided on the standing issue, and thus we are back to Judge Vaughn Walker's ruling that Prop 8 was unconstitutional. Therefore, any same sex couple may now be legally married in California. Marriages have been proceeding in every county with most counties being extremely helpful, including welcoming same sex couples to apply for marriage licenses on their websites. (And while Orange County threatened to make sure the Housewives thereof remained heterosexual, same sex marriages have proceeded in all counties. The Ninth Circuit ordered all county clerks to issue the licenses 2 days after the decision came down.)

DOMA & Federal Recognition of Same Sex Couples Marriages: Section 3 of DOMA was declared unconstitutional. Other parts of DOMA still stand, and it will take passage of the Respect for Marriage Act by congress to repeal all sections of DOMA. Currently there are 41 sponsors, but we need 60 votes. Until then, marriage recognition is going to go state by state. If you reside in a marriage recognition state (CA, CN, DE, IA, ME, MD, MA, MN, NH, NY, RI, VT, WA, District of Columbia), it is clear that you are entitled to all of the same benefits as any married couple, including but not limited to:

- *Bi-National couples can sponsor partner/spouse for US residency;
- *Same sex widows and widowers will receive social security benefits;
- *Federal employees' spouses will receive health insurance and retirement benefits;
- *Servicemembers' spouses will receive equal benefits;
- *You can file your taxes jointly (beneficial for some;not for others);
- *Upon death, you can rollover your spouse's retirement into your own, and it's not a taxable event;

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Linda M. Scaparotti has been in practice throughout the San Francisco Bay Area for 33 years, specializing in estate planning and family law issues for theLGBT community. She writes and lectures extensively on these issues, as well as donating over 600 hours a year to non-profit organizations such as NCLR, HRC, Horizons Foundation, EQCA. Attorney Scaparotti has worked with over 2000 couples, individuals and families, helping them to clarify, structure, and protect their varied relationships.

*Married couples can combine their spousal estate tax exemptions and wait until the death of the last surviving spouse to pay taxes, providing the surviving spouse with more income to live on for the rest of his/her life, and allowing for more assets to pass onto the couples' children/beneficiaries;

*Health benefits provided to the same sex spouse of an employee will not be taxable to the employee.

Things get more complicated depending on whether a particular state recognizes same sex couples' marriages, or not. Here is a summary of what it means based on where you are married and where you reside:

1. Your State of Residence Grants Marriage Licenses to Same Sex Couples:

If you **now get married, or you did get married**, in a state that grants marriage licenses to same sex couples, and you reside in that state, your marriage will be recognized by the state you reside in, and by the federal government. You are entitled to all of the same benefits as any married couple.

2. Residing in a Marriage Recognition State but Legally Married Elsewhere:

You weren't married in your state of residence, but you were legally married in a state that legally granted marriage licenses to same sex couples. As long as your state is a marriage recognition state, your marriage will be recognized by your state and by the federal government.

2. Legally Married but Residing in a Non-Recognition State:

If you are legally married from a state or country that legally granted you a marriage license, but you now reside in (or move to) a non-recognition state: Unfortunately, the **state you reside in will not recognize** your marriage and does not have to.

As to the **federal government**, this is a little more complicated. Some rights will be recognized by some of the Federal Agencies and others will not. Each Federal Agency has a different approach as to whether they recognize marriages based on "place of recognition" (you reside in a state that recognizes your marriage) vs, "place of celebration." (you were married in a state where it was legal to do so), and some have no approach/rule at all. While this is not coordinated at this time among all of the Federal Agencies, the Obama Administration is well aware of the dilemma, and is working on trying to find a way to provide federal benefits for all legally married same sex couples.

As of August, the IRS and the U.S. Treasury will recognize any legally valid marriage of same sex couples (place of celebration). This means for all tax related purposes. Likewise with Immigration. The Social Security Administration will only recognize marriages based on domicile; therefore those couples residing in non-recognition states will not be entitled to spousal social security benefits!

The following federal benefits are only available to those residing in marriage recognition states: Spousal Social Security Benefits, Medicaid, Medicare, SSI, Bankruptcy, Family Medical Leave Act(FMLA).

3. Registered domestic Partners:

If you are registered as domestic partners, you will have to decide whether to marry or not, as you will receive **NO federal benefits** available to married couples only. For the time being, California will recognize and treat your registration the same as a marriage, but, again, you will receive no federal recognition.

4. Neither Registered nor Married:

If you are neither married nor registered, same as 3 above, you will have to make the BIG decision now, as you have **no state or federal benefits**, including no step up in basis on death/inheritance of property so that capital gains is reduced or eliminated, and all of the other rights discussed above.

The Big Decision to be Made:

Are you going to marry or not? At the risk of once again being called non-romantic, consider the practicalities and the tradeoffs. (Please note, I am not addressing or downplaying anyone's social, political or personal attitudes toward marriage; that is known to you and will drive you to an answer as well as the practical considerations.) Please do not just rush out and get married, make sure you understand what it means legally to be married, and the consequences if the worse should happen and your relationship dissolves. (It happens to the best of us sometimes....) Please consider having a Prenup, even if they seem like the most unromantic thing possible and the opposite of relationship building; they really aren't! (See my commentary below.)

Community & Separate Property:

Here is a mini lesson on community and separate property for all married and registered Californians. (Please note, this is just the basics and there are many permutations and complications):

Anything either of you earns, from the earlier of your date of registration or marriage, is **community** property no matter which one of you earned it and no matter if one of you stays home and sits on a couch eating bonbons and never works a day in her life (hmm, whose fantasy is this?!) This means the income is owned equally by both of you.

Anything that is acquired or saved or invested or purchased from these earnings, no matter whose name is on the title to the asset, is also community property, and is owned equally by both of you. All of these assets and income would be split 50/50 upon dissolution.

Anything either of you acquired prior to your first date of registration or marriage is that person's **separate** property, and remains so upon dissolution. Anything acquired through inheritance or gift, no matter when, pre or post marriage/registration, is always separate property as well. Where things get more complicated is when you have an asset that is separate property, like the house you owned prior to marriage/registration, and in which you both live now, and your income from your employment now goes to pay the mortgage. Even if only you are paying the mortgage from earnings, the community is acquiring an interest in the house. It's a small interest, only the amount of the principal

that is paid; however, the community, that is each of you, 50/50, is owed a right of reimbursement upon dissolution.

Alimony is a dreaded word/concept, but very necessary in some circumstances. This is where one of you owes the other spouse a certain amount of monthly support upon separation/dissolution of your marriage. The amount is determined by formula based on the amount you each earn minus each of your expenses, the years of the marriage, the supported spouse's skills/ability to get back into the job market. The court has final say. If you were a stay at home parent, dropping out of the job market for a period of time, and perhaps helping to advance the career of your spouse, you will be happy we have alimony in California.

Prenuptial Agreements: I strongly recommend that many of you enter into a **Prenup** before getting married, that way you can have the best of both worlds! You will have clarity on income and assets, spousal support or not. (For some of you already married, I'd advise entering into a **Postnup**.) Please know that there are many ways you can structure Prenups/Postnups. They do not have to be all or nothing agreements. You can clarify that specific assets are to be separate property no matter if earnings or labor go into them, such as that home you purchased previously but in which you both reside, or the business you built up but now is the primary income for your household, or the LLC you own with your family. You can still build community property

Practical Considerations re Getting Married:

Here are some practical considerations: (Please note- for the tax issues you must have a good tax preparer do some calculations for you, or talk to you about your particular situation.)

Practical Pros: (Please note- many of these will apply if you are registered as domestic partners in CA):

- If one of you is a state or municipal employee, and thus you would be entitled to benefits such as health care and pension;
- If one of you is expecting or adopting a child;
- If you are a stay at home parent and your partner has the sole income;
- If you gave up your career to support the career of your partner;
- You will probably save money on income taxes if one of you stays home and takes care of the children, and the other makes all of the income;
- Your taxes will cost less to prepare now and won't be so complicated;
- If you want to avoid reassessment and an increase in property taxes on half of your California real estate upon death;
- If you want to put your partner on title to any real estate;
- Your partner is not a U.S. citizen;
- Your estate is over \$5 mil;
- You or your partner is in the military (ah, how times have changed);
- The other benefits to be gained are contained in the previous discussion re DOMA, and are numerous (some say there are over 1000).

Think Twice and Obtain Good Professional Advice:

- If one of you has serious debt, or might, or is prone to debt, as both partners' assets could be subject to attachment;
- If one of you will try to qualify for financial aid, scholarships, or public aid of any kind, as both incomes will be considered;
- Your income taxes will probably go up if you both work and make decent incomes;
- If you have a complex financial situation, or you are worried about the tax issues, or you don't want to deal with filing taxes jointly (but remember you can draft a PreNup);
- Everything you each earn and acquire from those earnings is community property and would have to be divided 50/50 upon dissolution (but remember you can draft a PreNup);
- You might have to pay spousal support if you were to divorce (but again, the PreNup).

Adoption of Your Spouse's (Birth Mother's) Child:

If you're never leaving this state, and you are legally married or getting legally married, then you do not need to adopt the biological child of your partner (step-parent adoption), as you're both named on the birth certificate, and according to California law, you are the presumed parent of the child born during the marriage. The federal government will have to recognize you as a parent as long as you are living in a marriage recognition state.

If you are even thinking about moving out of state to a non-recognition state, then you **must** do a step-parent adoption. (That is the official name, not a second parent adoption.)

Next Steps For Those Already Married or Once You are Married:

- Notify the proper **HR** or other department at your place of employment;
- Refill out **beneficiary forms** on every asset/account, checking the "spouse" box;
- Notify insurance companies** and the like which will entitle you to a reduction in fees;
- Redesign your estate plan** so that you are identified as spouses if you aren't already, and for most of you, have a **joint marital trust** drafted instead of your individual trusts.