

SAME-SEX MARRIAGE

by

Clint Heckenberry

Georgetown University Law Center

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Homosexual civil rights threaten American society at its core. Since Lesbians and Gay Men are an affront to the traditional ways our society perceives sexuality, sexual roles, social relationships, family, achievement and happiness, any changes in the American legal system regarding sexual ^{orientation} preference discrimination will have a direct impact upon attitudinal norms.

GAYS AND TRADITIONAL ATTITUDES: NO NUKES

Gay demands for social equality assault the sanctity of the nuclear family since homosexual acts are not precreative. Homosexual acts are *prima facie* "coitus interruptus," which consequently challenges the traditional moral justification for sexual activity. Homosexual activity, like that of premarital or extramarital heterosexual activity, is condemned in part because sexual activity is reserved for the purpose of bearing children within wedlock. In contrast, Lesbians and Gay Men, and the so-called "swinging single" heterosexual, affirm the play and pleasure involved in sexual activity. Singularly, however, homosexuals separate female and male anatomy so that a woman is not dependent on a man, or a man dependent on a woman, for sexual fulfillment. Sexually, as well as emotionally, "a woman without a man is like a fish without a bicycle," and vice versa.

Gays deromanticize the sex act from its Victorian underpinnings to make a sexual encounter part of human experience, not the goal of human experience. Neither Lesbians nor Gay Men exchange vows of eternal, faithful love before they discover their sexual compatibility. Traditional sexual values against premarital sex are meaningless when applied to a

minority legally precluded from marriage by a heterosexually dominated society.

A gay lifestyle, indebted to the women's movement, offers alternative role models of what it means to be a man or what it means to be a woman. Diversity among male and female gays demonstrates how inaccurate stereotypes can be. Whether a man dresses in leather, flannel, LaCoste, pin-stripe or drag, or whether a woman is butch or femme, gays define "masculine" and "feminine" in their own terms and not necessarily as heterosexual society dictates. In offering alternative models, Lesbians and Gay Men challenge heterosexual society to reexamine its own inflexible sex role definitions. For example, the traditional sharp distinction between masculine and feminine has contributed to suppression of homosexual and bisexual urges that most people at some point in their lives experience. Less rigidity in defining sex roles may enable individuals to recognize degrees of homosexuality and heterosexuality in themselves without the guilt or stigma of being thought sexual "deviants".

It ~~therefore~~ is not surprising that gay rights advocacy is met with ^{and fear in} ^{notably among} disdain by many segments of society. Sexual minorities, whether homosexual, bisexual, or transsexual, foster open discussion of "sexuality" in general.

~~As a result,~~ Traditional heterosexual mores and values ^{are intrinsically} ^{will} ^{need to} must also be reexamined in conjunction with any changes in attitude toward Lesbians and Gay Men.

At stake in this confrontation between "moral majority" and Gay rights is an American sexual identity.

RELATIONSHIPS

Homosexuality is not only normal human behavior^①; being gay can lead to a fulfilling relationship. A man's relationship with another man can have the same complexion and complexity as any heterosexual relationship; two Lesbians can experience the full range of human emotions that attests the stability of their alternative lifestyle.

Despite the many similarities of homosexual and heterosexual relationships, it is interesting to note some of their differences. One major difference is the ability of gay couples to communicate openly on what each person is feeling, even if of a highly "private" nature (i.e., sexual performance).

. . . [T]he abysmal lack of knowledge of men by women and of women by men should constantly stimulate communicative interchange, particularly if the men and women are partners in a committed relationship. Yet, this pattern of communicative interchange was notably present in committed homosexual, not heterosexual, relationships, even though the homosexual partners already had the immediate advantage of intragender empathy.⁽²⁾

By necessity a same-sex couple must also address the careful delineations of responsibilities that are often unexplored within traditional heterosexual marriages. Labor within a family unit is commonly divided according to gender. Where there is neither a husband nor a wife, however, the hierarchical and patriarchal concepts of the husband as protector, breadwinner, and head of the household, and the wife as mother, breadbaker, and keeper of the household, are inapplicable. Where both partners are wearing the pants in the family, there is necessarily greater equality, experimentation, and sharing of tasks within the relationship.

Sex role regimentation within a traditional heterosexual relationship is most vividly illustrated by the plight of the "happily" married housewife. Bernard, in "Marriage: Hers and His,"⁽³⁾ observes that the difference in the work of housewives and their husbands eventually has alienating effects on their relationship. Over the years the husband's horizons expand as the wife's contract, with the result that the housewife is susceptible to psychoses and a heightened sense of powerlessness. Bernard then asks: why do women marry at all?

. . . There is a wide variety of reasons: emancipation from the parental home; babies; pressure of social expectations; the absence of any better alternatives.

The real question is not why do young women marry, but why, in the face of all the evidence, do more married than unmarried women report themselves as happy? As, in fact, they do (sic).

The anomaly may be explained by the fact that happiness is interpreted in terms of conformity. Those who do not marry are made to feel failures. Escape from being "an old maid" is one definition of happiness.

Such conformity to the norm of marriage is not merely imposed from the outside. Women have internalized the norms prescribing marriage. And since marriage is set up as the summum bonum of life for women, they interpret their achievement of marriage as happiness, no matter how unhappy the marriage itself may be. 'I am married, am I not? Therefore, I must be happy.'

Another way to explain the anomaly of depressed, phobic, and psychologically distressed women reporting themselves as happy may be that they are interpreting happiness in terms of adjustment. The married woman has supposedly adjusted to the demands of marriage; she is reconciled to them. She interprets her reconciliation as happiness, no matter how much she is paying for it in terms of psychological distress. (4)

In contrast to the "happily" married housewife, Bernard notes "the benign effect of childlessness" on heterosexual couples. Although divorce is more common among childless couples because it is psychologically and emotionally easier if there are no children, and the financial burden on the husband is thereby less onerous, childless marriages that do survive are happier than marriages with children. Mothers far more than childless wives find marriage restrictive; slightly fewer are happy. Far more mothers report problems in the marriage; considerably fewer report satisfaction in the marital relationship; and more feel dissatisfied with themselves. Among husbands, more fathers felt marriage to be restrictive, and more reported problems. Twice as many fathers as childless men felt dissatisfied with themselves; three times as many, inadequate. (5)

The relationship between a wife and husband in a childless marriage

is roughly analogous to that of two homosexual lovers. Although research into long-term Lesbian and Gay male couples is almost nonexistent⁶, it is safe to hypothesize that separation is more common among homosexual lovers (as with heterosexual childless couples) but that gay relationships that do survive are happier than heterosexual marriages with children. For childless couples, both hetero- and homosexual, happiness must be defined differently than [^]at a station wagon, little league and the P.T.A. Childless couples will find personal satisfaction in the relationship or will [^]dissolve the relationship. One element that may contribute to a greater sense of happiness among childless couples is the fact that both partners usually work outside the home and share the household tasks more equally than their child-rearing counterparts.

ROOTS

The roots of sexual preference discrimination, as well as the origins of gender discrimination, may lie less in "heterosexism" and "sexism" and more in society's attempt to ensure familial harmony. Seldom justified in terms of preserving familial harmony as is often the pretext for discrimination against women, gay relationships are denied legal recognition to a large extent because they are biologically incapable of begetting offspring. Homosexual "crimes against nature" essentially are "crimes" because they threaten the survival of the family name. These observations are supported by an examination of cases where states have refused to issue marriage licenses to Lesbian and Gay male couples.

SAME-SEX MARRIAGE

Marriage between members of the same sex is not legally recognized in any American jurisdiction. Some states like California have designated marriage as a personal relation arising out of a civil contract between a man and a woman.⁽⁷⁾ Other states have explicitly barred same-sex marriage.⁽⁸⁾

A number of court challenges in the early 1970's spearheaded increased legislative attention to state marriage laws. Uniformly, the courts had dismissed arguments that the absence of an express statutory prohibition against same-sex marriages indicated legislative intent to authorize such marriages.⁽⁹⁾ Nevertheless, many cases extolled the virtues of the marriage institution, including a 1942 United States Supreme Court decision which affirmed marriage as "one of the very basic civil rights of man" (sic).⁽¹⁰⁾ The Supreme Court reiterated that "among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage.'"⁽¹¹⁾ Clarified legislative direction successfully preempted possible judicial extension of this fundamental right of marriage to homosexuals.

Legislative action was undoubtedly overkill. Denial of a marriage license to two women or two men was consistently held not to violate the Constitution, that in effect there was no constitutional right for two homosexuals to marry each other although the same 'fundamental' right was recognized for legally competent heterosexuals. Challenges to this judicial interpretation have been based at various times on the first, eighth, ninth, and fourteenth amendments to the United States Constitution, as well as the proposed Equal Rights Amendment. Since the Equal Protection Clause of the Fourteenth Amendment has been argued by plaintiffs in all these cases, it will serve as the vehicle for studying same-sex marriage.

THE EQUAL PROTECTION CLAUSE

Under the Fourteenth Amendment's Equal Protection Clause the Supreme Court identified areas for strict judicial scrutiny by asking two questions: 1) was a suspect classification present?^(a) and 2) was a "fundamental" right involved? While states were not prohibited from enacting legislation that affected some people differently from others, states could justify that differentiation only if the different treatment bore a rational relationship to a permissible constitutional purpose (Dandridge v. Williams, 397 U.S. 471 (1970)).

Gradually this standard of review changed. In Reed v. Reed, 404 U.S. 71 (1971), the Court enunciated a standard of substantial relationship to a permissible government purpose. In Craig v. Boren, 429 U.S. 190 (1976), the standard was narrowed to a substantial relationship to an important (not just permissible) government purpose. Finally, the dissent in Kahn v. Shevin, 416 U.S. 351 (1974) propounded a restrictive standard of review where a state had to prove a necessary relationship to a compelling governmental purpose before it could "deny to any person within its jurisdiction the equal protection of the laws" XIV §1.

These recent decisions establishing the standard of review for gender-based discrimination cases could be extended to sexual preference discrimination cases as well. Arthur Silverstein in "Constitutional Aspects of the Homosexual's Right to a Marriage License"^(b) examined whether sexual preference could be labeled as a suspect classification, and, if so, whether homosexuals have a fundamental right to marry.

Silverstein initially identified five features which he theorized were factors in the Court's determination of a classification as "suspect". First, classifications based on attributes which are inherent in the

individual and beyond her/his control are often found to be suspect.⁽¹⁴⁾ Second, groups which are victims of suspect classification are frequently subjects of derogatory stereotypes.⁽¹⁵⁾ Third, a suspect classification occurs frequently in areas where conduct should logically be a neutral factor.⁽¹⁶⁾ Fourth, groups found to be targets of suspect classification have usually been denied access to the political process.⁽¹⁷⁾ And last, groups affected by suspect classification have a history of unjustified unequal treatment.⁽¹⁸⁾ Although the Court continues to take each case as it arises without articulating its reasons for subjecting a particular classification to strict scrutiny, Silverstein concluded that these five features point to the existence of a suspect classification.

FUNDAMENTAL INTEREST

The second part of this two-tier test is the recognition of a basic or fundamental interest. Since "[t]he Fourteenth Amendment makes no attempt to enumerate the rights it was designed to protect,"⁽¹⁹⁾ the Court has had to develop its definition of "fundamental" on a case by case basis. Regarding marriage, the Court has specifically stated that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men(women)."⁽²⁰⁾ The Court, however, has limited this fundamental right to heterosexuals.

The right to marry has always been circumscribed by the legal competency of one or the other of the parties to a marriage contract. Marriages have been invalidated because of affinity,⁽²¹⁾ age,⁽²²⁾ mental capacity,⁽²³⁾ insanity, disease,⁽²⁴⁾ or criminal conviction.⁽²⁵⁾ Denials of marriage licenses to minors, for example, have been based on the inability of adolescents to consent. Similarly, marriage restrictions because of

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an individual's mental retardation have been justified in terms of the lack of consent as well as overriding state interest in preventing heritable disorders and reducing the number^{of} wards of the state.⁽²⁶⁾

Individual Lesbians and Gay Men, on the other hand, are legally capable of marriage. Only when homosexuals desire to marry each other is any prohibition involved. Both parties are able to consent to the contract; no continuing state burden due to hereditary disorders of offspring is arguable since homosexual couples do not reproduce. Homosexuals, otherwise able to perform fully on a contract, are unable to enter into a marriage contract because the subject matter is not a marriage. Despite opinions to the contrary,⁽²⁷⁾ the competency of the individuals seeking to marry is not at stake. The Court in Jones v. Hallahan⁽²⁸⁾ observed:

In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

The Supreme Court tackled an analogous situation in 1967 where a Virginia statutory scheme prevented marriages between persons solely on the basis of racial classifications.⁽²⁹⁾ The state argued that its antimiscegenation statutes did not violate constitutional prohibitions against racial classification because the statutes affected both racial groups equally.⁽³⁰⁾ The Court, however, subjected the Virginia statute to the Fourteenth Amendment's rigid scrutiny to decide that no legitimate overriding purpose independent of invidious racial discrimination justified the racial classification.

. . . To deny this fundamental freedom (to marry) on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.⁽³¹⁾

Although appellants in Singer v. Hara⁽³²⁾ raised the argument that the racial classification in Loving and Perez was analogous to the sexual classification in their case, the Washington Court disagreed. The operative distinction for the Singer Court lay in the relationship described by the term "marriage," that is, the legal union of one man and one woman.

There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.⁽³³⁾

Appellants in Singer further contended that " . . . at the time Loving and Perez were decided, marriage by definition barred interracial marriages and that the Loving and Perez courts changed that definition through their interpretation of the Fourteenth Amendment."⁽³⁴⁾ The Court again rejected this reasoning, reiterating the basic definition of marriage as the legal union of a man and a woman.

If marriage is an enumerated fundamental right, the fact that the relationship is a same-sex marriage is irrelevant. "Indeed, now the question has become whether any restrictions on marriage are valid."⁽³⁵⁾ Nevertheless, homosexuals as a class are deprived of many legal advantages associated with state recognized marriages. A brief investigation of several of these benefits will help demonstrate the strong interest Lesbians and Gay Men have for obtaining a marriage license.

II 6

CHILD CUSTODY

The Court generally considers whether the best interests of the child are served before granting custody of the child to one parent or the other. The Court will avoid placement of the child in a home environment detrimental to her/his welfare. Unfortunately this standard allows great latitude for judicial discretion. The court may meticulously examine an unpopular or alternative lifestyle of a parent in light of a nebulous majority standard of morality. The court may, as the dissent in Bennett v. Clemens⁽³⁾ noted,

. . . impose a standard of morality devised by judges upon parents of a child when a determination must be made concerning the loss of permanent custody of the child . . . Where neglect, abuse, or mistreatment in some manner is absent, the state has no right to inquire into what a parent teaches his child, or with whom a parent allows his child to associate, or the type of environment a parent permits his child to inhabit.

A parent's homosexual tendency is often introduced into a custody battle to prove the parent's "moral depravity or utter lack of moral perception and principle."⁽³⁷⁾ Usually the introduction of such evidence is an attempt to persuade the court that strong societal disapproval of a gay lifestyle has an additional deleterious effect on the child's development.⁽³⁸⁾

The final consideration of the court has been to determine whether the parent is conducting a homosexual relationship in the home where the child resides. The court often is careful to distinguish between a parent's being homosexual and her/his doing homosexual acts.⁽³⁹⁾

. . . At bench, this factor (the mother's homosexuality) is not merely fortuitous or casual, but rather it dominates and forms the basis for the household into which the children would be brought if custody were awarded to (the mother), who does not merely say she is homosexual. She also lives with the woman with whom she has engaged in homosexual conduct, and she intends to bring up her children in that environment.⁽⁴⁰⁾

Should the court find that the Lesbian or Gay Man fails to keep the lever relationship separate from the child, the court in most jurisdictions will grant or change custody to the heterosexual parent.⁽⁴¹⁾ The custody decree generally places "certain conditions on the (parent's) custody designed to safeguard the home environment against possible pernicious influences, including prohibiting defendant's partner or any other (person of the same sex) from living in the family home."⁽⁴²⁾ Even if custody were granted to a Lesbian or Gay Man who is allowed to maintain a lever relationship, the homosexual parent must prove to the satisfaction of the court that s/he is "aware that her (his) homosexual lifestyle could have an impact on (the) children" and that s/he is "intelligently seeking to minimize, if not totally eliminate, that impact . . ."⁽⁴³⁾

In addition, visitation rights of the non-custodied parent are invariably conditioned on the total exclusion of the child from homosexual contact.⁽⁴⁴⁾ Representative conditions have included: 1) the homosexual parent may not cohabit or sleep with any individual other than a lawful spouse (emphasis added)⁽⁴⁵⁾; 2) the child may not visit the parent in the presence of the lever⁽⁴⁶⁾; and 3) the parent will not involve the child in any homosexual activities or publicity⁽⁴⁷⁾.

Despite the preference of the court to place children with their parent, the fact that a parent maintains a relationship with a lever has sometimes sufficed to give custody to the grandparents⁽⁴⁸⁾ or to the state⁽⁴⁹⁾. In one unpublished opinion,⁽⁵⁰⁾ the Court considered evidence from a mother's journal that articulates the dilemma that^a homosexual parent faces in a vast majority of jurisdictions: the choice between the love of her children or the love of her lever.

I don't say that a mother cannot be fit to rear her children even if she is a lesbian, but I wonder if she is fit when she boldly and brazenly sets up in the home where the children are to be reared, the lesbian practices which have been current there, clearly to the neglect of supervision of the children. . . The defendant in her journal, in a moment of infatuated exuberance over the relationship she was establishing with Vicky Dickinson, (wrote) that 'she loved her to a degree where if it became a choice she would have to make, she would give up the children before she would give up Vicky Dickinson.'

The Court then made the decision for the mother by granting custody of the children to their sixty-five year old grandmother.

Where neither parent is involved in a custody battle, such as cases of adoption or foster homes, the Court will not allow placement of a child into a gay environment. A Superior Court in Washington removed a sixteen year old gay youth from a homosexual foster home and placed him in an institution. The Department of Social and Health Services, after exhausting "normal" options, had located the boy in the gay household. The Court declared that:

... substituting two male homosexuals for 'parents' does violence not only to the literal definition of who are parents but offends the traditional concept of what a family is. Legal acceptance or social tolerance of homosexuals does not equate with the state's sanctioning such relationships . . . regardless of how extensively they may wish to emulate 'straight' society or regardless of how well intentioned they may profess to be . . . (The minor) should be encouraged to behave normally regardless of his sexual orientation and to this end neither the Court or the state's institutions should be used by any individual or group to foster or promote personal and highly questionable philosophies and lifestyles that do not have general acceptance in the community. (57)

The desirability of homosexual foster homes is also questioned by Gay Men themselves because homosexuals might be open to allegations of child molestation. (58)

In a curious Louisiana decision that involved both divorce and custody of the children, the court addressed the issue of same sex marriage in a somewhat circumlocutional manner. (59) The court granted a divorce decree and

custody of the children to the father because of the mother's "adulterous lesbianism." The court held

. . .that the same degree of proof is necessary in the case where one party to a marriage is accused of 'homosexual adultery' as where one party is accused of heterosexual adultery.

Adultery has traditionally been defined as voluntary sexual intercourse of a married person with a person other than the offender's spouse. Sexual intercourse, in turn, has been defined as the "carnal copulation of male and female, implying actual penetration of the organs of the latter" (Black's Law Dictionary). The readiness of this court to expand the traditional definition of "adultery" and "sexual intercourse" to homosexual conduct is in sharp contrast to the previous resistance of the courts to expand the definition of "marriage" to homosexual relationships. The Louisiana Court recognized this inconsistency when it referred in a footnote to "non-discriminatory legislation, the import of which allows marriage between persons of the same sex, a relatively new phenomenon in our society."

Legal recognition of same-sex marriages would have a dramatic impact upon child custody cases. In effect, restrictions placed on the gay parent that he or she avoid contact ^{with} another homosexual—and in particular ^{with} the lever—forces the parent to choose between the child or the lever. If the purpose of the court is to ascertain the best interest of the child, the stability of the lever relationship should be evaluated, and not the fact that the relationship is homosexual.

Judge Sedgwick, the first woman appointed to a District Court seat in Minnesota history, applied this new standard in Terrance v. Terrance:

This court does not believe it is necessary to either condemn or condone any relationship, but it is necessary that the Court assess the quality of the relationship between the adults as it affects the child. Some marriages are not stable environments in which to raise children, and some informal relationships are very stable and can provide the emotional, psychological and physical security necessary to raising children. (X)

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Lesbians and Gay Men are not afforded the same opportunity as heterosexual couples for demonstrating their commitment to one another. A heterosexual may remarry, and thus defeat any challenges of being an unfit parent because of her or his premarital sexual relations; a homosexual, on the other hand, may not remarry and therefore can not defeat challenges of being an unfit parent unless s/he remains celibate. The difference is one of premarital and amarital. (59)

Legal recognition of same-sex marriages would enable the courts to apply the same standard of review in both heterosexual and homosexual child custody cases. This is not to imply that the institution of marriage is a litmus test for stability, or to ignore the reservations of many Gay Men and Lesbians to consummate their relationship in a marriage ceremony. But access to the institution of marriage could alleviate harsh and disparate treatment given gay parents in child custody cases by placing them on equal footing with their heterosexual counterparts.

ILC
DECEDENTS' ESTATES

Under most American intestate succession laws, the spouse is an heir to land and personalty. Homestead and exemption statutes have been adopted in most states to protect the spouse and family of an insolvent debtor from claims by creditors against the residence or essential personal property. The Uniform Probate Code provides a substantial allowance for a surviving spouse in addition to the intestate share. (60)

It is clear that these and other spousal intestate property rights are not permitted a homosexual lover. Whether a marriage ceremony was ever performed is irrelevant since that union is definitionally null and void in the eyes of the state.

Where a testate decedent has bequeathed or devised property to his or her lover, the will itself may be attacked on grounds of undue influence. The appellate court in Estate of Larendon⁵² upheld a trial court's decision that the legatee had unduly influenced the decedent. Although the beneficiary and decedent's relationship was never specifically identified as homosexual, provisions of the will were described as "unnatural" and the relationship itself was reported as "strange."

In re Kaufmann's Will, 247 N.Y.S. 2d 664 (1964), aff. 257 N.Y.S. 2d 941 (1965) similarly described the relationship of the two men as "unnatural" and "unusual." The majority held that the will, which had left the bulk of the estate to testator's male companion of eleven years, was invalid because of undue influence. The dissenting opinion was more explicit:

It is not disputed that the testator was competent to make a will nor that the will was executed in accordance with the required legal formalities. There is no claim nor evidence of coercion . . . The verdict in this case rests upon surmise, suspicion, conjecture and moral indignation . . . The issue is not what were the morals of these men, nor whether testator led a normal life . . . Morals aside, upon the facts of this case, proof that the will was an unnatural one is lacking.

A New York will contest nine years later once more involved charges of undue influence.⁵³ The beneficiary refused to respond to questions of a possible homosexual relationship since that involved an admission of a crime of sodomy. The court granted immunity from prosecution of the crime, but nonetheless required him to answer "whether said relationship unduly influenced the decedent in making gifts and transfer of property."

Since testator's intent should be the controlling criteria for deciding the beneficiaries of a will, the existence of a homosexual relationship between the decedent and the legatee should not be used to defeat the unambiguous intent of the testator. Indeed, parole evidence of a homosexual relationship could assist the court in ascertaining the testator's intent in an ambiguous situation.

Legal recognition of same-sex marriage would grant a homosexual lover the same spousal rights as the heterosexual widow and widower. Election against the will, protection against unintentional disinheritance, and certain protections against creditors could be extended to same-sex spouses to provide legal cushioning at a time of personal loss. At the minimum, however, recognition of same-sex marriages would bar charges that a lover-beneficiary had unduly influenced the decedent.

CONTRACT AND EQUITY PROTECTION

Until 1973 California, a community-property state, consistently applied the general rule of Vallera v. Vallera that only a spouse in a legally sanctioned relationship enjoyed an interest in acquired income and accumulations. The Vallera court, however, specified two exceptions to this general rule. First, a meretricious spouse could claim an equitable interest given an express agreement between the couple to pool their resources and share accumulations jointly. Second, if no express agreement existed, the court might allow the petitioner to recover on a theory of constructive trust.

As a practical matter, few couples enter into a written agreement. The courts consequently are forced to decide if an oral contract exists between the parties. If a contract were founded upon immoral considerations, often a subjective evaluation of the facts where the meretricious spouse is equated to a concubine or prostitute, then the claimant does not receive benefits "attendant to marriage."

In the absence of an express agreement to share jointly in accumulations, the court may allow the meretricious spouse to recover the reasonable value of services rendered during the time the couple cohabited. In Keene v. Keene plaintiff had contributed farm labors and performed housewife duties over

the eighteen years of the couple's relationship. The Court ruled that plaintiff could not recover under a trust theory because she had contributed neither money nor property of value in the acquisition of the farm. The dissent relied on Vallera that recovery for services was permitted.

Finally in 1973 In re Marriage of Cary⁽³⁾ allowed a meretricious spouse to recover under community property principles where there existed an "ostensible marital . . . and actual family relationship." The court's reasoning was later rejected by the State Appellate Court, then partially resurrected under the California Supreme Court, in the famous Marvin v. Marvin⁽⁴⁾ case. The Supreme Court held in Marvin that

. . . although parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain. The parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort.

The recent decision of the ~~the Court of Appeals in the Marvin case~~ has left contract and equity protection of the meretricious spouse in a state of confusion. It is impossible to discern a national trend on whether access to the courts will remain closed to meretricious spouses who seek to have private contracts enforced. The rapidly evolving case law in this area has a direct bearing on litigation involving gay relationships. Justice Tebriner's statement in Marvin " . . . that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage" is not completely adaptable to the gay experience. Homosexual couples, unlike many young(heterosexual) couples, may never entertain the solemnization of their relationship. Nevertheless, both heterosexual and homosexual couples face identical problems of property division upon dissolution of their relationship.

Illinois, for example, declined to follow the Marvin Court. In Hewitt v. Hewitt, 394 N.E. 2d 1204 (1979), the Illinois Supreme Court refused to recover one-half of the property accumulated during a fifteen year meretricious relationship. The Supreme Court,

in reversing the state appellate court, based its opinion largely on public policy grounds. It said:

Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc.? And still more importantly: what of the children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of environment?

District of Columbia

Plaintiff in
A recently filed "palimony suit" in the District of Columbia demonstrates the need for expansion of the doctrine of meretricious spousal protection to homosexuals. In Cox v. Elwing (CA No. 8129-79) plaintiff is requesting half of all accumulations acquired during their three year relationship. The two men were married in Illinois with the benefit of clergy but without the benefit of the state. If the court inquires " . . . into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture or some other tacit understanding between the parties" (Marvin), then it may accept claimant's contention. The fact that defendant has already admitted the existence of a contract may also be decisive. Nevertheless, the Court may declare that petitioner is estopped from demanding enforcement of the express contract because sodomy is a criminal act in the District of Columbia⁽⁶⁵⁾, and, therefore, enforcement of a contract founded on an illicit relationship is void against public policy.

As men and women are less reluctant to being identified as homosexuals, *based on extension of a meretricious relationship theory,* "palimony" suits will become more common. The fact that Lesbians and Gay Men can not elect the legal solemnization of their relationship denies them all protection attendant to a marital status. For the Courts to ignore the dissolution of a gay relationship under the pretext that the relationship was a (legal) non-entity excludes an injured party from all equitable remedies.

III A ADDITIONAL BENEFITS: *Marital Status Discrimination and Gay Relationships*

Married couples receive other advantages because of their legally recognized relationship that single individuals and non-married couples do not. Immunity from testifying against one's spouse, survival of right

of action for wrongful death, the ability to file joint tax returns, preferential visitation privileges in prisons and hospitals, reduced tuition at state universities where one spouse is a resident, social security survivor benefits, and family health insurance plans begin the long list of marriage benefits. Because of a definition that delimits a marriage union only between one man and one woman, Lesbians and Gay Men are deprived of many legal and economic benefits that a majority of people take for granted.

depending on the income of the spouse this may be an advantage or a disadvantage

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In McCennell v. Neener, 547 F. 2d 54 (1976) the Eighth Circuit Court of Appeals held that petitioner was collaterally estopped from arguing his eligibility for increased educational benefits under the Veterans Act because he was not, under an earlier decision, determined to be a "spouse". In addition, the Court upheld the lower court's rejection of appellants' second contention that the Internal Revenue Service should permit petitioners' filing of joint income tax returns on the grounds that a homosexual relationship can not constitute a marriage.

Another example of marital status discrimination occurs in housing. The first marital status case in New York to reach public hearing was Marans v. Oriental Blvd. Co. (1976). The City of New York Commission on Human Rights awarded damages to a man separated from his wife when his application for an apartment lease was rejected by a rental agent on grounds that separated persons make unreliable tenants.

By comparison, a Lesbian who separates from her husband will likely remain separated or divorced for the rest of her life since she may not marry a woman. She thus is a victim of marital status discrimination as well as sexual discrimination. Moreover, housing and residential zoning restrictions designed to exclude households of two or more unrelated

individuals⁽⁶⁷⁾ have a disproportionate impact upon Lesbians and Gay Men. Homosexuals either must live alone in these family residential zones or risk criminal charges for illegal occupancy.

Beyond purely legal and economic benefits is the social respectability attributed to the institution of marriage. Rabbi Friedman has observed that society in general attaches values of responsibility and seriousness to marital status. "A major term used in our society for couples who are dating and who now think of getting married is they get serious . . . This seriousness which is the opposite of playfulness has as a major component becoming responsible for the other . . ." Without social recognition and support, Gay Men and Lesbians must establish a serious relationship in a vacuum. Ideally, a wedding ceremony is both a public declaration of love before a community of friends and a public request for support from that community. Yet, the absence of legal authorization transforms ceremony into charade, a ritual without effect or purpose.

The first purpose is sometimes served, so it not?

II. B STATE INTERESTS

Gay Relationships and the Law

Under the Equal Protection Clause, the Court balances the character of the classification and the relative importance of the infringed rights against asserted state interests. Assuming sexual preference is a suspect classification and the right of Lesbians and Gay Men to marry is basic, the state may successfully defend its policy of refusing marriage licenses to homosexual couples by showing a necessary relationship of the restriction to a compelling governmental purpose. If there do not exist less onerous means to implement a legitimate and overriding state end, the state will have satisfied the strict scrutiny test of the Equal Protection Clause.

Courts have uniformly supported their ~~denial~~ *denied the validity* of same-sex marriages in terms of public policy favoring procreation. In a New York case⁽⁶⁸⁾

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where a man had unknowingly married another man who subsequently underwent sex reassignment surgery, the court did not base its opinion on fraud or lack of consent. Instead, the court found that "[t]he law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman . . ." The judge then referred to an earlier decision³⁰

The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring.

In Jones v. Hallahan³¹ the court equated appellants' "own incapability of entering into a marriage" to their inability to form and maintain a family. And similarly in Baker v. Nelson³² the court declared "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."

Finally, the clearest expression that the purpose of marriage is procreation appeared in Singer v. Hara.³³ The court rejected appellants' contention that denial of marriage licenses to gay couples violated the Equal Rights Amendment.

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex."

Public policy favoring procreation within wedlock should logically be extended to the sterile or impotent heterosexual applicant for a marriage license. Not only should physical incapacity for sexual relationship be grounds for divorce; sterility and impotency should be grounds for the state's denial of a marriage license to all applicants. Since sterile and impotent heterosexuals are not denied the right to marry, the refusal to issue marriage licenses to gay couples on the basis that homosexual relationships are non-reproductive is a clear example of underinclusive classification.

The reasoning of Anonymous^(X) and its progeny may have been 'emasculated' in a recent New Jersey case.⁽³⁹⁾ The issue confronted by the court was whether a marriage between a male and a postoperative transsexual, who had surgically changed her external sexual anatomy from male to female, was to be regarded as a lawful marriage between a man and a woman. The appellate court affirmed the trial judge's order granting maintenance and support to the divorcee. In so holding, the appellate division declared:

If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, recognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.

The court relied heavily on plaintiff's capacity to perform sexually as a female in rejecting defendant's argument that the marriage was void as a same-sex relationship. Plaintiff, however, was biologically incapable of reproduction; despite surgical construction of an artificial vagina and labia, she nevertheless had no uterus or cervix and could offer no possibility of childbirth through their union. Is the validity of a marriage then to be determined in terms of sexual performance rather than procreation? Is a valid public purpose served to allow transsexual but not homosexual marriages if the standard of review is sexual performance?

Although it may be conceded that propagation of the human race is a legitimate and compelling state purpose, restrictions against same-sex marriage bears no necessary or direct or rational relationship to that end. Since the benefits derived from a legally recognized marriage are not predicated upon a heterosexual couple's fertility, refusal of a marriage license because of a homosexual couple's sterility makes little sense.

Since 1960, twenty-two jurisdictions have decriminalized private sexual acts between consenting adults. (3) "Abominable and detestable crime[s] against nature" (3) are no longer crimes against the state. Therefore, it can not be argued that official recognition of homosexual relationships would encourage illegal activity. In none of these jurisdictions is there any documented increase in the incidence of homosexuality among adolescents— or any perceptible disintegration of society however measured. A legitimate state interest may be the enforcement of morals. But a majority can not abridge the rights and liberties of an unpopular minority simply by claiming they, the majority, are preserving the moral order.

In balance, no compelling interest is apparent for refusing to issue marriage licenses to Lesbians and Gay Men, especially in those states which have decriminalized private consensual homosexual acts. The right of homosexuals to marry is thereby dictated under the Equal Protection Clause. Nevertheless, absent clearly manifested legislative intent, courts will be reluctant to expand the definition of marriage. Legal recognition of same-sex relationships would transform the institutional nature of marriage itself.

FOOTNOTES

¹The American Psychiatric Association in 1973 removed homosexuality as a classification of mental disorder. Cf., Bell and Weinberg, Homosexualities: A Study of Diversity Among Men and Women (1978), at 196. "Growing numbers of people, including clinicians, came to disagree with the long held view that homosexual persons were necessarily less well adjusted than were their heterosexual counterparts. The new view, ultimately upheld by the American Psychiatric Association in a vote of its membership, was put quite succinctly by a most distinguished psychoanalyst: 'Surely the time has come for psychiatry to give up the archaic practice of classifying the millions of men and women who accept or prefer homosexual object choices as being, by virtue of that fact alone, mentally ill. The fact that their alternative life-style happens to be out of favor with current cultural conventions must not be a basis in itself for diagnosis of pathology.'"

²Masters and Johnson, Homosexuality in Perspective (1979), at 218.

³Bernard, "Marriage: Hers and His," Ms. Magazine 46-49, 110, 113 (December 1972).

⁴Bernard, The Future of Marriage 57 (1972).

⁵Ibid.

⁶Bell and Weinberg's Homosexualities has been widely criticized as unreliable because of its outdated material. Dr. Charles Silverstein, the author of The Joy of Gay Sex, is currently undertaking a study on long-term gay male relationships. In addition, a University of Washington research team is interviewing both Lesbian and Gay Male couples. The results of either project will likely not be available until 1981.

⁷Cal. Stat. §4100 (1977).

⁸E.g., Tex. §1.01 (1974) (" . . . A license may not be issued for the marriage of persons of the same sex."); Md. Code 1957, art. 62 §1 ("Only a marriage between a man and a woman is valid in this State."); Vir. Code §20.45.2 (1975) ("A marriage between persons of the same sex is prohibited."); Fla. Stat. Ann. §741.04 ("No county court judge or clerk of the circuit court in this state shall issue a license for the marriage of any person, . . . unless one party is male and the other party is female.").

⁹Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

¹⁰Skinner v. Oklahoma, 316 U.S. 535 (1942).

¹¹Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).

¹²Besides a standard of strict scrutiny, the Supreme Court has also relied on a rationality approach (Reed v. Reed, 404 U.S. 71 (1971)). The Court has further determined it unnecessary "to decide whether a classification based on sex is inherently suspect" (Stanton v. Stanton, 421 U.S. 7 (1975)).

¹³12 J.Fam.L. 607 (1972-73).

¹⁴Although Masters and Johnson, infra, acknowledged that a homosexual orientation could be changed to a heterosexual preference, they cautioned that successful reorientation was rare. Indeed, the selection process for their study filtered out well adjusted Lesbians and Gay Men. Clearly, the medical emphasis is no longer "curing" homosexuality but assisting these individuals "coming out" to accept their sexual preference. In light of sex reassignment surgery, it can be argued that homosexuality is as "immutable" as gender; both are medically alterable but only in the most unusual circumstances.

¹⁵ E.g., Gay Men as effeminate and Lesbians as aggressive, and all homosexuals as pedophiles.

¹⁶ E.g., homosexuality as grounds for refusal to award a degree (Vance v. Lexington Theological Seminary, Ky.App.Ct., Case No. 78-CA-1172MR, argued March 21, 1979) or for refusal to admit to the bar (Cord v. Gibb, Vir.S.Ct., Rec. No. 780823, argued February 27, 1979) (plaintiff, a Georgetown University Law Center graduate, was denied permission to take Va. bar exam although she is a practicing attorney in the District of Columbia).

¹⁷ E.g., few openly Gay Men or Lesbians, except the recently assassinated San Francisco Supervisor Harvey Milk or the retired Massachusetts State Senator Elaine Noble, have been elected to public office.

¹⁸ E.g., the most conservative figure for the number of homosexuals exterminated under the Nazis was reported by the Austrian Protestant Church at 220,000. See Steakley, The Homosexual Emancipation Movement in Germany (1975) at 106. Concurrent with the Nazi genocide, a judge in Pasadena, California, routinely order castration of homosexuals and "other" sex deviates. See I Sex.L.R. 2 (June 1975).

¹⁹ Strauder v. West Virginia, 100 U.S. 303 (1880).

²⁰ Loving v. Virginia, 388 U.S. 1 (1967).

²¹ E.g., Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (uncle's marriage to niece held invalid).

²² See Friedrich v. Katz, 73 Misc. 257, 341 N.Y.S.2d 932 (age difference for male and female applicants for marriage license upheld, but vacated on appeal as moot because statutory amendment both males and females to marry at age 18 without parental consent); People v. Benu, 87 A.D.2d 139, 385 N.Y.S.2d 222 (1976) (father convicted of child neglect for arranging marriage of 13 year old daughter).

²³ See Note, 15 J.Fam.L. 463 (1976-77).

²⁴ E.g., Wash. R.C.W. 26.04.020-26.04.040.

²⁵ See In re Ann Goalen, 30 Utah 2d 27, 512 P.2d 1028 (1973).

²⁶ See In re Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (1976). See generally Ferster, "Eliminating the Unfit—Is Sterilization the Answer?", 27 Oh. St.L.J. 591, (1966). Quoting Dr. Bernard Diamond, the article at 603 questions the assumptions behind sterilization laws: "All laws providing for the sterilization of the mentally ill or defective which have as their basis the concept of inheritability of mental illness and mental deficiency are open to serious question as to their scientific validity and their social desirability."

²⁷ E.g., Singer v. Hara, 522 P.2d 1189 (Wash. App. 1974) ("Appellants argue that the legislature has not defined the competency of marriage but only the competency of individuals seeking to marry; inasmuch as the appellants are both legally 'capable' of marriage, they argue state law permits them to marry each other . . . The trial court correctly concluded (however) that the applicable marriage statutes do not permit same-sex marriage."); Jones at 589 ("Kentucky statutes do not specifically prohibit marriage between persons of the same sex; however, it appears to us that appellants are prevented from marrying . . . by their own incapability of entering into a marriage.").

²⁸ Ibid.

²⁹ Loving v. Virginia, 388 U.S. 1 (1967).

³⁰ See also Barnes v. Costle, ___ F.2d ___, 15 Fair Empl. Prac. Case 345 (D.C. Cir. 1977), ftnt. 55, for a similar argument regarding sexual harassment.

³¹ Loving; Accord. Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948) (state can not deny interracial couples their "fundamental" right to marry).

³² at 1191.

³³ Ibid., at 1192.

³⁴ Ibid.

³⁵ Areen, Family Law (1978) at 36.

³⁶ 196 S.E.2d 842 (Ga. 1973).

³⁷ Dissent, Spence v. Durham, 198 S.E.2d 537 (N.C. 1973), cert. den. 415 U.S. 918 (1974).

³⁸ Townend v. Townend, unpublished (Ohio 1975); Chaffin v. Frye, 45 Cal.App.3d 39 (1975); In re J.S. & C., 324 A.2d 90 (N.J. 1974), affd. 362 A.2d 54 (1976).

³⁹ E.g., In re J.S. & C.; Contra, Nadler v. Sup. Ct., 255 Cal. App.2d 523 (1967) ("homosexuality as a matter of law constitutes her not a fit or proper person to have the care, custody and control" of her child; reversed on appeal).

⁴⁰ Chaffin.

⁴¹ See In re Jane B., 380 N.Y.S.2d 848 (1976).

⁴² A. v. A., 514 P.2d 358 (Ore. App. 1973).

⁴³ Whitehead v. Black, unpublished (Maine Sup. Ct. CV-76-422 1976).

⁴⁴ E.g., A. v. A.

⁴⁵ In re J.S. & C.

⁴⁶ Ibid.; In re Jane B.; A. v. A.; Contra, Davis v. Davis, 335 So.2d 857 (1976); Buck v. Buck, 233 S.E.2d 792 (Ga. 1977); People v. Brown, 212 N.W.2d 55 (Mich. 1973).

⁴⁷ In re Jane B.; In re J.S. & C.

⁴⁸ Chaffin; Townend.

⁴⁹ People v. Brown (probate court ordered children placed in foster homes because the two mothers were "living together in a state of lesbianism"; reversed on appeal); In re Mara, 150 N.Y.S.2d 524 (1956) (children declared wards of the state but left in custody of their mother on the condition that mother's lover be removed from home environment).

⁵⁰ Townend.

⁵¹ In re Anonymous, unpublished (Wash. Sup. Ct. 1975).

⁵² A discussion on Gay foster parents at the July 27, 1979, meeting of the Montgomery County Gay Rap Group (Maryland) evoked this reaction: "Where do I stand legally? was the frequent refrain as group members thought aloud about the risks of becoming involved in a close relationship with a Gay minor. An interest in helping others was clearly in conflict with a vulnerability they felt as Gay people in a society that has trouble understanding both Gays and young people." Reported in The Blade, August 2, 1979, at 17.

⁵³ Adams v. Adams, 357 So.2d 881 (La. 1978).

⁵⁴ The Courts seem to apply a "sexuality-plus" test analogous to the short-lived "sex-plus" defense to allegations of sex discrimination. In Phillips v. Martin Marietta, 416 F.2d 1257 (5th Cir. 1969), the court ruled that Ida Phillips was not discriminated because of sex, but because of a permissible "coalescence of two elements": sex PLUS having pre-school age children. In child custody cases, the courts have generally disclaimed that homosexuality per se is justification for denying custody or visitation rights, but the coalescence of the parent's homosexuality plus a relationship with another homosexual are grounds for denial. Thus, in child custody cases the courts have been willing to accept homosexuality only to the extent that it remains dormant and homosexual parents only to the extent that they remain celibate.

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- ⁵⁵ §§ 2-401, 2-402.
- ⁵⁶ 216 Cal. App.2d 14 (1963).
- ⁵⁷ In re Anonymous, 347 N.Y.S.2d 263 (1973).
- ⁵⁸ 132 P.2d 761 (1943).
- ⁵⁹ I.e., one who cohabits with another knowing the relationship is not a valid marriage.
- ⁶⁰ See Hill v. Estate of Westbrook, 247 P.2d 19 (1952) (plaintiff's living as the wife of the deceased and her bearing him two children during their sixteen year relationship constituted immoral consideration); Updeek v. Samuel, 266 P.2d 822 (Cal. 1954) ("The illegal oral contract was void ab initio because . . . at the time both parties were legally married to other spouses. Hence the alleged agreement called for them to live in a state of adultery . . . A contract which has the direct effect of promoting sexual immorality is against public policy.").
- ⁶¹ Vallera.
- ⁶² 371 P.2d 329 (Cal. 1962).
- ⁶³ 109 Cal. Rptr. 862 (1973).
- ⁶⁴ 557 P.2d 106 (Cal. 1976) ("But although we reject the reasoning of Cary . . . we share the perception . . . that the application of former precedent in the factual setting of these cases would work an unfair distribution of property accumulated by the couple.").
- ⁶⁵ Illinois, however, decriminalized private sexual acts between consenting adults in 1960.
- ⁶⁶ Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
- ⁶⁷ See Village of Belle Terre v. Boraas, 416 U.S. 1 (1976) (ordinance affecting only unrelated individuals with express allowance for those related by "blood, adoption or marriage" was sustained on grounds that the ordinance promoted "family values" and "family needs"). For a holding which distinguishes Belle Terre yet reaffirms the goals of a family housing ordinance, see Moore v. City of East Cleveland, 431 U.S. 494 (1977).
- ⁶⁸ Georgetown Family Symposia 27-44 (1971-72), quoted by Areen at 78.
- ⁶⁹ Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971).
- ⁷⁰ Mirizio v. Mirizio, 242 N.Y. 74, 81; 150 N.E. 605, 607.
- ⁷¹ 501 S.W.2d 588 (Ky. 1973).
- ⁷² Infra.
- ⁷³ 522 P.2d 1195 (Wash. App. 1974).
- ⁷⁴ M.T. v. J.T., 140 N.J.Super. 77, 355 A.2d 204 (1976).
- ⁷⁵ Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, Wyoming, and Vermont have decriminalized private sexual acts between consenting adults, including consensual homosexual acts. Arkansas and Idaho, however, recriminalized private homosexual conduct.
- ⁷⁶ Prindle v. State, 21 S.W. 360 (Tex. 1893).

1 URGING THE HEALTH SERVICE SYSTEM BOARD TO INCLUDE AS A DEPENDENT
2 ELIGIBLE FOR BENEFITS PERSONS RESIDING WITH A MEMBER OF THE
3 SYSTEM IN A FAMILIAL RELATIONSHIP AND RELATED BY BLOOD OR
4 MARRIAGE OR DECLARED IN MAY OF EACH YEAR BY THE MEMBER TO BE THE
5 PERSON WITH WHOM THE MEMBER SHARES THE NECESSITIES OF LIFE ON A
6 PERMANENT BASIS, AND REQUESTING THE CITY ATTORNEY AND THE CITY
7 AND COUNTY OF SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM TO
8 SUBMIT TO THE BOARD, IN A MANNER SUFFICIENTLY TIMELY TO ALLOW
9 PRESENTATION TO THE VOTERS ON THE NOVEMBER, 1988, ELECTION
10 BALLOT, A CHARTER AMENDMENT WHICH WOULD PROVIDE THAT WHERE THERE
11 IS (ARE) NO SURVIVING SPOUSE OR MINOR CHILDREN TO RECEIVE THE
12 NORMAL SURVIVOR BENEFITS, THE EMPLOYEE WOULD BE EMPOWERED TO
13 NAME ANOTHER BENEFICIARY WITH WHOM THE EMPLOYEE SHARES THE
14 NECESSITIES OF LIFE ON A PERMANENT BASIS, WHICH DESIGNATION
15 WOULD BE MADE ON A FORM TO BE PROVIDED BY THE CITY AND COUNTY OF
16 SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM, AND URGING THE MAYOR
17 TO ESTABLISH A TASK FORCE TO ACQUIRE, ANALYZE, AND TRANSMIT TO
18 THE BOARD AND TO THE MAYOR (1) ALL AVAILABLE INFORMATION
19 CONCERNING EXTENDED FAMILY COVERAGE FOR HEALTH INSURANCE AND
20 RETIREMENT BENEFITS PURPOSES IN OTHER COMMUNITIES THROUGHOUT
21 CALIFORNIA AND ANY OTHER STATE, AND IN MAJOR BUSINESSES, AND (2)
22 ACTUARIAL DATA FOR THE EXPLICIT PURPOSE OF ESTABLISHING
23 APPROPRIATE PREMIUMS AND CONTRIBUTIONS TO MAINTAIN THE STABILITY
24 AND AVAILABILITY OF CURRENT BENEFIT FUNDS.

25
26 WHEREAS, Health care costs have soared to the point that
27 only the most wealthy in this society can afford health care
28 without insurance; and
29

30 WHEREAS, Persons and families confronted with staggering

SUPERVISOR NELDER

BOARD OF SUPERVISORS

*Author, to new
retirement benefits*

*Mayor's Task Force on
health & retirement benefits*

1 health care costs are often bankrupted by the burden; and

2
3 WHEREAS, The City and County of San Francisco, as a matter
4 of law, are mandated to provide health care to all who cannot
5 afford care under their own resources; and

6
7 WHEREAS, Health insurance spreads the risks and burdens of
8 health care costs across society in a more equitable manner; and

9
10 WHEREAS, The high cost of living and longer life spans and
11 the effects of our mobile society have resulted in many people
12 having as dependents residing with their parents, siblings and
13 blood relations other than their own children; and

14
15 WHEREAS, In our modern complex society, persons not related
16 by marriage often reside together in a familial relationship,
17 sharing the necessities of life, and

18
19 WHEREAS, The conscientious and affectionate wage-earner in
20 a given household in today's economy is concerned not only with
21 the costs of health insurance to assure proper and necessary
22 health care for members of his or her household, but also with
23 the on-going living expenses for those surviving members of his
24 or her household in the event of his or her death; and

25
26 WHEREAS, There currently exist in the San Francisco Charter
27 certain references which provide for automatic city-funded
28 continuation benefits for "surviving spouses", which, in light
29 of the many non-traditional households in the City and County of
30 San Francisco, should now appropriately be extended to other

SUPERVISOR NELDER

SGARD OF SUPERVISORS

1 individuals with whom the employee shares the necessities of
2 life on a permanent basis; and
3

4 WHEREAS, The Health Service System Board is vested under
5 the Charter with the power to determine eligibility of
6 dependents; and
7

8 WHEREAS, It is equitable and practical to expand the
9 categories of eligible dependency lest those persons become
10 obligations of the City as the health care provider of last
11 resort; now, therefore, be it
12

13 RESOLVED, That the Health Service System Board is urged to
14 include as a dependent eligible for benefits persons residing
15 with a member of the system in a familial relationship and
16 related by blood or marriage or declared in May of each year by
17 the member to be the person with whom the member shares the
18 necessities of life on a permanent basis; and be it
19

20 FURTHER RESOLVED, That this Board requests the City
21 Attorney and the City and County of San Francisco Employees'
22 Retirement System to submit to the Board in a manner
23 sufficiently timely to allow the presentation to the voters on
24 the November, 1988, election ballot of a Charter Amendment which
25 would provide that where there is (are) no surviving spouse or
26 minor children to receive the normal survivor benefits, the
27 employee would be empowered to name another beneficiary with
28 whom the employee shares the necessities of life on a permanent
29 basis, which designation would be made on a form to be provided
30 by the City and County of San Francisco Employees' Retirement

SUPERVISOR NELDER

BOARD OF SUPERVISORS

1 System; and be it

2

3 FURTHER RESOLVED, That this Board of Supervisors urges the
4 Mayor to establish a Task Force to acquire, analyze, and
5 transmit to this Board and to the Mayor (1) all available
6 information concerning extended family coverage for health
7 insurance and retirement benefits purposes in other communities
8 throughout California and any other state, and in major
9 businesses, and (2) actuarial data for the explicit purpose of
10 establishing appropriate premiums and contributions to maintain
11 the stability and availability of current benefit funds; and be
12 it

13

14 FURTHER RESOLVED, That upon approval of this Resolution by
15 his Honor the Mayor, the Clerk of the Board is directed to
16 present a copy of this Resolution to the President of the Health
17 Service System Board.

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SUPERVISOR NELDER

BOARD OF SUPERVISORS

**AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY ADDING CHAPTER
** THERETO, PROVIDING FOR DOMESTIC PARTNERSHIPS AND DECLARATIONS
OF DOMESTIC PARTNERSHIP.**

Be it ordained by the people of the City and County of San Francisco:

Section 1. The San Francisco Administrative Code is amended by adding Chapter **, to read:

CHAPTER **. DOMESTIC PARTNERSHIPS

Sec **.1. DOMESTIC PARTNERSHIPS.

(a). Domestic Partners Defined.

Two people are Domestic Partners if:

1. Neither is married;
2. They are not related to each other in a way which would bar marriage in California;
3. Neither is acting under fraud or duress, and both are competent to contract;
4. They reside together and share basic living expenses;
5. Each declares in writing, either under oath or under penalty of perjury, that she or he is the other's Domestic Partner;
6. Any different Domestic Partnership of which either was previously a member ended more than six months ago (but this requirement does not apply if the earlier domestic partnership ended because of the death of one of its members);
7. They are both 18 or older.

(b). "Reside Together" Defined

"Reside together" means that two people share the same living quarters. It is not necessary that the right to possess the quarters be in both names. Two people may reside together even if one or both have additional separate living quarters as long as the two share at least one set of living quarters.

(c). "Share Basic Living Expenses" Defined

"Share basic living expenses" means that two people both contribute to the total cost of their food and the cost of utilities for shared living quarters. The individuals need not contribute equally as long as both contribute.

Sec. **.2 ENDING DOMESTIC PARTNERSHIPS

(a) Termination.

A Domestic Partnership ends when:

- job transfer?*
- ① the partners no longer reside together; or
 - 2) one partner sends the other a written notice that he or she has ended the partnership.

Domestic Partners do not cease to reside together if one leaves the shared living quarters due to illness but intends to return.

(b) Notice of Termination.

(1) To Domestic Partners.

A Domestic Partner who terminates a Domestic Partnership must send his or her partner a signed statement declaring that the partnership is at an end.

(2) To Third Parties.

A Domestic Partner who has given a copy of a Declaration of Domestic Partnership to any third party in order to qualify for any benefit or right must, when he or she terminates the domestic partnership, give that third party a statement signed under oath or penalty of perjury stating the partnership has ended. The statement must be sent within 60 days of the termination of the Domestic Partnership.

(3) Failure to Give Notice.

Failure to give either of the notices required by this subsection will not void or delay termination of the Domestic Partnership.

Sec. **.3 LEGAL EFFECT OF DECLARATION OF DOMESTIC PARTNERSHIP

A Domestic Partnership will create no legal rights or duties from one of the parties to the other, other than:

a. the legal rights and duties specifically created by this Chapter or other ordinances or resolutions of the San Francisco Board of Supervisors which specifically refer to Domestic Partnership; and

b. legal rights and duties which the partners agree in writing they will owe to each other, provided the agreement is otherwise legally enforceable.

Sec. **.4 FILING DECLARATIONS OF DOMESTIC PARTNERSHIP

(a). Filing Declaration.

Two people may file a declaration of Domestic Partnership with the County Clerk. To file a Declaration of Domestic Partnership with the County Clerk, two people must use the form set out in sec. **.6(a).

(b). Amendments to the Declaration.

A Partner may amend a Declaration of Domestic Partnership filed with the County Clerk at any time to show address changes. To amend, a partner must use the form set out in Sec. **.6(b).

(c) Filing Termination Statement

If a Domestic Partnership for which a Declaration was filed with the County Clerk ends, the partner ending it must, and the other partner may, file a Statement of Termination with the County Clerk. To file a Statement of Termination, a person must use the Form set out in Sec. **.6(c).

(d) New Declarations of Domestic Partnership.

No person who has filed a declaration of Domestic Partnership may file another declaration of Domestic Partnership until six months after a Statement of Termination has been filed with the County Clerk.

Sec. **.5 RECORDS, COPIES AND FILING FEES

(a) County Clerk's Records

The County Clerk will keep a record of all Declarations of Domestic Partnership, Amendments to Declarations of Domestic Partnership and all Statements of Termination. The file will be arranged so that Amendments and Statements of Termination are filed with the Declarations of Domestic Partnership to which they apply.

(b) Filing Fees

The County Clerk will charge a fee of ten dollars ~~((\$10))~~ for filing a Declaration of Domestic Partnership. There will be no charge for filing Amendments or Statements of Termination.

(c) Copies

(1) Declaration of Domestic Partnership

When a person files a Declaration of Domestic Partnership, she or he is entitled to have two copies of the Declaration certified by the Clerk without further charge.

(2) Other Declaration or Additional Copies at Time of Filing

When a person files an Amendment to a Declaration of Domestic Partnership, or a Statement of Termination, she or he may have the Clerk certify copies at a cost of three dollars (\$3) each. The same charge will apply to certification of additional copies of a Declaration of Domestic Partnership at the time of filing.

(3) Copies at Other Times

At any time other than the time of filing, the County Clerk will charge four dollars (\$4) each for certified copies of Declarations of Domestic Partnership, Amendments to Declarations of Domestic Partnership and Statements of Termination.

Sec. **. 6 FORMS

a. Form Declaration of Domestic Partnership

DECLARATION OF DOMESTIC PARTNERSHIP

WARNINGS.

(1) Public Record

When filed with the San Francisco County Clerk, this Declaration becomes a PUBLIC RECORD. This means that anyone may get to see it and may get copies. This also means that, although the partnership may be ended (see below), there is no way to remove this Declaration from the public records or to destroy it.

(2) Legal Effect

It is possible that this declaration could be interpreted as evidence that the partners have taken on financial or other obligations to each other. San Francisco law says that Declarations of Domestic Partnership have very limited effect, but state law might give it other, broader effects. If you are worried about this possibility, get legal advice on the effect of this declaration and ways to control its effect before you sign it.

(3) Termination

Domestic Partnerships end if the partners stop residing together or if one partner gives the other written notice that the partnership is at an end (Note: Partners are not considered to have stopped residing together if one leaves because of illness but intends to return). If the Domestic Partnership covered by this Declaration ends, the partner who ends it must file a Statement of Termination with the County Clerk, mail a copy to the other partner, and give a copy to any third person to whom the Declaration was given to obtain benefits or rights.

(4) Changes

To be sure that you get notice if your partner files a Statement of Termination, you must file an Amendment any time any of the addresses change.

We declare under penalty of perjury:

1. Neither of us is married;
2. We are not related to each other in any way which would bar marriage in California;

3. Neither of us is acting under fraud or duress, and both of us are competent to contract;
4. We reside together (see below for definition) and we share basic living expenses (see below for definition);
5. We are each other's Domestic Partner;
6. Neither of us has, within the last six months, been a member of a different domestic partnership;
7. We are both 18 years of age or older.

We both promise that if we stop residing together (see below for definition), or if either of us decides to end the Domestic Partnership, we will file a Statement of Termination, send a copy to each other and to any third party to whom either of us has given a copy of this declaration to obtain benefits or rights.

I declare under penalty of perjury under the laws of the State of California that the statements above are true and correct.

Signed on _____, 19__, in _____

Signature _____

Print Name _____

Address for Mail: _____

I declare under penalty of perjury under the laws of the State of California that the statements above are true and correct.

Signed on _____, 19__, in _____

Signature _____

Print Name _____

Address for Mail: _____

IMPORTANT DEFINITIONS

"Reside Together" Defined

"Reside together" means that two people share the same living quarters. It is not necessary that the right to possess the quarters be in both names. Two people may reside together even if one or both have additional separate living quarters so long as the two share at least one set of living quarters. Two people do not cease residing together if one leaves the shared living quarters because of illness but intends to return.

"Share Basic Living Expenses" Defined

"Share basic living expenses" means that two individuals both contribute to the total cost of their food and the cost of utilities for shared living quarters. Two people need not contribute equally so long as both contribute.

b. Form for Amendments

AMENDMENT TO Declaration OF
DOMESTIC PARTNERSHIP

I am filing this statement to change the mailing address shown for me on the Declaration of Domestic Partnership which I filed. The new address is:

I declare under penalty of perjury under the laws of the State of California that the statements above are true and correct.

Signed on _____, 19____, in _____
Signature _____ Print Name _____
Address for Mail: _____

c. Form Statement of Termination

STATEMENT OF TERMINATION OF
DOMESTIC PARTNERSHIP

I declare under penalty of perjury:

1. _____¹
and I are no longer Domestic Partners;
2. I mailed my former partner a copy of this Statement on
_____, 19____.² I sent the copy of this
Statement to the following address:

I declare under penalty of perjury under the laws of the
State of California that the statements above are true and
correct.

Signed on _____, 19____, in _____

Signature _____

Print Name _____

Address for Mail: _____

¹ Fill in the name of the individual who you declared was
your Domestic Partner on a Statement of Domestic Partnership.

² Fill in month, day and year.

**AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY ADDING SECTIONS
*** THROUGH *** ABOUT NONDISCRIMINATION, REAL ESTATE, FAMILY
LEAVE, HOSPITAL VISITATION, RETALIATION AND ENFORCEMENT.**

Be it ordained by the people of the City and County of San Francisco:

Sec. 1. The San Francisco Administrative Code is amended by adding Sections ***.7, ***.8, ***.9, ***.10 and ***.11, to read:

Sec. ***.7 **REAL ESTATE.**

Any lease, rental agreement or other contract for the use of real estate which uses the term "family" shall be interpreted to include within a person's family either a domestic partner or an individual designated by the person. No agreement covered by this section may put conditions on who the person may designate except that no designation may be made if the person is married. If the agreement includes within the term "family" the parents, children or other blood relatives of a spouse, the term shall also include the parents, children or other blood relatives of a domestic partner or a designated individual.

Sec. ***.8 **FAMILY LEAVE POLICIES**

(a) **Leave Definitions.**

"Leave" means time off or any accomodation in hours or scheduling. "Related Person Leave" is leave:

1. to care for a spouse or the child or the parent of a spouse;
2. upon the death of a spouse or the child or the parent of a spouse.

(b) **Employers with Leave Policies**

Any employer in San Francisco which allows employees (or any class or group of employees) related person leave must allow employees the same kind of leave on the same terms for a Domestic Partner.

(c) **City Contractors**

Any contract in which Chapter 12B or 12C of the San Francisco Administrative Code requires a non-discrimination provision will also contain a provision requiring the contractor, if it allows employees (or any class or group of employees) related person leave, to allow employees the same leave on the same terms for a Domestic Partner.

(d) **Alternate Compliance.**

Any employer covered by subsections (a) or (b) of this Section may fully comply if it allows all unmarried employees to name one individual and it allows all unmarried employees the same leave as its related person leave for that individual. An employer may require an employee to give the address of the individual, but it may not require any other information. The employer must allow employees to substitute one individual for another and to make a new designation if the individual dies.

(e) Proof of Domestic Partnership.

Any employer covered by subsections (a) or (b) of this Section may require its employees to submit proof of a Domestic Partnership in the form of a written declaration of Domestic Partnership, signed by both partners under penalty of perjury. The Declaration shall be substantially the same as the form set out in Sec. **.6(a) of this code, deleting the "Warnings." Any employer who requires a Declaration as proof of a Domestic Partnership must accept (but may not require the employee to submit) a copy of a Declaration of Domestic Partnership which shows that it has been filed with the County Clerk.

Sec. **.9 HOSPITAL VISITATION

(a) Patient Designation.

All hospitals shall allow any patient with whom visiting is restricted to name those individuals whom the patient wishes to allow to visit, unless:

1. No visitors are allowed: or
2. The hospital decides that the presence of a particular visitor named by the patient would endanger the health or safety of a patient or patients, or would endanger the primary operations of the facility.

(b) Domestic Partners of Patients Who Do Not Make Designations.

If a patient with whom visiting is restricted has not made the designation provided for in subsection (a), and if the patient has not indicated that she or he wishes no visitors, the hospital must allow the patient's Domestic Partner to visit, unless:

1. No visitors are allowed: or
2. The hospital decides that the presence of a particular visitor named by the patient would endanger the health or safety of a patient or patients, or would endanger the primary operations of the facility.

(c) Proof of Domestic Partnership. Any hospital covered by subsection (b) may require a person claiming to be the Domestic Partner of a patient to submit proof of the Domestic Partnership in the form of a written Declaration of Domestic Partnership, signed by both partners under penalty of perjury. The Declaration shall be substantially the same as the form set out in Sec. **.6(a) of this Code, but the "Warnings" Section may be deleted. Any hospital which requires a Declaration as proof of a Domestic Partnership must accept (but may not require anyone to submit) a copy of a Declaration of Domestic Partnership which shows that it has been filed with the County Clerk.

Sec. ***.10 RETALIATION.

No person who seeks the benefit of this chapter will be discriminated against in any way for doing that. No person who assists someone else in obtaining the benefit of this chapter will be discriminated against in any way for doing that.

Sec. ***.11 ENFORCEMENT.

(a) Human Rights Commission.

This chapter may be enforced by the San Francisco Human Rights Commission under Article 12 of the Administrative Code.

(b) Civil Action.

This chapter may be enforced by a civil action. A complaint to the human rights commission is not a prerequisite to enforcement in a civil action.

(c) Remedies.

Any court which finds that this has been violated or will be violated may use all the powers which it has to remedy or prevent a violation.

(d) Time Limits.

Any action to enforce this chapter must be started no later than three years after the claimed violation.

Sec. 2. Since the City of San Francisco itself is an employer in the City and County of San Francisco, and since it operates institutions of the types otherwise covered by this ordinance, it is the intent of the Board of Supervisors that to the full extent allowed by law, this ordinance apply with full effect and force to the City and County.

MAC:fmb
PARTNERS/SFCode

Omnibus Family Equity Ordinance of 1989

- Chapter 1 Preliminary Provisions
- Chapter 2 Non-Discrimination Provisions
 - Business Establishments
 - Educational Institutions
- Chapter 3 City Contracts
- Chapter 4 Family Partnership License
- Chapter 5 Supplementary Provisions

Chapter 1 - PRELIMINARY PROVISIONS

Sec. 1 POLICY.

- (a) It is the policy of the City and County of San Francisco to eliminate discrimination that creates or promotes inequities in the privileges and benefits realized by family units. In adopting this Ordinance, the Board of Supervisors recognizes the diverse family units living within the City and County of San Francisco. These family units include, but are not limited to, lesbian and gay couples and their children, siblings or other blood relatives, married couples, and any other combination of adults and children who function as a family unit. The Board of Supervisors recognizes the importance of protecting these diverse family units from unequal treatment and that a need for such protection exists.
- (b) It is the purpose of this Ordinance to require the equal treatment of all individuals, regardless of family status (as defined in Section 3 below), in all business promotions, real estate transactions, employment and educational opportunities. Should the legislation of such treatment be found to be preempted, it is the policy of the City and County of San Francisco to encourage voluntary compliance with the policies articulated by this Ordinance.
- (c) It is the policy of the City and County of San Francisco to eliminate discrimination based on family status from all of its contracts, subcontracts, franchises, leases, concessions or other agreements involving real or personal

property. It is the intent of this Amendment to eliminate discrimination based on family status from any practice undertaken or employed by all contractors or subcontractors with respect to its employees or applicants for employment, including, but not limited to, the compensation, terms, or conditions or privileges of employment.

- (d) This amendment shall apply to contracts for the purchase of goods and to contracts for the provision of services.
- (e) In adopting the sections in this Ordinance that provide for the establishment of Family Partnerships, it is the intent of the Board of Supervisors to recognize officially the family units of non-married couples who reside in the City and County of San Francisco.
- (f) In adopting this Ordinance, the Board of Supervisors does not intend to infringe upon the free exercise of religion as guaranteed by the United States and California Constitutions.

Sec. 2 FINDINGS.

(To be supplied after public hearings.)

Sec. 3 DEFINITIONS.

As used in this Ordinance, the following words or phrases shall have the meanings indicated:

- (a) The phrase "business establishment" means any entity, however organized, which furnishes goods or services to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements consist only of payments of fees or consist of requirements under which a substantial portion of the residents of this City could qualify.
- (b) The phrase "educational institution" means any public or private institution including an academy, college, university, elementary or secondary school, extension course, kindergarten, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

- (c) The word "employee" means any individual employed or seeking employment from an employer.
- (d) The word "employer" means the City and County of San Francisco, any individual, firm, corporation, partnership, or other organization or group of persons however organized, located or doing business within the City and County of San Francisco, that employs personnel for salary or wages, or any person acting as an agent of such an organization.
- (e) The phrase "family status" means the state of being married, not married, a family partner, single, divorced, separated, or widowed.
- (f) The phrase "Family Partner" means someone who has a Family Partnership License as provided in Chapter 4 of this Ordinance.
- (g) The word "person" means any individual, person, firm, corporation or other organization or group of persons however organized.

Chapter 2 - NON-DISCRIMINATION PROVISIONS

Sec. 1 BUSINESS ESTABLISHMENTS.

(a) Prohibited Activity.

It shall be unlawful for any person to do any of the following acts wholly or partially based on family status:

- (1) To deny the full and equal enjoyment of, or to impose different terms or conditions upon, the enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any business establishment;
- (2) To make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with respect to any business establishment which indicates an unlawful discriminatory preference.

Sec. 2 EDUCATIONAL INSTITUTIONS

(a) Prohibited Activity.

It shall be unlawful for any person to do any of the following acts wholly or partially based on family status.

- (1) To deny admission, or to impose different terms, or conditions on admission to any educational institution;
- (2) To deny any individual the full and equal enjoyment of, or to impose different terms or conditions upon the availability of, any facility owned or operated by or any service or program offered by an educational institution.
- (3) To make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with respect to any educational institution which indicates an unlawful discriminatory preference.

Sec. 3 EXCEPTIONS

Nothing in this Chapter shall be construed to prohibit any act specifically authorized by the laws of the State of California.

Chapter 3 - CITY CONTRACTS

Sec. 1 AMENDMENTS

To comply with the intent of this Ordinance, the following amendments shall be made to the San Francisco Administrative Code:

- (a) Section 12B.1 of Chapter 12B shall be amended to include the words "or family status" following the words "(AIDS/ARC)."
- (b) Section 12B.1(a) of Chapter 12B shall be amended by inserting the definition of the words "family status," as stated in Chapter 1, Section 3(e) of this Ordinance, between the definitions of the words "Lessee" and "Sublease."
- (c) Section 12B.2(a) of Chapter 12B shall be amended to include the words "or family status" following both occurrences of the words "AIDS/ARC."
- (d) Section 12B.2(d) of Chapter 12B shall be amended to include the words "or family status" following the word "disability."
- (e) Section 12C.1 of Chapter 12C shall be amended to include the words "or family status" following the words "(AIDS/ARC)."
- (f) Section 12C.2 of Chapter 12C shall be amended by inserting the definition of the words "family status," as stated in Chapter 1, Section 3(e) of this Ordinance, between the definitions of the words "Sublease" and "Real Property."
- (g) Section 12C.3(a) of Chapter 12C shall be amended to include the words "or family status" following the words "AIDS/ARC."

Chapter 4 - FAMILY PARTNERSHIP LICENSE

Sec. 1 QUALIFICATIONS

Any two residents of the City and County of San Francisco may apply for and obtain a Family Partnership License if they:

- a. Are 18 years of age or older;
- b. Have no legal spouse;
- c. Have had no other Family Partner within the six (6) months preceding application, unless the most recent Family Partnership terminated due to the death of one Partner;

- d. Pay a \$35.00 filing fee; and
- e. Execute the Declaration stated in Section 2 of this Chapter.

Sec. 2 LICENSING

- (a) For a Family Partnership to take effect, both Family Partners shall execute the Family Partnership license, to be supplied by the County Clerk.
- (b) The Family Partnership License shall be comprised of the following text:

FAMILY PARTNERSHIP LICENSE

I, (Family Partner #1), declare that:

- 1. I am a resident of the City and County of San Francisco;
- 2. I am 18 years of age or older;
- 3. I have no legal spouse;
- 4. I have had no other Family Partner within the preceding six months, (excluding Family Partnerships terminated by death of one Family Partner),
- 5. (Family Partner #2) is my sole Family Partner.

Signed under penalty of perjury this _____ day of _____, in the City and County of San Francisco.

(Signature of Family Partner #1)

I, (Family Partner #2), declare that:

- 1. I am a resident of the City and County of San Francisco;
- 2. I am 18 years of age or older;
- 3. I have no legal spouse;
- 4. I have had no other Family Partner within the preceding six months, (excluding Family Partnerships terminated by death of one Family Partner),
- 5. (Family Partner #2) is my sole Family Partner.

Signed under penalty of perjury this _____ day of _____, in the City and County of San Francisco.

(Signature of Family Partner #2)

Signature of County Clerk

- (c) The Declaration must be witnessed by the County Clerk.
- (d) Upon execution of a Family Partnership License, the County Clerk shall affix to the License the Official Seal of the City and County of San Francisco and shall issue the original License to the Family Partners, retaining a copy for the Clerk's records.
- (e) The filing fee for issuance of a Family Partnership License shall be dedicated to organizations and services for preventing and remedying instances of domestic violence. A portion of these funds will go to organizations and services that focus on such violence within the lesbian and gay community.
- (f) Duplicate copies of Family Partnership Licenses will be issued by the County Clerk for a fee of \$_____.

Sec. 3 EFFECTS OF LICENSE

- (a) This License may be used as proof that a Family Partnership has been established and as proof that either Partner is a member of a Family Partnership.

Sec. 4 FAMILY PARTNERSHIP RESOURCE MATERIALS

Upon issuance of a Family Partnership License, the County Clerk shall provide the following resource material to the Family Partners:

- Introduction to rights created/not created by this License
- Forms and Information on Durable Powers of Attorney (Financial and Healthcare)
- Living Together Contract Information
- Will Information
- Conservatorship Information

Sec. 5 DISSOLUTION

- (a) A Family Partnership may be dissolved by either Family Partner.
- (b) To dissolve a Family Partnership, either Family Partner must:
 - i. Execute and file a Declaration of Dissolution as provided by subsection (c) of this section;
 - ii. Pay a filing fee of \$____; and
 - iii. Notify the other Family Partner by delivering, or having delivered, a copy of the Declaration of Dissolution to that Partner's residence.
- (c) The Declaration of Dissolution of a Family Partnerships shall be comprised of the following text:

I, (Family Partner #1), have been in a Family Partnership with (Family Partner #2). I hereby dissolve this Family Partnership.

I understand that dissolution shall not take effect until a copy of this Declaration has been delivered to my Family Partner, and Proof of Service has been made to the County Clerk.

(Date)

(Signature)

- (d) Proof of Service may consist of either:
 - i. Registered Mail Receipt;
 - ii. Affidavit from Process Server; or
 - iii. Personal oath.

Chapter 5 - SUPPLEMENTARY PROVISIONS

Sec. 1 DISCRIMINATORY EFFECTS OF PRACTICES

Any practice which has the effect or consequence of violating any of the provisions of this Ordinance shall be deemed to be an unlawful discriminatory practice.

Sec. 2 LIABILITY

Any person who violates any of the provisions of this Ordinance is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than \$1,000, and such costs and attorney's fees as may be determined by the court. In addition, exemplary damages may be awarded.

Sec. 3 ENFORCEMENT

(a) Human Rights Commission.

Any person who believes that he or she has been discriminated against in violation of the provisions of this Ordinance may file with the Human Rights Commission a request to have the Commission investigate and mediate his or her complaint under the provisions of the Administrative Code of the City and County of San Francisco.

(b) Civil Action.

Any aggrieved person may enforce the provisions of this Ordinance in a civil action.

(c) Equitable Relief.

- (1) Any person who commits, or proposes to commit, an act in violation of this Ordinance may be enjoined therefrom by any court of competent jurisdiction.
- (2) Any action for equitable relief under this subsection may be brought by any aggrieved person, by the District Attorney or by the City Attorney.

(d) Bar.

A complaint to the Human Rights Commission is not a prerequisite to the filing of a civil action under this Section. The pendency of a complaint before the Human Rights Commission shall not bar any civil action under this Section, but a final judgment in any civil action shall bar any further proceedings by the Human Rights Commission.

Sec. 4 LIMITATION ON ACTIONS

Judicial actions or requests to the Human Rights Commission under this Ordinance must be filed within one year of the alleged discriminatory act.

Sec. 5. NONWAIVERABILITY

Any written or oral agreement which purports to waive any provision of this Ordinance is against public policy and void.

Sec. 6 SEVERABILITY

If any part or provision of this Ordinance, or the application thereof to any person or circumstance is held invalid, the remainder of this Ordinance, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Ordinance are severable.

Sec. 7 APPLICATION TO THE CITY AND COUNTY OF SAN FRANCISCO

All the provisions of this Ordinance apply to the City and County of San Francisco.

TESTIMONY OF CLINT HOCKENBERRY ON DOMESTIC PARTNERSHIP
LEGISLATION BEFORE THE S.F. HUMAN RIGHTS COMMISSION
MARCH 7, 1989

My name is Clint Hockenberry. I am the Administrator of the AIDS Legal Referral Panel, a project of Bay Area Lawyers for Individual Freedom in partnership with the Volunteer Legal Services Program of the Bar Association of San Francisco. We have 350 volunteer attorneys who provide free and low cost legal services to persons with AIDS and ARC.

I have come here tonight as an individual who has worked on over 5000 AIDS legal cases over three and a half years. More than half of those cases involved hospital visitation authorizations, durable powers of attorney, and wills. I am also here as a man who was married to a woman for five years and who has been lovers with a man for fourteen years.

First of all, I want to thank you for the opportunity to address an issue of great importance to thousands of San Franciscans. I commend the authors of the several "domestic partnership" proposals for their constructive and creative ideas. Although I have specific reservations regarding each of the approaches, I believe the dialogue to date has been helpful in focusing attention on a systemic form of discrimination: marital status discrimination.

Many of us, especially in the Lesbian and Gay community, hunger for some sort of legal recognition of our relationships and legal protection for our relationships. We simply want the law to reflect the realities of California life and to protect those "significant others" who are closest to us. In today's California meaningful relationships are not defined by blood or marriage, but by love, trust, and understanding. We are becoming a state of nontraditional households.

Nevertheless, marital and nontraditional family status discrimination is pervasive. Marital status discrimination can occur in a host of legal areas: child custody cases, conservatorships, intestate succession, contractual obligations under a meretricious spouse theory, immunity from testifying against one's spouse, survival of a right of action for wrongful death, the ability to file joint tax returns, preferential visitation privileges in prisons and hospitals, educational benefits, housing and residential zoning restrictions designed to exclude households of two or more unrelated individuals, social security survivor benefits, family health insurance plans, and numerous other places. Unfortunately, the California legislature and the Governor--not municipalities--have power to remedy many of these areas of marital and family status discrimination.

A critical question becomes how far a local government may push without state or federal laws preempting the legislation. I believe it is irresponsible to promote a constitutionally infirmed proposal if there is a reasonable likelihood that state or federal law will preempt the municipality's ordinance. The broader the attempted sweep of local protection, the greater the chance for federal or state preemption. I believe this is a central weakness in the National Gay Rights Advocates proposal, "Omnibus Family Equity Ordinance of 1989."

The reverse side of the coin is also true. Carefully crafted, specific provisions in any proposed piece of domestic partnership legislation will more likely escape state and federal preemption problems. Nevertheless, those specific provisions must make a qualitative difference in the lives of the people it is intending to protect. I believe this is an inherent weakness in Supervisor Harry Britt's "Domestic Partnership" legislation.

None of the 5000 AIDS and ARC clients I have served over the last several years would have benefited from the specific provisions of the Supervisor Britt proposal. I will take the major provisions one by one in order to highlight my concerns.

. Real Estate (Sec. ***.7): People with AIDS and their partners frequently experience conflicts with their landlords in two areas: 1) when the tenant wants to move the partner into the apartment to care for him or her and the landlord refuses, or 2) the Person with AIDS dies and the partner, whose name is not on the lease, wants to continue to reside in the rental unit against the landlord's wishes. Neither of these frequently encountered situations is addressed by the proposed legislation.

The proposed protections of Section .7 are triggered only when there is a lease "which uses the term 'family'." I have yet to read such language in a lease. But if in some leases there is that language, landlords will simply delete the use of the term 'family.'

. Family Leave Policies (Sec. ***.8): The AIDS Legal Referral Panel has not received a single complaint in the last several years involving bereavement leave for partners of deceased Persons with AIDS. Some companies have voluntarily redrafted their bereavement leave policies to include domestic partners. Other companies provide the leave as a matter of course. Most other companies have no written bereavement policies but routinely grant such leave when the need arises.

In contrast, the AIDS Legal Referral Panel has received perhaps a half dozen complaints over the last several years from caregivers of Persons with AIDS. Often these caregivers are forced to choose between their jobs or their relationship. None of the companies involved had any caretaker policy for any employees, not even those who are legally married.

. Hospital Visitation (Sec. ***.9): California is one of forty-two states that empowers a competent adult to make health care choices in advance of incapacitating injury or illness. If a domestic partner is appointed the "attorney-in-fact" under a durable power of attorney for health care, the domestic partner is given first preference to visit the patient in a hospital.

Use of the durable power of attorney for health care is widespread. Social services personnel, nursing staff, physicians, and patient advocacy groups routinely distribute an eight page form by the California Medical Association. The instructions are plainly written, and it does not take an lawyer to fill out a durable power of attorney for health care. Equally important, a "dpa" not only permits the agent [or partner] into the hospital room, but also allows the agent to make fundamental medical treatment decisions on behalf of the principal.

In the alternative, any California resident may execute and have notarized a one paragraph hospital visitation authorization. The AIDS Legal Referral Panel uses the following language:

"I, _____, a resident of the City and County of San Francisco, California, do hereby give notice and authorize that, if any injury or illness, or any incapacity through any other cause necessitates my hospitalization or treatment in a medical facility, it is my wish that [Partner] be given first preference in being admitted to visit me in such facility, whether or not there are parties related to me by blood or by law or other parties desiring to visit me, unless and until I freely give contrary instructions to competent medical personnel on the premises involved."

Because of greater acceptance and distribution of these legal documents, the AIDS Legal Referral Panel has only encountered scattered problems in partners' access to hospitalized patients. None of the situations we experienced would have been addressed by the proposed domestic partners legislation.

The first case involved a lover of eight months where the sister of the Person with AIDS held a two year old durable power of attorney for health care. Pursuant to that power she barred the lover from the hospital room. Luckily in this case the Person with AIDS awakened from a coma and requested to see his lover. That gave the AIDS Legal Referral Panel attorney the leverage to claim a partial revocation of the dpa regarding the partner's hospital visitation. But this situation illustrates the possible conflict between a state authorized durable power and a local ordinance that authorizes partner visitation.

In two other situations, the "lovers" of incapacitated Persons with AIDS contacted the AIDS Legal Referral Panel office alleging the families had barred their visits. Curiously, in both these cases family members themselves also contacted the Panel office to complain that the "lovers" had looted the PWAs' estates. In both cases the alleged "lover" relationship had been of short duration and had begun after the AIDS diagnosis.

Finally, in several other circumstances friends had intervened through use of durable powers of attorney to restrict (but not bar) visits of roommates to hospitalized patients with

AIDS. The friends had alleged the roommates had stolen objects and cash from the weakened Person with AIDS.

I do not believe in any of these half dozen hospital visitation cases that the proposed local ordinance would have made any difference. The popularity of durable powers of attorney for health care, the relative ease in obtaining and in filling out these documents, and the fact that dpas cover medical treatment as well as visitation--all suggest that this particular provision is unnecessary.

. Filing Declarations of Domestic Partnership (Sec. **.4)
[see also National Gay Rights Advocates "Family Equity Ordinance," Chapter 4]: Both Supervisor Britt's and NGRA's proposals contain sections on registering a declaration of Domestic Partnership with the County Clerk. As currently drafted, there are no confidentiality or privacy protections of this information. Anyone has access to this public document.

My heightened concern on the need for privacy protections is the result of hearing one horror story after another. I have spoken with eleven San Franciscans over the last two weeks who have lost their health insurance. Insurance companies had dropped entire health care plans; employers had switched carriers; or individuals or small businesses were no longer able to afford skyrocketing premiums. If insurance companies [or employers or prospective landlords...] have access to domestic partnership information, then gay men and lesbians could very easily become victims of sexual orientation discrimination.

For example, the City and County of San Francisco is powerless to prevent discrimination by insurance carriers. Pretextual reasons can always be invented to deny an insurance application. Sadly, the State Insurance Commissioner has traditionally not attempted to regulate the insurance industry. Therefore, if an insurance company accesses the County Clerk's "public" records, no gay San Franciscan--seropositive or HIV negative--will obtain insurance.

I strongly recommend safeguards be added to any legislation in order to guarantee that these public documents be opened only on court order. I further suggest that a warning precede any declaration alerting the couple that information contained in a domestic partnership declaration may result in discrimination.

Overall I favor the more generalist approach of the National Gay Rights Advocates "Omnibus Family Equity Ordinance of 1989." Nevertheless, I would suggest a thorough examination by the City Attorney's Office into the issues of state and federal preemption.

I also want to express my admiration for Supervisor Britt, Supervisor Nelder, and attorney Matt Coles for their leadership and vision in the arena of domestic partners legislation.

I finally want to thank the Human Rights Commission for this opportunity to discuss issues of vital concern to me and thousands of other San Franciscans.