

WILL PROPOSITION 8 SURVIVE?

By Terry L. Thompson, Esq.

On November 4, 2008, 52.1 percent of the voters of California approved Proposition 8, which is a 14 word constitutional amendment that simply states, "Only marriage between a man and a woman is valid or recognized in California." This is identical to Proposition 22 which was passed by 61.4 percent of the voters in 2000. The difference between Prop 8 and Prop 22 is that Prop 8 is a Constitutional Amendment and Prop 22 was only a statute.

On May 15, 2008 the California Supreme Court, by a narrow 4-3 margin, declared the Proposition 22 statute that prohibited same sex marriage violated the California Constitution. Thus, the vote of one Supreme Court Justice overturned the will of the 4.6 million people who voted for Proposition 22. Therefore supporters of traditional marriage were forced to go to the people again with Proposition 8, and this time make it a constitutional amendment. (If it is in the constitution, by definition, it cannot be unconstitutional!) Fortunately, on November 4th, Proposition 8 passed, but not by as big a margin as Proposition 22. This was due in large part to Attorney general Jerry Brown's revision of the ballot title from the neutral words "Limit on Marriage" to the negative words "Eliminates Right of Same-Sex Couples to Marry." However, even this biased language wasn't enough to defeat the will of the people.

Those in favor of same sex marriage, however, have not given up. They filed a law suit on November 5th which is a last ditch "hail Mary" attempt to overthrow the will of the voters. Although, the chances of their success would not be significant if this were another time or another state, we are not in living in the "good old days" and we are not in Idaho. We are living in period of radical political correctness and in the looney left state of California. If that isn't bad enough, the Supreme Court is located in the belly of the beast, San Francisco, just across the street from Mayor Gavin "any twosome" Newsom"!

What is the legal challenge put forth by the Proposition 8 opponents? It is a novel but well articulated theory that undermines the people's sovereign right to change the constitution by the initiative process. Opponents of Proposition 8 allege that the initiative process can only be used to **amend** the constitution but cannot be used to **revise** it and that Proposition 8 was actually a revision to the constitution. If this sounds like a distinction without a difference you are on the right track. Nevertheless, this challenge must be treated seriously because Judges love intellectual nuances and novel theories, especially if the outcome fits their preconceived viewpoint. Is Proposition 8 a revision? Revisions can be either quantitative or qualitative. A quantitative revision is "an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution." (*Amador Valley v. State Board of Education* (1978) 22 Cal.3d 208,222) Clearly, the 14 words of Proposition 8 are not a quantitative revision! A qualitative revision includes one that involves a change in the basic plan of California government, i.e. a change in the structure or foundational powers of its branches. Opponents of Proposition 8 claim that this is an equal rights issue and that equal rights

are only the province of the judiciary and that Proposition 8 transferred final authority to enforce the equal protection clause from the judiciary to a majority of voters. They conclude that Proposition 8 was therefore a revision to the Constitution, not an amendment, and therefore is not valid. (A Constitutional revision requires a two-thirds vote of the legislature and the popular ratification by the voters, whereas an amendment only requires a majority of the voters.) Their argument is that this is similar to a hypothetical initiative to overturn the California Supreme Court's decision protecting women from discrimination in employment and taking away their equal rights protection. Clearly, retaining the definition of marriage is not analogous to their hypothetical, especially since California's domestic partner laws have given same sex couples virtually all the rights that married couples have.

What's next? The Supreme Court has agreed to hear the case (bypassing the lower courts). Briefing will be completed by the attorneys on both sides in January and oral arguments are expected in March. The decision will probably be in April or May of 2009. Let's pray that logic and good jurisprudence prevail and that the hail Mary legal pass goes out of bounds and this outrageous assault on California Families is over!