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Washington Domestic Partnership:
Update for Family Law Practitioners

The 2009 Domestic Partnership Expansion Act was signed into law on May 18, 2009, and was to take effect on July 26, 2009. However, on July 25, 2009, signatures were submitted to the Secretary of State in support of proposed Referendum 71, which if placed on the November 2009 ballot and approved by the voters would repeal the Domestic Partnership Act. The signatures are being counted and verified at present. As a result, the 2009 Expansion Act is not in effect and will remain in limbo, until the Secretary of State determines that the measure did not qualify for the ballot or the measure is defeated by the voters in November.

Further, it is important to note that statutory amendments enacted through the 2009 Expansion Act which confer financial benefits on registered domestic partners, are not scheduled to take effect until January 1, 2014. These provisions primarily concern retirement benefits for state employees.

A Brief History of Domestic Partnerships in Washington

2007 Domestic Partnership Act: *The Initial Extension of Legal Rights to Domestic Partners*

Washington's historic Domestic Partnership Act, sponsored by Rep. Jamie Pedersen and Sen. Ed Murray, was signed into law on April 21, 2007. The Act established a domestic partner registry and amended certain state statutes to extend to state-registered domestic partners a portion of the legal rights already enjoyed by married couples. The legal rights extended to state registered domestic partners in the initial Act (which did not apply directly to family law, but involve issues that can arise in family law practice) included:

- Hospital visitation with an ill or injured partner;
- Providing informed consent to medical treatment for an incapacitated partner;
- Standing to bring a lawsuit for damages for a deceased partner's wrongful death;
- Authorizing a deceased partner's autopsy;
- Controlling the disposition of a deceased partner's remains;
- Making anatomical gifts for a deceased partner;
- Inheriting from a deceased partner through intestate succession;
- Administering a deceased partner's intestate estate;
- Being listed on a deceased partner's

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death certificate.

Creation of Domestic Partnership

Domestic partnerships are registered by paying a filing fee and submitting a notarized Declaration of State Registered Domestic Partnership to the Office of the Secretary of State. In the Declaration, the partners-to-be must attest that they meet the six criteria:

1. sharing a common residence;
2. both partners are at least 18 years of age;
3. neither partner is married to or in a state-registered domestic partnership with another person;
4. each partner is capable of consenting to the partnership;
5. the partners are not closer relatives than second cousins;
6. both partners are of the same sex, or one is at least 62 years of age.

A Certificate of State Registered Domestic Partnership is issued and the Department of Health, Center for Health Statistics is notified.

Termination of Domestic Partnership

Under the 2007 Act, termination of a state-registered domestic partnership required only payment of a fee and submission of a Notice of Termination (either signed by both parties, or signed by one party and properly served upon the other) to the Secretary of State. Ninety days after receiving the Notice and fee, a Certificate of Termination of Domestic Partnership was issued, and the Department of Health, Center for Health Statistics was notified. State-registered domestic partnerships were automatically terminated upon the parties' subsequent marriage to one another or either party's marriage to another person, provided the marriage was recognized as valid in Washington. Note that the termination procedure was revised substantially in 2008, as discussed below.

2008 Domestic Partnership Expansion Act

The 2008 Domestic Partnership Expansion Act was signed into law in March 2008 and took effect June 12, 2008. This Act amended an additional 170 state statutes to expand the legal protections applicable to state registered domestic partners. These protections, which are too numerous to list with particularity in these materials, are significant in that they included the extension of Washington's community property law to state-registered domestic partnerships, effective from the date of the initial registration or June 12, 2008, whichever is later. The 2008 Expansion also extended the application of the "marital exemption" for the state's real estate excise tax, the "homestead" exemption, the family support statute and statutes concerning property tax deferral to state registered domestic partners.

Dissolution of Domestic Partnership is created

With the 2008 Expansion Act, the procedure for terminating a state registered domestic partnership was significantly altered. Automatic termination no longer occurs upon either parties' marriage to another person. However, the partnership is automatically terminated upon the party's marriage to one another, provided the marriage is recognized in Washington. Instead, except under very limited circumstances, state-registered domestic partners must use the Superior Court dissolution of marriage process to terminate the partnership.

The state-promulgated mandatory family law forms now have been updated to reflect their applicability to dissolutions of state registered domestic partnerships. However, the requirement that state registered domestic partners use the dissolution process to terminate the partnership raises troubling issues for partners who relocate from Washington to another state where the partnership is not recognized. The new state may not permit dissolution of the partnership under its laws. And, once the partners have relocated

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from Washington, this state may lack jurisdiction to dissolve the partnership. Clients considering registered domestic partnership should be advised about these potential dissolution issues.

Maintenance, Attorney Fees, Parenting Plans, Child Support Available

With the 2008 expansion, courts dissolving state registered domestic partnerships are now authorized to award maintenance and attorney fees. The court is also authorized to make a fair and equitable distribution of the assets and liabilities of the partners. As is the case with marital dissolution, separate and community property is before the court for division. This is a marked distinction from the common law applicable to meretricious/committed intimate relationships, which limited the court's authority to property acquired during the relationship, and prohibited the distribution of separate property.

Significantly, the 2008 Expansion Act also authorized the court, in dissolving a state registered domestic partnership, to enter a Parenting Plan and order child support for any minor child of the domestic partnership. However, the 2008 Act did not amend the Uniform Parentage Act, RCW 26.26. The 2009 Expansion Act, currently in limbo, does amend the parentage statute. Those amendments are discussed below.

THE 2009 DOMESTIC PARTNERSHIP EXPANSION ACT: "EVERYTHING BUT MARRIAGE"

The 2009 Domestic Partnership Expansion Act – called the "Everything But Marriage" law – created close to full parity for registered domestic partners. The 2009 Act extends all of the approximately 500 state-conferred rights and responsibilities of married spouses to state-registered domestic partners by substituting the words "spouse or domestic partner" where "spouse," "husband" or "wife" occurs in the existing statute. The rights and responsibilities the 2009 Act extended to registered domestic partners are far too numerous to list here.

The 2009 Expansion Act added a section to RCW chapter 26.60 which clearly states

> *It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses. Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a state registered domestic partnership, related in a specific way to another individual. The provisions of this act shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.*

For the family law practitioner, the chief "issue to watch" when the 2009 Expansion Act is implemented will involve the Act's impact on the determination of parentage for children born to registered domestic partners. That issue is discussed below, followed by a discussion of portability and jurisdiction issues.

THE 2009 DOMESTIC PARTNERSHIP EXPANSION ACT AND PARENTING – MORE QUESTIONS THAN ANSWERS?

With the 2008 Expansion Act, registered domestic partners gained the right to have the court establish a Parenting Plan and order child support upon dissolution of the partnership. The availability of these remedies assumed, however, that both partners were already legal parents of the involved children. The 2008 Act did not amend the Uniform Parentage Act, Washington's parentage statute. For registered domestic partners who were not both the legal parents of their children, the

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availability of these dissolution remedies fell short. The 2009 Act, if implemented, amends the Uniform Parentage Act to enable the court to determine parentage for children born into the domestic partnership. However, as set forth below, the 2009 Act's broad language leaves many questions unanswered where parentage is concerned.

Establishment of Parentage

The 2007 Domestic Partnership and 2008 Expansion Acts did not address the determination of parentage for children born to registered domestic partners. The 2009 Expansion Act does address parentage. However, it does so in a "broad brush" way which potentially raises as many questions as it answers.

The 2009 Expansion Act provides in its opening section:

> NEW SECTION 1 - A new section is added to chapter 26.60 RCW to read as follows:
> It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses. Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a state registered domestic partnership or because the individual is or was, based on a state registered domestic partnership, related in a specified way to another individual. The provisions of this act shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.

With regard to parentage, the Act does not amend Washington's Uniform Parentage Act ("UPA") on a section-by-section basis, but simply provides:

> NEW SECTION 67- A new section is added to chapter 26.26 RCW to read as follows:
> For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement this act, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

It is difficult to know how this broad language will be interpreted in light of portions of the UPA that key on biological and genetic relationships. The broad language mandates treating children of domestic partners the same as children of married people, and domestic partners the same as spouses, with regard to parentage. Taking a conceptual approach, children born to registered partners should be treated as the legal children of both parents from the time of birth, with the presumption becoming conclusive as to the parents after two years.

While reading gender neutral language into many of the provisions appears to accomplish just that, the original language of many UPA sections is clearly based on the existence of a *theoretical possibility* that the child is the genetic child of the husband. Given this, some sections of the UPA are written in a manner that renders them inapplicable to same sex couples even when gender-neutral and marital-neutral terms are substituted. For example, Acknowledgments of Paternity are only available to "a man claiming to be the fa-

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ther of the child conceived as the result of his sexual intercourse with the mother." Even if gender-neutral terms are substituted into this definition, a same sex partner cannot claim that the conception is the result of sexual intercourse between the partners. Similarly, the assisted reproduction sections of the UPA refer to "a child born to" a woman and a "wife who gives birth."

Given the uncertainty of interpretation, it is a risky proposition for lesbian and gay couples to rely on parentage established solely through marriage (available in an expanding group of the New England states, Iowa, California for a time, and foreign countries, including Canada), civil union (Vermont, Connecticut, New Jersey, New Hampshire) or domestic partner registration (California, Oregon and Washington and other jurisdictions in the future), because it is not clear how other jurisdictions, many of which do not recognize legal relationships between same sex partners, will treat parentage established through such status. This is particularly true because most states have Defense of Marriage Acts (DOMAs), and 29 states have constitutional amendments prohibiting marriage between same sex couples or recognition of marriage-like statuses.

Until there is greater uniformity among states, at least with regard to full faith and credit and recognition of parentage established based on status in one state, same sex couples should be advised in the strongest terms to secure the legal parent-child relationship through completion of a second parent adoption.

Parenting Plan Available upon Dissolution of Domestic Partnership Where Both Partners are Already Legal Parents

The 2008 Expansion Act created a clear, uniform *process* for registered domestic partners who have children in common to use in dissolving their partnership and obtaining a parenting plan and child support order. Registered domestic partners with children in common can only dissolve their partnership by filing for dissolution in Superior Court using the same process that married couples use to dissolve their marriages.

Until this expansion, there was no clear process for separating same sex couples who needed to divide property and also had children in common. The process varied from county to county and sometimes within a courthouse. Often such couples would have to file two separate actions, seeking establishment of a parenting plan and child support in one and division of quasi-community property in the other, and then bring a motion to consolidate. Since 2008, it is clear that registered domestic partners with children in common will be able to resolve all of their issues in one case, which should be treated by the Superior Court in the same way that it treats all other dissolution cases (in terms of judge assignment, case schedule, family law motion rules, etc.).

In addition, the state-mandated form Petition for Dissolution of Domestic Partnership also creates an easy way to simultaneously request that the court establish one partner as the *de facto* parent of children, when the legal criteria for such a determination are met.

Prior to the 2009 Expansion, determination of *de facto* parentage was the only remedy available to establish parentage for registered domestic partners who had not completed a second parent adoption. If the 2009 Expansion is implemented, the new mandatory form should allow parties who are dissolving domestic partnership to allege that children are children of the partnership and establish parentage on that basis. In some cases, and until it is clear how the new law and UPA will interpreted together, it may make sense to plead in the alternative.

Caveat

As explained above, co-parenting registered domestic partners should not rely on parenthood based on their registration status. Moreover, co-parenting same sex couples should not rely on the existence of the *de facto* parent doctrine or its inclusion on the mandatory forms to establish a parent's legal status. *De facto* parent

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doctrine is a retrospective remedy, which should only be relied on as a last resort. Second parent adoption is the best way of ensuring both parents' legal relationship will be recognized, even outside of Washington.

Issues to Watch: Portability

Whether domestic partnership rights and responsibilities will be recognized and enforced in other states is far from clear. Clients who are registering as domestic partners should be counseled in the strongest possible terms that they still need to protect their relationships and rights with all of the available documents (durable powers of attorney, durable medical powers of attorney, advance directives, wills, hospital visitation authorization, documents regarding autopsy and disposal of remains, etc.).

One compelling argument advanced in support of same sex marriage is the need to protect the children of gay and lesbian couples by ensuring that the parent-child relationship is recognized. It is, indeed, a compelling interest and an important long-term goal. Unfortunately, because of the existence of federal and state DOMAs, the huge variation and unpredictability of family law from state to state, and the mobility of families today, married same sex partners and those with civil unions and domestic partnerships should not rely on the existence of their marriage/ union/partnership to ensure that children born during the marriage/ union/partnership are recognized legally as the children of the non-biological parent.

In theory, children born to a state-recognized couple should be presumed to be the children of the couple. Indeed, California's Family Code section 297.5 specifically provides that "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses." Similarly, Vermont law provides an automatic presumption that a child born to a same sex couple who have entered into a civil union has a legal parent/child relationship with both parents. VT. STAT. ANN. tit. 15, § 1204(f). Likewise, as discussed above, Washington's 2009 expansion of the Domestic Partner Registration Act purports to accord parental status on both partners.

However, if the couple breaks up and the biological parent moves to Mississippi or Florida with the children, there is no guarantee, and in fact it is doubtful, that Mississippi and Florida courts will honor and enforce Vermont or California law. And, while one might argue that Washington remains the home state and retains jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to determine custody and visitation issues, if the new state declines to recognize the non-biological parent as a parent, then there is no remaining "parent" in the original state and it would therefore lose its status as the home state.

Indeed, that is the very ruling made by a Virginia trial court judge in a case involving a lesbian couple with a Vermont civil union. The biological mother initially filed for dissolution of the union in Vermont, waived her right to challenge her former partner's claim to parentage, and requested that her former partner be awarded visitation. Later, when the biological mom was not happy with the Vermont court's ruling, she initiated a second custody case in Virginia, where the trial court ruled, pursuant to the Virginia Affirmation of Marriage Act, that the biological mother was the sole parent; that the Vermont court's rulings were null; and that Virginia had sole jurisdiction to determine custody issues regarding the child. Ultimately the Virginia Court of Appeals and Supreme Court overruled the trial court and allowed the Vermont orders to be registered and enforced (*Miller-Jenkins v. Miller-Jenkins,* 49 Va. App. 88, 637 S.E.2d 330 (2006), *cert. denied,* 127 S. Ct. 2130, 167 L. Ed. 2d 863). However, the case has now involved appeals to both states' Supreme Courts and a

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petition for certiorari is pending on a second Virginia appeal (*Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 2006 VT 78, 912 A.2d 951 (2006); *Miller-Jenkins v. Miller-Jenkins,* 276 Va. 19, 661 S.E.2d 822 (2008), *cert. pending*).

Looking more specifically at Washington, even if the 2009 Domestic Partner Act becomes effective, and even if there is further legislation resolving the ambiguities as to when parentage is established for children born to registered domestic partners, it would be foolhardy to rely on the Act's portability to other states. Thus, couples should continue to complete second parent adoptions even if they have been married in a state which allows same sex marriage or have a civil union or registered domestic partnership from a state which addresses parentage. (While there is no absolute guarantee that states will give full faith and credit to second parent adoptions, it seems less likely that a court will decline to recognize a valid adoption decree granted by another court than that one of the 39 other states with a state DOMA will decline to recognize a marital presumption. Indeed, there are cases from several states (e.g., Nebraska, North Carolina, Virginia) which are themselves hostile to adoption by lesbian and gay couples, which hold that full faith and credit must be accorded to a valid second parent adoption granted by another state. *See Russell v. Bridgens,* 264 Neb. 217; 647 N.W.2d 56 (Neb. 2002). Likewise in *Finstuen v. Crutcher,* 496 F.3d 1139 (10th Cir. 2007), the Tenth Circuit struck down an Oklahoma law which prohibited recognition of adoptions by same sex parents from other states.)

CONCLUSION

Passage of the Domestic Partnership Act and subsequent expansions has done a great deal to create stability for the many thousands of Washington couples who cannot solemnize their relationships through marriage. Washington is now near the forefront of domestic partnership law. The chapter is not yet closed, however. Given the current level of uncertainty, family law practitioners should exercise care in advising clients considering state-registered domestic partnerships. Clients should be made aware not only of the rights and responsibilities they will assume as state-registered domestic partners, but of the unanswered questions which continue to exist.

ABOUT THE AUTHORS

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