



Report from the Inter-Agency Workgroup On Implementation of HB 2007: *The Oregon Family Fairness Act*

Inter-Agency Workgroup Participants:
Bureau of Labor & Industries
Department of Consumer & Business Services
Governor's Office
Department of Justice
Department of Human Services
Public Employees Retirement System
Oregon Department of Revenue
Basic Rights Oregon

July 24, 2009

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Background and Purpose: HB 2007 Interagency Workgroup

In October 2008, Commissioner Brad Avakian convened an interagency workgroup to address certain technical and legal complications that had been identified by same sex partners utilizing Oregon's new domestic partnership law. This report summarizes the work to date of the Interagency Workgroup on HB 2007.

The Family Fairness Act, passed in 2007, created a new statute, separate from Oregon's marriage statute, to provide same-sex couples with domestic partnerships under state law. While domestic partnerships now provide Oregon's same-sex couples and their families with many of the same rights and protections previously available to couples only through marriage, the creation of a separate statute for domestic partnerships has created a number of consistency/parity issues for domestic partners in the areas of family law, estate and gift taxes, healthcare and insurance coverage, employee benefits, state and federal taxes, property, and retirement benefits.

Workgroup participants included representatives from: the Department of Revenue, the Department of Human Services, the Bureau of Labor and Industries, the Public Employees Retirement System, the Department of Consumer and Business Services, the Department of Justice, the Governor's office and from Basic Rights Oregon who worked to identified many of the issues facing registered domestic partners in Oregon.

This report summarizes the issues examined by the workgroup and describes the solutions identified and/or proposed by the workgroup. In some instances, federal law prevents Oregon from completely resolving an issue. The workgroup agreed that, in these instances, better notification and education could minimize the impact of these federal law requirements. Toward this end, the workgroup developed an educational brochure, produced by the participating agencies, which will be given to all new domestic partners to alert them to potential issues relating to name changes, will and estate planning, parental rights, and tax implications.

Overview of the Issues Addressed by the Inter-Agency Workgroup

- I. Family Law
 - a. Birth Certificates
 - b. Name Changes
- II. Insurance and Benefits
 - a. Employer Provided Benefits
 - b. Title Insurance
 - c. Insurable Interests
 - d. Means Testing
- III. Taxes
 - a. Estate and Gift Tax
 - b. Treatment of a Decedent's Retirement Accounts
 - c. Federal Income Tax Treatment of Benefits
- IV. Retirement
 - a. Public Employee Retirement System

Summary of Actions & Recommendations of the Inter-Agency Workgroup

- V. Agency Action
- VI. Workgroup Recommendations to Legislature & Other Entities
- VII. Federal Issues

Overview of the Issues Addressed by the Inter-Agency Workgroup

I. Family Law

Birth Certificates	
<u>The issues:</u>	<p>Oregon will automatically issue birth certificates for the children of female Registered Domestic Partners (RDPs) that identify both women as parents. However, there is a concern that other states may not recognize parental status based upon an Oregon RDP.</p> <p>Additionally, there is no such process for children of male couples born via surrogate. Such couples still have to go through the expensive process of a formal second parent adoption.</p>
<u>Concerns:</u>	<p>Another state's refusal to acknowledge the non-biological mother's parental rights could impact her ability to make health care decisions for her child, or could impact child support obligation in the event of a dissolution. Many RDPs believe that the birth certificate would be unquestioned in another state and choose not to go through the process of a second parent adoption. A second parent adoption generally requires the involvement of an attorney and can cost between three to five thousand dollars in attorney fees.</p>
<u>Discussion:</u>	<p>The workgroup discussed the possibility of developing a streamlined process by which a "judgment of parentage" could be obtained quickly and inexpensively. However there was uncertainty that a streamlined process predicated on HB 2007 would provide any greater protection than a birth certificate.</p> <p>There was also discussion regarding revision of the surrogacy statutes to address the male RDP parental issues. It was determined that the statutes need to be modernized to address many other issues involving parentage determinations.</p>
<u>Resolution:</u>	<p>DHS completed an update of the birth certificate registry system to ensure proper issuance of birth certificates for the children of female RDPs that identify both women as parents.</p> <p>The workgroup identified the need for further education recommending that couples pursue a second parent adoption and not rely solely on the birth certificate when traveling or moving out of the state (see section V. of this report).</p> <p>The workgroup also recommends that the Family Law section of the Oregon State Bar undertake an overhaul of the surrogacy statutes.</p>

Name Changes

The issues:

Under Oregon law, a person entering into a domestic partnership may change their name using a process similar to that used by opposite-sex couples who marry. Because of a recent statutory change, the processes are not identical. More importantly, federal agencies, such as Social Security, are refusing to accept RDPs as proof of a legal name change.

Concerns:

Many RDPs do not expect to encounter difficulties when updating their records with federal agencies.

Resolution:

The workgroup recommended a legislative fix to create a uniform process for domestically-partnered couples seeking a name change – this recommendation has been incorporated into HB 2839.

Because federal law is not impacted by HB 2007, the workgroup is unable to require federal agencies to accept RDPs as proof of a legal name change.

The workgroup identified the need for further education recommending that couples go through the standard name change process found in ORS 33.410 (see section V. of this report).

II. Insurance & Benefits

Employer Provided Benefits

<u>The issue:</u>	Not all employers are offering RDPs the same benefits as are offered to married couples.
<u>Discussion:</u>	<p>ERISA preempts state law as it applies to employer provided benefits. House Bill 2007 expressly recognizes that federal law controls all employee benefit plans governed by ERISA. Therefore, House Bill 2007 does not require any employee benefit plan that is subject to federal ERISA regulation to extend any benefits to same-gender domestic partners. Because no court decision that is binding in Oregon courts has interpreted ERISA and other federal laws to require employers to extend benefits to same-gender domestic partners, it likely remains <i>optional</i> for employers to extend the benefits of their ERISA-governed plans to same-gender domestic partners.</p> <p>In general, ERISA does not cover employee benefit plans established or maintained by governmental entities, churches for their employees, or plans which are maintained solely to comply with applicable workers compensation, unemployment, or disability laws. ERISA also does not cover plans maintained outside the United States primarily for the benefit of nonresident aliens or unfunded excess benefit plans.</p> <p>House Bill 2007 and Senate Bill 2, taken together, do require employers to provide most non-ERISA governed benefits to same-gender domestic partners in the same way that they would provide those benefits to married employees. Benefits that may fall into this category include payments to employees out of the employer's general assets for leaves of absence or paid time off related to spousal relationships, employer-sponsored scholarship programs which are paid out of the employer's general assets for which a spouse is eligible, employee discounts or memberships, certain stock option and stock purchase plans, and some types of child care assistance plans. In addition, employers should consider offering benefits that other Oregon statutes require employers to provide to an employee's "spouse" to domestic partners as well. (For example, ORS 652.190 requires an employer to pay a deceased employee's last wages to the employee's spouse.)</p>
<u>Resolution:</u>	This workgroup is unable to address inequities in employer provided benefits that are covered by ERISA.

Title Insurance	
<u>The issue:</u>	Title companies will not acknowledge that RDPs should be treated the same as married couples for purposes of real property deeds. They will not allow RDPs to take title “by the entirety” as is common for married couples. Instead they have been using the following phrase on deeds for RDPs: “A and B, domestic partners, with right of survivorship”
<u>Concerns:</u>	There are several problems with the title company’s language. First, “with right of survivorship” is legally not the same as “by the entirety” and does not provide the same protections.
<u>Discussion:</u>	DCBS regulates title insurer activities and can require them to modify their language. DCBS can also investigate any consumer complaints related to the title insurers’ current practice.
<u>Resolution:</u>	DCBS is meeting with the title insurers to discuss the review of their current practice and the determination that the title insurers must revise their current practice in order to comply with the Oregon Family Fairness Act. DCBS urges any individual who expressed concerns to the Workgroup to submit complaints to the DCBS Insurance Division for investigation and any appropriate enforcement action. NOTE: Couples are encouraged to call the DCBS Insurance Division (503-947-7980) regarding title insurance issues, filing a complaint and receive any updates since publication of this report.

Insurable Interests	
<u>The issue:</u>	In order to obtain insurance, the person who buys a policy must have an insurable interest in the subject of the insurance. By state law, married couples have an insurable interest in the lives of one another.
<u>Resolution:</u>	The workgroup recommends that the interpretation of insurable interests be clarified to assure that RDPs have an insurable interest in one another for the purposes of life insurance.

III. Taxes

Federal Estate and Gift Tax

The issues:

RDPs do not qualify for the unlimited marital deduction from federal estate and gift tax. Nor can RDPs utilize disclaimer planning to avoid federal estate tax at the surviving partner's death. Furthermore, a division of property between RDPs upon dissolution may be subject to gift tax.

Concerns:

At death, if an RDP leaves assets to the surviving partner, any amount in excess of the individual exemption will be subject to federal estate tax. Similarly, gifts between RDPs in excess of the yearly exemption amount will be subject to gift tax. These results are not the same for married couples who can freely transfer assets between one another during life and at death without any federal gift or estate tax implications.

With married couples, the Internal Revenue Code provides that a surviving spouse can perform "second look" estate tax planning through the use of a disclaimer trust. At the death of the first spouse the surviving spouse may disclaim all or any portion of the deceased spouse's assets; those disclaimed assets are transferred to a trust for the benefit of the surviving spouse with the surviving spouse receiving all income and the ability to use the assets for health, education, maintenance and support. Assets in the disclaimer trust are not subject to estate taxes on the death of the surviving spouse. This technique permits the surviving spouse to fully maximize the deceased spouse's exemption from estate taxes. However, under the federal law, a surviving registered domestic partner cannot disclaim assets into a disclaimer trust for the benefit of the surviving partner.

Tax law provides exclusions from gift and capital gains taxes upon division of property between formerly married persons for transfers that are incident to separation or divorce. On the federal level, registered domestic partners are not considered spouses, thus, upon dissolution any settlement of assets between registered domestic partners might result in transactions that are gifts (thus taxable) unless the transfer is for full and adequate consideration in money or money's worth, or would otherwise qualify for a tax-free exchange.

Resolution:

These are federal issues that cannot be resolved by the workgroup.

Treatment of a Decedent's Retirement Accounts

The issue: Not all RDPs are able to defer distribution of their deceased partner's retirement accounts.

Discussion: Spouses can "roll over" a deceased spouse's retirement account into his/her own IRA and continue the tax deferral until the surviving spouse reaches age 70 1/2 when the surviving spouse must begin minimum required annual withdrawals. Registered domestic partners who are beneficiaries of a deceased partner's retirement plan cannot "roll over" the retirement plan into his/her own retirement account, unlike a surviving spouse.

Under the Pension Protection Act a non-spouse beneficiary of an IRA can put the deceased participant's IRA into an "Inherited IRA" and stretch-out minimum required withdrawals over the life expectancy of the surviving partner. However, minimum required withdrawals must begin the year after the deceased partner's death and cannot be deferred until age 70 1/2, unlike a spouse.

The Pension Protection Act did not require corporate plans (401(k) and 403(b)) plans to permit the transfer to an Inherited IRA. If the plan does not allow an Inherited IRA the surviving partner may be forced to take out the retirement benefits within 1 or 5 years, depending upon the terms of the plan, thus accelerating the income taxation.

In addition, under most plans, upon retirement the employee cannot annuitize the retirement benefits over the joint lifetimes of both partners (however, in Oregon the Public Employer Retirement System does allow a joint annuity for domestic partners).

Resolution: This is a federal tax issue that cannot be addressed by the workgroup.

Federal Income Tax Treatment of Benefits

The issue: Benefits provided by an employer to a RDP's partner are taxed based on their imputed value.

Discussion: If an employer provides a benefit to an employee's partner, the benefit is subject to federal income tax based on the fair market value of the benefit. This is true even if the cost to the employer for providing the benefit is nothing.

Resolution: This is a federal tax issue that cannot be addressed by the workgroup.

Means Testing

The issue: Many state agencies and programs rely on federal means testing (eg. Medicaid Assistance). These programs are paid for fully or in part with federal funds. The state should apply the same eligibility criteria for these benefits for domestic partners as it applies to spouses. This would make some domestic partners ineligible for benefits that they would receive if treated as unmarried. It would make other domestic partners eligible for benefits that they would not receive if treated as unmarried.

Discussion: The Defense of Marriage Act prevents the state from using federal money to pay for benefits to couples who are eligible based on domestic partnership status. However, state funds can be used to pay for these benefits. This is consistent with the approach used to pay for abortions for low income women under the state Medicaid Assistance program after the decision in *Planned Parenthood et al v. Department of Human Resources*, 297 OR 562 (1984), affirming the Court of Appeals at 63 Or App 41 (1983). The Hyde Amendment prohibits using federal funds to pay for such abortions. The state pays for these abortions using state-only funds.

Resolution: The workgroup recommends that DHS do an analysis of impacted programs and then develop administrative rules.

IV. Retirement

Public Employee Retirement System

<u>The issues:</u>	<p>The PERS administrative rules do not currently reflect the changes mandated by HB 2007.</p> <p>PERS allows retirees to choose a payment option that would increase the retiree's benefit if the retiree's designated survivor dies or the parties get divorced. This is called the pop-up. PERS does not allow RDPs to take advantage of the pop-up in the event the RDP dissolves.</p> <p>PERS has not stated how they will report, to the IRS, the division of a PERS account pursuant to a dissolution of a RDP.</p> <p>Spouses of PERS retirees can obtain health insurance under PERS. Domestic partners cannot.</p>
<u>Discussion:</u>	<p>Because PERS is a governmental plan, it is not subject to ERISA. However, HB 2007 does state that it does not require PERS to extend benefits if "doing so would conflict with tax qualification requirements under the Internal Revenue Code and regulations adopted under the Internal Revenue Code."</p> <p>Many of the changes that can be made to the PERS administrative rules clearly do not conflict with the Internal Revenue Code or regulations. Others, arguably, cause a conflict and might threaten PERS' tax-exempt status (in particular, the pop-up and RDP health insurance coverage issues).</p> <p>All state sponsored retirement plans had to be submitted to the IRS for review in 2008. PERS was able to include in the plan proposed amendments that would not take effect until after the IRS approved the plan. These proposed amendments addressed the pop-up and health insurance coverage issues.</p> <p>Ultimately, the state cannot predict how the IRS will handle the division of a PERS account after the dissolution of an RDP. However, PERS will have to report the division to the IRS. PERS can inform participants how it will report the division.</p>
<u>Resolution:</u>	<p>PERS will make housekeeping changes to their administrative rules to resolve many of the issues above. PERS will wait to implement the pop-up and health insurance coverage until after the IRS either approves or disapproves the plan. Lastly, PERS will inform the domestic partners of how an account division will be reported should a division be ordered by a court as a result of the dissolution of a domestic partnership.</p>

Summary of Actions & Recommendations of the Inter-Agency Workgroup

V. Agency Action

- **DHS completed an update of the birth certificate registry system** to ensure proper issuance of birth certificates for the children of female RDPs that identify both women as parents.
- **DCBS notified title insurers that the practice of not allowing RDPs to take title “by the entirety” is under review.**
- **The Department of Justice provided notification to State Agencies** of their responsibilities under HB 2007. The Department informed all state agencies that, with exceptions generally limited to federal law, HB 2007 has the legal effect of having amended all references in statute or administrative rules to “spouse” or “married” to include those in a registered domestic partnership. This memo also was provided to the attorneys who advise the various state agencies.
- **The Department of Justice produced and DHS agreed to distribute a brochure for Registered Domestic Partners** to educate couples on the following critical issues:

- **Potential Impact on Wills/Estate Planning**

When people marry, their wills are automatically revoked unless the wills were executed when they were contemplating marriage. Similarly, couples who register as Domestic Partners may find that their wills have also been revoked. You should see your estate planning attorney to determine the status of your will. If your will was revoked, your attorney should be able to provide a simple, inexpensive post-registration fix that will reinstate your will.

- **Name Changes**

Couples who take advantage of the law to have their names changed upon registration (e.g., having their driver license changed to match partner’s name) may find that Federal government agencies will not recognize the name change. This could have negative impacts for Social Security, Federal tax law, Federal grants and entitlements, the ability to acquire a U.S. passport and more.

The “quick” fix for this is to actually change your name through the court. It’s relatively inexpensive. Although you can go to a lawyer to have this done, most people find it simple enough to do on their own. *Please note that changing your name will also affect your voter registration. After you change your name you may vote once in the county in which you were registered to vote under your former name. After that, your registration will be considered inactive unless you update it with your new name. Voter*

*registration is available online at:
www.sos.state.or.us/elections/votreg/vreg.htm*

- **Parenting Rights**

For female couples with biological children, **both Moms** will be placed on the original birth certificate at the hospital. However, that statement of parenthood may not be sufficient to have the non-biological mother recognized as a legal parent once your family steps outside of Oregon. There may also be issues of federal law affected, such as right to social security benefits and to claim the child on federal taxes. Consult an adoption attorney to pursue a “second-parent” adoption (cost ranges from \$1,000 to \$3,000).

Oregon’s Domestic Partnership law does not change the process by which two Dads secure a legal relationship to their children, regardless of biological relationship.

Additionally, you should not assume that children born before a couple registers for an Oregon Domestic Partnership and who are being raised by both partners are legally the children of both partners. Most likely, such children will be viewed as the step-children of the non-biological parent. To ensure full parental rights, adoption is recommended.

- **Dissolution of Your Relationship**

Unlike the county-based domestic partner registries that are largely symbolic in nature, Oregon’s Domestic Partnership Registration is a **legally binding** contract. This contract can only be dissolved through a court procedure similar to divorce. In the event that you decide to dissolve your relationship, you should consult an attorney.

- **PERS Tax Implications**

Federal income tax law may apply differently to an Oregon Registered Domestic Partner who receives any benefit from a tax qualified plan, like the Oregon Public Employees Retirement System. Please consult with a qualified tax professional if you have questions about the federal income tax aspects of these benefit payments, especially in connection with dissolution of the domestic partnership.

- **Taxation on Health Benefits**

Under federal law, if the employer of one partner of a same-sex couple provides health insurance to their domestic partner, the value of that benefit is required to be included as taxable wages reported on the W-2 of the employee. Oregon has allowed a deduction on the Oregon return of the domestic partner who had to report the imputed income for the value of the health insurance reported as taxable wages.

Following the implementation of HB 2007 the Oregon Family Fairness Act in February, 2008, the Oregon Department of Revenue revised the deduction to apply only to Oregon Registered Domestic Partners and only for the portion of the year that a couple was registered.

- **Effect on Qualification for Benefits (Means Testing)**

A change in family status, including registering for an Oregon Domestic Partnership, may affect qualification for benefits through state programs such as Medicaid Assistance. Please consult with the appropriate agency to determine your eligibility.

VI. Workgroup Recommendations to Legislature & Other Entities

- The workgroup recommends that the Family Law section of the Oregon State Bar undertake an overhaul of the surrogacy statutes.
- The workgroup recommended a legislative fix to create a uniform process for domestically-partnered couples seeking a name change – this recommendation has been incorporated into HB 2839.
- The workgroup recommends that the interpretation of insurable interests be clarified to assure that RDPs have an insurable interest in one another for the purposes of life insurance.
- The workgroup recommends that DHS do an analysis of impacted programs and then develop administrative rules.

VII. Federal Issues

- Because federal law is not impacted by HB 2007, the workgroup is unable to require federal agencies to accept RDPs as proof of a legal name change.
- This workgroup is unable to address inequities in employer provided benefits that are covered by ERISA.
- RDPs do not qualify for the unlimited marital deduction from federal estate and gift tax. Nor can RDPs utilize disclaimer planning to avoid federal estate tax at the surviving partner's death. Furthermore, a division of property between RDPs upon dissolution may be subject to gift tax.
- Not all RDPs are able to defer distribution of their deceased partner's retirement accounts.
- Benefits provided by an employer to a RDP's partner are taxed based on their imputed value.

- Tax qualification issues (pop-up and health insurance) have been presented to the IRS as part of the PERS Plan’s determination letter request.

Issues that can be addressed by workgroup	Issues that cannot be resolved due to federal law	Issues to be discussed in brochure
Insurable Interests	Employer Provided Benefits	Birth Certificates
Means Testing	Federal Estate and Gift Tax	Name Changes
	Treatment of a Decedent’s Retirement Accounts	
	Federal Income Tax Treatment of Benefits	