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Putative Partners: Protecting Couples from the Consequences of Technically Invalid Domestic Partnerships

Ben Johnson†

INTRODUCTION

In 2006, Lena Velez sought to end her fifteen-year relationship with Krista Smith. Velez filed an action in the Mendocino Superior Court to officially dissolve her domestic partnership and requested partner support, continued health coverage, and a division of her and her partner's property and assets. There was only one problem with Velez's request: neither she nor her partner had ever registered a domestic partnership with the state of California. Instead, Velez and Smith had only registered their partnership with the City and County of San Francisco. This is important because of the differences in benefits offered by registration with the State of California and registration with the City and County of San Francisco. Without a valid state registration, Velez would not be able to receive a share of the property acquired by the couple during their relationship and would be ineligible for continued health insurance coverage.

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2. Id. at 22.
3. Id. at 15.
Velez argued that even without a valid state partnership, she was still entitled to dissolution as a putative domestic partner. She based her claim on the putative spouse doctrine and argued that it should apply to domestic partnerships in the same way it applies to marriages. The putative spouse doctrine is a legal principle that allows a court to treat an individual or couple as married even though the marriage is technically invalid. The doctrine is based on equitable principles, created to protect innocent parties who relied on a good faith belief that his or her marriage was valid. A putative spouse is entitled to the same rights and privileges as a legal spouse, including the right to community property and spousal support. The doctrine is largely the product of judicial development, although the California legislature eventually codified it in the state’s Family Code.

Velez petitioned the court to grant her a putative partner status because she held a good faith belief that her domestic partnership was valid. She argued that the court should put her in the same position as a putative spouse and allow her to receive a property distribution and continued partner support. The trial court dismissed the complaint and the Court of Appeal subsequently held that the putative spouse doctrine did not apply to domestic partnerships. The Court of Appeal held that "the Legislature has not created a 'marriage' by another name or granted domestic partners a status equivalent to married spouses." The court emphasized the differences between a marriage and a domestic partnership and concluded that putative status was not among the enumerated rights granted to domestic partners by the legislature.

Although Velez is the first published decision regarding a putative partner claim in the context of a domestic partnership dispute, Lena Velez’s situation is not unique. Thousands of same-sex couples registered with city and county

4. Appellant's Amended Opening Brief at 13, Velez, 48 Cal. Rptr. 3d 642, 2006 WL 1020899 [hereinafter Appellant’s Brief]. The “putative domestic partner” status is an issue of first impression and has not previously been addressed by any jurisdiction.
7. See CAL. FAM. CODE § 2254; CAL. FAM. CODE § 2251(a)(1).
9. Velez also made an argument regarding the retroactive application of California’s Domestic Partner Act, but this Comment will only examine her putative partner claim. See Appellant’s Brief, supra note 4, at 5, 53-54.
10. See id. at 55-56.
12. Id. at 657 (quoting Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 699 (Cal. Ct. App. 2005)).
13. Id.
registries before the California legislature enacted Assembly Bill 26 (AB 26), which amended the Family Code and established a statewide registration system for domestic partnerships. Subsequently, in 2003, the legislature adopted AB 205, the Domestic Partnership Rights and Responsibilities Act. The Act essentially “extend[ed] the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005.”

With a state domestic partnership system in place, it was not entirely clear what would happen to partnerships that had been registered locally with cities or counties across California prior to the enactment of AB 26. This confusion could conceivably lead an individual or couple, like Lena Velez and Krista Smith, to believe that he or she held a valid state-recognized domestic partnership, when in actuality the couple was only registered at the city or county level. Adopting a putative partner status would create a safety net for individuals who mistakenly believe that they have the benefits that are conferred with a valid state domestic partnership.

The Velez court correctly concluded that domestic partnerships are not marriage by another name. However, the court wrongly held that the putative spouse doctrine is inapplicable to domestic partnerships. The court overlooked the fact that the “Legislature has made it abundantly clear that an important goal of the Domestic Partner Act is to create substantial legal equality between domestic partners and spouses.” Establishing a putative partner doctrine would fulfill the legislative intent behind the Domestic Partner Act while protecting innocent parties who held a good faith belief that his or her

(on file with author) [hereinafter Ellis Opening Brief]. In Ellis, Darrin Ellis and David Arriaga had been in a committed partnership for five and a half years. Id. at 4. In August 2003, Ellis and Arriaga met with an attorney who prepared a Declaration of Domestic Partnership that was executed by both Ellis and Arriaga and duly notarized. Id. at 4-5. At the end of the meeting, Ellis believed that Arriaga was going to mail the Declaration to the Secretary of State in order to complete the registration process. When the couple separated in April 2006, Ellis was shocked to discover that Arriaga had never mailed the Declaration and consequently the couple never held a valid state partnership. Id. at 5. Ellis filed a petition for dissolution of the partnership and sought a distribution of the couple's jointly held assets and property. Id. at 6. Ellis argued that he was entitled to dissolution as a putative partner because he innocently believed their partnership had been validly registered. Id. The trial court dismissed Ellis's claim and held that the failure to incorporate a putative domestic partnership status in the text of AB 205 precluded recovery. Id. at 7.

17. Id.
18. See Knight, 26 Cal. Rptr. 3d at 700 ("The numerous dissimilarities between the two types of unions disclose that the legislature has not created a 'same-sex marriage' under the guise of another name.").
partnership was valid.\textsuperscript{20}

This Comment proposes the creation of a putative domestic partner status by drawing upon the putative spouse doctrine. A putative domestic partnership would apply in cases like Velez's where a couple registered locally, but mistakenly failed to re-register after the enactment of AB 26 and AB 205, because the couple believed in good faith that their partnership was recognized by the state.\textsuperscript{21} Although this Comment focuses on the application of the putative spouse doctrine to domestic partnerships in California, the issues raised in \textit{Velez} have national implications. In recent years non-marital relationship recognition regimes—such as domestic partnerships, civil unions and reciprocal beneficiaries—have proliferated.\textsuperscript{22} Most recently, New Jersey implemented a civil union registry after the state supreme court ruled that same-sex couples could not be denied the benefits granted to married couples.\textsuperscript{23} States and municipalities across the country have enacted these regimes, largely to improve legal protections and equality for same-sex couples. To the extent that the different statuses overlap or fail to overlap, incorporate rights or fail to incorporate rights, confusion and the risk of inadvertent hardship increases. Across the country, laws of relationship recognition are changing rapidly in response to evolving cultural norms and the politics of equality. Same-sex couples experience high uncertainty surrounding the legality of their relationships. Long-standing equitable principles, such as the putative spouse doctrine, can prevent the injustice that same-sex couples might experience as a result of falling through legal cracks created by seismic shifts in the law. California is not the only place where the law has changed.

Part I of this Comment describes the facts presented in \textit{Velez} and reviews the Court of Appeal decision rejecting Velez's putative partner claim. Part II briefly explores the evolution of domestic partnerships in California and demonstrates how the similarities between the state and local registries could cause confusion. Part III examines the putative spouse doctrine as defined by California courts and shows how equitable principles support the application of the doctrine to domestic partnerships. Finally, Part IV discusses why the Court of Appeal wrongly decided \textit{Velez} and proposes the creation of a new "putative

\textsuperscript{20} \textit{See Assemb. B. 205 §1(b).}

\textsuperscript{21} A putative domestic partner status could apply to other factual scenarios, but this Comment focuses on the situation in \textit{Velez v. Smith}.

\textsuperscript{22} \textit{See generally LAMBDA LEGAL, LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS BY STATE, Mar. 14, 2007, http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31988886 (providing a state-by-state breakdown of the various levels of legal recognition granted to same-sex couples).}

\textsuperscript{23} \textit{See Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006) (holding that “[w]ith this State's legislative and judicial commitment to eradicating sexual orientation discrimination[,] . . . denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of [the state constitution]”); LAMBDA LEGAL, NEW JERSEY RELATIONSHIP RECOGNITION INFORMATION, Mar. 27, 2007, http://www.lambdalegal.org/our-work/states/new-jersey.html.}
partner" status for application to domestic partnerships. This Part explains how
the creation of a putative partner status would protect the expectations of
innocent parties and fulfill the legislative intent behind AB 26 and AB 205.

I

VELEZ v. SMITH: A CASE OF FIRST IMPRESSION

A. Velez and Smith Form a Domestic Partnership

Lena Velez and Krista Smith met in 1989 and subsequently began
dating.24 After five years, Velez and Smith filed a declaration of domestic
partnership with the City and County of San Francisco.25 Two years later, in
March 1996, the couple celebrated a public commitment ceremony officiated
by Mayor Willie Brown.26 They joined five hundred other same-sex couples
who exchanged vows and filed a second declaration of domestic partnership
with the City and County of San Francisco.27

After receiving their registration certificate, Velez and Smith held
themselves out as domestic partners in many ways.28 They purchased several
pieces of real property, including the home they shared during their
relationship.29 Velez and Smith also designated each other as beneficiaries on
insurance plans, pension plans, and held a joint bank account.30 Most
importantly, when Velez was stricken with multiple sclerosis, she received
health insurance coverage through Smith's employer, the City of San
Francisco.31

After ten years, the relationship began to fall apart. On November 23,
2004, Smith filed a "Notice for Ending a Domestic Partnership" with the San
Francisco County Clerk.32 Velez countered by filing a dissolution action with
the Mendocino County Superior Court and requested a division of their
property and partner support.33 Soon after Velez realized she faced a huge
obstacle: she and Smith had never registered as domestic partners with the State
of California.34 Smith argued that the court lacked jurisdiction to hear the
dissolution petition because she and Velez did not have a valid domestic

25. Id.
27. Id. It is unclear why the couple registered their partnership twice. See also id. at 7.
28. Id. at 16.
29. Id.
30. Velez, 48 Cal. Rptr. 3d at 645.
31. Krista Smith worked as a firefighter and paramedic for the City and County of San
Francisco. See Appellant's Brief, supra note 4, at 15, 55.
32. Velez, 48 Cal. Rptr. 3d at 645.
33. Id.
34. The state scheme has different requirements for dissolving a domestic partnership than
many local registries. See infra Part II.
partnership under the state system. The trial court agreed and dismissed the action. Velez appealed the decision to the California Court of Appeal.

B. Velez's Putative Partner Claim

Velez attempted to establish that she was entitled to dissolution of the partnership using a putative domestic partner status argument. She argued that she had standing to proceed with a dissolution action because she had a good faith belief in the validity of her domestic partnership. Her claim was based in part on her reliance on the health care benefits she received through Smith’s employer. The medical coverage provided by the city was available only to eligible domestic partners who had registered with the state. When Velez became ill with multiple sclerosis, she completely relied on these health care benefits.

To receive medical coverage, the insurer required a copy of the partnership registration form filed with the Secretary of State. Velez and Smith never registered a domestic partnership with the Secretary of State according to the provisions in the Domestic Partner Act. Despite this lack of registration, Velez continued to receive medical coverage. Velez’s uninterrupted, continuous medical coverage further led her to believe that their locally-registered partnership carried all of the same rights and duties as a state registered domestic partnership.

C. Court of Appeal Rejects the Putative Partner Status

The appellate court rejected Velez’s call to extend the putative spouse doctrine to the domestic partnership context. The court found “[l]ocal law and the state Domestic Partner Act are not equivalent; compliance with one is not compliance with the other.” The court concluded that Velez and Smith held only a county registration, which was distinct from a state-recognized partnership. Since the court held that Velez’s local partnership was not equivalent to a state partnership, the court had to address whether Velez’s putative partner theory could rehabilitate her status on equitable grounds. The court concluded that Velez could not avail herself of a putative partner theory.

The court placed great emphasis on the legislature’s failure to create

35. Velez, 48 Cal. Rptr. 3d at 645.
36. Appellant’s Brief, supra note 4, at 54.
37. Velez, 48 Cal. Rptr. 3d at 656; Appellant’s Brief, supra note 4, at 55.
38. Appellant’s Brief, supra note 4, at 55.
39. Id.
40. Id.
41. Velez, 48 Cal. Rptr. 3d at 645.
42. Appellant’s Brief, supra note 4, at 56.
43. Velez, 48 Cal. Rptr. 3d at 651.
44. Id.
45. Id.
domestic partnerships as an institution equal to marriage. The court pointed out differences between rights granted to married couples and domestic partners, such as domestic partners' ineligibility for numerous federal benefits or the right to file joint tax returns—privileges enjoyed by married couples. In addition to the benefits conferred, the prerequisites for obtaining a domestic partnership are different from marriage. The court stated, “we must assume the legislature was aware of the existing putative spouse doctrine, and if inclined to do so could have either expressly added to the Domestic Partner Act the rights granted to the putative spouses, or amended § 2251 to include within its reach putative domestic partners.” Ultimately, the court said that only the legislature, and not the court, has the authority to afford standing to putative domestic partners.

II

THE EVOLUTION OF DOMESTIC PARTNERSHIPS IN CALIFORNIA

The Velez court overlooked the similarities between local domestic partnership registries and the statewide domestic partnership registry established by AB 26. In doing so, the court ignored how these competing systems have caused much confusion for future and current domestic partners. This Part examines the development of domestic partnerships in California and how the parallel relationship recognition regimes create the need for a putative partner status.

Currently in the United States, same-sex couples have attained various levels of recognition. This spectrum ranges from full marriage rights in Massachusetts to no recognition at all. Domestic partnerships lie somewhere in the middle of this continuum. Domestic partnerships have been described as “one step more than cohabitation, but one step less than marriage.” In California, domestic partnerships are comprised of “two adults who have chosen to share one another’s lives in an intimate and committed relationship of

46. Id. at 656-57.
47. Id. at 657.
48. See CAL. FAM. CODE § 300 (West 2004); CAL. FAM. CODE § 297.
49. Velez, 48 Cal. Rptr. 3d at 657 (pointing out the “less stringent” requirements for a domestic partnership and arguing that the “Legislature may not have wanted to create a putative domestic partnership status.”).
50. Id. at 658.
Unlike civil unions in Vermont or Hawaii's reciprocal beneficiaries, domestic partners in California are not restricted solely to couples who are ineligible to marry. In addition to same-sex couples, domestic partners can be members of the opposite-sex if at least one individual is at least sixty-two years old.

A. Local Registries Open the Door to Equal Rights

It has been suggested that recognition of unmarried cohabitants opened the door for domestic partnerships. While this assertion may or may not be correct, it is undeniable that the push for a state-wide registry began in the cities and counties of California. The earliest domestic partnership registries were largely symbolic in nature. The city of Berkeley was the first American municipality to recognize same-sex domestic partners in 1984. But the system was initially restricted solely to city employees and their partners and only offered the right to share health insurance. Berkeley did not open the domestic partnership registry to members of the general public until 1990. The registry established in West Hollywood worked in a similar manner. Although West Hollywood was the first to grant partnership benefits to couples who were not city employees, the ordinance did not carry the same weight as other laws passed by the city council. Other ordinances adopted by the city council "mandated immediate changes . . . backed . . . up with strong criminal penalties" but "the new 'domestic partnership' law had almost no legal strength."

These first registries allowed the couples to receive a registration certificate but carried very few tangible benefits. The West Hollywood registry

53. CAL. FAM. CODE § 297(a).
54. See VT. STAT. ANN. tit. 15, § 1202 (2004) (requiring members of a civil union to "be of the same sex and therefore excluded from the marriage laws of this state"); HAW. REV. STAT. §527C-4 (2004) (restricting recognition to "parties [that are] legally prohibited from marrying one another under chapter 572"); CAL. FAM. CODE § 297.
55. CAL. FAM. CODE § 297(b)(5)(B).
56. See O'Brien, supra note 52, at 167-68 (explaining that in Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), the California Supreme Court allowed unmarried persons to enter into contracts that had the effect of antenuptial agreements.).
57. Id. at 181-82.
59. Id. Although members of the general public were allowed to register their partnerships, they were not granted health care coverage by the city. Id.
61. Stephen Braun, LAW LISTS RIGHTS, LACKS TEETH: INTENT OF W. HOLLYWOOD DOMESTIC PARTNERSHIP ORDINANCE CLEAR BUT IMPACT ISN'T, L.A. TIMES, Jan. 31, 1985, § 9, at 1. The ordinance purported to grant these rights, but the city did not include any provisions for enforcement. The city council still had to negotiate with officials at the local jail and hospitals for visitation and there were no penalties if these officials refused. Id.
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granted the right to jail and hospital visitation, but nothing else. City employees could obtain health insurance for their partners, but coverage was not guaranteed. The city council had problems finding a carrier who would cover same-sex partners, thus coverage for domestic partners was limited.

Even though these early registries lacked many tangible benefits, they created awareness regarding the status of same-sex couples. Essentially, the ordinances “helped provide visibility to . . . couples that otherwise [were] treated as non-existent, insignificant or, at best, as . . . roommates.”

Registration also allowed couples to receive official recognition that could be used to obtain benefits from their employers. Many companies were willing to extend health benefits to the partners of their employees, but expressed concern about the potential for abuse. Without official sanction anyone could claim that they had a domestic partner in order to receive employer benefits; registering with the city provided proof of the domestic partnership.


62. Id.
63. Id.
64. Id.
65. Id. The mayor of West Hollywood noted that “[t]he intention is to give some recognition to caring relationships between two people . . . [a]llowing domestic partners to register is a way of saying that the relationship is equal to marriage in the eyes of the city.” Id.
67. See O’Brien, supra note 52, at 178.
68. See id. at 179.
69. See Bill Workman, Palo Alto OKs Registry for Unmarried Couples, S.F. CHRON., Dec. 12, 1995, at A18. Although the registry is largely symbolic, Mayor Joe Simitian noted that “the certificate could be useful by providing verification of a relationship, such as to establish visitation rights at hospitals . . . [and] [s]ome businesses, including health clubs and airlines, offer the same privileges to unwed domestic partners who can prove their relationship as they do to married couples.” Id. Registration is also useful in other circumstances where proof of the relationship is required. See Robin Leonard, One Small Step; S.F.’s New Domestic Partners Law is a Symbolic Start but State Law is Needed to Confer True Rights, THE RECORDER, Feb. 14, 1991, at 4.
70. When adopting their registry, the San Francisco Board of Supervisors acknowledged that the real benefits were limited, but noted that “San Francisco is doing something cities all around the country are going to emulate.” Robert Chow, S.F. Supervisors OK ‘Domestic Partner’ Law, L.A. TIMES, May 23, 1989, at 3.
71. Davidson, supra note 66, at 1-2 n.2; see also CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, STATE AND LOCAL DOMESTIC PARTNERSHIP REGISTRIES, at 2-10 (2004), available at http://www.ci.sf.ca.us/site/uploadedfiles/sfhumanrights/
1. Requirements of Municipal Registration

The requirements for registration are essentially the same among local registries. Generally, each member of a couple must be at least eighteen years old, competent to contract, and not related in a way that would prevent them from being married to each other, such as being blood relatives. A shared residence is often required, although both names do not have to appear on the title or lease. Partners cannot be currently married or a member of another domestic partnership. Finally, entering into a domestic partnership may bind the couple into being jointly responsible for each other’s living expenses, including the cost of food and shelter.

Beyond these basic requirements, several jurisdictions demand at least one member of the couple either be a resident or employee of the city or county. Municipalities may also stipulate that both members must be residents of the city, while others have no residency requirements at all. Parties must generally be competent to enter into the relationship and not be acting under the influence of fraud or duress.

2. Benefits of Municipal Registration

Over time, local registries increased the benefits given to same-sex couples who registered as domestic partners. Although some of the earliest domestic partnership programs offered hospital visitation, the purported right


See CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, supra note 71.

See id. Some jurisdictions also require that an individual wait at least six months after the termination of a prior relationship before entering a new one. This requirement is waived if the termination was due to the death of one partner. Id.

See id.


See DAVIS, CAL., MUNICIPAL CODE ch. 10.05.05 (1994), available at http://www.ci.davis.ca.us/cmo/citycode/chapter.cfm?chapter=10.

was never guaranteed to be effective. Slowly other benefits were added to the list granted to domestic partners. Domestic partners in Palm Springs could file paperwork for each other with the city clerk, while Laguna Beach granted domestic partners power of attorney over each other for decisions regarding health care and the disposal of personal effects.

Jurisdictions also adopted enforcement provisions for partnership registration. For example, the City of Davis required all disputes between domestic partners to be mediated, but created the right to file a civil action if mediation failed. Long Beach implemented one of the more comprehensive systems and offered a combination of all the benefits mentioned previously, including hospital and jail visitation rights and the ability to appoint each other with power of attorney. Additionally, Long Beach prohibited discrimination against any person who sought benefits under the partnership system. Finally, San Francisco granted city employees the same bereavement leave and retirement benefits offered to heterosexual couples. As the forerunner to AB 26 and 205, these local registries set an important precedent and established the framework utilized when adopting the state system.

B. From AB 26 to AB 205—The Development of State Recognition of Domestic Partners

The momentum created by the growing number of local ordinances spurred the California legislature into repeated attempts to create a statewide registry for domestic partners. After several false starts, the legislature enacted a state registration system in 1999 with the passage of AB 26. This Section

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79. See Braun, supra note 61 and accompanying text. Visitation was a problem because a hospital’s policy may have confined visitation to members of the family and this definition often did not include domestic partners.

80. See City and County of San Francisco Human Rights Commission, supra note 71, at 6.


84. See id.

85. See Katherine Bishop, San Francisco Grants Recognition To Couples Who Aren’t Married, N.Y. Times, May 31, 1989, at A17. The ordinance also directs the city to treat domestic partners the same as married couples when instituting new policies. Id.

examines the development of the state system, including the requirements and benefits of state recognition.

1. State Requirements and Legislative Intent

California Family Code § 297 resembles many of the local registries in terms of the requirements enumerated. To register, both members of the couple must be at least eighteen years old, agree to be jointly responsible for the needs of the partnership, have a common residence, not be a member of another partnership or marriage, and not be related by blood in a way that would prevent marriage. Additionally, both members of the couple must be of the same sex, or may be of the opposite sex if one or both are over the age of sixty-two, and must file a declaration of domestic partnership with the Secretary of State. Until January 1, 2005, state domestic partnerships were subject to termination in a process similar to the dissolution of a city or county partnership.

After AB 26 laid the basic foundation for domestic partnerships, the California legislature adopted AB 205, the Domestic Partners Rights and Responsibilities Act of 2003, which added new registration requirements and granted additional benefits. The language of AB 205 reveals the legislative intent and demonstrates that protecting same-sex couples was a key consideration in amending the original legislation. Section 1(b) of the bill states:

The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples

12, 1994, at 3A.

87. For a comparison of requirements, see supra Part I.A.

88. This requirement was part of the initial registry created by AB 26 but was removed as of January 1, 2005. See Assemb. B. 26, amended by CAL. FAM. CODE § 297 (West 2004).

89. CAL. FAM. CODE § 297. Originally, the registry created by AB 26 also required that couples agree to be jointly responsible for the living expenses of each member of the partnership. This requirement was removed as of January 1, 2003. Assemb. B. 26, amended by Assemb. B. 205, 2003 Leg., Reg. Sess. § 1 (Cal. 2003), available at http://www.assembly.ca.gov/LGBT_Caucus/laws/2003/ab0205/fulltextchapteredbill.htm.

90. CAL. FAM. CODE § 297(b)(5)(B).

91. Under the 1999 system, a partnership was terminated by failing to have a shared residence, sending written notice of termination to the other partner, or by the death of a partner. See Davidson, supra note 66, at 4. Several local registries had similar provisions for terminating a partnership. See, e.g., ARCATA, CAL., MUNICIPAL CODE ch. 5, §4515 (1998), available at http://www.arcatacityhall.org/municode/IV-5.html (declaring that a domestic partnership is terminated when one partner sends written notice of termination to other partner, one member dies, one partner marries or, they no longer live together).

92. See Assemb. B. 205 (expanding the Domestic Partner Act and granting same-sex couples all of the “rights, protections, and benefits” as granted to spouses).

93. See id. § 1(b).
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share lives together, participate in their communities together, and many raise children and care for other dependent family members together. Many of these couples have sought to protect each other and their family members by registering as domestic partners with the State of California and, as a result, have received certain basic legal rights.94

Although the scope of the domestic partnership regime is not limited to same-sex couples, it is clear from the language of the legislation that two of the major legislative goals were to offer more equality and more legal protections to members of the gay and lesbian community. AB 205 granted domestic partners “most of the legal rights, benefits, responsibilities, and obligations of married heterosexuals in California.”95 By increasing the number of rights available to state registered same-sex couples, the legislature aimed to improve equality between same-sex domestic partners and legally married heterosexual couples.

2. The Benefits of State Registration

AB 26 was touted as “the first enactment of its type that [was] entirely legislative in origin.”96 Yet little distinguished the newly-established state system from the municipal registries that already existed. Like many of the city and county programs, the only benefits granted by AB 26 were hospital visitation and health insurance coverage for the dependents of government employees.97 As originally enacted, AB 26 was mostly symbolic and did not provide anything beyond what was offered through local registries.98

Subsequent legislation, particularly AB 205, significantly increased the benefits offered under the statewide system. The law mandated that eligible couples “shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities . . . under law, whether they derive from statutes, . . . common law, or any other provisions or sources of law, as are

94. Id.
96. Grace Ganz Blumberg, Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective, 51 UCLA L. REV. 1555, 1556 (2004). Unlike civil unions in Vermont, California was not compelled to adopt domestic partnership legislation by a state court. See Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (holding that the “State was constitutionally required to extend to same-sex couples the common benefits and protections that flowed from marriage under Vermont law”).
98. See supra Part II.A.2.
granted to and imposed upon [married] spouses." Essentially the law intended to provide domestic partners with almost all of the rights given to married couples.

Enumerated benefits under AB 205 include the right to be treated the same as a surviving spouse at the death of a partner, equal adoption and parental rights, and protection from discrimination. One of the most important rights granted is the ability to inherit and receive "precisely the same intestate share as a surviving spouse." Allowing domestic partners to inherit fulfills "the decedent’s presumed intent" while "supporting the surviving family, and continuing . . . the economic partnership between two people committed to each other." Each benefit granted to domestic partners brings the system another step closer to accomplishing the legislative goal of protecting committed families and reducing inequality.

C. AB 205 Causes Confusion

While AB 205 made great strides toward expanding legal protections for same-sex couples, the enactment’s sweeping changes created uncertainty for couples who had previously registered a domestic partnership at the city or county level. For the thousands of domestic partners who had registered under city and county systems, it was not entirely clear what would happen to their partnerships after the adoption of AB 26 and AB 205.

The amended Family Code offers only a partial answer. Family Code § 299.6 preempts any local law that allows for the creation of a domestic partnership on or after July 1, 2000. The effect of the preemption section is that locally registered partnerships became part of the state system after July 1, 2000. Section 299.6 provides that a “[d]omestic partnership[] created under any local . . . ordinance or law before July 1, 2000, shall remain valid . . . provided a Declaration of Domestic Partnership is filed by the domestic partners . . .” It is unclear what effect failure to re-register would have on these local

99. CAL. FAM. CODE § 297.5(a) (West 2004).
100. Despite the declaration that same-sex couples would have the same rights as married couples, some benefits were originally excluded, among them was the ability of domestic partners to file joint tax returns. However, legislation enacted in 2006 amended § 297.5 and granted domestic partners joint tax status. See CAL. FAM. CODE § 297.5(a), amended by S.B. 1827, 2006 Leg., Reg. Sess. (Cal. 2006), available at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1801-1850/sb_1827_bill_20060929_chaptered.pdf.
103. Id. at 91.
104. CAL. FAM. CODE § 299.6(a).
105. Id. § 299.6(b).
partnerships. Thus, ambiguity remains about what rights are conferred upon those couples who registered locally before July 1, 2000.

After July 1, 2000 a couple is required to register with the Secretary of State in order to receive the benefits granted by AB 205. The law allows municipalities to retain their domestic partnership registries provided that they offer the same or broader rights than the state system. This created a situation where parallel state and local domestic partnership registries offered the same benefits to registrants. Confusion about the rights of domestic partners results from the statutes’ lack of clarity about preemption. First, registration requirements under California’s first Domestic Partners Act and existing local registries were so similar that couples could easily believe that the parallel systems were, in fact, the same. This is exactly the reason that Velez believed she had a valid state partnership. Second, Velez believed that her local registry was part of the state domestic partnership system and carried the same rights because she received insurance benefits only given to state registered partners. The similarity of benefits led to the belief that both systems offered the same privileges and were, in fact, the same.

Finally, timing created confusion. The requirement that domestic partners register with California’s Secretary of State to access state protections only became law with the passage of AB 205, well after AB 26 initially created California’s domestic partnership registry. A couple who had registered with a city or county prior to 2000 would not necessarily see the need to re-register with the state, as state registration would not grant them any new rights or responsibilities. A couple could reasonably believe that the systems were the same and therefore find no reason to register with the state for rights and benefits already secured through the local registry.

The ambiguous language in California’s domestic partnership statute, the similar local and state registration requirements, the comparable benefits, and late date at which the legislature imposed the requirement to register with the state, created tremendous confusion for domestic partners registered locally. Depriving benefits to couples who registered locally before July 1, 2000, but failed to register under the state system punishes those like Velez who, to their detriment, held a good faith belief that their partnership was subsumed under the new state-enacted domestic partnership law. As domestic partnership is a relatively new legal status in California, ordinary citizens likely do not understand its intricacies as clearly as they understand those of a marriage. A person not well versed in the California Family Code could easily become confused by the competing partnership systems. The belief that registering a

106. ld. § 299.6(a).
107. ld. § 299.6(c).
108. Appellant’s Brief, supra note 4, at 56-57.
109. ld. at 55.
110. CAL. F~M. CODE § 297.5.
local domestic partnership creates a valid state domestic partnership, though mistaken, may constitute a good faith belief. A good faith belief forms the basis of the putative spouse doctrine discussed in the next Part.

III
THE PUTATIVE SPOUSE DOCTRINE

The courts developed the putative spouse doctrine to "ameliorate or correct the injustice which would occur" if a party who "believe[d] in good faith that he or she [was] validly married" was not allowed to recover.\footnote{Christopher L. Blakesley, The Putative Marriage Doctrine, 60 Tul. L. Rev. 1, 6 (1985).} Courts used their equitable jurisdiction to protect putative spouses because they recognized that "equity demands that innocent persons not be injured through an innocent relationship."\footnote{Id. (citing Lee v. Hunt, 483 F. Supp. 826 (W.D. La. 1978)).} A party declared to be a putative spouse gains all of the rights and benefits of a legal marriage, and thus the doctrine is generally invoked during divorce or estate proceedings. The doctrine was originally a product of the judicial system and was only codified later by state statutes.\footnote{Id. at 13-14.}

The putative spouse doctrine may be invoked in instances where individuals have "duly solemnized a matrimonial union which is void because of some legal infirmity."\footnote{Estate of Vargas, 111 Cal. Rptr. 779, 780 (Cal. Ct. App. 1974).} The marriage is technically invalid, but the putative spouse doctrine allows the court to treat the individuals as if the marriage were legitimate because of their good faith belief that they had affected a valid union. The court looks to uphold the "reasonable expectations of [the] putative spouse."\footnote{Barry R. Pinnolis, Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse, 6 U.C. Davis L. Rev. 354, 357 (1973).}

This Part addresses the factors involved in establishing a putative spouse claim. First, it reviews the legal standards required to establish putative spouse status, including the components of a good faith belief. Second, it discusses the rights given to putative spouses once they fulfill all of the statutory and case law requirements. Part IV will argue that courts should apply the putative spouse doctrine to domestic partnership scenarios that are analogous to those marital situations in which the doctrine is currently used. Specifically, the doctrine should apply where one or both partners believe in good faith that their partnership is valid under state law, yet discover that it is technically invalid because of a failure to re-register under the state system.

A. Establishing a Putative Marriage

Courts have consistently applied the putative spouse doctrine to cases where a person has failed to meet one of the formal requirements for
marriage. The case of Josephine Vargas is a classic illustration of the putative spouse doctrine. Josephine had no idea that her husband Juan had been living a double life for more than twenty years. When Juan died, Josephine found herself in a probate court dispute over Juan’s estate with another woman claiming to be his wife. Technically, the marriage between Josephine and Juan was void because he had never divorced his first wife. As California prohibits polygamy, the second marriage was invalid. Josephine, however, had a good faith belief that Juan was already divorced when she married him. Faced with two innocent parties, both claiming that they were the lawful spouse, the court declared that Josephine was a putative spouse. The court determined that the estate should be cut in half and each innocent wife should be awarded an equal share.

In California, the putative spouse doctrine was initially judge-made, but the legislature eventually codified the doctrine. According to California statutory language, there are two basic elements that a person must show in order to be treated as a putative spouse. First, there must be a “determination that the marriage is void or voidable.” Second, one or both spouses must have “believed in good faith that the marriage was valid.”

The courts have construed the void/voidable requirement as “simply requiring a threshold determination that a legal infirmity in the formation renders a marriage invalid.” Although the statutory language requires a court to find that a marriage is void or voidable, courts have often found putative marriages in instances that do not specifically fall into either of these categories. The California Court of Appeal held that “[a] fact situation may involve neither a void nor a voidable marriage, and yet relief is afforded, based upon the reasonable expectations of the parties to an alleged marriage entered into in good faith.” Accordingly, courts have granted putative spouse status in a variety of situations, including one in which a husband remarried after he changed his name and obtained a fraudulent divorce without telling his first wife, another in which a wife continued living with her husband unaware that he had obtained a final divorce decree, and finally in a case where a wife had a

117. Estate of Vargas, 111 Cal. Rptr. at 780 (citation omitted).
118. Id.
119. Id.
120. CAL. FAM. CODE § 2210(b) (West 2004).
121. Estate of Vargas, 111 Cal. Rptr. at 780.
122. Id.
123. Id. at 781.
124. CAL. FAM. CODE § 2251(a).
125. Id.
127. Id. at 811.
common law marriage before moving to California.  

In addition to the threshold requirement of an invalid marriage, statutory language and case law concerning putative spousal claims require a good faith belief in the validity of the marriage. The good faith belief must be: (1) a "belief . . . in the existence of a lawful California marriage" and (2) objectively reasonable. The objectively reasonable good faith belief in the validity of the union is the key to establishing a putative marriage. Good faith has been described as "being 'ignorant of the cause which prevents the formation of the marriage or the defects in its celebration which caused its nullity' . . . it is 'an honest and reasonable belief that the marriage is valid and that no legal impediment exists' . . . " To establish this good faith belief, a party must demonstrate facts "that would cause a reasonable person to harbor a good faith belief in the existence of a lawful California marriage." It is not enough for the individual to have a subjective good faith belief in the marriage, even if he or she is a "credible and sympathetic party." Objective evidence must demonstrate a good faith belief. Once a party discovers that the marriage is invalid, any rights as a putative spouse are terminated.

To determine the existence of an objective good faith belief in a valid marriage, courts undertake a fact-based analysis by examining the circumstances surrounding the purported marriage. A couple that holds itself out to the public as married is more likely to receive putative status than a couple who keeps the relationship secret. Objective evidence of spousehood may include "pooling of earnings, acquisition of joint property, or any

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128. Sousa v. Freitas, 89 Cal. Rptr. 485 (Cal. Ct. App. 1970); In re Marriage of Monti, 185 Cal. Rptr. 72 (Cal. Ct. App. 1982); Sanchez v. Arnold, 251 P.2d 67 (Cal. Ct. App. 1952). For further examples see e.g., Lazzaverich v. Lazzaverich, 200 P.2d 49 (Cal. Ct. App. 1948) (finding a wife was a putative spouse because she had good faith belief that marriage was valid even though a final divorce decree had been entered); Wagner v. County of Imperial, 193 Cal Rptr. 820 (Cal. Ct. App. 1983) (holding that a valid marriage does not require a solemnization ceremony and that a woman was entitled to a putative spouse status even though the couple had only exchanged personal marriage vows). Although these examples all involve a wife being declared the putative spouse, the doctrine can apply equally to both men and women. See Turknette v. Turknette, 223 P.2d 495, 498 (Cal. Ct. App. 1950).

129. Vyronis, 248 Cal. Rptr. at 812 (holding that a wife was not a putative spouse because she merely performed a private religious ceremony but made no other attempt to comply with the requirements of a valid California marriage).


131. Blakesley, supra note 111, at 19.

132. Vyronis, 248 Cal. Rptr. at 813.

133. Id.

134. Stanley A. Coolidge, Jr., Rights of the Putative and Meretricious Spouse in California, 50 CALIF. L. REV. 866 (1962). Knowledge of the invalidity "does not, however, destroy rights already acquired." Id.

135. Estate of Depasse, 118 Cal. Rptr. 2d 143, 156 (Cal. Ct. App. 2002) (holding that a man could not be a putative spouse because there was absolutely no attempt to acquire a marriage license even though it was clearly required and there was no evidence that they held themselves out as a couple).
economic interdependence” between the two purported spouses.\textsuperscript{136}

However, objective evidence alone is not always sufficient to establish a putative claim. In \textit{Welch v. State}, a couple “conducted themselves as husband and wife for many years” and “shared . . . their incomes[,] . . . debts[,] . . . filed tax returns[,] . . . and held property” but failed to acquire a marriage license or have a solemnization ceremony.\textsuperscript{137} The Court of Appeal determined that a reasonable person would not have concluded that he or she was lawfully married under these circumstances.\textsuperscript{138}

Failure to attempt any of the statutory requirements for marriage will preclude a putative spouse claim. A lawful California marriage is one that conforms to the statutory requirements of the Family Code.\textsuperscript{139} It requires consent, a license, and solemnization.\textsuperscript{140} California will recognize a marriage contracted outside the state if it comports with the laws of the appropriate jurisdiction.\textsuperscript{141} This provision applies even if the marriage would have been invalid if it had originally been made within California.\textsuperscript{142} The wife in \textit{Vyronis} could not establish a reasonable belief because she had only performed a private religious ceremony and made no attempt to follow any of the other statutory requirements.\textsuperscript{143} The \textit{Vyronis} court held “[w]here there has been no attempted compliance with the procedural requirements of a valid marriage . . . and conduct consistent with a valid marriage [is] absent, a belief in the existence of a valid marriage . . . would be unreasonable and therefore lacking in good faith.”\textsuperscript{144} A spouse who made no attempt whatsoever to follow any of the requirements for contracting a valid marriage simply cannot claim to be a putative spouse.\textsuperscript{145}

\textbf{B. Benefits Granted to a Putative Spouse}

Once an individual successfully establishes a putative spouse status, he or she is “entitled to share in the property that would have been community if the marriage were valid.”\textsuperscript{146} Property acquired during a putative marriage is technically not community property, because community property can only be

\begin{itemize}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} 100 Cal Rptr. 2d 430, 431 (Cal. Ct. App. 2000).
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{See} CAL. FAM. CODE § 300 (West 2004).
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{See} CAL. FAM. CODE § 308.
\item \textsuperscript{142} For example, California would not recognize a common law marriage that was performed within the state, but if a couple had a common law marriage in a state that recognized common law marriages and then moved to California, California would recognize that marriage. \textit{See} Sancha v. Arnold, 251 P.2d 67 (Cal. Ct. App. 1952).
\item \textsuperscript{143} \textit{In re Marriage of Vyronis}, 248 Cal. Rptr. 807, 809 (Cal. Ct. App. 1988) (noting that there was no attempt made to secure a marriage license).
\item \textsuperscript{144} \textit{Id.} at 813.
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} Rajan, supra note 8, at 97.
\end{itemize}
acquired during a valid marriage or domestic partnership. Therefore, such property is deemed to be "quasi-marital" property. When the court divides this quasi-marital property, "one-half of the property belongs to the putative spouse, and one-half belongs to the legal community." Family Code § 2254 also allows a putative spouse to acquire spousal support just as if the marriage were valid.

Putative spouses are also entitled to a variety of other rights. *Estate of Krone* held a putative wife was entitled to inherit the entire estate after her husband died without a will. After finding a woman to be a putative spouse, the court in *Brennfleck v. Workers' Compensation Appeals Board* determined that she was entitled to bring a cause of action for wrongful death and could recover as a "putative widow." *Adduddell v. Board of Administration* expanded upon the holding in *Brennfleck* and allowed a "putative widow" to recover pension benefits upon the death of her husband. Finally, *Estate of Sax* concluded that a putative spouse is considered a "surviving spouse" for purposes of the probate code. All of these benefits serve to protect the reasonable expectations of a putative spouse and ensure that the surviving putative spouse does not become a public charge.

As the case law makes clear, courts designed the putative spouse doctrine to protect innocent parties who believe in good faith that they hold a valid marriage and would thus be entitled to the legal rights and benefits of marriage. The following Part demonstrates why similar considerations for domestic partners call for the development of a "putative partner" status, one that can protect innocent parties holding a good faith belief that their domestic partnership is valid.

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148. *Estate of Leslie*, 689 P.2d 133, 136 (Cal. 1984); *Blakesley*, *supra* note 111, at 33 ("Under California law, true community property can only exist when there is a legal marriage, so the California courts and legislature analogize to the community property laws to obtain the same result.").
150. *CAL. FAM. CODE. § 2254* (West 2004) ("The court may . . . upon judgment of nullity of marriage, order a party to pay for the support . . . in the same manner as if the marriage had not been void or voidable if the party whose benefit the order is made is found to be a putative spouse.").
152. 84 Cal. Rptr. 50, 52 (Cal. Ct. App. 1970).
IV
REVISITING VELEZ V. SMITH: THE PUTATIVE PARTNER STATUS

A. Velez v. Smith Was Wrongly Decided

The Velez court rejected the call to extend the putative spouse doctrine to the domestic partnership context. In doing so, the court placed great emphasis on the legislature's omission of an express provision for putative domestic partner status. The court found it dispositive that a putative status was not included among the enumerated rights granted to same-sex couples under the domestic partnership statute. The court took care to distinguish the differences between the domestic partnership system and traditional marriage. In the opinion, the court enumerated both differences between forming a partnership versus a marriage, as well as the disparity of rights and benefits granted to each.

The court used these differences to conclude that the legislature knew what it was doing when it created domestic partnerships. The court insisted that the legislature was aware of the benefits given to marriage and made a conscious decision to exclude some of those rights when drafting the Domestic Partner Act. It reasoned that if such care was taken to enumerate these benefits, the legislature must have made an intentional decision to exclude a putative spouse status, just as the legislature intentionally excluded joint tax returns. The court stated:

In interpreting the law we must assume the Legislature was aware of the existing putative spouse doctrine, and if inclined to do so could have either expressly added to the Domestic Partner Act the rights granted to putative spouses, or amended section 2251 to include within its reach putative domestic partners.

The court dismissed Velez's claim and left it to the legislature to fashion a remedy for her and the potentially thousands of other same-sex couples who may have been confused or misled regarding the impact of the Domestic Partner Act on their locally registered partnerships.

Velez was incorrectly decided for two reasons. First, the court wrongly assumed that the legislature's failure to expressly adopt a putative partner status was intentional. In doing so, the court misinterpreted the legislative intent.

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157. Id. at 650.
158. Id. at 656.
159. Id. at 656-57.
160. Id.
161. Id. at 657.
163. Id. at 657.
164. Id.
behind the Domestic Partnership Rights and Responsibilities Act. Second, the court overlooked the history and equitable foundation of the putative spouse doctrine, which support applying the doctrine to domestic partnerships.

1. The Court Misinterpreted Legislative Intent

The court treated the absence of an express provision establishing a putative domestic partner status as evidence of the legislature's intent to bar this principle from the domestic partnership context. The court wrote that "the Legislature may not have wanted to create a putative domestic partnership status to grant parties dissolution rights despite the invalidity of the relationship due to a legal infirmity." This "hyper-technical interpretation" ignores the legislative history and intent of the Domestic Partnership Rights and Responsibilities Act.

The language of AB 26 and AB 205 illustrates two goals that the legislature intended to accomplish by establishing a domestic partnership registry. First, the legislature sought to create equality among same-sex and heterosexual couples by granting domestic partners new rights and benefits. Second, the legislature wanted to establish tangible benefits that would provide protection for members of domestic partnerships.

Prior to the adoption of AB 26 and AB 205, there was great inequality between married couples and members of nontraditional families. Married couples received a multitude of state and federal benefits denied to same-sex couples. Recognizing this enormous disparity, the legislature demanded that domestic partners "shall have the same rights, protections, and benefits ... 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." Assemblywoman Carole Migden, primary author of AB 26 and subsequent domestic partnership legislation, emphasized the purpose of this bill noting that "[t]his bill addresses the issue of fairness and justice for nontraditional families."

This equality goal was also engrained in the text of AB 205 which reads:

This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality ... by providing all caring and committed couples, regardless of their ... sexual orientation, the opportunity to obtain essential rights,

165. Id.
protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships.\textsuperscript{169}

Even the \textit{Velez} court acknowledged "[i]t is clear from both the language of section 297.5 and the legislature's explicit statements of intent that a chief goal of the Domestic Partner Act is to equalize the status of registered domestic partners and married couples."\textsuperscript{170} Despite the court's explicit recognition of the statute's equality goal, it nevertheless declined to follow the legislative mandate that domestic partners receive the same benefits as married couples.

The legislature also intended to protect "Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises."\textsuperscript{171} To accomplish this goal the statute enumerated specific rights that domestic partners would receive.\textsuperscript{172} The legislature was particularly concerned with "protecting [domestic partners] from the economic and social consequences of . . . the death of loved ones."\textsuperscript{173} The legislature specifically stated that domestic partners should be treated the same as a surviving spouse.\textsuperscript{174} The goal was to ensure domestic partners a means of support after the death of a partner and to prevent him or her from becoming a burden on the state. The putative spouse doctrine was developed for the same reason, to ensure the continued support of a spouse at divorce or death. Therefore, a putative partner status would fulfill the same goal of ensuring continued support for domestic partners.

Registered partners face the same issues as married couples upon termination of the relationship or the death of a partner. A domestic partner is just as shocked to find out that his or her partnership is not valid in the same way that a married person would feel at discovering the invalidity of the marriage.\textsuperscript{175} Domestic partners also deal with the same issues regarding community property, inheritance, and property division as spouses. The legislature acknowledged that domestic partners are confronted with the same hardships as married couples and extended various rights and benefits to alleviate these problems.\textsuperscript{176} Legislators recognized that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and \textit{protecting family...}"

\begin{itemize}
  \item \textsuperscript{170} \textit{Velez} v. Smith, 48 Cal. Rptr. 3d 642, 650 (Cal. Ct. App. 2006).
  \item \textsuperscript{171} Assemb. B. 205 §1 (emphasis added).
  \item \textsuperscript{172} \textit{See} CAL. FAM. CODE § 297.5(c) (West 2004).
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} Darrin Ellis testified at the dissolution proceeding that he was shocked to discover that his partnership had never been validly registered with the state. \textit{Ellis} Opening Brief, \textit{supra} note 14, at 5.
  \item \textsuperscript{176} \textit{See supra} Part I.B.2.
\end{itemize}
members during life crises, and would reduce discrimination on the bases of sex and sexual orientation . . . ."\textsuperscript{177}

AB 205 promotes these legislative goals by directing that the Domestic Partner Act "shall 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 the laws of California extend to . . . spouses."\textsuperscript{178} The putative spouse doctrine should be considered one of the "protections" extended to married couples in California. If courts construe the statute as directed, the putative spouse doctrine should extend to domestic partnerships, especially considering the legislature's directive to construe this Act liberally. One legal commentator has agreed with the suggestion that AB 205 can sustain a putative partner claim.\textsuperscript{179}

Principles of statutory construction support the conclusion that the \textit{Velez} court misinterpreted the statute. In determining how to construe a statute, a court should ascertain the legislative intent by "look[ing] to the objective to be attained, the nature of the subject matter and the contextual setting. The statute is construed as a whole with reference to the system of which it is part."\textsuperscript{180} The California Supreme Court and Courts of Appeal have adopted these principles of construction, holding that "[s]tatutes are to be interpreted in accordance with their apparent purpose"\textsuperscript{181} and that this purpose can be found "in the language of the statute"\textsuperscript{182} or in "the history of the statute, committee reports and staff bill reports."\textsuperscript{183} Where the statute's language is unambiguous, however, that language controls.\textsuperscript{184}

But the \textit{Velez} court did not follow this principle of looking at and interpreting the statute with reference to the system of which it is a part. Instead it isolated the domestic partnership section and failed to interpret it in conjunction with the rest of the Family Code. If the court had properly followed the mandate to construe the statute liberally, it would have looked at other provisions in the Family Code, namely § 2251 and it would have held that \textit{Velez} was entitled to a putative partner status. Even if the legislature did not

\textsuperscript{177} Assemb. B. 205 § 1 (emphasis added).
\textsuperscript{178} Id.
\textsuperscript{179} See Davidson, \textit{supra} note 66, at 4 n.8 (stating that "[a] strong argument . . . can be made that, under AB 205, someone who in good faith but mistakenly believes he or she has taken adequate steps to enter a state domestic partnership should be treated analogously to a 'putative spouse' who, in good faith, but mistakenly, believes he or she legally has married.").
\textsuperscript{180} 2A \textit{SUTHERLAND STATUTORY CONSTRUCTION} § 46:1 (6th ed. 2000); \textit{CAL. CODE CIV. PROC.} § 1859 (West 2006) ("In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible . . . ").
\textsuperscript{182} Appellant's Brief, \textit{supra} note 4, at 47 (citing Mercer v. Dep't of Motor Vehicles, 809 P.2d 404 (Cal. 1991)).
\textsuperscript{183} \textit{Kaiser}, 23 Cal. Rptr. 2d at 240.
\textsuperscript{184} Appellant's Brief, \textit{supra} note 4, at 47 (citing Security Pac. Nat'l Bank v. Wozab, 800 P.2d 557 (Cal. 1990)).
enumerate a putative partnership status, a leading treatise on statutory interpretation counsels that "the court can adopt a position to effect legislative intent to reach an equitable result even though the literal statutory language lends itself to an opposite outcome." As this case involved an issue of first impression, the court was compelled to determine the legislative intent and then give effect to that intent.

There is no restrictive language anywhere in the statute that indicates the legislature intended to limit the rights and benefits solely to those enumerated in § 297.5. To the contrary, the broad public policy language in AB 26, plus AB 205’s proclamation that the Domestic Partner Act should be liberally construed to provide domestic partners the same rights as married spouses indicates that there was no intent to limit rights and benefits to those listed in § 297.5.

Adopting a putative partner status would fulfill the dual goals of the state domestic partnership regime because it would open the door to all of the benefits and rights given after valid state registration. The putative spouse doctrine was derived from “[equitable] considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith . . . .” The doctrine is inherently protective in nature because it safeguards innocent parties who hold good faith beliefs in the validity of their marriages. Applying the doctrine to the domestic partnership context involves the same considerations. Domestic partners who have a good faith belief in the validity of their partnership have just as much need for this equitable protection as similarly situated married couples. Creating a putative partner status would allow Velez to receive continued partner support and health care benefits and allow the court to equitably divide the couple’s assets. Alternatively, denying a putative partner status would directly contravene the legislative goals because it would leave members of an invalid domestic partnership without a remedy. Denying the equitable remedy would leave same-sex couples vulnerable to the harsh circumstances that befall individuals upon the death of a partner or dissolution of the partnership.

Some may argue that if the legislature were so concerned with equality and protecting same-sex couples, it would have simply extended full marriage benefits to them. While establishing a same-sex marriage regime was an option, the legislature faced a major obstacle from Proposition 22 (Prop. 22), California’s Defense of Marriage Act. Adopted by voters, Prop. 22 defined

185. SUTHERLAND, supra note 180.
186. Id. (“In a case where a court is faced with a novel question, it must seek to ascertain and give effect to the intention of the legislature as it is expressed in the statute itself.”).
188. See Vallera v. Vallera, 134 P.2d 761, 762 (Cal. 1943).
189. See CAL. FAM. CODE § 308.5 (West 2004) (establishing that “[o]nly marriage between
marriage as between one man and one woman and prohibited same-sex couples from getting married.\textsuperscript{190} The legislature could not have granted same-sex couples equal marriage rights without first repealing Prop. 22. Faced with this obstacle, the legislature chose to expand the rights received by domestic partners by adopting AB 205 and directed therein that the Domestic Partner Act be liberally construed in order to implement the dual policy goals of equality and protection.\textsuperscript{191}

In 2004, opponents of same-sex marriage attacked the Domestic Partner Act as a violation of Prop. 22.\textsuperscript{192} Petitioners argued that the Domestic Partner Act violated Prop. 22 because it “created a marriage by another name” or in other words, the legislature extended marriage benefits to same-sex couples but called it domestic partnerships in order to bypass Prop. 22.\textsuperscript{193} The Court of Appeal rejected this claim and held that the voter initiative did not limit the legislature’s authority to enact laws regulating domestic partnerships.\textsuperscript{194} In 2005, the legislature passed AB 849, the Religious Freedom and Civil Marriage Protection Act, which would extend full marriage benefits to same-sex couples.\textsuperscript{195} Although the governor vetoed this legislation, the legislature has continued to expand upon the rights granted to domestic partners.\textsuperscript{196}

Most recently, the California legislature adopted Senate Bill 1827 (SB 1847) which allows domestic partners to file joint tax returns in the same way that married couples do, a right previously denied to domestic partners.\textsuperscript{197} In enacting this bill, the legislature acknowledged that AB 205 created inequality between spouses and registered domestic partners because it excluded the ability to file joint tax returns.\textsuperscript{198} It also denied them the right to treat their earnings as community property for state income tax purposes.\textsuperscript{199} The legislature reiterated its policy goal of “promoting stable and lasting family relationships in this state by affording comprehensive protections under state law.”\textsuperscript{200}

\textsuperscript{190.} Id.
\textsuperscript{192.} Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 689 (Cal. Ct. App. 2005).
\textsuperscript{193.} Id. at 690.
\textsuperscript{194.} Id.
\textsuperscript{198.} Id.
\textsuperscript{199.} Id.
\textsuperscript{200.} Id. § 1(b).
This newest addition to the roster of benefits granted by AB 205 demonstrates that the legislature never intended AB 205 to be a statute of enumerated rights. The express language of the statute itself “makes apparent that the Legislature neither intended nor attempted to state all of the rights, responsibilities and presumptions that were affected by the enactment.”\(^{201}\) It would be nearly impossible to enumerate all of the benefits and rights accorded to domestic partners because “a legislative itemization of each such benefit and obligation would have required AB 205 to amend individually hundreds if not thousands of California statutes throughout each of California’s numerous and lengthy codes.”\(^{202}\) Instead, the legislature “us[ed] the broadest terms possible to grant to, and impose upon, registered domestic partners the same rights and responsibilities as spouses” and demanded that it be construed liberally.\(^{203}\)

A comparison of AB 205 with AB 26 supports this conclusion. AB 26 was a statute of enumerated rights, specifically granting hospital visitation rights and extending health care coverage to domestic partners.\(^{204}\) These benefits were established through express amendments to the Health and Safety Code § 1261 and Government Code § 22867.\(^{205}\) AB 205, on the other hand, did not provide for the express amendment or the repeal of other California code sections in order to effectuate the rights and responsibilities granted by the statute.\(^{206}\) There are several rights granted to domestic partners which are not explicitly stated in AB 205, including equitable division of jointly acquired property and custody, support, and visitation of children born before or after registration.\(^{207}\) None of the relevant code provisions were amended by specific reference in AB 205.\(^{208}\) The language of AB 205 only enumerated the rights that the legislature intended to exclude from domestic partnerships and did not itemize every right granted to partners.\(^{209}\) A putative partner status is just one of many rights that the legislature did not enumerate during the adoption of AB 205. The failure to enumerate a putative partner status should not prevent the court from exercising its equitable jurisdiction to fashion a putative partner status.

\(^{201}\) Ellis Opening Brief, supra note 14, at 13.
\(^{202}\) Id.
\(^{205}\) Id.
\(^{208}\) Assemb. B. 205 § 1.
\(^{209}\) Id. § 4 (excluding domestic partners from filing joint tax returns).
2. The Court Ignored the Origin of the Putative Spouse Doctrine

The Velez court’s second error is its failure to acknowledge the equitable origin of the putative spouse doctrine. The court refused to create a new status, stating “[w]e cannot engraft onto the statutory scheme putative spouse provisions that the legislature did not see fit to include. We must leave to the legislature the task of affording standing to putative domestic partners to proceed with dissolution actions.”210 This statement, however, ignores the fact that the putative spouse doctrine is a creation of the courts rather than the legislature.

The putative spouse doctrine was a doctrine of judicial decision-making for decades before it was codified in the California Family Code.211 Courts used it as a means to “ameliorate or correct the injustice which would occur if civil effects were not allowed to flow to a party to a null marriage who believes in good faith that he or she is validly married.”212 Courts used their equitable power to grant justice to innocent spouses who detrimentally relied on a good faith belief in the validity of their marriage.213 The situation is no different with a domestic partnership. There are potentially one or two innocent parties who have a good faith belief that their partnership is valid. Therefore there is nothing to preclude courts from exercising their equitable jurisdiction to provide justice to these individuals and couples.

The putative spouse doctrine, as codified law, is liberally applied. Monti and Vyronis rejected the notion that the putative spouse statute need be narrowly applied.214 These courts held that the legislature did not intend to strictly limit application of the doctrine to instances where there was a void or voidable marriage. If the doctrine was “limited to situations where a marriage is void or voidable as those terms are defined by statute . . . the putative marriage doctrine would cease to apply to many invalid marriages.”215 These cases held that the legislature never intended for equitable provisions of the Family Code, like the putative spouse doctrine, to be interpreted in such a narrow way as to defeat the goal of protecting innocent persons. The Velez decision contradicts precedent that calls for the generous application of the putative spouse doctrine in order to prevent injustice. In doing so, the Velez court failed to abide by the

211. California did not codify the putative spouse doctrine until 1969; however, courts have applied the doctrine since at least 1920. See CAL. FAM. CODE § 2251 (West 2004); Schneider v. Schneider, 191 P. 533 (Cal. 1920); Luther, supra note 8, at 314.
212. Blakesley, supra note 111, at 6.
213. Luther, supra note 8, at 314.
command to liberally apply the doctrine in the name of equity, fairness, and justice.

Even if the putative spouse doctrine cannot simply be expanded by the courts to apply to domestic partnerships as it does to marital unions, courts are still in a position where they can craft a separate putative partner doctrine that would solely apply to domestic partnerships. California courts explored the limits of the putative spouse doctrine and it evolved to cover a variety of situations over a long period of time. The domestic partnership regime is still in its infancy as a state-wide system. Given more time, new issues will likely develop and more legal challenges will test the boundaries of the system.216 Couples who meet the requirements of § 297 have only been able to register with the state since January 1, 2000, and the expanded rights have only been granted since January 1, 2005.217 Because there simply has not been enough time to resolve all of the wrinkles in the system, it would be premature to conclude that there can be no putative partnership status without allowing the system the opportunity to mature.

B. Countering Other Arguments Against Velez’s Putative Partnership Claim

The judicial challenge to the state’s domestic partnership regime in Knight is evidence that not all Californians support the legislature’s expansion of same-sex benefits. In Knight, the opponents of the expansion of same-sex relationship recognition attempted to void the domestic partnership registry as a violation of Prop. 22.218 Although the Court of Appeal ultimately rejected this claim, there are other arguments against expanding the putative spouse doctrine to include domestic partners. First, a putative partner status might perpetrate a fraud on individuals who never wanted to be registered under the state system and who did not want all of the rights and responsibilities that attach to such registration. Second, creating a putative status might be seen as an attempt to further bypass Prop. 22 and open the door to creating full same-sex marriage rights.

A putative partner status would bind members of a domestic partnership to all of the rights and responsibilities of Family Code § 297. This may work as

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216. The domestic partnership system has already survived one legal challenge that sought to have the whole registry overturned. Opponents claimed that AB 205 violated the voter initiative Prop. 22 and the prohibition against same-sex marriage. The court dismissed the challenge because Prop. 22 did not address legislation concerning domestic partnerships. Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Cal. Ct. App. 2005).


218. Knight, 26 Cal. Rptr. 3d at 689.
an injustice on the other member if he or she never intended to enter into a state-recognized partnership and never intended to take on those additional responsibilities. Krista Smith could have made this argument in response to Velez's putative partner claim. Smith simply claimed that they "did not have a putative partnership—they had a valid County partnership." She could have gone on to argue that her not entering into a state-recognized partnership was purposeful because she never intended to take on those additional responsibilities. Locally registered partners could be unfairly held to the same obligations as state-registered couples if a putative partner status were allowed.

Although fraud may be a potential danger, failure to make the equitable doctrine available to domestic partners could lead to significant injustice. Velez received health insurance benefits from Smith's employer based on her domestic partnership with Smith. Smith acknowledged the validity of their partnership when she submitted evidence of the partnership to her employer in order to secure health insurance for Velez. In doing so, Smith demonstrated her belief that "the valid, registered county [domestic partnership] carried all of the new rights and duties of [a] state-registered [domestic partnership]." By affirming Velez's belief in their valid partnership through this act and others, she encouraged Velez's detrimental reliance on her understanding that they had a domestic partnership valid for both state and local purposes. After Smith had already acknowledged her partnership in a way that encouraged Velez's belief in and reliance on its validity, it was an injustice to Velez to now deny its existence.

The risk of fraud is also decreased because the California courts and state legislature already weighed the relative risks of fraud and injustice when they established the equitable doctrine for marital disputes. The courts decided that the need to prevent injustice outweighed the risk of fraud, and accordingly established the putative spouse doctrine. The legislature concurred when it codified the judge-made rule into statutory law. The danger of fraud is no greater in the domestic partnership context than it is in the marriage context. According to the most recent census data, there are over five million married couple households in California as compared to approximately 40,000 registered domestic partnerships. If anything, the danger of fraud is higher in marriage because there are so many more married couples in California than domestic partners.

220. Id.
221. Appellant's Brief, supra note 4, at 57.
222. Id.
Finally, the courts will be able to guard against fraud by examining the facts on a case-by-case basis. The courts have been trusted to guard against fraud in putative spouse claims, and they are equally capable of guarding against fraud in putative partner cases. California courts already engage in a careful factual analysis to determine the appropriate application of the putative spouse doctrine. There is no reason why they would not conduct the same careful examination of putative partner claims in the domestic partnership context.

There may also be fear that establishing a putative partner status would lead to courts granting full-fledged marriage benefits. Opponents reason that by allowing a putative domestic partnership and analogizing domestic partnerships to marriages, courts might open the door to claims for putative spouse status by same-sex couples who believe they were in a valid marriage. These fears are unfounded, however, because at least two courts have heard cases involving the putative spouse doctrine and same-sex marriage and have rejected the claims both times. Each case arose in states that had enacted statutes recognizing a putative spouse status in appropriate circumstances.

The Ninth Circuit rejected the claim of two men who argued that they were putative spouses after they received a marriage license from a county clerk in Boulder, Colorado. Although the court did not reach the specific issue of whether a same-sex couple could have a putative marriage, it upheld the findings of the trial court that rejected this claim. As the Court of Appeals pointed out, the couple “could not have been without doubts concerning the validity of their marriage.” These doubts precluded the men from having the necessary good faith belief in the validity of their union. A critic of allowing same-sex couples to take advantage of the putative spouse doctrine argued that because same-sex marriage is against public policy, “all are on notice of invalidity of such a marriage.” An Illinois appellate court also rejected the claims of a lesbian couple who argued that they had a good faith belief in their marriage. The court stated that, although the parties “may have subjectively believed that the ceremony and exchange of vows and rings constituted a marriage between themselves, they nonetheless knew that the marriage was not legally recognized” so they had no grounds for a putative spouse claim.

Fear that a new legal status might lead to same-sex marriage should not preclude a putative partner doctrine. The argument against a putative same-sex

224. See supra Part III.A.
225. Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982).
226. Id. at 1039.
227. Id.
230. Id.
marriage is made stronger given the fact that in recent years many states have passed legislation forbidding gay marriage or defining marriage as between a man and a woman. There is nothing to indicate in either of these cases that the dismissals of putative marriage claims by a gay couple who believed they were married should also prohibit putative domestic partnership claims by couples who believed they were in valid domestic partnerships. Neither case mentioned domestic partnerships or any other system of legal recognition for same-sex couples nor is there any basis to read these holdings beyond the specific fact patterns involved. Although "various substitutes for a legal marriage [have not] been available" to same-sex couples, the emphasis in these cases has been on preventing a putative marriage recognition, not putative domestic partnership recognition.

C. Establishing a Putative Partner Claim

Velez was never allowed to present her case and fully demonstrate that she had a putative partner claim. This Section will examine how she might have presented her claim if given the chance. Applying the principles of the putative spouse doctrine, a person seeking to establish a putative partner claim must first establish that there is some legal defect or deficiency in their domestic partnership and then demonstrate an objectively reasonable good faith belief in the validity of that partnership.

I. A Legally Deficient Partnership

Velez and Smith had a legally defective partnership because they did not fully conform to the requirements of § 299.6 of the Family Code. Although Velez and Smith had a valid locally registered partnership, they did not file the appropriate paperwork with the Secretary of State to form a state-recognized domestic partnership.

This failure to re-register may have resulted from the ambiguous effect of the Family Code. According to the preemption section, Velez and Smith would have had to re-register with the Secretary of State to gain the benefits of § 297.5. Velez and Smith’s partnership would fall under the preemption subsection 299.6(b) because they had validly registered a domestic partnership with San Francisco in 1994. But they failed to file the requisite declaration with

231. See, e.g., CAL. FAM. CODE § 308.5 (West 2004) (codifying Prop. 22 and restricting valid marriages to a man and a woman).

232. Sol Lovas, When is a Family Not a Family? Inheritance and the Taxation of Inheritance within the Non-Traditional Family, 24 IDAHO L. REV. 353, 363 (1988) (noting that "the putative spouse doctrine will be unavailable because neither party can in good faith believe the marriage to be valid").


234. See CAL. FAM. CODE § 299.6.
the Secretary of State and never received a state registration certificate. The failure to re-register under the state system forms the basis of Velez’s putative partner claim.

2. Velez’s Good Faith Belief

Velez’s biggest challenge is demonstrating that she had a good faith belief in the validity of the partnership. It would not be enough for her to show that she had a valid local partnership because the law requires that she register her partnership with the state. Arguing good faith may be difficult because only local ordinances existed at the time Velez and Smith registered. There was no statewide registry, so Velez cannot argue that she believed she and Smith were registering with the State of California. This leaves Velez two arguments to support her putative partner claim. First, the health care Velez received through Smith’s employer was only available to partners who were validly registered with the state. This led her to believe that her partnership was recognized by the state. Second, the state-wide system subsumes at least some local partnership registries. It is conceivable that Velez objectively believed her partnership was one of those incorporated into the new system.

When doctors diagnosed Velez with multiple sclerosis, she depended on Smith’s work-sponsored health insurance. The coverage for domestic partners specified that it was only available if the beneficiaries had registered the domestic partnership with the state. Despite this requirement, Velez received benefits without state registration, consequently believing that Family Code § 297 governed her partnership because she continued to receive benefits without state registration. With the confusion that the Domestic Partner Act caused, an objectively reasonable person, like Velez, could believe that she had a state-recognized partnership because she continued to receive benefits ostensibly available only to partners registered with the Secretary of State.

Velez also argued that the new Domestic Partner Act system subsumed and incorporated her locally registered domestic partnership. Velez argued that even if she knew that her original partnership was only governed by the San Francisco County Code, it became a state-level partnership when such partnerships became available. In 2005, when the sweeping changes to the state domestic partnership system took effect, the state sent thousands of letters to domestic partners informing them of the impending changes. Family Code

235. CAL. FAM. CODE § 298.5(a) (requiring a declaration of domestic partnership to be filed with the state). The Secretary registers the union and then sends a certificate memorializing the registration. Id.
236. Appellant’s Brief, supra note 4, at 55.
237. See supra Part I.B.
238. Velez, 48 Cal. Rptr. 3d at 656.
239. Appellant’s Brief, supra note 4, at 56-57.
240. Lee Romney, Though They Can’t Wed, Gays May Now Divorce; Law Expanding Rights and Responsibilities for State’s Domestic Partners Takes Effect Today, L.A. TIMES, Jan. 1,
§ 299.3 directed the Secretary of State to send three separate letters to all partners registered with the state on or before January 30, 2005. Presumably these letters, along with the media coverage of the legislation, put state domestic partners on notice of the change. Over 26,000 couples who had registered with the state had to decide to remain partners or dissolve their partnerships to avoid the increased responsibilities. Indeed, several thousand couples ended their partnerships to avoid the added liabilities of state recognition.

The plan to educate partners did not extend to local registries. Section 299.3 makes no mention of couples who registered with a city or county clerk. It is not clear if locally registered couples received notice directing them to re-

241. CAL. FAM. CODE § 299.3(a) (West 2004). The letter reads as follows:

Dear Registered Domestic Partner:

This letter is being sent to all persons who have registered with the Secretary of State as a domestic partner. Effective January 1, 2005, California's law related to the rights and responsibilities of registered domestic partners will change (or, if you are receiving this letter after that date, the law has changed, as of January 1, 2005). With this new legislation, for purposes of California law, domestic partners will have a great many new rights and responsibilities, including laws governing community property, those governing property transfer, those regarding duties of mutual financial support and mutual responsibilities for certain debts to third parties, and many others. The way domestic partnerships are terminated is also changing. After January 1, 2005, under certain circumstances, it will be necessary to participate in a dissolution proceeding in court to end a domestic partnership.

Domestic partners who do not wish to be subject to these new rights and responsibilities MUST terminate their domestic partnership before January 1, 2005. Under the law in effect until January 1, 2005, your domestic partnership is automatically terminated if you or your partner marry or die while you are registered as domestic partners. It is also terminated if you send to your partner or your partner sends to you, by certified mail, a notice terminating the domestic partnership, or if you and your partner no longer share a common residence. In all cases, you are required to file a Notice of Termination of Domestic Partnership.

If you do not terminate your domestic partnership before January 1, 2005, as provided above, you will be subject to these new rights and responsibilities and, under certain circumstances, you will only be able to terminate your domestic partnership, other than as a result of your domestic partner's death, by the filing of a court action.

Further, if you registered your domestic partnership with the state prior to January 1, 2005, you have until June 30, 2005, to enter into a written agreement with your domestic partner that will be enforceable in the same manner as a premarital agreement under California law, if you intend to be so governed.

If you have any questions about any of these changes, please consult an attorney. If you cannot find an attorney in your locale, please contact your county bar association for a referral.

Sincerely,
The Secretary of State

242. Romney, supra note 240. After AB 205 became effective, couples would have to go through a divorce-like proceeding in order to terminate their partnership.

register if they wanted to gain the benefits of the new legislation. Indeed, Smith acknowledged that they “would not have received the letter... as they were not registered with the Secretary of State.”

One author suggested that local registries should advise domestic partners of the changes and the consequences of failing to re-register, but there is no indication that this ever occurred. It is important to point out that “while some information about AB 205 is available through the Secretary of State’s website... no general informational brochure about AB 205’s effects has been prepared yet by the state.”

Heterosexual couples are not responsible for knowing all the statutory requirements of marriage to invoke the putative spouse doctrine. The same should be true for same-sex couples. A heterosexual couple is not held liable for failing to follow exact statutory provisions. It would be unjust to hold domestic partners to a different standard and require them to know the “ins and outs” of the registry system, particularly when there are competing levels of registration between the state and municipalities. Couples like Velez and Smith, who did not receive notice of the necessity of re-registration could foreseeably have misunderstood the intricacies of the system. It is reasonable to expect that a person unfamiliar with the law would not understand the full requirements of registration. People should not be punished for this understandable unfamiliarity where a putative partner status would provide the necessary protection.

Velez and Smith registered with the San Francisco County Clerk, but Velez believed the statute preempted that registration, thus assimilating her partnership from the local to the state program. This belief can be objectively supported by the fact that the two registry systems were parallel with one another: both required members to be at least eighteen years old, share a common residence, and be capable of consenting to the partnership, among other requirements. The declaration of partnership forms used by San Francisco and the State are also virtually identical. Both systems’ benefits are mirror images of each other. A reasonable person would hardly be able to

244. Respondent's Brief, supra note 219, at 11.
245. Davidson, supra note 66, at 10 (“Local governments with registries may want to notify couples who are locally registered that they will not receive the benefits provided by AB 205 unless they separately register with the state.”).
246. Id.
247. Professor Arthur Leonard of New York Law School makes the same argument in his criticism of the Velez decision. Leonard, supra note 166 (“[W]hy should the typical LGBT couple in the street be charged with knowing that they had to register all over again for this purpose, when they had done it twice under the city/county ordinance?”).
Velez can bolster her argument by demonstrating that she and Smith held themselves out as registered domestic partners. They had a commitment ceremony to celebrate their union, and invited friends and family to witness the event. Velez and Smith commingled their funds, bought property jointly, and shared the same residence for many years. They took advantage of the health insurance offered to domestic partners when Velez became ill. Importantly, they met all of the criteria a heterosexual couple would need to invoke the putative spouse doctrine. Unlike the couples in Welch or Vyronis, who made no attempt to meet the statutory requirements of a marriage, Velez and Smith not only attempted, but succeeded in registering their partnership, albeit in the locality rather than the state.251

If Velez can establish that she is a putative domestic partner, she will gain all of the benefits granted by the Family Code. At the dissolution of the partnership, the privileges include continued partner support, which is like spousal support in a marriage, and a share of the quasi-community property accumulated during their domestic partnership.252 Velez could also receive any of the other rights and benefits given to a former partner.253 Without a putative partner status, Velez’s rights are severely limited because the San Francisco Code does not provide these benefits for former partners. To truly fulfill the legislative goal of protecting reasonable expectations and good faith beliefs, Velez should be afforded the rights of a putative partner.

CONCLUSION

Recognition for same-sex couples has come a long way since 1984, the year the first California municipality enacted a local domestic partnership registry. Since then, both the legislature and courts have bestowed a plethora of new rights and responsibilities on those couples who meet the requirements for registration. It is estimated that “[s]ince 2000 more than 37,000 cohabitating gay couples (and a few eligible senior couples) have registered as domestic partners in California.”254 This number excludes same-sex partners registered with cities and counties throughout the state. Although only one claim of a putative partner status has been considered in a written opinion, more legal

250. It would be more difficult to argue a good faith belief if the partnership was registered in a locality like Los Angeles County. Although the county includes a statement acknowledging the importance of protecting unmarried couples, the ordinance does not enumerate any special rights or protections for couples who register with the county clerk. L.A. COUNTY, CAL., CODE ch. 2.210 (1999), available at http://ordlink.com/codes/lacounty/index.htm.


252. CAL. FAM. CODE § 297.5(k)(1).

253. Id. § 297.5(b).

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claims are certain to develop as the state’s domestic partnership system matures. This Comment proposed the formation of a new legal doctrine, that would complement the judicial and legislative trend of protecting innocent parties and their reasonable expectations.

Velez’s story represents a problem facing domestic partners in California. The legislature should amend the Family Code to establish putative partner status. It is impossible to predict all of the various situations that may arise, but if lawmakers or the courts act now they can save thousands of couples from the injustice of being denied the rights and privileges afforded to domestic partners.

Equity and the protection of innocent parties form the basis of the putative spouse doctrine. The language of AB 205 reflects these same principles. The legislature has inscribed its intent to protect non-traditional families. There is no reason to deny justice to these couples. Until the legislature amplifies the Family Code to expressly provide for a putative partner status, the courts should not turn away couples who have a good faith putative partner claim. Courts should exercise their equitable jurisdiction to create a new legal status in the same way that the putative spouse doctrine was developed. Establishing a basic putative domestic partner status will protect innocent parties’ reasonable expectations of equity and only then can the “promises of inalienable rights, liberty, and equality” be fulfilled for all committed couples in California, regardless of sexual orientation.255

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