In re Rabin: The Price of Progress for California Registered Domestic Partners

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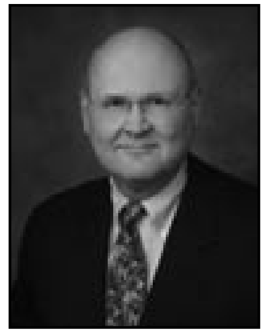

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The Price of Progress

Since 2000, same-sex couples in California have been able to register with the Domestic Partnership Registry maintained by the California Secretary of State.[1] While the initial legislation created only limited new rights and obligations, the Domestic Partners Rights and Responsibilities Act of 2003 ("DPRRA") extended to registered domestic partners most of the rights and obligations of marriage, effective January 1, 2005.[2]

At what price this progress? And to whom? The recent case of *Rabin v. Schoenmann (In re Rabin)*[3] provides an ironic answer to these rhetorical questions.

Among the new *obligations* imposed by DPRRA, registered domestic partners are now mutually responsible for debts to third parties to the same extent that married spouses are so liable.[4] Given the broad sweep of the new legislation, the holding of *Rabin* was predictable: Following the enactment of DPRRA, registered domestic partners—like married spouses—may together assert *only one* homestead exemption, i.e., one homestead exemption fewer than if the domestic partners had not registered as such. To their chagrin, the registered domestic partners in *Rabin* learned that *they* paid a price for the progress under DPRRA—in the amount of the $75,000 value of the lost homestead exemption.

Rabin Factual Background

Marla Rabin and Nanoshka Johnson were same-sex partners in a committed, long-term relationship. One was the adoptive parent of the other's child; they jointly operated a business and incurred business and consumer debts.

In 1995 (before the first of California's registered domestic partnership statutes), Rabin and Johnson jointly purchased a residence. In 2000 (pursuant to the initial registration statute), they registered with California's Domestic Partner Registry. In August 2005 (after the effective date of DPRRA), each filed a separate Chapter 7 bankruptcy petition. Each debtor-partner individually scheduled her 50% interest in the residence and each asserted a $75,000 homestead exemption for each such interest. Thus, Rabin and Johnson together asserted *two* homestead exemptions, seeking to protect a total of $150,000 of equity value.

The bankruptcy trustee[5] sold the subject residence, netting proceeds that exceeded the $150,000 sum of the two exemptions. If the two homesteads were valid, the bankruptcy trustee would have disbursed $75,000 to each debtor-partner, free and clear of creditors' claims, and would have retained the balance for distribution to creditors. The bankruptcy trustee objected to the assertion of *two* exemptions, however, arguing that: (i) under California Code of Civil Procedure section 703.110, subdivision (a), married "spouses" may together assert only *one* homestead exemption; (ii) under DPRRA, the right of registered domestic partners to assert the homestead exemption is the same as that of married "spouses"; and (iii) therefore, as registered domestic partners, Rabin and Johnson were together limited to only *one* $75,000 homestead exemption.

The Bankruptcy Court sustained the trustee's objection, and the Bankruptcy Appellate Panel for the Ninth Circuit affirmed.

Background: California Homestead Exemptions

Exemptions are a central feature of California debtor-creditor law. Whether in opposition to a judgment-lien foreclosure or in a bankruptcy filing,[6] debtors may exempt certain statutorily-defined assets from the claims of their creditors. The homestead exemption is among the most important of these: It protects the equity value of the debtor's residence, the amount depending upon the characteristics of the debtor asserting the homestead. Thus, if the debtor lives in a residence with members of his/her "family unit," the homestead exemption protects up to $75,000 of equity value.[7] For a debtor who does not reside with a family unit, the homestead exemption is limited up to only $50,000 of equity value.[8] For aged or disabled debtors, the homestead exemption protects up to $150,000 of equity value.[9]

A major limitation on the homestead exemption arises if the debtor is *married*: Code of Civil Procedure section 703.110, subdivision (a) limits the debtor and his/her spouse to only *one* homestead exemption.[10] This limitation can constitute a substantial "marriage tax": While unmarried joint owners of a residence may *each* assert a homestead exemption for his/her respective interest, Code of Civil Procedure section 703.110, section (a) limits married couples to one exemption, even if they own their respective interests as separate property. For older debtor-couples (*each* of whom may separately qualify for a $150,000 exemption), the difference between *two* "non-marital" homesteads and *one* "marital" homestead could be as great as $150,000.

DPRRA and California Homestead Exemptions

By the deceptively simple language of Family Code section 297.5, subdivision (a), DPRRA accords to registered domestic partners the same rights and responsibilities that California law grants to or imposes upon "spouses":

> *(a) Registered domestic partners* shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon *spouses*. (Emphasis added.)[11]

Because the word "spouse" is statutorily synonymous with the words "husband," "wife," and "married person," DPRRA defines the rights and duties of registered domestic partners by incorporating any source of California law that employs one or more of those words.[12] Further, DPRRA requires that the Act "be construed liberally, in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses."[13]

The trustee's objection in *Rabin* was based upon a straightforward reading of Code of Civil Procedure section 703.110, subdivision (a) and DPRRA: If the former statute restricts "spouses" to one homestead exemption, then that statute—read together with Family Code section 297.5, subdivision (a)—must limit "registered domestic partners" to one homestead exemption.

Rabin and Johnson countered with a narrower reading of the statutes. By its introductory clause, Code of Civil Procedure section 703.110, subdivision (a) operates only if the judgment debtor "*is married*." Rabin and Johnson argued that the phrase "is married" does not appear in Family Code section 297.5, subdivision (a), and so that statute may not be used to equate "is married" with "is registered." Moreover, Rabin and Johnson argued that under California law—even after the enactment of DPRRA—the *status* of being married is *not* the same as the status of being registered. Rabin and Johnson thus argued that because of its introductory words of limitation, Code of Civil Procedure section 703.110, subdivision (a)'s one-exemption limitation did not apply to registered domestic partners, even though the word "spouse" appears later in the statute.

Rabin's and Johnson's argument is more than mere parsing of phrases. The legal distinction between "being married" and "being registered" is fundamental to DPRRA, because California, by voter initiative, recognizes only marriages that are between "a man and a woman."[14] While acknowledging this legal distinction, *Rabin* rejected the debtor-partner's argument. It held that the California Legislature intended that registered domestic partners have the same rights and responsibilities as spouses, married persons, husbands and wives, except to the extent expressly excluded by DPRRA. The court further noted that it was the Legislature's intention to equalize the respective statuses of registered domestic partners and married couples for purposes of creditor-debtor relations. Thus, the court concluded that Rabin and Johnson together were entitled to assert only one homestead exemption—in the *total* amount of $75,000.[15]

Beyond *Rabin*

Hidden in the interstices of DPRRA and debtor-creditor law are a number of other issues, which, though not raised by the facts of *Rabin,* will be of importance to registered domestic partners, their creditors, and their respective counsel.

1. Statutory construction of "before marriage" and "during marriage":

The temporal terms "before marriage" and "during marriage" appear in California statutes that define spouses' community property rights and mutual debt obligations. Family Code section 760, for example, defines "community property" as including property that was acquired "during the marriage"; Family Code section 911, subdivision (a) provides that earnings of a married person "during marriage" are not liable for the debts of the person's spouse incurred "before marriage."[16] Like the phrase "is married" (which was at issue in *Rabin*), these phrases do not appear in the operative language of Family Code section 297.5, subdivision (a).

In the same manner as the *Rabin* appellants, future litigants may argue—perhaps in litigation between separating registered domestic partners; perhaps in litigation between registered domestic partners and their creditors—that "before marriage" and "during marriage" do not mean "before registration" and "during registration," so that the appearance of such phrases in a statute renders such statute meaningless for registered domestic partners. *Rabin* will likely be cited for the propositions that such phrases must be harmonized with the broad mandate of DPRRA, and, that as a consequence, the statutes in which they appear apply to both registered domestic partners and married spouses.

2. Retroactivity of DPRRA:

For domestic partners who registered between 2000 (following the initial registration law) and January 1, 2005 (DPRRA's effective date), the new rights and obligations under DPRRA operate retroactively, from the date of the partners' registration. This retroactivity expressly applies to "community property" rights and to "mutual responsibility for debts."[17]

This retroactive operation of DPRRA may create surprises for domestic partners who registered prior to January 1, 2005, and for their creditors. For example, property that was purchased by one partner after the date of the couple's registration, but prior to January 1, 2005, may have become the community property of *both* partners as of January 1, 2005. Under such circumstances, the "new" community property is likely subject to the creditor claims of both the purchasing partner and the non-purchasing partner, whether the claims were incurred pre- or post-registration.[18]

DPRRA's retroactivity was *not* an issue in the *Rabin* bankruptcy cases, in part because Rabin and Johnson had jointly purchased their residence, in part because they had purchased their residence before they registered in 2000, and in part because they had incurred most of their debts jointly. Where retroactivity creates an economic asymmetry between partners, or between their respective communities of creditors, one may expect litigation questioning the fairness and even the constitutionality of these retroactivity provisions.[19]

3. Discriminatory impacts of Defense of Marriage Act ("DOMA") and bankruptcy:

We have seen above that DPRRA expands usage of the word "spouse" to create new rights and obligations for California registered domestic partners. Under *federal* law, precisely the opposite has occurred. Under the federal Defense of Marriage Act ("DOMA"),[20] whenever the word "marriage" appears in a federal statute or regulation, it can only mean "a legal union between one man and one woman as husband and wife"; whenever the word "spouse" so appears, it can only mean "a person of the opposite sex who is a husband or a wife."

Had *Rabin* construed a federal statute, DOMA would have required the DOMA's restrictive definitions of "marriage" and "spouse." Because *Rabin* involved only the construction of California exemption law, however, the federal bankruptcy court appropriately applied California's more expansive usage of "spouse," notwithstanding DOMA.

Nonetheless, the shadow of DOMA's restrictive definitions appear in *Rabin*, if only as backdrops to the opinion. For example, even though Rabin and Johnson had broad "spousal" rights under California law, DOMA precluded *them* from filing a *joint* bankruptcy petition. The reason: federal Bankruptcy Code section 302 allows only a debtor and "the debtor's spouse" to file a joint petition;[21] because Rabin and Johnson could not qualify as "spouses" of one another under DOMA, federal law precluded them from filing a joint bankruptcy petition; instead, they had to file separate, individual bankruptcy petitions. While this requirement did not create a major imposition in *Rabin*, the appellants argued, without success, that it was "inequitable" for the bankruptcy court to distinguish between married spouses and registered domestic partners for federal bankruptcy purposes, and then to ignore the distinction for state exemption purposes.[22]

Domestic relations counsel and insolvency counsel should be cautioned that DOMA may play a far more central, discriminatory role in *future* bankruptcy cases involving California registered domestic partners.

Under California law, a spouse may be entitled to receive spousal support, maintenance and child support from his/her former spouse. The Bankruptcy Code characterizes such obligations as "domestic support payments," and accords them special protections. Thus, if a bankruptcy debtor is a separated or divorced spouse, *Bankruptcy* Code section 507(a) provides that claims for domestic support obligations that are owed to "a spouse, a former spouse, or a child of the debtor.…" receive distributions before any other unsecured claims.[23] Additionally, such domestic support obligations cannot be discharged in a bankruptcy case;[24] any *other* debt owed by the debtor to "a spouse, a former spouse, or a child of the debtor…" is non-dischargeable;[25] and a debtor may not avoid a judgment lien that secures a domestic support obligation.[26]

Post-DPRRA, a registered domestic partner who separates from his/her partner, or whose domestic partnership is terminated, may be entitled to the same categories of spousal support that California law authorizes for a separating or divorcing spouse. As a consequence, one might anticipate that such domestic support obligations would be subject to the same protections that the Bankruptcy Code accords for such debts to spouses or former spouses.

Because the federal bankruptcy protections employ the word "spouse," however, the restrictive definitions of DOMA are triggered, and these federal statutes cannot be read to protect domestic support obligations owed to registered domestic partners. Thus, a claim for domestic support obligations owed to a current or former registered domestic partner will *not* have *first* priority under Bankruptcy Code section 507(1)(a), but rather will have the same *11th* priority accorded to general unsecured creditors; a similar claim is *not* non-dischargeable under Bankruptcy Code sections 523(1)(5) and (15); a judgment-lien *may* be avoided under Bankruptcy Code section 522(f), if the judgment is for a domestic support obligation owed to a registered domestic partner.

4.Uncertainty about DOMA and "DPRRA community property":

Finally, DOMA raises serious questions about how the "community property" of registered domestic partners—created by the interaction of Family Code section 297.5, subdivision (a) with California's community property statutes—will be administered in a bankruptcy case.

Bankruptcy Code section 541(a)(2) broadly includes in a debtor's bankruptcy estate "[a]ll interests of the debtor *and the debtor's spouse* in community property ….”[27] While this federal statute brings community property interests into the bankruptcy estate, it does not define the nature and extent of such interests; such interests are defined, instead, by the *state* law of the debtor's domicile.[28] Because post-DPRRA California law creates community property for registered domestic partners, it should logically follow that Bankruptcy Code section 541(a)(2) brings a debtor domestic partner's community property interests into his/her bankruptcy estate, just as it brings the community property interests of a debtor spouse into that spouse's bankruptcy estate.

An uncertainty exists, however, because DOMA's restrictive definition of "spouse" must be read into Bankruptcy Code section 541(a)(2). Is it possible that Bankruptcy Code section 541(a)(2) describes, as a matter of federal law, only community property that is owned by *married* spouses, man and woman? If so, is it possible that Bankruptcy Code section 541(a)(2) does *not* describe the community property of a registered domestic partner under DPRRA, and that, as a consequence, the debtor's and the non-debtor's interest in such community property must be administered differently? These questions are well beyond the scope of this monograph but will undoubtedly provide interesting opportunities for future litigants.[29]

As we began, we ask again: What price progress? ■

Endnotes

1 Pursuant to former Family Code section 297. Note that, effective January 1, 2005, opposite-sex partners who are eligible to receive Social Security benefits may also register as domestic partners, if one of the partners is over 62 years of age. (Fam. Code, § 297, subd. (b)(5)(B).)

2 California Domestic Partners Rights and Responsibilities Act of 2003. For general discussion of the legislation, see *Knight v. Superior Court (Schwarzenegger)* (2005) 128 Cal.App.4th 14, 20-21; *pet. for rev.den.,* 2005 LEXIS 7127 (June 29, 2005). See generally: California Domestic Partnerships (Sondra Allpin, ed., Cont. Ed. Bar 2005) ("California Domestic Partnerships").

3 *Rabin v. Schoenmann (In re Rabin)* (B.A.P. 9th Cir. 2006) 359 B.R. 242 (*"Rabin").*

4 See generally: R. Kidd and F. Hertz, *Partnered in Debt: The Impacts of California's New Registered Domestic Partner Law on Creditors' Remedies and Debtors' Rights Under California Law and Under Bankruptcy Law* (2006) 28 Calif. Bankr.J. at pp. 148-193 ("Kidd and Hertz"); M. O'Halloran, *Bankruptcy Issues for Domestic Partners,* in California Domestic Partnerships, pp. 561-596.4 ("O'Halloran").

5 Although the debtor partners' respective bankruptcy cases were administered separately, the same bankruptcy trustee was appointed in each case.

6 Bankruptcy Code section 522 provides the framework by which individuals who are debtors in bankruptcy cases may assert exemptions. Section 522(b)(1) sets forth a list of *federal* exemptions, which the debtor may assert unless the state, in which the debtor has been domiciled for 180 days before the bankruptcy filing, does not so authorize. In such case, section 522(b)(1) authorizes the debtor to assert such exemptions as are provided by applicable state law. The State of California has "opted out" of the federal exemption system (C.C.P., § 703.130), and so bankruptcy debtors who are California domiciliaries may assert California exemptions. (See *Rabin*, *supra*, 359 B.R. at p. 246.)

7 Code Civ. Proc., § 704.730, subd. (a)(2).

8 Code Civ. Proc., § 704.730, subd. (a)(1).

9 Code Civ. Proc., § 704.730, subd. (a)(3).

10 Code Civ. Proc., § 703.110, subd. (a).

11 Fam. Code, §297.5, subd. (a).

12 Fam. Code, § 11.

13 *Koebke v. Bernardo Heights Country Club* (2005) 26 Cal.4th 824, 838, *quoting* STATS. 2003, CH. 421 §15.

14 Fam. Code, § 308.5; *Knight v. Superior Court (Schwarzenegger), supra*, 128 Cal.App.4th at p. 20.

15 *Rabin, supra,* 359 B.R. at p. 246-47.

16 See also, Fam. Code, §§ 770, 780, 910, 913, 914.

17 Fam. Code, § 297.5, subds. (m), (*l*).

18 See general discussion in Kidd and Hertz, at pp. 153-54 and 158-61.

19 For further discussion, see Kidd and Hertz at pp. 154-154, fn. 22; Erwin Chemerensky, *Constitutional Issues and California's Domestic Partnership Law*, in California Domestic Partnership, pp. 87, et seq.

20 1 U.S.C. §7.

21 11 U.S.C. §302; *Rabin*, *supra*, 359 B.R. at p. 244 fn. 3.

22 *Rabin, supra,* 359 B.R. at p. 247.

23 11 U.S.C. §507(a)(1).

24 11 U.S.C. §523(A)(5).

25 11 U.S.C. §523(A)(15).

26 11 U.S.C. §522(f)(1)(A).

27 11 U.S.C. §541(A)(2).

28 *Butner v. United States* (1979) 440 U.S. 48, 55.

29 See: 5 Collier on Bankruptcy, ¶541.13 [5] (15th ed., 2007 supplement); Kidd and Hertz, at pp.168-77; O'Halloran, at pp. 596.1-596.2.