NOTE: This June 2009 memorandum was written by a group of family law attorneys and law professors, including Deborah H. Wald, to answer the question left open by the California Supreme Court in Strauss v. Horton re: the continuing validity of out-of-state marriages after the passage of Proposition 8. We have decided to make the information publically available in the hopes that it proves useful to family law practitioners who are representing same-sex couples that married outside of California and are seeking recognition of their marriages within California.

Recognition of Marriages Between Same-Sex Couples Performed Outside of California Prior to November 5, 2008

SUMMARY:

In the wake of Proposition 8 and the California Supreme Court's decision in *Strauss v. Horton*, upholding Proposition 8 but also holding that marriages of same-sex couples entered in California prior to the passage of Proposition 8 are valid, an important question about the status of marriages of same-sex couples entered in jurisdictions outside of California has arisen. As a practical and legal matter, this issue is of great importance to the individuals and couples involved, which may include married couples or persons who are visiting California, who have moved here following Proposition 8, or who left the state to marry in order to marry in the presence of family members or friends. Those couples and individuals, many of whom may have children, have an urgent need to know whether their marriages will be respected within our state borders. This memorandum briefly explains our conclusion that marriages between same-sex couples entered into outside of California before November 5, 2008 must be recognized under California law, on a par with marriages entered into in California before November 5, 2008. That is true for a number of reasons, each of which is independently compelling. Considered together, they make it plain that any construction of Proposition 8 that would bar recognition of marriages validly entered before November 5, 2008 simply because they took place outside of California is neither legally nor practically tenable.

As a preliminary matter, it bears emphasizing that the California Supreme Court in *Strauss v. Horton* did not reach or decide whether California must recognize valid marriages of same-sex couples entered in other jurisdictions before the passage of Proposition 8, thereby leaving the question open. In that case, the California Supreme Court held that it would not address the status of marriages performed outside of California in *Strauss v. Horton* because the issue was not before it. (*Strauss v. Horton* (2009) __ Cal.4th __ [p. 135, fn. 48] [declining to address this question because "[n]one of the petitioners before us in these cases falls within this category"].) In the absence of specific guidance from the Court, we must look to existing precedent and principles to resolve the issue, including the court's analysis and holding in *Strauss v. Horton* and *In re Marriage Cases* (2008) 43 Cal.4th 757, 800, as well as long settled principles of California family law. Those

precedents provide a strong basis for concluding that, under both federal and state law, marriages between same-sex couples validly entered outside of California prior to November 5, 2008 must be recognized under California law.

Serious federal constitutional concerns under the federal Privileges and Immunities clause and the federal and state Due Process Clause would be raised if same-sex couples who married in California prior to the passage of Proposition 8 were recognized as married but same-sex couples who married outside of California prior to this date were not recognized. In addition, California family law strongly supports treating in-state and out-of-state marriages equally and also strongly supports protecting the stability and certainty of existing marriages regardless of where they were performed. In *In re Marriage Cases*, the California Supreme Court ruled that California not only must permit same-sex couples to marry, but also must recognize valid marriages of same-sex couples from other jurisdictions. Once that decision became final, couples and individuals across the country were entitled to rely upon that holding as an authoritative statement of California law and thus to assume that their valid out-of-state marriages would be respected if the couple or either spouse or their children ever traveled or moved to California. Additionally, California residents who wished for personal reasons to marry in another jurisdiction (for example to be with family or friends) were entitled to rely on the Court's decision and to assume that their marriage would be respected in their home state. It would be unfair, and contrary to those reasonable expectations, to adopt a construction of Proposition 8 that retroactively unsettled those assumptions, especially given that couples who married in another jurisdiction were legally barred from remarrying in California.

In addition to violating established precedent, any attempt to distinguish between in-state and out of state marriages entered before November 5, 2008 would cause serious and intractable practical problems. For example, would businesses or state agencies be responsible for determining where a couple married? If so, how as a practical matter could they fulfill that responsibility without potentially invading the privacy of married couples and incurring enormous administrative burdens and costs? Would whether a couple's marriage is entitled to recognition turn on whether the couple had entered California prior to the passage of Proposition 8? If so, would any degree of contact (however transient) be sufficient? Would both spouses have to have entered the state? Would virtual contact suffice? Would a different rule apply to California residents who left California to marry and then returned than to couples who married elsewhere and moved to California after Proposition 8? If so, what would be the basis for making such a distinction? Would it apply to couples who intended to move to California prior to the passage of Proposition 8 but had not yet done so? These are only a sampling of the thicket of tangled practical questions and difficulties that inevitably would arise and multiply if any construction of Proposition 8 that required differential treatment of out-of-state marriages entered before November 5, 2009 were adopted.

For all of the foregoing legal and practical reasons, the only reasonable, feasible, and constitutional interpretation of Proposition 8's effect on existing marriages is that California must continue to recognize and treat as valid all marriages between same-sex couples that were validly entered into outside of California prior to the passage of Proposition 8.

I. DIFFERENT TREATMENT OF IN-STATE AND OUT-OF-STATE MARRIAGES WOULD VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FEDERAL CONSTITUTTION.

The federal Privileges and Immunities Clause prevents California from treating out-of-state marriages differently merely because the marriage was performed outside of California. In order to avoid an interpretation of Proposition 8 that raises a serious constitutional question under the federal Privileges and Immunities Clause, Proposition 8 must be construed to avoid that problem. (See e.g., *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 ["If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable."].) Here, it is consistent with the reasonable meaning of the language of Proposition 8 to construe Proposition 8 to bar recognition of marriages of same-sex couples entered *after* the passage of Proposition 8, regardless of where performed, but not to bar recognition of marriages entered before the passage of Proposition 8 merely because those marriages took place outside of California. Any other construction would run afoul of the federal Privileges and Immunities Clause by requiring overtly differential treatment of marriages based solely because they were performed in another state.

The California Supreme Court recognized the necessity of treating in-state and out-of-state marriages equally based on the federal Privileges and Immunities Clause in *In re Marriage Cases* (2008) 43 Cal.4th 757, 800. In the *Marriage Cases*, the Court struck down Proposition 22 as a violation of the equality, due process and privacy guarantees of the California Constitution. Enacted by initiative in 2000, Proposition 22 created Family Code Section 308.5, which provided: "Only marriages between a man and a woman are valid or recognized in California." Prior to invalidating that statute, the Court held that it must be construed to apply to marriages performed both inside California and outside of California. (*Ibid*; see also *Strauss v. Horton* (May 26, 2009, S168047) __ Cal.4th __ [p. 25] [explaining that *Marriage Cases* held that Proposition 22 applied equally to marriage performed in California or in another jurisdiction].) The Court explained that treating the marriages of same-sex couples who married outside of California differently from those who married in California "would be difficult to square with" the Privileges and Immunities Clause of the federal constitution. (*Marriage Cases*, *supra*, at p. 800 ["serious constitutional problems under the privileges and immunities clause . . . of the federal Constitution would be presented were [Proposition 22] to be interpreted as creating a distinct rule for out-of-state marriages as contrasted with in-state marriages."].) That portion of the Court's holding is directly applicable here to the analogous question of how to construe the identical language contained in Proposition 8. Just as the Court held that Proposition 22 would violate the federal Privileges and Immunities Clause if construed to require different treatment of marriages entered in California than marriages entered in other states, the identical language in Proposition 8 likewise would violate the federal Privileges and Immunities Clause if construed to permit recognition of marriages of same-sex couples entered in California

before the passage of Proposition 8, but to bar recognition of marriages of same-sex couples entered in other jurisdictions before that date.

Moreover, even independently of the California Supreme Court's analysis of Proposition 22 in *In re Marriage Cases*, which is directly on point and would appear to be dispositive of this issue, application of the established standard under the federal Privileges and Immunities Clause mandates the same result. The federal Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (U.S. Const., art. IV, § 2, cl. 1.) The purpose of the Clause is:

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

(*Hicklin v. Orbeck* (1978) 437 U.S. 518, 524 [internal quotations and citations omitted] [striking down state law that discriminated against out-of-state residents with regard to eligibility for jobs]; see also *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274 [right to practice law].)

The Clause "bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." (*Hicklin v. Orbeck*, 437 U.S. at p.. 525 [internal quotations and citations omitted]; see also *Piper*, *supra*, 470 U.S. at p. 284 [disparate treatment of out-of-state residents barred unless there is a substantial reason for the discrimination].). That standard is exacting and requires that in order to establish a "substantial reason for the discrimination," there must be "something to indicate that noncitizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed." (*Hicklin v. Orbeck*, 437 U.S. at pp. 525-526 [internal quotations and citations omitted]) Further, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." (*Hicklin v. Orbeck*, 437 U.S. at p. 526 [internal quotations and citations omitted].).

Here, the application of that established standard mandates equal treatment of same-sex couples who validly married prior to the passage of Proposition 8, regardless of where they married. California has no substantial reason to treat same-sex couples who married prior to the enactment of Proposition 8 differently based on whether they married in California or another jurisdiction. There is nothing peculiar or distinctive about out-of-state marriages, per se, that would justify treating them differently, and doing so would not serve any discernable public purpose or objective. Moreover, even if the proponents of Proposition 8 asserted that recognizing such marriages would be undesirable from their perspective because it would increase the number of recognized married same-sex couples in California, there is no reasonable relationship between any

"danger" represented by non-citizen married same-sex couples, as a class, and the discrimination that would be practiced upon them.

To the contrary, in *Strauss v. Horton*, *supra*, __ Cal.4th __, the Court held that there is no state interest that requires Proposition 8 to be retroactively applied to invalidate the marriages of same-sex couples who married in California. The same reasoning applies regardless of where the marriage was performed. Rather than serving any state interest, retroactively invalidating marriages entered into outside of California would discriminate against persons simply because they married in another state without there being any substantial reason for doing so. In addition, establishing a rule that treated couples who married out of state differently would be contrary to one of the core state purposes of recognizing marriage – providing legal protections that encourage people to rely on the security of their family relationships. As the Court explained in the *Marriage Cases*, *supra*, 43 Cal.4th at p. 816, "[t]he legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential." The importance of protecting and promoting this reliance applies equally regardless of where the marriage happened to take place. In fact, as explained below in section II-A, California law strongly mandates equal treatment of marriages performed both inside and outside of California. California thus has no "substantial reason" not to recognize the marriages of same-sex couples who married prior to the passage of Proposition 8 simply because these couples married out-of-state. Therefore, the Privileges and Immunities Clause mandates that California treat in-state and out-of-state marriages equally.

II. ALL SAME-SEX COUPLES WHO MARRIED BEFORE NOVEMBER 5, 2008 WERE ENTITLED TO RELY ON THE CONTINUED VALIDITY OF THEIR MARRIAGES.

Prohibiting retroactive application of Proposition 8 to out-of-state marriages entered before November 5, 2008 also serves the policy that state law generally should protect the decisions people have made in reliance on law that existed at the time. Protecting this reliance is particularly essential in the area of family law, where couples have had children, acquired property, obtained health insurance, and made estate planning decisions within the context of their marriage. California family law does not distinguish in any way between marriages based on where the marriages were performed. In fact, we know of no California statutes, court decisions, or court forms that distinguish between marriages based on where they were entered. Therefore, allowing Proposition 8 to retroactively invalidate marriages that were previously recognized under California law would be contrary to established family law precedent.

In fact, because of the profound impact that retroactively invalidating a marriage would have on spouses and their children, as far as we know, California courts have never retroactively invalidated a marriage that was previously valid and recognized in California because of a change in the laws regarding qualifications for marriage. It would be unprecedented under California or any other state's laws if a change in the state's eligibility requirements for marriage could retroactively invalidate marriages that were previously recognized in

that same state. (*See e.g.*, *Wells v. Allen* (1918) 38 Cal. App. 586, 589-590 [treating as valid a common law marriage entered into prior to an 1895 statute abolishing common law marriage]; see, also, *In re Singer's Estate* (1955) 138 N.Y.S.2d 740 [New York must recognize a common law marriage entered into in New Jersey prior to the passage of statutes in both New York and New Jersey abolishing common law marriage].)

A. There Were No Actions Out-of-State Couples Could Have Taken to Ensure That Their Marriages Would Be Recognized.

It is particularly important for the law to protect reliance where the parties have already taken all possible actions to protect their rights. As the California Supreme Court has explained, "[i]t is difficult to imagine greater disruption [of reliance] than retroactive application of an about-face in the law . . . to parties who are completely incapable of complying with the dictates of the new law." (*In re Marriage of Fabian* (1986) 41 Cal.3d 440, 450.)

There were no actions that same-sex couples who married outside of California could have taken to ensure that their marriages would be recognized. Marriages from other states are automatically entitled to formal recognition in California by operation of law. (See, e.g., Fam. Code § 308 ["A marriage performed outside this state that would be valid by the laws of the jurisdiction in which the marriage was performed is valid in this state"].) The purpose of this rule is to promote stability in family relationships by providing legal certainty and security about familial status. (See *Marriage Cases*, supra, 43 Cal.4th at 816 ["In view of the public's significant interest in marriage, California decisions have recognized that the Legislature has broad authority in seeking to protect and regulate this relationship by creating incentives to marry and adopting measures to protect the marital relationship"].)

In addition, California law not only mandated automatic recognition of valid marriages from other jurisdictions, it also affirmatively *prohibited* couples who had already married outside of California from remarrying. In order to be eligible to marry in California, an individual must be an *unmarried* person 18 or over. (Fam. Code § 301.) By statute, therefore, one of the legal requirements to marry in California is that a person must not be married already, even to the same person. Because of that statutory directive, some same-sex couples who had already married out-of-state attempted to remarry in California after the *Marriage Cases* decision became final, but were not permitted to do so. In addition, there are no other actions that couples could have taken to ensure that their out-of-state marriages would be respected. For example, there is no way to "register" or "domesticate" a marriage from out-of-state. In light of that clear law, it would be grossly unfair and improper to penalize same-sex couples who married before the passage of Proposition 8 out of state by now subjecting them to a unique retroactive rule, different than that applied to such couples who married within the state. Such a differential rule could not be squared with Family Code section 308 or with section 301, or with the reasonable expectations based on those statutes.

Married same-sex couples who lived outside of California but who owned property in California or had other connections to California also had no steps they could have taken to ensure that their marriages would

continue to be respected in California. These couples relied on California's recognition of their marriages, as explained below in section II-B, but were unable to act to protect the validity of their marriages in California.

B. Same-Sex Couples Who Married Outside of California Took Numerous Actions in Reliance on Their Marriages.

Retroactive application of Proposition 8 to out-of-state marriages would seriously disrupt same-sex couples' legitimate reliance on the *Marriage Cases*. Same-sex couples who married outside of California prior to the passage of Proposition 8 made important decisions in reliance on California's recognition of their marriages, whether they lived in California and had already married elsewhere when the *Marriage Cases* was decided, lived in California and traveled elsewhere to marry, moved to California after living and marrying elsewhere, lived elsewhere but planned to move to or travel in California, or did not plan to move to California but developed a connection to California.

Couples in each of these subgroups of same-sex couples who married outside of California made choices in reliance on the *Marriage Cases* that would be seriously disrupted if California were to no longer recognize their marriages. First, couples who lived in California but traveled elsewhere to marry relied on the fact that California would recognize their marriage regardless of where they married. For example, a female same-sex couple living in California decided to marry in July 2008. They are both originally from Massachusetts, and their families live there. At their families' urging, they have their wedding in Massachusetts. After they return to California, they rely on their status as a validly married couple. One spouse begins receiving insurance benefits as a spouse from the other's employer. They have a child, and both mothers have their names on the birth certificate. The child receives health insurance from the non-birth mother's employer. This couple had no reason to believe that their marriage would be less protected if they married in Massachusetts, rather than in California, and in reliance on California's recognition of their marriage, they decided to have their wedding outside of California for the convenience of their families.

Same-sex couples who lived in California but had already married outside of California prior to the Court's decision in the *Marriage Cases* were treated as married for all purposes in California after this decision became final. Some of these spouses are employed by the state of California and have started receiving health benefits from the state for their spouses. Other couples have written wills and made estate planning decisions based on their marriages that would no longer be secure if their marriages were not recognized after November 5, 2008. Some spouses have passed away without a will and their surviving spouses have begun actions in probate court regarding the property of the deceased spouse.

Married same-sex couples who lived outside of California and planned to move here after November 5, 2008 were also entitled to rely on the fact that their marriages would be respected in California. For example, a couple who lived in Massachusetts planned to move to California at the end of the year when they married in Massachusetts in August 2008. They rely on the fact that California would recognize their marriage when they decide to marry in their current home state rather than traveling to California to marry prior to their move. They subsequently sell their home in Massachusetts and move to California. They use proceeds from the sale of the

Massachusetts home that one of them owned before their marriage to jointly purchase property in California, intending to gift one spouse's previously separate property to the community.

After these married same-sex couples moved to California after November 5, 2008, they were recognized by the state as married for many purposes. After November 5, 2008, these couples have filed actions for dissolutions of their marriages and are currently in the process of dissolving their marriages. Some of them filed California income tax returns and paid California income taxes as married couples. Same-sex couples who married outside of California have had children here and have been allowed to place both of their names on the child's birth certificate. California law cannot now say that all of these actions taken after November 5, 2008 are no longer valid.

Retroactively invalidating marriages would also affect non-resident couples who have no plan to move to California but who relied on California's recognition of their marriages by traveling in California after November 5. For example, a same-sex couple who lived in Massachusetts and married there travels to California for a vacation in January 2009. One spouse is killed in a car accident during their vacation, and the other spouse files a wrongful death action in California against the other driver. This couple decided to visit California believing that they would be recognized as married in California, with all the rights of a married couple. The surviving spouse has already begun litigation in California to enforce a right that flowed from California's recognition of their marriage.

Couples who married outside of California but did not plan to move to or travel in California have also taken actions in reliance on California's recognition of their marriages. For example, a couple involved in a dispute with an individual in California may have relied on the spousal communication privilege in their private communications on the belief that these communications would be protected from discovery if they were to become involved in litigation in California. Certainly non-resident couples who owned or purchased property in California have taken actions in reliance on California's recognition of their marriages – for instance, these couples may have changed the title of their California property to include both spouses without having their property reassessed for California property tax purposes. Allowing Proposition 8 to retroactively invalidate out-of-state marriages that were entered into by same-sex couples who have never lived in California would disrupt many decisions that these couples made in reliance on California's recognition of their marriages.

There are many actions that same-sex couples who married outside of California have taken in reliance on the validity of their marriage in California, even if they have not lived in California. After the *Marriage Cases*, any married same-sex couple was entitled to reasonably rely on fact that California would recognize their marriages, based on Family Code section 308, Family Code section 301, and the complete absence of any precedent of California or any other state retroactively stripping otherwise valid marriages of recognition simply because they took place in another jurisdiction.

III. UNDER THE REASONING OF *STRAUSS V. HORTON*, PROPOSITION 8 CANNOT BE RETROACTIVELY APPLIED TO MARRIAGES ENTERED INTO OUTSIDE OF CALIFORNIA.

After the Court's decision in the *Marriage Cases* and before the passage of Proposition 8, California recognized marriages between same-sex couples that were validly entered into in other states. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 800, 855-856 [holding that the Proposition 22's prohibition on recognition of both in-state and out-of-state marriages between same-sex couples was unconstitutional].) If California were to no longer recognize these out-of-state marriages, that would be a retroactive application of Proposition 8. (See *Strauss v. Horton*, *supra*, __ Cal.4th __ [p. 131] [applying Proposition 8 to "invalidate or to deny recognition to marriages performed prior to November 5, 2008, rendering such marriages ineffective in the future . . . would constitute a retroactive application of [Proposition 8]"].) Although these marriages would still be valid in jurisdictions that recognize marriage between same-sex couples, if California were to stop recognizing these marriages, this would be equivalent to invalidating them under California law.

Although the Court in *Strauss v. Horton* did not address the validity of marriages entered outside of California, the same reasoning used by the Court to uphold the validity of marriage performed in California prior to the passage of Proposition 8 applies to out-of-state marriages. In *Strauss v. Horton*, *supra*, __ Cal.4th __ [p. 131], the Court explained that constitutional amendments cannot be applied retroactively unless they include an express retroactivity provision or it is clear that the voters intended the provision to apply retroactively. (*Id.* at 129-133 [citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188].) The Court found that Proposition 8 did not include an express statement that it was to apply retroactively and there was no evidence in the ballot pamphlet or elsewhere that Proposition 8 was intended to apply retroactively to affect any marriages of same-sex couples that had already taken place. (*Id.* at 129-133; *id.* at [p. 132] ["neither the official title and summary prepared by the Attorney General, nor the analysis prepared by the Legislative Analyst, contains any reference to the retroactivity issue. Similarly, neither the argument in favor of Proposition 8 nor the argument against it adverts to the question of retroactivity."].)

The Court in *Strauss v. Horton* then went on to hold that Proposition 8 also could not be applied retroactively because such an application would raise serious concerns under the California and federal due process clauses. (*Id.* at 133.) The Court recognized that retroactive application of a new law may be unconstitutional "if it deprives a person of a vested right without due process of law." (*Ibid* [citing *Marriage of Buol* (1985) 39 Cal.3d 751, 756; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592].) In determining whether a retroactive application would violate due process, the Court looks at a number of factors, including the significance of the state interest, the importance of the law to effectuating that state interest, the extent and legitimacy of the reliance on the previous law, the extent of the actions taken in reliance, and the extent to which retroactive application would disrupt those actions. (*Ibid.*)

The Court recognized that all of these factors were present: same-sex married couples acquired vested property rights "with respect to a wide range of subjects, including among many others, employment benefits, interests in real property, and inheritances"; these couples legitimately relied on the *Marriage Cases* holding that their marriages were valid; and applying the law retroactively would destroy "thousands of actions taken in reliance" by couples, their families, and third parties (*Id.* at 133-134.) As explained above in section II-B,

same-sex couples who married outside of California also relied on their status as married in making numerous decisions, regardless of whether they have ever lived in California.

Retroactive application of Proposition 8 to marriages performed outside of California is not also essential to serve any state interest in enacting Proposition 8. The Court recognized that "a retroactive application of Proposition 8 is not essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively." (*Id.* at [p. 134].) There is no reason why any state interest in restricting marriage to different-sex couples would be served by retroactively invalidating only marriages that were entered into outside of California but not marriages entered into inside of California.

For all of the same reasons why Proposition 8 cannot be retroactively applied to marriages between same-sex couples entered into in California, Proposition 8 cannot retroactively invalidate marriages that were performed outside of California prior to the passage of Proposition 8.

IV. PROPOSITION 8 ALSO CANNOT RETROACTIVELY INVALIDATE MARRIAGES BETWEEN SAME-SEX COUPLES PERFORMED IN OTHER COUNTRIES PRIOR TO NOVEMBER 5, 2008.

Marriages between same-sex couples validly entered in other countries also cannot be retroactively invalidated by Proposition 8. After the *Marriage Cases*, *supra*, 43 Cal.4th 757, became final on June 16, 2008, marriages between same-sex couples validly entered in other countries were recognized in California under Family Code section 308, which provides that a "marriage performed outside this state that would be valid by the laws of the jurisdiction in which the marriage was performed is valid in this state" (italics added). California has also long recognized that marriages validly performed in other countries must be recognized under principles of comity in the absence of a compelling public policy reason not to do so. (I*n re Bir's Estate* (1948) 83 Cal.App.2d 256, 261 [recognizing polygamous marriage entered in India for purposes of intestate succession; *Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1183 [recognizing the rule that a marriage validly entered into under the laws of another country is valid in California but finding no common law marriage under Mexico law]; *Halvorsen v. Halvorsen* (1951) 44 Cal.App.2d 211 [holding that the question of whether an underage marriage performed in Mexico could be annulled in California depended on whether a marriage was validly entered under the laws of Mexico].) Plainly in light of the *Marriage Cases*, there was no public policy that would have allowed California to refuse to recognize marriages between same-sex couples validly performed in other countries, and California did in fact recognize such marriages prior to the passage of Proposition 8, so these marriages were valid under California law before November 5, 2008. These marriages must continue to be valid in California because Proposition 8 cannot be retroactively applied to invalidate marriages performed in other countries for the same reasons it cannot be retroactively applied to marriages performed in other states.

HYPOTHETICAL SITUATIONS ILLUSTRATING THE PRACTICAL IMPORTANCE OF RECOGNIZING OUT OF STATE MARRIAGES ENTERED BEFORE THE PASSAGE OF PROPOSITION 8

A female same-sex couple living in California traveled to Massachusetts to marry in August 2008 because their families lived in Massachusetts. One of the spouses gave birth to a child in California on Nov. 10, 2008. The non-biological mother is on the birth certificate and is considered a legal parent under California law. The child has health insurance through the non-biological mother's employer as her child. The parents obtained a social security number and passport for the child that recognizes that the child has two legal parents, and the non-biological mother claimed the child as a tax dependent on her 2008 California state taxes.

A male same-sex couple married in Massachusetts in 2005, and moved to California in May 2008. They filed for dissolution in California in mid-November 2008, and requested support orders based on the marriage, as well as division of their assets based on community property accumulated during their marriage. Temporary spousal support was ordered by the court pending final dissolution of the marriage; and at a hearing in December the court ordered the higher earning spouse to pay the lower earning spouse's attorney's fees pursuant to Family Code section 2030; and made appropriate temporary financial orders for maintenance of the couple's home and credit cards based on a their relative earnings. A final dissolution was entered in late May 2008, shortly before the Supreme Court's ruling in *Strauss v. Horton*, where final support and community property divisions were entered.

A female same-sex couple lived in Massachusetts and married there in 2004. In January 2009, they moved to California. One spouse passed away without a will in March 2009.

A male same-sex couple living in California traveled to Canada and married there in 2007. One spouse was hired as a state employee in August 2008, and the state began providing health insurance benefits to his spouse. They filed their 2008 California income tax returns as married filing jointly.

For more information please contact Deborah H. Wald at (415) 648-3097 or info@waldlaw.net

The Wald Law Group, PC **www.waldlaw.net**

San Francisco Office:
88 Kearny, Suite 1475
San Francisco, CA 94108
(415) 648-3097 ph
(415) 648-3098 fax