

II. THE STATE'S SEPARATE SYSTEM HAS CREATED LEGAL UNCERTAINTY AND CONFUSION, WHICH THE JUDICIAL BRANCH MUST UNTANGLE.

A. Despite The Legislature's Express Statement That Domestic Partners Shall Have The Same Legal Rights And Duties As Spouses, The First District Court of Appeal Was Uncertain Whether The Legislature Intended The Putative Spouse Doctrine To Apply To Domestic Partners.

Even though the Legislature attempted to confer the same rights on domestic partners as spouses enjoy, the existence of a separate status undercuts this intention and inevitably causes confusion on the part of courts about how to apply the law. In *Velez v. Smith*, for example, the First District considered whether the "putative spouse doctrine" could apply in parallel fashion to a domestic partner who believed in good faith, albeit incorrectly, that the domestic partnership was valid. (*Velez v. Smith, supra*, 142 Cal.App.4th at 1172-74.) Appellant Lena Velez and her partner Krista Smith filed a declaration of domestic partnership with the City and County of San Francisco in 1994. (*Id.* at 1159.) Thereafter, they held themselves out as domestic partners, living together, purchasing property together, and maintaining joint bank accounts. (*Ibid.*) Through Smith's employer, Velez obtained health coverage and was listed as an alternate payee of Smith's retirement benefits. (*Ibid.*) The couple never registered their partnership with the State of California. (*Ibid.*)

In 2004, Smith filed with the San Francisco County Clerk and sent to

Velez a “Notice for Ending a Domestic Partnership.” (*Velez v. Smith*, *supra*, 142 Cal.App.4th at 1159.) Velez then filed a petition for dissolution in the Mendocino County Superior Court. (*Ibid.*) Smith objected that the petition was “procedurally defective,” contending the court had no jurisdiction to proceed. (*Ibid.*) The court granted Smith’s motion to strike the petition, finding the petition lacked a legal basis. (*Id.* at 1160.) The First District agreed, finding the superior court lacked jurisdiction over the dissolution proceeding because no valid domestic partnership was ever registered with the Secretary of State, and in any event, Smith had terminated it before the effective date of AB 205. (*Id.* at 1167-69.)

Velez argued unsuccessfully that she had standing to proceed with her dissolution action as a putative domestic partner. Under the putative spouse doctrine, if a marriage is invalid due to some legal infirmity, but one or both the parties believed in good faith that the marriage was valid, a court may declare the party or parties to have the status of a putative spouse. (Fam. Code § 2251, subd. (a)(1).) Thus, a party to an invalid marriage may be entitled to quasi-marital property rights if he or she can establish status as a “putative spouse” pursuant to Family Code section 2251. (Fam. Code § 2251, subd. (a)(2).) The putative spouse doctrine serves to “protect expectations in property acquired through the parties’ joint efforts.” (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 108.) The State affords to putative spouses protection similar to that afforded married

couples, in contrast to unmarried cohabitants, who receive no such protection. (*Elden v. Sheldon, supra*, 46 Cal.3d at 274-75 (quoting *Nieto v. City of Los Angeles, supra*, 138 Cal.App.3d at 470-471).)

The *Velez* court was reluctant to recognize a putative domestic partner status in the absence of any statutory authority showing the Legislature intended such rights to apply to domestic partners, despite the Legislature's mandate that domestic partners would share the same rights and duties as spouses under the law "whether they derive from statutes, administrative regulations, court rules, government policies, common law, or other provisions or sources of law." (*See Velez v. Smith, supra*, 142 Cal.App.4th at 1173-74; Fam. Code § 297.5, subd. (a).) The court did not hold merely that the putative spouse doctrine did not apply based on the particular facts in the case; rather, the court held the doctrine would not be applicable under any set of facts, stating:

The Domestic Partner Act seeks to create 'substantial legal equality between domestic partners and spouses,' but *nothing in the statutory scheme includes within the enumerated rights granted to domestic partners any form of putative spouse recognition.* [Citation.] Despite the most recent amendments to the domestic partnership laws, domestic partners are not in all respects treated the same as spouses.

(*Velez v. Smith, supra*, 142 Cal.App.4th at 1173 (emphasis added).) The court went on to conclude, "*given the different and less stringent requirements* for formation of a domestic partnership, the Legislature may not have wanted to create a putative domestic partnership status" (*Id.*

at 1174 (emphasis added).)

The *Velez* case illustrates the difficulty of applying the rules governing marriage to something that is not marriage. The Legislature did not specifically address whether it intended the putative spouse doctrine to apply to domestic partners. Even so, the Legislature's statements in Family Code section 297.5 are a strong mandate to treat domestic partners the same as spouses under California law, unless specifically noted otherwise. Nevertheless, the *Velez* court was uncertain whether the Legislature intended to create an analogous "putative domestic partner" doctrine in the absence of specific legislative guidance on this point.

The *Velez* court also focused on the "different and less stringent" requirements for formation of domestic partnerships as an indication that the Legislature did not intend the putative spouse doctrine to apply to domestic partners. This reasoning confirms the second-class status of domestic partnership, and presents even greater potential for confusion and uncertainty if it were followed in other instances where the Legislature did not specifically state that a particular right applied. By focusing on the "less stringent" requirements as a reason to deny rights to domestic partners, the court affirmed that domestic partners enjoy a lesser status than married couples, and accordingly, fewer rights.

This issue is likely to present itself again. As the Rymer Respondents note, the reasoning of *Velez* is already being challenged in

another case pending before the Fourth District, *Ellis v. Arriaga* (Super. Ct. Orange County, 2007, No. 06D008042) (G038437, app. pending). (Rymer Respondents' Consolidated Supplemental Reply Brief, pp. 5-6, fn. 5.) As long as the State continues to exclude same-sex couples from marriage and allow them only domestic partnership, courts will remain confused about how to apply the law governing marriage to individuals who are not married. Only if same-sex couples are allowed to marry will this uncertainty be resolved.

B. Despite The Legislature's Express Statement That Domestic Partners Shall Have The Same Legal Rights And Duties As Spouses, The Orange County Superior Court Concluded Domestic Partnership Is "The Functional Equivalent Of Cohabitation."

Courts do not treat domestic partnership as seriously as they do marriage. In *Garber*, the Orange County Superior Court was asked to determine whether a marital settlement agreement ("MSA") should be set aside on the ground that ex-wife Melinda failed to disclose her registration as a domestic partner, thereby cutting off ex-husband Ronald's obligation to pay spousal support. (*Garber v. Garber* (Super. Ct. Orange County, 2007, No. 04D006519) (G039050, app. pending).) Following dissolution of a marriage, a party's obligation to pay spousal support terminates upon the death or remarriage of the other party, unless otherwise agreed in writing. (Fam. Code § 4337.) In contrast, if the party entitled to support does not remarry but merely cohabitates with "a person of the opposite

sex,” the obligation to pay support does not terminate automatically. In that circumstance, the court has discretion to modify or terminate support upon a showing that the circumstances have changed. (Fam. Code § 4323, subd. (a)(1).) The party seeking to modify or terminate support has the benefit of a presumption of a decreased need for support, but the automatic termination provision of section 4337 does not apply. (See Fam. Code §§ 4323, subd. (a)(1), 4337.)

Irrespective of whether Melinda failed to disclose her status, the court expressly found:

A Registered Domestic Partner is not the equivalent of a marriage. It is the *functional equivalent of cohabitation*.

(Statement of Decision, *Garber v. Garber*, attached as Exh. 3 to City and County of San Francisco’s Supplemental Request for Judicial Notice (hereafter “CCSF Supp. RFJN”) (emphasis added).) As a result of this finding, Ronald’s Motion to Set Aside Judgment and MSA would have to be analyzed under Family Code section 4323, not section 4337.² (*Id.*, Exh.

² Campaign for California Families (“CCF”) suggests the dispute in *Garber* revolved around a contractual issue, specifically, the meaning of the “no modification” clause in the MSA. (Campaign for California Families’ Supplemental Brief In Response to June 20, 2007 Order, p. 4, fn. 1.) Therefore, CCF concludes, *Garber* does not signify a gap in the rights of married couples and registered domestic partners. (*Id.*, p. 4, fn. 1.) CCF overlooks the fact that to reach the issue of whether Ronald waived his rights under Family Code section 4337 by signing the MSA, the court first had to determine whether section 4337 applied. Since the court found that it did not, there was no need to decide whether Ronald waived his rights under section 4337. Thus, CCF is incorrect that *Garber* signifies no

3 to CCSF Supp. RFJN.) The court ultimately ordered Ronald to continue paying support. (Dolan, *Alimony Provides a Same-Sex Union Test*, L.A. Times (July 22, 2007), available at <http://www.latimes.com/news/local/la-me-gaywed22jul22,1,5066981.story?page=1&ctrack=1&cset=true&coll=la-headlines-california>.)

As in *Garber*, courts may confuse the status of registered domestic partners with that of unmarried cohabitants, in the absence of express language that the law in question applies to domestic partners. But, the Legislature did not draft (and could not have drafted) AB 205 in this manner; courts often have only Family Code section 297.5 to rely on in determining if spousal rights and duties apply to domestic partners. Nevertheless, as illustrated by *Velez* and *Garber*, the existence of a separate legal status for same-sex couples sends an inherently contradictory message that has caused, and will continue to cause, judicial confusion.

The confusion evident in *Velez* and *Garber* naturally results from the attempt to sever marital “rights” from marital “status.” The common understanding of “marriage” includes not only property and other substantive rights but also intangible benefits associated with the State’s bestowal of marital status. (See *Goodridge v. Dept. of Public Health* (2004) 440 Mass. 309, 322-26 [798 N.E.2d 941] (discussing the tangible

difference in rights. In any event, *Garber* and *Velez* are significant primarily because they demonstrate the courts’ uncertainty about how to apply the law to domestic partners.

and intangible benefits of marriage).) By refusing to marry same-sex couples and allowing them only domestic partner registration, the State bestows a different and lesser status upon them. The State's deliberate withholding of marital status allowed the court in *Garber* to conclude that domestic partnership was akin to cohabitation. If Melinda Garber had married her same-sex partner, no such confusion would have existed.

III. UNLIKE MARRIAGE, DOMESTIC PARTNERSHIP IS NOT UNIVERSALLY UNDERSTOOD.

Confusion over domestic partnership appears everywhere, not just in the courts. Domestic partnership is confusing to citizens and businesses alike, because it is not immediately recognized and understood, as marriage is. Individual members of same-sex couples report that they desire marriage in part because other marriage-like relationships are not universally understood by others in society, or given the same level of respect. (Rymer Respondents' Appendix, Case No. A110451, p. 89, ¶ 11 [Rymer Decl.], p. 107, ¶¶ 11-12 [Adams Decl.], p. 136, ¶¶ 15-16 [Davis Decl.] & p. 144, ¶ 24 [Beach Decl.]; *see also* Kelley, *Equality Elusive Under New Jersey Civil Union Law*, *New York Times* (Apr. 13, 2007) Westlaw, 2007 WLNR 7046089 (after being told customer was having a civil union, saleswoman inquired, "Oh, is that some kind of business dinner?").) This basic lack of understanding creates difficulties for same-sex couples, who must constantly explain their relationships to others.

Even individual members of same-sex couples do not necessarily understand what domestic partnership entails. As the *Velez* case illustrates, some individuals may fail to grasp the significance of state registration as opposed to registration with a municipality, leading them to believe they have more rights than they actually do. Conversely, because domestic partnerships are viewed as less substantial relationships than marriage, some individuals may fail to appreciate the seriousness of registering and the complexity involved in dissolving the partnership. (See Brevetti, *Dissolving Partnerships is Complicated Process*, San Mateo County Times (Jan. 14, 2007) Westlaw, 2007 WLNR 775584 (partner had “no clue” what a serious step domestic partnership was until dissolution).)

The State’s construction of separate systems for marriage and domestic partnership fosters confusion regarding the scope of domestic partnership rights in business contexts as well. It is not always clear whether employers must extend the same benefits to domestic partners as they do to spouses. (Cal. Domestic Partnerships (Cont.Ed.Bar 2007) § 8.2, p. 255 (“Counsel who advise clients concerning rights and obligations under employee benefit plans must carefully examine plan provisions and the requirements of state and federal law to determine whether extension of rights to domestic partners is mandatory, permitted, or prohibited, rather than relying on the broad mandate of DPRRA[.]”).) Confusion about how the law applies to domestic partners may also lead escrow officers and title

companies to resist the efforts of registered domestic partners to take title as “community property.” (Cal. Domestic Partnerships (Cont.Ed.Bar 2007) § 7.22, p. 233; *see also* Pender, *Marriage and Money – Unfamiliar Territory*, San Francisco Chronicle (June 24, 2007), p. C-1, (question from reader whose escrow officer was not sure whether “community property with right of survivorship” was available to domestic partners).)

The lesser status accorded to domestic partnerships may also lead to discrimination by health care providers and hospital staff, who do not understand that registered domestic partners are supposed to enjoy the same rights and duties as spouses. (*See, e.g.*, Hagedorn, *Couple: Hospital’s Refusal of Visit Was Discrimination*, The Bakersfield Californian (Mar. 7, 2007), *available at* <http://www.bakersfield.com/619/story/103906.html> (reporting that an emergency room security guard at San Joaquin Community Hospital refused a registered domestic partner access to her and her partner’s child).) Such misunderstanding is particularly harmful because it affects the ability of registered domestic partners to care for their children. Discrimination by health care providers and hospital staff is likely to continue as long as the State refuses to allow same-sex couples to marry, because the State’s exclusionary marriage laws invite others, such as the San Joaquin Community Hospital security guard, to question the rights of domestic partners.

These examples illustrate that domestic partnership is not universally

understood, increasing the likelihood of future litigation and the difficulty of resolving such litigation. Even Assemblymember Jackie Goldberg, the author of AB 205, recently acknowledged that domestic partnership is confusing, and continues to pose new problems:

It puts gay couples in a distinct system that is *inferior and confusing*. Without the universal, understandable and esteemed status of 'marriage,' same-sex couples are not treated equally.

...

This session, the Legislature is considering three bills to resolve other gaps, ambiguities and inequalities—and that's not unusual. We have needed multiple pieces of legal patchwork every year since 2001, when domestic partnerships went into effect.

I am convinced that it is time for the obvious solution: Give same-sex couples equal access to civil marriage.

(Goldberg, *A Wedding Sure Beats a Contract*, Los Angeles Times (Aug. 10, 2007, Westlaw, 2007 WLNR 15486714) (emphasis added).)

Assemblymember Goldberg's conclusion that equal marriage rights must replace domestic partnership is unavoidable. It is unfair to require same-sex couples to litigate their rights, and courts to adjudicate them, in the face of such uncertainty.

IV. THE UNCERTAINTY AND CONFUSION CREATED BY THE STATE'S SEPARATE SYSTEM UNFAIRLY BURDENS SAME-SEX COUPLES AND THE COURTS, AND CANNOT BE CORRECTED THROUGH FUTURE LEGISLATION.

Although the Legislature intended to confer the same rights and duties on domestic partners as on same-sex couples, the State's refusal to

grant the right to marry has created confusion about how those rights should be applied. Gay and lesbian individuals disproportionately bear the burden of resolving these issues through litigation. Members of opposite-sex couples do not have to fight for their rights in the same way that domestic partners do, nor do they have to try to explain to a court how their relationship can exist as “something less than marriage”³ and yet entitle them to the same treatment as spouses.

Requiring same-sex couples to litigate their rights on a case-by-case basis doubly burdens them with the cost of constantly having to adjudicate their rights in court, and the inability to plan effectively for the future. At times, same-sex couples are forced to choose between abandoning their rights and fighting a protracted court battle. For example, in *Koebke v. Bernardo Heights County Club*, *supra*, 36 Cal.4th at 832-36, the plaintiff domestic partners merely sought to play golf on the same terms as married couples at the Bernardo Heights Country Club. Their case went all the way to this Court. California can expect more of such litigation so long as the State’s parallel systems exist. The State’s creation of a separate, inferior status stands as an open invitation for anyone to question the rights of domestic partners. Accordingly, the State’s exclusionary marriage laws also burden the courts, which must spend precious judicial resources

³ (See *Knight v. Superior Court*, *supra*, 128 Cal.App.4th at 31 (concluding “marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership”).)

resolving such challenges.

The State denies gay and lesbian individuals the fundamental right to marry the person of one's choice, contending that an uncertain, separate system that marks them as second-class citizens is an adequate replacement. It is not. It has long been understood that "separate" is not truly "equal." (*Brown v. Bd. of Education* (1954) 347 U.S. 483, 493-95 (rejecting *Plessy v. Ferguson* (1896) 163 U.S. 537); see also *Mendez v. Westminster School Dist.* (D.C. Cal. 1946) 64 F. Supp. 544, 548-51 (enjoining discriminatory school segregation practices on the ground that such practices violate equal protection).) The State can only give same-sex couples who wish to marry equal rights by giving them the right to marry.

The State's suggestion that any "problematic" differences between marriage and domestic partnership can be corrected through future legislation is wrong. No amount of legislative redrafting can correct the inherently confusing message that same-sex couples shall be treated the same as spouses, yet shall not be recognized as married. Moreover, no amount of tinkering with domestic partnership will erase the fact that it creates a second-class status. (*See Opns. of the Justices to the Senate, supra*, 440 Mass. at 1207-08 [802 N.E.2d 565].) This Court should not allow the Legislature to continue attempting to perfect a system that is not capable of ever conferring true equality.

CONCLUSION

The status of marriage cannot be replicated through California's domestic partnership scheme. As cases like *Velez* and *Garber* illustrate, courts struggling with the parallel institutions of marriage and domestic partnership are uncertain how to apply the laws governing marriage to domestic partners. In addition, the practical application of the State's separate system has burdened same-sex couples with an unreasonable degree of legal uncertainty that threatens to affect every aspect of their lives. Same-sex couples should not be burdened with the need to set Supreme Court precedent in order to ensure they have access to the substantive protections afforded to married persons under California law. Nor should California courts be required to expend scarce judicial resources resolving confusion over the rights of same-sex couples, when such confusion could be avoided if the State allowed same-sex couples to marry. Such confusion will inevitably arise, so long as the State continues to impose a second-class status on same-sex couples.

This Court has the opportunity to end the uncertainty and confusion by declaring that otherwise qualified same-sex couples must be allowed to marry. For the foregoing reasons, and for the reasons stated in Respondents' briefs, this Court should reverse the First District Court of

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Appeal and affirm the judgment and writ relief granted by the San Francisco Superior Court.

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McMANIS FAULKNER & MORGAN

Christine E. Peek
CHRISTINE PEEK

Attorneys for Amicus Curiae,
SANTA CLARA COUNTY BAR
ASSOCIATION

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McMANIS FAULKNER & MORGAN

Christine E. Peek

CHRISTINE PEEK

Attorneys for Amicus Curiae,
SANTA CLARA COUNTY BAR
ASSOCIATION