



Frederick Hertz, the legal guru of same-sex relationships.

## An All-Too-Fragile Union

Thousands of Bay Area gay and lesbian couples are learning that domestic partnership isn't in their best interest—and may never be. **BY PETER BYRNE**

**FREDERICK HERTZ NEVER THOUGHT HE'D TURN HIS BACK ON ANYTHING** designed to protect his relationship with his partner of two decades. The 52-year-old Oakland lawyer is probably America's reigning expert on the financial intricacies of gay and lesbian cohabitation and domestic partnership. For 20 years, he has been advising gay and lesbian couples who can't marry how to weave a thicket of wills, powers of attorney, and agreements to create for themselves the basic

protections that matrimony provides. He's written several books on the subject, and he's appeared on NBC's *Today Show* and CNN's *Your Money* to discuss it. He is the go-to guy when lovers need a contract spelling out who owns the stereo, the Lamborghini, the summer home in Sea Ranch. And when love withers, the prominent gay attorney can dissolve the partnership with minimal mess.

"When I came out in 1971, I thought, 'Now I'll never have to get married or join the military,'" Hertz says, laughing. Indeed, he has never done either. He's always preferred serial monogamy to free-form dating—he's had only three serious relationships in the past 31 years—and he's welcomed the freedom of not being

married. "One benefit of being excluded from marriage is that it forced me and my partner to custom-design a relationship that works for us," Hertz explains.

But after the Legislature created a domestic partnership registry in 2000, Hertz and his partner happily signed up along with nearly 20,000 other homosexual couples, not because they needed the benefits—some they'd covered in their own contractual agreement; others didn't apply to them—but because they thought the concept was worth supporting. "Registering was a symbolic thing for us, a way of affirming the dignity of our relationship," Hertz says. And for a while, they were content with their decision. →

**FAMILY→** Then, in 2003, with little fanfare, the Legislature injected the body of domestic partnership law with the legal equivalent of anabolic steroids—and the same mixed blessing that comes with the performance enhancers. The California Domestic Partner Rights and Responsibilities Act (AB205) is a remarkable chapter in the saga of the gay liberation movement, as close to legalized gay marriage as a couple can get in most of the United States. (Only Massachusetts, Vermont, and Connecticut go further in granting domestic partner rights.) As of January 1, 2005, registered gay and lesbian domestic partners have had nearly all of the state rights, responsibilities, and benefits available to married heterosexuals, including more inheritance rights, custody rights, and the right to share in a spouse's income and property.

Governor Gray Davis's signing of the act barely made a blip in the local newspapers. Nonetheless, proponents of gay marriage considered the act to be a foreshadowing of marriage equality to come. That's why it's so surprising that Hertz and his partner visited a notary last fall to *deregister* from this path-breaking legislation. And they are hardly alone. In the past few months, hundreds of couples have deregistered from AB205; in 2004, more than 2,500 called it quits. And more defectors will likely follow, as the National Center for Lesbian Rights, a San Francisco-based nonprofit that advocates for same-sex marriage, is advising people to take a closer look at whether the souped-up state-sanctioned partnership is truly for them.

Why this about-face on such promising legislation? While AB205 is good for many couples, it turns out to have some serious hidden pitfalls. In some cases, AB205 could spell financial ruin, propelling one partner into a much higher tax bracket or robbing a surviving partner of his or her inheritance. Hertz says that upon his death, the clash between AB205 and federal law could cost his partner hundreds of thousands of dollars in tax money that a straight married person would not have to pay. It could also threaten anyone on public assistance and lead to deportation in some cases in which one of the partners is a foreigner living in this country on a visa.

In fact, some people will end up worse off than they were under the original 2000 domestic partner legislation, and much worse off than if they were married. For Hertz and others like him who have championed the rights of homosexual couples to partner up equally without marriage, the irony is painful. "When I deregistered, I had people saying they felt I was betraying the cause we had all fought for so hard," he says. It was also difficult for Hertz on a personal level. "Friends came to me and said, 'Is this really true? I heard you and your partner broke up and were afraid to mention it.'"

Of course, the ultimate irony of AB205 is that while it was designed as a viable alternative to marriage, it only makes same-sex marriage that much more important. That's because its flaws stem directly from the fact that while it's a near replica of marriage, it doesn't provide all the rights of a legal marriage—and never can. In other words, AB205 is a milestone on the road to gay marriage before the road smacks into a brick wall: federal law that says marriage is for heterosexuals only. Which is why an epic battle may be brewing between the state, which is moving to tear that wall down, and the federal government, which seems determined to keep it in place.

## THE POLITICAL SLOGFEST

**IT'S CERTAINLY NOT THE FIRST TIME** opposing forces on this issue have lined up. It may be hard to believe, but not so long ago domestic partnership was a profoundly divisive idea—even in San Francisco. In 1978, the San Francisco Board of Supervisors passed an ordinance, written by newly elected gay supervisor Harvey Milk, that outlawed discrimination based on sexual orientation in employment, housing, and businesses. But it took the AIDS crisis to create the climate for the first domestic partner law. In 1989, Mayor Art Agnos signed legislation establish-



**Why did Governor Davis sign such a progressive bill? He was in the middle of a recall campaign and was angling for the gay vote.**

**Nearly 15 years after our first domestic partner law went into effect, state legislators Jackie Goldberg, Paul Koretz, Carole Migden, and Mark Leno (from left to right) teamed up to push through AB205.**

ing a domestic partnership registry and granting visitation rights in city hospitals for those who signed up. (The ultimate goal was health insurance for sick partners, not just visitation rights.) In a homophobic lather, the Catholic archdiocese convinced voters to repeal the registry, but in June 1990, San Franciscans flip-flopped and approved it.

Over the next decade, health and retirement benefits were granted piecemeal to domestic partners of city employees and city contractors. San Francisco even refused to do business with companies that didn't honor the domestic partner laws. Several large corporations, including United Airlines, resisted the city's agenda, but they eventually backed down after California courts upheld the new contracting rules. Meanwhile, in the Legislature, bills designed to extend recognition to domestic partners flared up and died several times. And at the national level, the push for same-sex partnership rights suffered a serious setback when President Clinton signed the Defense of Marriage Act, which defined marriage exclusively as the union between a man and a woman.

The movement finally broke through in 1999, when Assemblywoman Carole Migden (D-San Francisco) wrote a law establishing a state-wide registry for gay and lesbian domestic partners that granted hospital visitation rights and benefits for partners of state employees. "Migden created a frame on which we've slowly been able to hang partnership rights," says Assemblyman Mark Leno (D-San Francisco), a leading proponent of same-sex marriage.

"Everything that matters in life is incremental," says Migden, now a state senator representing San Francisco and Marin Counties. "We do not believe in magic shows. It took a gradual plan to bring along representatives of the Central Valley and the more conservative areas. We added benefits by making sure we were in step with public attitudes."

The process continued in 2001 as she added more than a dozen new rights, including the right to sue for wrongful death, to use stepparent adoption procedures, and to make medical decisions for a partner. Over the next two years, family leave, protections against domestic violence, death benefits, and more were added as well. Nonetheless, the framework fell considerably short of granting domestic partners the vast array of rights married people take for granted, such as the right to share community property, the right not to testify against each other in court, and the right to alimony.

Enter Assemblywoman Jackie Goldberg (D-Los Angeles). She spearheaded AB205 to secure some of the most critical rights the original law left out: parental rights vis-à-vis non-biological offspring. "My partner and I have been together for 26 years," Goldberg says. "Our son, who was four years old when we moved in together, would have loved the protection of knowing no one could take him away from us when he was growing up." Under AB205, nonbiological mothers automatically get parental rights.

In September 2003, the California Legislature passed Goldberg's act by a solid majority—a measure of how much had changed over the years. Why did Governor Gray Davis, neither a liberal nor a risk taker, go for such a progressive piece of legislation?

**FAMILY**→ The answer is simple: he had little to lose. He was in the midst of a bitterly contested recall campaign, and he was clearly angling for the gay vote.

## WHO GETS WHACKED HARDEST

**FOR "TRADITIONAL" GAY AND LESBIAN FAMILIES**, meaning those with children, AB205 is a godsend because of the parental rights issue—but only for those whose kids were born *after* AB205 went into effect. Three cases now pending before the California Supreme Court argue that this right should be retroactive and apply to parents whose kids were born *before* AB205. But in the meantime, couples who already had kids must still go through a stepparent adoption.

That's what happened to Gap marketing director Margot McShane and Alexandra D'Amario, a psychotherapist, who live with their twin babies in downtown Napa. The twins were born to D'Amario last summer, nearly six months shy of AB205. McShane is now adopting them, but she would have loved not having to go through that legal process.

On the other hand, since parental rights under AB205 (all of its rights, actually) are recognized only inside California, the adoption serves a double purpose: it protects McShane if she moves, or even just travels, outside the state. In fact, therein lies one of AB205's main problems—while it grants nearly all of the state rights that apply to marriage, it provides none of the 1,138 rights the federal government gives to married couples. And that loophole can lead to a disastrous financial deal for a range of gay couples.

Consider federal income tax, for example. Say Ada makes \$100,000 a year and Beta earns \$20,000. Since they cannot file a joint federal income tax return, Ada and Beta each pay tax on their respective earnings. But under AB205, the salaries of domestic partners are deemed community property, so Ada, in effect, "owns" \$10,000 from Beta (half of Beta's "property"), and Beta "owns" \$50,000 from Ada. Once Ada and Beta become domestic partners, Hertz and other tax experts say, the IRS could decide to tax each portion of their shared income as a new source of income. Therefore, Beta could be taxed on \$70,000 and Ada could be taxed on \$110,000, adding thousands of dollars to their tax bills.

The reason for the "could" is that no one knows exactly how the IRS will interpret the laws, and there's no place on a federal tax return for listing a domestic partnership. So theoretically, you could avoid the extra tax hit if you're willing to lie on your tax return by not listing any assets you may share as a result of your domestic partnership. However, you could be in trouble if you're audited or in the event of a death or divorce, in which case you'll get hit with substantial new taxes.

And it's not just income taxes that could get you; property tax is also an issue with AB205. Under Proposition 13, married people are exempt from taxation on real estate transfers, so a house that's jointly owned is always taxed at its original market value, plus a 2 percent yearly increase. But Prop. 13 doesn't apply to domestic partners, so as soon as a couple registers under AB205, half of any house could be considered a gift, or a "transfer," to the other partner, typically triggering an extremely costly reassessment.

Ouch. Say you bought your house for \$250,000 in 1995, but five years later you fell in love, and five years after that, you and your inamorata decided to register as domestic partners, prompting a reassessment. During that time, the value of your house would have at least doubled, boosting your annual tax bill by about \$2,500. The state and the feds could even decide to make the "new owner" pay a gift tax or a capital gains tax. (Luckily, San Franciscans are exempt from this whole mess, since the assessor here is engaging in a minor act of civil disobedience by declining to reassess property transferred between domestic partners.)

Joe Alfano and his lover, Frank Capley, live in San Francisco and were married at City Hall last February. But when the California Supreme Court invalidated all same-sex marriages, they registered under AB205—only to come face-to-face with the Prop. 13 issue. When Alfano looked into putting Capley on the deed of his weekend home in Monte Rio, he discovered the reappraisal would hike their yearly tax bill by \$3,000. "Domestic partnership hasn't helped us at all," Capley says.

And the impact of AB205 is not limited to families of means. Although legally helpful to some poor families with children, the law socks it financially to many who can least afford it. Generally in California, same-sex couples raising kids have significantly lower incomes than their heterosexual counterparts, according to a 2004 study by the Williams Project on Sexual Orientation Law and Public Policy at the UCLA School of Law, a think tank on gay and lesbian issues. That means they're more likely to qualify for some kind of welfare or public

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health benefit. However, if they register under AB205, their total household income is used to calculate their benefits instead of the individual income of each partner.

According to the Williams Project, this means that thousands of couples could be forced out of state-run public assistance programs, collectively losing as much as \$127 million per year.

The new registry could also threaten some binational couples, including helicopter pilot Belinda Ryan and her partner, Wendy Daw. After 9/11, the aerial photography company that employs Ryan, who is British, nearly hit the skids when flights were curtailed by the Federal Aviation Administration. Ryan's visa was suddenly in jeopardy because losing one's job can trigger deportation, and despite the fact that the women are domestic partners, only a spouse can sponsor someone for permanent resident status. So the couple live in fear that Belinda's visa will be revoked if her company goes under or lets her go. They've thought about moving to the United Kingdom, which is on the verge of granting full marriage rights to same-sex couples, but Daw, a native Californian, isn't thrilled by the idea. "I don't really want to live in Wales," she says. "Our home is here."

## WHERE IS THE LOVE? NOT IN D.C.

**DETAILS ASIDE, THE PEOPLE WHO REALLY STAND** to lose are those who registered as domestic partners before AB205's passage, only to be hit a few years later with these potential deal-breakers. Although the secretary of state sent two warning letters to 27,000 domestic partners, many couples did not understand the consequences of AB205's fine print. And once

they do, it's not an easy matter to sign off. Until January 1, 2005, a couple could have dissolved their domestic partnership simply by filling out a form. Until June 30, couples can keep their AB205 status but write up independent contracts separating some of their assets. After that, however, if two people want to back out of AB205, the process they have to go through is tantamount to a divorce *without* the full protection of the marriage laws, which means they can be subject to a panoply of taxes that heterosexual couples escape.

Did legislators foresee all these difficulties when crafting AB205? Yes, says Assemblyman Leno. "But we weighed the pros and cons and decided it was more beneficial to go forward than not." Besides, he thinks AB205 isn't the main culprit. "The problems we subsequently faced are not the result of AB205; they're the result of the inequity of denying marriage licenses to same-sex couples."

So will these problems go away if same-sex marriage is approved in California, a prospect that seems increasingly likely? Last year, the city and county of San Francisco filed a lawsuit arguing in favor of civil marriage for all people, regardless of sexual orientation. The suit even called the ban on same-sex marriage unconstitutional, much like the separate-but-equal laws that discriminated against African Americans. In a move that stunned advocates *and* opponents of gay marriage, San Francisco Superior Court Judge Richard A. Kramer upheld the argument. "No rational purpose exists for limiting marriage in this state to opposite-sex partners," he wrote in his opinion. And many experts believe the state Supreme Court will uphold Kramer's ruling.

But that won't solve all of AB205's problems. The Prop. 13 snare will disappear, but same-sex partners will still be subject to the same federal tax issues, as well as the parental rights and visa problems, all of which are governed by federal law. And with the current powers-that-be, same-sex marriage on the federal level is as likely as America's withdrawing from Iraq. All of which means that at least for the foreseeable future, Hertz's business will continue to thrive. ●

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