

Tax Decisions & Rulings

Domestic Partners

Same-Sex Partners Not Federal Tax 'Spouses' Despite Overturn of California Marriage Ban

SAN FRANCISCO--The California Supreme Court May 15 threw out the state's ban on same-sex marriage, holding that preventing gay couples from marrying is unconstitutional, but practitioners and officials noted same-sex partners would still not be considered spouses for federal tax purposes (*In re Marriage Cases*, Cal., No. S147999, 5/15/08).

On a 4-3 vote, the court invalidated voter-approved Proposition 22 defining marriage as a union between a man and a woman. The majority's decision prompted three dissents, including one that accused the majority of "legal jujitsu" to justify its position to override voters who approved the initiative in 2000.

"We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples," Chief Justice Ronald George wrote for the majority.

Adopting different terminology--marriage for opposite-sex couples and domestic partnership for same-sex couples--"poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect," the chief justice wrote.

Although domestic partnership law affords same-sex couples "most of the substantive elements embodied in the constitutional right to marry, the current California statutes nonetheless must be viewed as potentially impinging upon a same-sex couple's constitutional right to marry under the California Constitution."

Same-sex marriage opponents have submitted more than 1.1 million signatures for certification for a proposed November initiative that would undo the court's decision.

San Francisco Fight

The court struck down Family Code Section 300(a) created by Prop. 22 defining marriage as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."

The decision comes four years after San Francisco Mayor Gavin Newsom (D) ordered the city to begin providing marriage licenses to same-sex couples.

More than 3,000 marriage licenses were issued to same-sex couples starting Feb. 12, 2004, until the California Supreme Court ordered San Francisco to stop issuing marriage licenses to same-sex couples pending its ruling on the legality of such practice.

The California Court of Appeal in October 2006 overturned a trial court, ruling the California Superior Court erred in finding state laws that define civil marriage as the union between a man and a woman unconstitutional. San Francisco appealed.

Benefits Impact Muted by DOMA

But the impact on the provision of benefits to domestic partners is not necessarily changed with the

court's ruling. Julie Burbank, an attorney with benefits firm Trucker Huss in San Francisco, said most employers have Employee Retirement Income Security Act plans and are covered by the Defense of Marriage Act (DOMA).

"We're subject to the Internal Revenue Code in most cases, and unfortunately, because of DOMA, even though California says a same-sex spouse is a spouse, DOMA says marriage is a union between a man and a woman," Burbank told BNA. "So for purposes of ERISA and the Internal Revenue Code, we still can't read spouse to include a same-sex spouse."

Employers can include employees' same-sex partners in self-funded medical and dental plans, she said. And since California enacted the Domestic Partner Rights and Responsibility Act in 2003, the state has read state law to mean a domestic partner as spouse, Burbank said.

No Federal Tax Change

However, Burbank added, "California law can't change the federal tax code, so while an employer can certainly provide the health and welfare benefits without a problem, the same-sex partners in California will still have imputed income for the employer for code Section 105 and 106."

Employers can still offer such benefits, Burbank said, but "for federal purposes, they're still not a spouse regardless of what California says," and thus have to pay taxes on such benefits.

Any change is up to Congress, which would have to overturn DOMA, "and that's kind of difficult," said William Sweetnam, a partner at the Groom Law Group in Washington, D.C.

The Internal Revenue Service "would not have the authority to do anything that would sort of mirror" the California court's conclusion, said Sweetnam, formerly the benefits tax counsel in the Treasury Department's Office of Tax Policy.

People are still trying to figure out issues such as whether a domestic partner is considered a dependent, Sweetnam said. "And sometimes, even taking the current rules and working your way through the current rules, you're not going to find an easy result. And that easy result can only come if Congress decides it," he added.

The California court's decision is "going to bring some sort of pressure, but I would actually be shocked if in the short run Congress made any sort of change," Sweetnam told BNA.

California enacted legislation that gives registered domestic partners many of the equivalent benefits offered to spouses. S.B. 1827, which took effect Jan. 1, 2007, requires RDPs to file as married either jointly or separately.

This was the first year California same-sex couples could file joint tax returns, but couples had to file separate federal returns, a joint dummy federal return, and joint and separate state tax returns, Burbank said.

Perspectives

"Today's majority has affirmed our Constitution's promise of equality for millions of Californians and their families," said San Francisco City Attorney Dennis Herrera, who noted that seven of California's eight largest cities filed briefs supporting San Francisco.

"Californians consider bans on interracial marriage an embarrassing relic of bigotry--and so does the rest of the country," said Maya Harris, executive director of American Civil Liberties Union of Northern California. "But in 1948, when the California Supreme Court struck down the state law barring interracial marriage, it blazed a brave new path for California and the nation. That decision changed California, and then it changed America," Harris said in a statement.

Gov. Arnold Schwarzenegger (R) said he respects and will uphold the court's decision. "Also, as I have said in the past, I will not support an amendment to the [state] constitution that would overturn this state Supreme Court ruling," Schwarzenegger said in a statement.

Ron Prentice, the executive director of California Family Council, said in a statement that attorneys representing the ProtectMarriage.com coalition will request a stay of the court's decision until the November general election.

Constitutional Issues

The court said the California constitutional right to marry, "while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause."

The court looked to a long line of cases, including 1948's *Perez v. Sharp*, which found that California's statutory provisions prohibiting interracial marriages were inconsistent with the fundamental constitutional right to marry.

"As these and many other California decisions make clear, the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual," the majority said.

'Second Class Citizenship.'

While retaining limits of marriage to opposite-sex couples "is not needed to preserve the rights and benefits of opposite-sex couples, the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children," the court said.

"Furthermore, because of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term 'marriage' is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution that has been established for same-sex couples to be considered a mark of second-class citizenship," the majority said.

As such, retaining the traditional definition of marriage "does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples."

Dissents

Justice Marvin Baxter, in a dissent joined by Justice Ming Chin, said the majority "violates the separation of powers, and thereby commits profound error."

Baxter said, "I cannot join this exercise in legal jujitsu, by which the Legislature's own weight is used against it to create a constitutional right from whole cloth, defeat the People's will, and invalidate a statute otherwise immune from legislative interference. Though the majority insists otherwise, its pronouncement seriously oversteps the judicial power."

The majority "simply does not have the right to erase, then recast, the age-old definition of marriage, as virtually all societies have understood it, in order to satisfy its own contemporary notions of equality and justice," Baxter wrote.

Justice Carol Corrigan in a concurring and dissenting opinion said Californians "should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not."

Corrigan said the majority "improperly infringes on the prerogative of the voters by overriding their decision. It does that which it acknowledges it should not do: it redefines marriage because it believes marriage should be redefined."

San Francisco and the petitioners were represented by Chief Deputy San Francisco City Attorney Therese Stewart; Shannon Minter, National Center for Lesbian Rights, San Francisco; Waukeen McCoy, Law Offices of Waukeen McCoy, San Francisco; and Michael Maroko, Allred, Maroko & Goldberg, Los Angeles.

The state was represented by Christopher Krueger, assistant attorney general, Sacramento, Calif. Gov. Schwarzenegger (R) was represented by Kenneth Mennemeier, Mennemeier, Glassman & Stroud, Sacramento.

Proposition 22 Legal Defense Fund was represented by Glen Lavy, Alliance Defense Fund, Scottsdale, Ariz. Campaign for California Families was represented by Mathew Staver, Liberty Counsel, Maitland, Fla.

Text of the decision  is in TaxCore. 