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**Further Thoughts on Proposition 8 and  
Retroactivity: A Response to Choper**

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**Abstract**

In a recent article, Professor Jesse Choper argued that, if held to be valid, Proposition 8 should not be applied retroactively. This conclusion, however, does not fully answer the question posed by the Court, which is: if valid, what effect does Proposition 8 have, if any, on the 18,000 marriages that were entered into before November 5, 2008. In order to answer the retroactivity question posed by the Court, one must consider another inquiry: what does it mean to apply Proposition 8 prospectively only? In this article, I argue that a prospective-only application of Proposition 8 would have no effect on the existing 18,000 marriages. Further, in response to an argument made by the interveners, I also urge that the fact that the putative spouse doctrine may extend some marriage-based rights for some limited period of time to persons who had a good faith belief that they were in a valid marriage does not in any way affect this conclusion.

**KEYWORDS:** Proposition 8, same-sex marriage, gay rights

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## Further Thoughts on Proposition 8 and Retroactivity: A Response to Choper<sup>1</sup>

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### Introduction

As a result of the California Supreme Court's decision in the *Marriage Cases*,<sup>2</sup> same-sex couples began marrying in the state of California on June 16, 2008. An estimated 18,000 same-sex couples married in California between June and November 2008. On November 4, 2008, however, the California voters narrowly approved Proposition 8,<sup>3</sup> which (if valid) amended the California Constitution to limit marriage to the union of one man and one woman,<sup>4</sup> bringing an abrupt halt to the marriages. Challenges to Proposition 8 were filed immediately. In its order accepting review of three of the challenges, the Court posed three questions to the parties. The first two questions relate to the validity of Proposition 8.<sup>5</sup> The third question asks: "If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?"<sup>6</sup>

This piece, like Professor Jesse Choper's piece,<sup>7</sup> is limited to consideration of the third question—the effect of Proposition 8 (if valid) on those 18,000 marriages. As Professor Choper explained, there is a strong presumption against applying legislation retroactively. This rule or presumption against retroactivity is based on the principle that people must be given confidence that they can rely on the "legal consequences of their actions."<sup>8</sup> This reliance interest is arguably at its pinnacle when people make decisions with respect to marriage and family issues. As the United States Supreme Court explained in *Lawrence v. Texas*, the decision to marry is one of the "most intimate and personal choices a person may make in a lifetime"; one that is "central to personal dignity and autonomy."<sup>9</sup> People must have a reasonable assurance when they make this profound decision that their marital status will be secure (as a legal matter) until the marriage is ended through death or divorce.

One of the reasons that the state favors marriage is because the institution of marriage encourages and promotes stable, committed familial relationships. The institution of marriage does so through both legal and social mechanisms. From the moment a person marries, that person automatically gains access to hundreds of important rights, many of which better enable the person to care for his or her spouse. For example, upon marriage, an individual has a right to make medical

decisions for an incapacitated spouse.<sup>10</sup> A married spouse also automatically incurs responsibilities to his or her marital partner. Unless they decide otherwise, married spouses share in the property acquired during the marriage,<sup>11</sup> and they also share in each other's debt.<sup>12</sup> The certainty that is extended to the spouses by this comprehensive web of respective rights and obligations fosters the parties' ability to commit to and invest in their relationship.

These legal incentives are furthered supported by the social conventions associated with marriage. As Professor Elizabeth Scott has written, "[m]arriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between the spouses—norms such as fidelity, loyalty, trust, reciprocity, and sharing."<sup>13</sup>

Holding that individuals do not have assurance that their marital status, once properly entered into, remains valid until ended by death or divorce would directly undermine this core purpose of marriage—that of providing a secure and stable set of rules that encourage and foster the development of a committed and mutually supportive relationship.

### **Presumption against Retroactive Legislation**

In order to protect people's reliance interests on the state of the law at the time that they acted in this and in other areas of law, California courts require that there be a "clear indication that the voters . . . intended" for the new law to be applied retroactively.<sup>14</sup> The standard that California courts have applied is very high; "vague phrases" are not sufficient.<sup>15</sup> Rather, the evidence must make clear that the intent to apply the law retroactively was "unequivocal."<sup>16</sup>

In his piece, Professor Choper argues, and I agree, that neither the text of Proposition 8 nor the ballot materials demonstrate that the voters clearly and unequivocally intended Proposition 8 to be applied retroactively.<sup>17</sup> At the oral argument in the Proposition 8 litigation it appeared that members of the Court likewise were deeply skeptical of the interveners' arguments to the contrary. For example, in his questioning of Dean Ken Starr, attorney for the interveners,<sup>18</sup> Chief Justice George even suggested that the proponents made a strategic decision to leave the language of the amendment vague as to what effect it would have on existing marriages because it was thought that people would be less likely to vote in favor of Proposition 8 if it was clear that it would be applied retroactively.<sup>19</sup>

Should the Court agree with Professor Choper's position that the evidence does not demonstrate that the voters clearly intended the amendment to be applied retroactively, Proposition 8 must be applied prospectively only. This conclusion, however, does not fully answer the question posed by the Court, which is: if valid,

what effect does Proposition 8 have, if any, on the 18,000 marriages that were entered into before November 5, 2008. In order to answer the question posed by the Court, one must consider another inquiry: what does it mean to apply Proposition 8 prospectively only?

In his briefing and oral argument to the Court, Dean Ken Starr suggested that a prospective-only application of Proposition 8 would mean that the 18,000 marriages were valid from their date of entry *until* November 4, 2008, but that on November 5, 2008 all of the 18,000 marriages became invalid and unrecognizable (at least in the state of California).<sup>20</sup> By contrast, the challengers argued that applying Proposition 8 to affect the existing marriages in any way would be a retroactive application of the law.

Because this question—what does it mean to apply Proposition 8 prospectively only—may be of central importance to the Court’s ultimate conclusion in the case and because it is undoubtedly of vital significance to the lives of the 36,000 lesbian and gay people who married in California last year, this essay further develops the conversation begun in Professor Choper’s piece about Proposition 8 and retroactivity.

### **What Is a Retroactive Law?<sup>21</sup>**

The California Court of Appeal recently explained that “[t]he retroactive application of a statute is one that affects rights, obligations or conditions that existed before the time of the statute’s enactment, giving them an effect different from that which they had under the previously existing law. . . . In other words, retroactive application of a recently enacted law applies ‘the new law of today to the conduct of yesterday.’”<sup>22</sup> In a previous case, the California Supreme Court held that applying a new law outlining the compensation that should be awarded to an individual based on a work-related injury to a claim arising out of an injury that occurred before the effective date of the new statute would be a retroactive application of the law.<sup>23</sup> Similarly, in *Yoshioka v. Superior Court*,<sup>24</sup> the California Court of Appeal held that applying a 1996 voter initiative that prohibited uninsured motorists from collecting noneconomic damages to an uninsured motorist who had sustained injuries in a 1994 car accident involved a retroactive application of the law.<sup>25</sup>

Likewise, here, holding that the existing 18,000 marriages abruptly became invalid and unrecognizable in the state of California on November 5, 2008 would be a retroactive application of law—such a conclusion would dramatically affect the legal rights, obligations, and conditions to which these couples were entitled under the old law.

Although many of the same-sex couples who married in California are also registered as domestic partners, some of them are not. Some of these couples are not registered because they were not qualified to register.<sup>26</sup> Some of these couples are not registered because they viewed domestic partnership as a second-class status and, accordingly, chose not to enter into a legally recognized relationship until they could enter into one that was fully equal in the eyes of the law.

For these couples, holding that their marriages abruptly became invalid and unrecognizable on November 5, 2008 would mean that they would have lost access to hundreds of state-conferred rights and responsibilities. As noted above, from the moment one marries, one gains access to a comprehensive web of hundreds of state rights and responsibilities. Among many others, these rights include: the right to sue for tort damages in the event of death or injury to a spouse;<sup>27</sup> the right to be supported by one's spouse;<sup>28</sup> the privilege not to testify against a spouse;<sup>29</sup> and the right to control disposition of a spouse's remains in the event of the spouse's death.<sup>30</sup> Particularly important during this time of economic uncertainty, a spouse is entitled to purchase continuation health care coverage under CalCOBRA if the person's spouse recently lost his or her job and, as a result, health insurance.<sup>31</sup> In addition to these rights conferred by state law, many private third parties extend special benefits to spouses. For example, many employers provide health coverage to the spouses of their employees,<sup>32</sup> and many insurance companies provide special rates for married couples.

Prior to the November 4, 2008 election, many of the 36,000 lesbian and gay people who married in California had already begun to exercise some of these rights. Many lesbian and gay individuals who married in California began receiving health insurance through a spouse's employer because of their marital status. Some lesbian and gay people who married in California have since passed away, and, prior to November 4, their surviving spouses began receiving benefits through the government and through private entities by virtue of their status as a surviving spouse.

In addition, many if not most of the 36,000 lesbian and gay people who married in California made profound and life-altering decisions based on their statuses as validly married persons. For example, upon marrying, some of these 36,000 spouses decided to leave their current place of employment based on the knowledge that their spouses had legal obligations to support them. Some of these 36,000 spouses canceled their medical insurance based on the knowledge that their spouses' employers would thereafter be contractually obligated to provide health insurance to them as the legal spouses of their employees. Some of these 36,000 individuals decided to undergo a medical procedure based on the knowledge that they were entitled to this new health insurance.

Holding, as Dean Starr urged the Court to do, that these 18,000 marriages became invalid and unrecognizable on November 5, 2008 would strip these individuals of a host of crucial rights and obligations that they were entitled to and may have been exercising on November 4, 2008. Moreover, many of these 36,000 individuals would be worse off than they would had been had they not married at all. This is true because many of these individuals made profound, life-altering decisions in reliance on their statuses as validly married persons that they otherwise would not have made. Such a result clearly would “affect[ ] rights . . . that existed before the time of the statute’s enactment, giving them an effect different from that which they had under the previously existing law.”<sup>33</sup>

Some of the 18,000 couples are also registered domestic partners. For these couples, even if their marriages were invalidated, they would retain most, but not all, of the tangible state-conferred rights and responsibilities of marriage.<sup>34</sup> Even for these couples, however, holding that their marriages became invalid and unrecognizable on November 5, 2008 would still change the legal consequences of their past conduct of getting married.

As the California Supreme Court made clear in its decision in the *Marriage Cases*, an important and constitutionally significant element of the fundamental right to marry is the right to be accorded equal dignity and respect for one’s intimate relationship.<sup>35</sup> The Court also held that the then-applicable system of permitting heterosexual couples to marry, while requiring same-sex couples to enter into the separate and distinct institution of domestic partnership to obtain the tangible rights and protections of marriage, denied same-sex couples of this core aspect of the fundamental right to marry.<sup>36</sup> Not only did the then-applicable system deny same-sex couples equal dignity and respect, forcing same-sex couples to enter into this separate and distinct institution was likely, the Court said, to mark same-sex couples as second-class citizens.<sup>37</sup> Invalidating their marriages would strip these couples of this constitutionally significant aspect of the right to marry, again changing the legal consequences of their past conduct.

As a technical matter, married couples who are registered as domestic partners would still be entitled to most of the state-conferred tangible rights and responsibilities of marriage. However, as a practical matter, if stripped of their status as validly married spouses, these couples would be likely to face profound difficulties and complications in enforcing their rights as domestic partners. As the Court explained last May, “[w]hile it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term ‘domestic partnership’ is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.”<sup>38</sup>



Two comprehensive reports out of New Jersey confirm the California Supreme Court's intuitions about these likely difficulties. After studying the matter, the New Jersey Civil Union Review Commission twice found that same-sex couples in civil unions continue to be denied rights to which they are entitled. "Many witnesses who are in civil unions described situations in which they were forced to explain their civil union status, what a civil union is, and how it is designed to be the equivalent of marriage."<sup>39</sup> The witnesses testified that many of these conversations and difficulties occurred in emergency situations when certainty and clarity is critical.<sup>40</sup>

Involuntarily stripping couples of their status as lawfully married spouses and forcing them once again to return to a state of the law where they are much more likely to be denied rights to which they are entitled certainly changes the legal consequences of their past act of getting marriage.

### **Sufficiency of the Putative Spouse Doctrine**

During the March 5, 2009 oral argument, Dean Starr repeatedly referred to the putative spouse doctrine. Under the putative spouse doctrine, which is recognized in California, a person who has a good faith belief that he or she is in a valid marriage, is entitled to the same division of property he or she would have been entitled to had the marriage not been invalid.<sup>41</sup> Putative spouses also may be entitled to some other rights that are extended to validly married spouses.

Although he never fully developed the argument, it appears that Dean Starr was suggesting as follows: From November 5, 2008 onward, the putative spouse doctrine (he suggests) would extend to these couples the rights and protections of marriage. Applying Proposition 8 to invalidate their marriages as of November 5, 2008 would not be a retroactive application of the law, he suggests, because the couples would still be entitled to tangible rights and protections and, therefore, the invalidation of their marriages would not change the legal consequences of the individuals' past conduct of getting married. To the extent this is what Dean Starr was suggesting, there are a number of significant flaws in his argument.

First, even assuming the putative spouse doctrine would apply to these couples, the doctrine does not extend to putative spouses all of the rights and protections of validly married spouses. It is clear under California statutes that a putative spouse is entitled to a distribution of property acquired during the void marriage as if the marriage had been valid.<sup>42</sup> In a nullity action, a putative spouse also may seek spousal support, and may be entitled to attorneys' fees and costs associated with the action.<sup>43</sup> California statutes also provide that a putative spouse has standing to sue for wrongful death.<sup>44</sup>



But as noted above, legally married spouses are entitled to *hundreds* of rights under state law and with respect to most of these protections it simply remains unclear whether putative spouses are entitled to them. For example, “[w]hether a putative spouse is a surviving spouse entitled to a family allowance from the estate of the decedent is an open question[.]”<sup>45</sup> Similarly, there is no statutory provision or case law guidance on whether various parenting provisions, including the conclusive marital presumption, Cal. Fam. Code § 7540,<sup>46</sup> or the assisted reproduction provision, Cal. Fam. Code § 7613(a),<sup>47</sup> would be applied to a putative spouse.

And case law affirmatively establishes that there are some rights that would be extended to validly married spouses would be denied to putative spouses. For example, in *Allen v. Western Conference of Teamsters Pension Trust Fund*,<sup>48</sup> the Ninth Circuit held that it was permissible to deny a contractual right to a putative spouse that would be extended to a validly married spouse. Thus, although there are some marital rights that are extended to putative spouses, there are many areas of law in which there is no existing statutory or case law guidance with respect to whether a putative spouse would be entitled to a right that is available to a validly married spouse, and there are some areas in which the existing law suggests that putative spouses would be denied protections that would be extended to validly married spouses.

Second, the putative spouse doctrine only protects individuals so long as they have an objective, good faith belief that they are in a valid marriage.<sup>49</sup> Should the Court agree with the rule being urged by Dean Starr, there would be an argument that the 36,000 individuals had a good faith belief that there were in a valid marriage from November 5, 2008 until the date of the decision. But it seems unlikely that a court would find that their good faith belief continued after the date of the Court’s decision. Accordingly, even with respect to rights that are extended to putative spouses, at best, these rights likely would only cover the period from November 5, 2008 until the date of the opinion.

Third, the doctrine of putative spouse is an equitable doctrine that is applied on a case-by-case basis with respect to individual rights and protections. Thus, to obtain protection under the doctrine, each one of these 36,000 individuals would have to separately litigate their right to each individual benefit to which they were seeking protection. Not only would this require each of the 36,000 spouses to live in a state of uncertainty that would not be resolved until every individual issue was decided by a court, but it would be a very costly and inefficient process. One of the core bases for the state’s policy favoring marriage is “rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in an organized society.”<sup>50</sup> The certainty of this clear institutional structure and its web of hundreds of important rights and obligations

fosters the stability of and fidelity to the relationship.<sup>51</sup> Requiring these 36,000 individuals—each of whom made one of the most profound decisions that one can make in a lifetime—to live with the level of insecurity that would come with protecting them only through the putative spouse and other equitable doctrines flies in the face of the public policy of this state to support and encourage committed, stable relationships.

Finally, even assuming *arguendo* that the putative spouse doctrine would apply, that it provided fully comprehensive marital rights and responsibilities, and that its coverage would continue into the future, these 36,000 individuals would still be stripped of their right to have equal dignity and respect accorded to their relationship by the government. As discussed above, being accorded equal dignity and respect is a core element of the fundamental right to marry, and denying thousands of individuals and their children this core, constitutional right would, in and of itself, change the legal consequences of their past decision to enter into a valid marriage.

### **Conclusion**

Holding that the 18,000 existing marriages became invalid and unrecognizable on November 5, 2008 would be a retroactive application of Proposition 8. Such an application would strip hundreds of important rights and responsibilities from these couples, clearly and dramatically altering the legal consequences of their past conduct of entering into a valid marriage. Moreover, even if the couples did not lose access to the tangible rights and protections of marriage, stripping the couples of their status as validly married spouses would deny them one of the core elements of the fundamental right to marry—the right to be accorded equal dignity and respect. The fact that the putative spouse doctrine may extend some marriage-based rights for some limited period of time to persons who had a good faith belief that they were in a valid marriage does not in any way affect this conclusion.

### **Notes**

<sup>1</sup> This piece is based upon and is further developed in an amicus brief that was filed in the Proposition 8 litigation on behalf of 28 California Family Law Professors. The brief focuses solely on the issue of retroactivity, arguing that Proposition 8 should not affect in any way the validity of the existing 18,000 marriages. The brief can be accessed at <<http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168047-amcur-prof-famlaw.pdf>>. I was a co-author of the brief, along with Professor Michael S. Wald of Stanford Law School.

<sup>2</sup> 43 Cal.4th 757 (2008).

<sup>3</sup> Proposition 8 was approved by the voters by a margin of 52% to 48%. See, e.g., Jessica Garrison, et al., “Attorney General Asks for Prop. 8 Invalidation,” *L.A. Times*, Dec. 20, 2008.

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<sup>4</sup> In full, Proposition 8 provides: “Only marriage between a man and a woman is valid or recognized in California.” Cal. Const. Art I, § 7.5.

<sup>5</sup> The first two questions posed to the litigants are as follows:

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution . . . ;
- (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

Nov. 19, 2008 Order, available at <[http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168047\\_S168066\\_S168078-11-19-08\\_ORDER.pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168047_S168066_S168078-11-19-08_ORDER.pdf)>.

<sup>6</sup> Nov. 19, 2008 Order, available at <[http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168047\\_S168066\\_S168078-11-19-08\\_ORDER.pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168047_S168066_S168078-11-19-08_ORDER.pdf)>.

<sup>7</sup> Jesse H. Choper, “Should Proposition 8 Be Held to Be Retroactive?” 1 *Cal. J. of Politics and Policy* 1 (2009).

<sup>8</sup> *Myers v. Phillip Morris Co., Inc.*, 28 Cal.4th 828, 841 (2002).

<sup>9</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>10</sup> See, e.g., Cal. Prob. Code § 4690 (providing that if a person becomes incapacitated, the agent may consult with the person’s spouse).

<sup>11</sup> See, e.g., Cal. Fam. Code § 751 (“The respective interests of the husband and wife in community property during continuation of the marriage relation are present, existing, and equal interests.”).

<sup>12</sup> See, e.g., Cal. Fam. Code § 910(a) (“Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage . . .”).

<sup>13</sup> Elizabeth S. Scott, “Marriage, Cohabitation, and Collective Responsibility for Dependency,” 2004 *U. Chi. Legal F.* 225, 241 (2004).

<sup>14</sup> *Californians for Disability Rights v. Mervyn’s, LCC*, 39 Cal.4th 223, 230 (2006).

<sup>15</sup> *Id.* at 229.

<sup>16</sup> *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207 (1988).

<sup>17</sup> See, e.g., Choper, *supra*, at 2–4.

<sup>18</sup> The interveners are the proponents of Proposition 8.

<sup>19</sup> Oral argument at 2:49. The oral argument can be accessed through the California Channel at <<http://www.calchannel.com/>>.

<sup>20</sup> In his brief to the Supreme Court, Dean Starr asked the Court to hold that the existing 18,000 marriages became invalid and unrecognizable on November 5, 2008, but he never specifically characterized this position as being a prospective-only application of the law. See Interveners’ Opp. Brief at 35–42, available at <<http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168047-opposition-brief.pdf>>. At the oral argument, however, Dean Starr told the Court that he believed that what they were asking the Court to do did not involve a retroactive application of law; that it was a prospective-only application. See oral argument at 2:55.

I assume that Professor Choper believes that applying Proposition 8 to affect in any way the existing 18,000 marriages in any way would be a retroactive application of the law, but this is never stated as such in his piece.

<sup>21</sup> Just because a particular application of the law is considered to be retroactive does not necessarily mean such an application is prohibited or unconstitutional. Where there is clear evidence that the voters or the legislature intended a particular law to be applied retroactively, then a court must assess whether such an application would raise due process or other constitutional concerns. Due to space limitations, whether a retroactive application of Proposition 8 would be constitutional is not addressed in this piece. This issue is, however, discussed in the amicus brief that was filed on

behalf of the 28 California Family Law Professors. As noted above, this brief is available at <<http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168047-amcur-prof-famlaw.pdf>>.

<sup>22</sup> *Rosasco v. Commission on Judicial Performance*, 82 Cal. App. 4th 315, 322 (2000) (citations omitted). See also *Evangelatos v. Superior Court*, 44 Cal.3d 1188 (1988) (“a retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.”) (quoting *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal.2d 388, 391 (1947)).

<sup>23</sup> *Aetna Casualty and Surety Co. v. Industrial Accident Commission*, 30 Cal.2d 388, 391 (1947).

<sup>24</sup> 58 Cal. App. 4th 972 (1997).

<sup>25</sup> *Id.* at 980 (“It is clear that the initiative applies to petitioner in a retroactive manner.”). The Court, however, held that this result was intended by the voters and that applying the law retroactively was constitutional.

<sup>26</sup> As the Court noted in its decision in the *Marriage Cases*, to be eligible to register as domestic partners, a couple must have a “common residence.” Cal. Fam. Code § 297(b)(1). There is no similar requirement to be eligible to marry. *In re Marriage Cases*, 43 Cal.4th at 805 n.24.

<sup>27</sup> See, e.g., Cal. Civ. Proc. Code § 377.60 (listing spouses as persons entitled to sue for wrongful death).

<sup>28</sup> Cal. Fam. Code § 4300 (“Subject to this division, a person shall support the person’s spouse.”).

<sup>29</sup> Cal. Evid. Code § 970 (“Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.”).

<sup>30</sup> Cal. Health & Safety Code § 7100 (providing that, in the absence of a named agent under a power of attorney for health care, that a competent surviving spouse is entitled to make decisions about disposition of remains).

<sup>31</sup> See, e.g., Morrison & Foerster, Yana S. Johnson, “Effects of Same-Sex Marriage on Employee Benefits” (Oct. 2008), available at <<http://www.mofo.com/news/updates/files/14724.html>> (noting that coverage of same-sex spouses would be required at least for small employers covered under the nonextended Cal-COBRA).

<sup>32</sup> See, e.g., Catherine Hoffman, Diane Rowland, Alicia L. Carbaugh, “Holes in the Health Insurance System – Who Lacks Coverage and Why,” 32 *J. L. Med. & Ethics* 390, 391 (2004) (noting that employers “often extend coverage to their employees’ families” and noting that half of the nonelderly adults who have access to employer-provided health insurance are covered as “the employee’s dependent.”).

<sup>33</sup> *Rosasco v. Commission on Judicial Performance*, 82 Cal.App.4th 315, 322 (2000) (citations omitted).

<sup>34</sup> The California Supreme Court noted in its decision in the *Marriage Cases* that “the parties ha[d] identified various differences (nine in number) that exist in the corresponding provisions of the domestic partnership and marriage statutes and in a few other statutory and constitutional provisions.” *In re Marriage Cases*, 43 Cal.4th 757, 805 n.24 (2008).

<sup>35</sup> *Id.* at 793 (2008).

<sup>36</sup> *Id.* at 845–47.

<sup>37</sup> *Id.* at 846 (“particularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining the distinction in nomenclature with regard to this most fundamental of relationships whereby the term ‘marriage’ is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.”).

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<sup>38</sup> *Id.* (citing N. J. Civil Union Review Com., First Interim Rep. (Feb. 19, 2008)).

<sup>39</sup> N. J. Civil Union Review Com., Final Report, 9 (Dec. 10, 2008).

<sup>40</sup> *Id.*

<sup>41</sup> Cal. Fam. Code § 2251.

<sup>42</sup> Cal. Fam. Code § 2251.

<sup>43</sup> Cal. Fam. Code § 2254.

<sup>44</sup> Cal. Civ. Proc. Code § 377.60(b).

<sup>45</sup> Cal. Jur. 3d Family Law § 100. See also *Estate of Hafner*, 184 Cal.App.3d 1371 (1986) (denying putative spouse's request for a family allowance).

<sup>46</sup> Cal. Fam. Code § 7540 establishes a presumption that a child born to a married woman is the legal child of her husband. The presumption becomes conclusive two years after the child's birth. Cal. Fam. Code § 7541.

<sup>47</sup> Cal. Fam. Code § 7613(a) provides that a husband is considered the legal parent of a child born to his wife through alternative insemination where the parties complied with the statutory requirements (including the requirement that the insemination be performed under the supervision of a licensed physician and surgeon and that both the husband and wife consented in writing to the insemination).

<sup>48</sup> 788 F.2d 648, 650 (9th Cir. 1986).

<sup>49</sup> See, e.g., 11 Witkin, Summary § 261 (“The plaintiff’s good faith belief that the marriage is valid has long been an essential basis for a claim of rights as a putative spouse.”); Cal. Civ. Proc. Code § 377.60(b) (defining “putative spouse” to mean “the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid”); *Centinela Hosp. Med. Center v. Superior Court*, 215 Cal. App. 3d 971 (1989) (denying wrongful death claim on the ground that the plaintiff could not reasonably have believed that the marriage was valid).

<sup>50</sup> *Elden v. Sheldon*, 46 Cal.3d 267, 275 (1988) (internal quotations and citation omitted).

<sup>51</sup> See, e.g., *In re Marriage Cases*, 43 Cal.4th at 816 n.38 (having a “justifiable expectation . . . that [the] relationship will continue indefinitely permits parties to invest themselves in the relationship with a reasonable belief that the likelihood of future benefits warrants the attendant risks and inconveniences.”) (internal quotations and citation omitted).