

Without Benefit of Clergy

How gay couples create their own legal rights

With the passage of Proposition 22 by a lopsided margin, marriages of gay couples remain unrecognized in California—even for those who exchange vows in Vermont, where gay civil unions were officially sanctioned recently. But for those lawyers who've carved a niche for themselves within the gay community, the news isn't all bad—either for them or the couples they represent.

In fact, since the election of Gray Davis as governor, the state's Department of Social Services is more open to the notion of gay couples adopting children than it

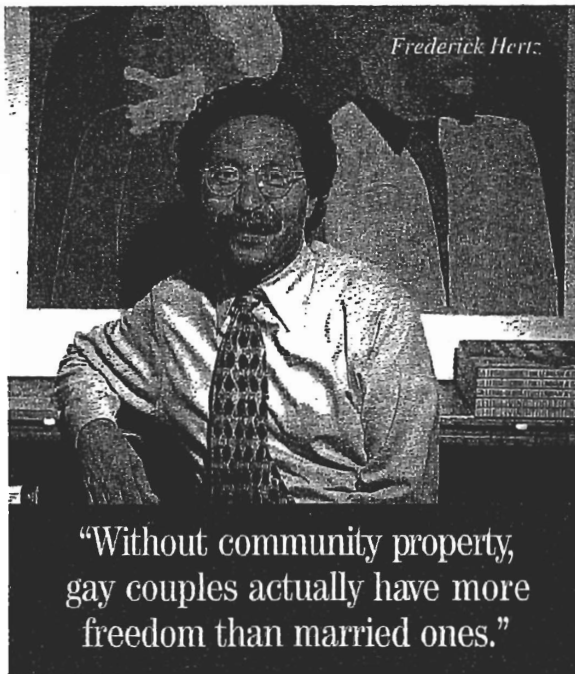
ever was under Davis's predecessor, Pete Wilson. Also, what Prop. 22 prevents, cohabitation agreements can to some extent secure.

In the San Francisco Bay Area there are about a dozen lawyers whose practices focus primarily on same-sex unions and offer a range of services. Still, even with the opportunity to do so, gay couples have yet to rush out in any great numbers to draw up cohabitation agreements. "People just don't like talking about breaking up when they're in love," says Stephen Lachs, a retired superior court judge in Los Angeles County who now mediates and tries conflicts between separating gay couples. "As soon as two people who can marry say 'I do' and sign on the dotted line, all the duties, rights, and obligations of our vast community property system kick in. If gay couples want any part of their relationship to be legally clear, the onus is on them to draw up an agreement."

Thanks to *Marvin v Marvin* (18 C3d 660), which was decided back in 1976, unmarried couples can sue to enforce some verbal and implied agreements. And twelve years later with *Whorton v Dillingham* (202 CA3d 447) a precedent was set that made those verbal

agreements between gay couples just as binding. But, of course, when couples take the time to put their agreements down on paper, they stand a much better chance of avoiding a lot of messy litigation in the event of a breakup.

Indeed, there is an argument to be made that with a clearly written cohabitation agreement, the right to marry becomes legally unnecessary for gay couples. "The fact that gay couples can make enforceable property agreements doesn't help the fight for gay marriage because many people say, 'Well, then, end of story,' "



admits Frederick Hertz, a real estate attorney in Oakland who, as the coauthor of *A Legal Guide for Lesbian and Gay Couples* (Nolo Press, 10th ed.), has made a specialty out of same-sex law. (He has a Web site at www.samesexlaw.com.)

"But marriage," he hastens to add, "does bestow certain rights and responsibilities on straight couples that gay couples don't have." For example, gay partners cannot successfully contract to be the guardian or conservator of an ailing partner or to receive Social Security payments if the partner dies. They also can't seek civil damages for the wrongful death of a partner or even file joint tax returns.

Still, it's possible for gay couples to come up with agreements that each party can take comfort in. They can nominate each other for durable power of attorney, make property agreements that mimic community property laws, keep earnings and assets separate, or have some mixture approach. "Without community property, gay couples actually have more freedom than married ones," says Hertz. And besides, he adds, if gay marriage is legalized, "I'm out of a job."

—Janet Weeks