Planning for Non-Traditional Families and the Evolving Definition of Marriage

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Part 1
Introduction

1. What We Will Not Cover

We will not explore the societal or religious arguments for and against same-gender marriages nor the related family law issues that are pertinent to this type of planning (such as adoption or divorce), or the bases for the constitutional challenges that are sure to come against the federal and state Defense of Marriage Acts.

2. What We Will Cover

In this course we will discuss planning for couples who: (a) consider themselves to be a family unit; but (b) who either cannot or choose not to be legally joined in marriage. For same-sex couples, we will also discuss the pros and cons of getting married in a jurisdiction which permits it, or entering into a civil union or domestic partnership.[2] We will also discuss some unique planning opportunities for same gender couples, given the state of Federal tax law in this area and mention some counseling issues when working with the LGBT community.[3]

That said, if ever there was a "no size fits all" area of the law, this is it. When the spectrum of individual needs in planning is matched up against the mishmash of state laws dealing with same-sex relationships particularly, the only thing certain is that a keen awareness of both the law and the nuances of its application in a particular state is essential.

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[2] This is an ever changing area of the law, so please keep that in mind. For an excellent survey of the impact that marriage and civil unions have on same sex couples, *see* Gates, Badgett & Ho, Marriage, Registration, and Dissolution by Same-Sex Couples in the U.S., a survey published by the Williams Institute of the University of California School of Law in July, 2008, sponsored by MerrillLynch.

[3] Note about terminology: Today's broader gay community is typically referred to as the LGBT (or GLBT) community. This stands for Lesbian, Gay, Bisexual and Transgender people. The community has unique and complex social and legal issues. Advisors often play an important role in helping with these issues. This outline addresses principally the legal issues facing Gay Men and Lesbian Women in committed, long term relationships.

3. Who are we talking about: same gender and opposite gender *committed* couples who

A. Can't get married; or

B. Choose not to marry:

i. Medicaid spousal impoverishment

ii. Surviving Spouse, QTIPS, and lines of descent

iii. Consequences of remarriage on alimony and divorce benefits

iv. General Opposition to the Institution of Marriage

C. Statistics on Demographics

i. Unmarrieds, of both sexual orientations.

The 2000 census reported nearly 5,500,000 unmarried couples sharing the same household, almost 8 times the number in 1970. Between the 1990 and 2000 United States Census, the number of unmarried couples living together increased from 3.2 to 5.5 million. This 72% increase means that 9.1% of the couples in 60 million households were made up of unmarried people. Of these, at least 1% of the households consisted of same-sex partners. This number may be understated because of (a) differences in counting methods between the 1990 and 2000 census and (b) some same-sex respondents might have refused to identify themselves out of fear of prejudice or because they were confused about the question, thus resulting in what could be a substantial undercount of same-sex households. We believe that the new 2010 Census will reveal a substantially different picture.[4] In fact, the 2010 census is the first ever to track same-sex married and cohabitating couples.

According to the 2000 census, most of the unmarried partners live in California (one out of eight of such households in the country), with Alaska next containing 12% of the total, followed by Maine, Vermont and Nevada, each with 11%. The lowest percentages of opposite sex unmarried partners were 4% in Utah and 5% in Alabama. California had 16% of same-sex couples, 54% of whom were male, concentrated in cities such as San Francisco.

The average age of single-sex couples is lower than married ones, but more unmarried couples are elderly**.** While the average age of unmarried-partner households was 37 for men and 35 for women, compared with husbands averaging 49 years of age and wives 47, single sex couples were mostly in their early 40s.[5]

[4] See 'Aging and the Nontraditional Family,' 32 U. Mem.L. Rev. 607 (2002)

[5] All the preceding statistics and material are from the New York Times, March 13, 2003, page A22, reporting the newly released 2000 United States Census figures, and were further reported in an exhaustive set of materials assembled by Connecticut attorney Frank S. Berall, of Copp & Berall, LLP, of Hartford, CT.

D. Common law marriages

i. Are only recognized in 16 states, none of which are east of the Mississippi except the District of Columbia. Of those 'western' states that recognize it, many have enacted 'mini-DOMA' statutes that defines marriage under that state's constitution as only between one man and one woman[6] and therefore even with common law marriage, it is unlikely to be available in those states to same-sex couples.

Part 2
Creating Family Ties

Your unmarried clients, and particularly same-sex couples, may well ask whether they should take advantage of some of the opportunities for marriage, civil union, or domestic partnership. They may also ask about adult adoption as a way of creating legal relationships between them. Being prepared for this conversation demonstrates your awareness of the issues actually facing them, and your commitment to them as clients. Also, status can be useful in determining if this is still a couple at time of death—for example, whether their registration as domestic partners was revoked or rescinded.[7]

1. Where? and How?[8]

A. Marriage[9] There are currently 6 U.S. jurisdictions that fully recognize same gender marriage: Massachusetts, Connecticut, Vermont, New Hampshire, Iowa, and the District of Columbia.[10]

[6] See, e.g. Colorado, Colo. Rev. Stat.§ 14-2-104; Kansas, Kan. Stat. Ann. §§ 23-101(a), 23-115 (2006). DOMA stands for "defense of marriage act", and is discussed a note xx infra and accompanying text.

[7] See note 20 infra and accompanying text.

[8] Much of the successful litigation in this area was handled by the Gay & Lesbian Advocates and Defenders, www.glad.org. See also the website for Lambda Legal, www.lambdalegal.org.

[9] Although Massachusetts was the first state to legalize same gender marriage in 2004, it was not the first state to have cases before its highest court on this issue. In fact, the cases and therefore the debate around same sex marriage actually started in the 1970's with the first case decided by the Minnesota Supreme Court in 1971 in a decision not favorable to same sex couples. The first judicial victory for same sex couple's right to marry occurred in Hawaii in 1993 (later undone by legislative action). The next successful case was in Vermont – which followed with legislation that made it the first state to provide all of the same rights and privileges to same-sex couples as married couples when it enacted the Vermont Civil Union Statute.

[10] Also, in 2008 the Coquille Tribe of Oregon legalized same-sex marriage, with the law going into effect in May 2009. The law approving same-sex marriage was adopted 5-2 by the Coquille Tribal Council and extends all of the tribal benefits of marriage to same-sex couples. To marry under Coquille law, at least one of the spouses must be a member of the tribe. In the 2000 Census, 576 people defined themselves as belonging to the Coquille Nation. Although Oregon voters approved an amendment to the Oregon Constitution in 2004 to prohibit same-sex marriages, the Coquille are a federally recognized sovereign nation, and thus not bound by the Oregon Constitution. On May 24, 2009, the first same-sex couple married under the Coquille jurisdiction. Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26-2 Ariz. J. Int'l & Comp. L. 509, 509 (2009)

i. Massachusetts

a. began issuing licenses to in state same-gender couples on May 17, 2004 after a landmark decision in November 2003 was issued by its highest court.[11] Since that time, approximately 7,500 same gender couples have been married in Massachusetts.

b. Out of state residents were barred from marrying in Massachusetts by Governor Mitt Romney's application of a law dating from 1913 (and enacted to apply to interracial marriages) that says that non-residents may not marry in Massachusetts if their marriage would be "void" in their home state. The law survived a challenge of the law's application to same-gender couples.[12]

c. The law was repealed on January 31, 2008, meaning that same sex couples living *ANYWHERE* can marry in Massachusetts.

ii. Vermont in 2009, passed a statute validating gay marriage, VERT.STAT.ANN. § 1a, and 15 VERT. STAT. ANN. §§ 4, 8, 1202(2), 18 VERT. STAT. ANN. §§ 5131(a), 5142, 5144; 8 VERT. STAT. ANN. § 4501; 9 VERT. STAT. ANN. § 4502, repealed 15 VERT. STAT. ANN. §§ 1, 2, 5, 6, 1201(4); 18 VERT. STAT. ANN. §§ 5610-5164; 5164a and 5165. Section 13 sets September 1, 2009 as the effective date.

iii. Connecticut.

a. On October 10, 2008, the Connecticut Supreme Court ruled that same-sex couples have the right to marry. The ruling went into effect November 12, 2008.

b. No residency requirement

iv. New Hampshire New Hampshire enacted a statute, H.B. 436-FNLOCAL, reenacting RSA 457:1 and 457:1a to permit same-sex marriage, effective January 1, 2010. Its earlier civil union act, n.H. Title 43XL III, Ch. 457-A:1-8 (2007 L 58:1, was effective. Jan. 1, 2008).

v. Iowa. Varnum v. O'Brien 2009 WL 874044, 763 NW2d 862 (Iowa 2009). Held that banning same-sex marriage violated the Iowa Constitution's due process and

[11] Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). The MA Supreme Judicial Court held that denial of marriage to same sex couples violated the equality and liberty provisions of the Massachusetts Constitution.

[12] *Cote-Whitacre v. Dep't of Pub. Health*, 446 Mass. 350 (2006). Interestingly, in that case, the Supreme Court held that two partners from New York could not be married because New York's highest court ruled that there was no constitutional right to same-gender marriage. *Hernandez v. Robles*, 7 NY3d 338 (2007). More recently, a lower court in New York held that New York would recognize same-gender marriages performed elsewhere. *Martinez v. County of Monroe*, 50 App. Div. 3rd 189 (4th Dep't 2008). And in an intestate estate, New York Courts have held the surviving partner of a couple married in Canada was entitled to the spousal inheritance. *Matter of the Estate of H. Kenneth Ranftle*, no. 4585-2008 (NYLJ Feb 3, 2009).

equal protection clauses. The language of this opinion eloquently expresses the injustice of the marriage bans.

vi. District of Columbia. The District of Columbia City Council of the passed a bill[13] on December 15, 2009. Following adoption of the the measure, it entered a mandatory Congressional review of 30 work days. Marriage licenses became available on March 3, 2010, and marriages began on March 9, 2010. The District became the only jurisdiction in the United States below the Mason–Dixon Line to allow same-sex couples to marry.

In addition to recognizing same-sex marriages, since 1992 the District has also allowed residents to enter into registered domestic partnerships; since the passage of the *Domestic Partnership Judicial Determination of Parentage Act of 2009*, the District recognizes civil unions and domestic partnerships performed in other jurisdictions that have all the rights and responsibilities of marriage. The law gives the mayor discretion to recognize relationships from states with lesser benefits.

vii. Also of Note

a. California.

(i.) Same-sex couples were able to marry in California between June 16, 2008 and November 4, 2008 based on a decision of California's highest court in which it ruled that sexual orientation is a 'suspect class' under the California constitution equal protection provisions.[14]

(ii.)A ballot initiative (proposition 8) took away that fundamental right.

(iii.) The California Supreme Court upheld that election.

(iv.) California will recognize a same sex marriage performed elsewhere—they just won't call it Marriage![15]

b. Maine. P.L. Ch 82 LD 1020 item 1, § 2, enacted 19A MRSA §§\650-A and B (May 6, 2009), effective September 1, 2009 permits same-sex marriage and recognizes those valid in another jurisdiction. A ballot initiative took away that right in November 2009.

viii. Canada

a. Legal in throughout the country.

b. Relatively simple process and procedure—No residency requirement.

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[13] D.C. Code §1-307.68; §1-612.31, 32(b); §3-413; §16-1001; §5-113.31, 33; §21-2210; §32-501, 701, 704, 705(a), 705(b), 705(c), 705(d), 706; §42-1102, 3404.02(b)(c), 3651.05(c)(3); §47-858.03; §47-902; §50-1501.02(e)(4) and various other section of the D.C. Code; B18-0010, A18-0070 (Jury and Marriage Amendment Act of 2009).
[14] In re Marriage Cases, 43 Cal. 4th 757, 76 Cal. Rptr. 3rd 683, 183 P.3d 384 (2008).
[15] CA Family Code Section 299.2.

c. Procedures do vary from province to province, so where one goes makes a difference.

ix. Netherlands: one partner Dutch citizen or resident

x. Belgium: one partner resident for 3 months;

xi. Spain—No residency requirement (but watch out for civil law!)

xii. Others: South Africa, Norway, Sweden, Australia, Denmark and Iceland.

B. Other Forms of Union

A number of other states, including California, Oregon, Nevada, New Jersey and Washington, provide for forms of union that are in most respects marriage in all but word[16]. Whether called civil unions or domestic partnerships, the intention is to provide couples with the status of marriage without exactly calling it that. In these states, couples with that status have most if not all of the rights benefits and privileges of married couples in that state.

i. The extent of protection is very different under the various laws—with California, Washington and Oregon's Domestic Partnerships and New Jersey's Civil Union being the basic equivalent of marriage, and others being in various degrees less so.

ii. Colorado and Hawaii have different rules completely. Hawaii has "Reciprocal Beneficiaries" which provides for certain rights. Colorado's legislation allows unmarried beneficiaries to enter into "designated beneficiary agreements" which will apply in a variety of estate planning, property transaction, medical, and benefits situations.

iii. A third group of states does not afford their same-sex couples the right to marry in state, but say that they will honor marriages performed elsewhere. This group includes California[17], Maryland, and New York.

All told, this list includes only 11 of the 50 states, and the District of Columbia. Viewed as a percentage of the population[18], however, the result isn't quite so lopsided. Nearly 25% of Americans live in a state in which same-sex marriage is either legal or will be recognized. Add to this the additional 7% of the population that lives in a state providing civil unions or comprehensive domestic partnerships, and we have 1 out of every 4 Americans living in a jurisdiction in which a same-sex marriage would be honored, and more than 3 in 10 Americans living where most if not all of the legal

[16] The website of the National Center for Lesbian Rights ("NCLR") provides excellent, up to date information on the status of same-sex marriage throughout the United States and abroad. Information included herein is in large measure derived from an NCLR publication "Summary of State Laws Regarding Same-Sex Couples" available on the NCLR website, www.nclrights.org.

[17] *Id.* As pointed out in another NCLR publication, "SB 54 and Same-Sex Couples who Marry Outside of California", the provision which was signed into law by Governor Schwarzenegger on October 11, 2009 ensures that couples who get married outside of California on or after November 5, 2008 will receive all of the rights, benefits, and responsibilities of marriage except for the name "marriage." See also text accompanying note 15.

[18] *See* Wikipedia article "List of U.S. states and territories by population".

rights, benefits, and privileges of marriage are available to same-sex couples—at least as far as the state is concerned.

iv. Europe. Germany, France, Switzerland, and Great Britain all have some form of Civil Union, which give same-gender couples many of the same social security, tax, pension, and inheritance rights as married ones. . In addition, some legal rights for formally unregistered same-sex couples exist in regions of Argentina, Australia, Austria, Brazil, Colombia, Croatia, Israel and Portugal.[19]

C. The whole issue of 'whether to wed' can be complex. When working with clients in the GLBT population around marriage, here are 10 considerations to keep in mind:

i. Ask. Clients may come to you and think that because they live in a DoMA state they don't have to tell you about a prior marriage or a civil union. They might think that because their home state won't honor it, the union doesn't even have to be considered in planning. Obviously that's not true. First of all, DoMA (state or federal) may not be around forever—indeed, one federal district court has already declared the federal aspect of DOMA unconstitutional twice[20]. Second, as was true with the cases challenging bars to interracial marriage, the existence of the union may be recognized for a variety of reasons even in a state in which the marriage itself couldn't be celebrated or (by the language of a statute) even honored. I wouldn't want to be the planner when the legal spouse (who I knew nothing of, and hadn't been told about) files a claim for elective share!

ii. Counsel, part 1. Clients may tell their advisors about their marriage plans, especially if there's a pre-nup involved. Rarely, however, do they consult with their legal and financial advisors about the advisability of getting hitched. Be that as it may, the consequences of a same-sex wedding are far less certain than those of a heterosexual marriage, and that uncertainty adds an element of risk to even the best formulated plans. For example, if the clients live in a marriage state or one that recognizes marriage, and there is a state gift or estate tax with a marital deduction, they would likely qualify. But if they move to a non-recognition state, that deduction would be gone. So in engaging in tax planning, it's important to consider the consequences of both living in a recognition jurisdiction and a non-recognition jurisdiction.

iii. Counsel, Part 2. If the clients live in a DoMA jurisdiction, they must be made to understand that in the event that the relationship doesn't work out, some considerable time may need to be spent in another jurisdiction which will recognize the union, and so consider itself empowered to dissolve it. Clients will likely have to establish residency elsewhere for a sufficient period to qualify for

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[19] Adilson Jose Moreira, *Equality for Same-Sex Couples: Brazilian Courts and Social Inclusiveness*, REVISTA HARVARD REVIEW OF LATIN AMERICA, Spring 2007, *available at* http://www.drclas.harvard.edu/revista/articles/view/967; David Masci, *Gay Marriage Around the World*, The Pew Forum on Religion & Public Life, July 9, 2009, http://pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Around-the-World.aspx; Tom Watkins, *Argentina Grants Gay Couples Partner Pensions*, CNN, Aug. 19, 2008, http://edition.cnn.com/2008/WORLD/americas/08/19/argentina.gay/.

[20] See notes 24 – 26 *infra* and accompanying text.

divorce. This can have unintended collateral impact on many other areas of life. For example, a Florida resident (who lives in a state with no income tax) may need to establish residence in Massachusetts to secure a divorce from a marriage that was celebrated in that state. As a resident of Massachusetts, income tax would be due.

iv. Counsel, Part 3. Whether or not a jurisdiction is a DoMA jurisdiction, look for a marriage to be honored when it's to the benefit of the state or other political entity to have it be so, and not honored when it's not to their advantage. In administering medicare benefits, Florida asked a same-sex spouse for his partner's income and assets in determining qualification. And New York, which has trumpeted its recognition of such unions, hid behind the Federal DoMA in denying same sex couples the right to file income taxes jointly[21].

v. Don't assume. The fact that DoMA may exist on a federal or state level shouldn't cause anyone to assume that the marriage would not be given any credibility whatsoever. As the miscegenation cases make clear, a careful balancing of state interests may tilt in favor of recognition, even in a state in which the marriage couldn't be celebrated, and wouldn't be recognized for all purposes.

vi. Drafting Part 1. Be prepared for the repeal or other elimination of the federal DoMA.[22] While it might be nice to hope and expect that your same-sex wedded clients will come back to see you, especially in the event of such a critical development in the tax law, you don't want to be the attorney who hadn't foreseen the possibility of DoMA's repeal or invalidation. Make a support trust for a surviving partner work as a QTIP, or at least include trust protector provisions, and empower the trust protector to modify the trust for the survivor to make it so.

vii. Drafting Part 2. If you have the opportunity to draft a pre-nup or domestic partnership agreement, how should it be styled? If a DoMA state, especially one like Virginia, should you even refer to the marriage, or to the partners as spouses? Consider whether it might not be preferable to style the agreement more as a business agreement, and stick to those terms. If you do make reference to the marriage, consider incorporating by reference the laws of the state of celebration of the union as regards dissolution, and thus turn a divorce action (which the home state would likely not handle) into a contract case (which it might).

viii. Use the status. Number 7 notwithstanding, unless you're in Virginia or another state in which the very reference to that status in an agreement might cause that agreement to be "void or voidable", consider referring to the union in the documents. It certainly explains who the parties are to one another. Moreover, drafting definitions of domestic partnership has been an extremely sticky challenge—whether the parties were "living together at the time of death" seems too ephemeral and subject to nuance to carry the full weight of inheritance or fiduciary appointment. Instead, consider using status within a relationship as a

[21] NYS Dept of Taxation & Finance Advisory Opinion Petition No 1090921A (5/12/2010).
[22] See notes 24-26 *infra*, and accompanying text.

bright line test—a client is either married or not; is either in a registered domestic partnership or not[23].

ix. Pay attention. This stuff changes almost daily. Twenty years ago, same-sex marriage had about as much reality as Santa Claus. Ten years ago, it was an academic conversation caused by what was viewed by many as an aberrant decision out of Hawaii. We now have same-sex wedded couples all over the country. The treatment that these marriages are receiving is not, and cannot be, readily predicted.

x. Acknowledge. Even in marriage and recognition states, marriage for a same-sex couple is an act of both courage and confidence. There is no promise that this status will confer many of the rights, benefits, and privileges routinely given heterosexual newlyweds. Things that are accepted as common-place and expected after inter-sex marriage are likely to be novel and up for question when the married couple is of the same sex. Indeed, there are situations in which the convenient (and sometimes only) course of conduct will be to lie about marital status (when re-entering the country for example, and being required to say "single" instead of married in completing the customs form).

D. Adult Adoption

Prior to the onset of the possibility of same-gender marriage and other recognized forms of union, some same-gender couples turned to adoption to create legal and emotional ties. This could serve to establish a family relationship for purposes of entitlements and other benefits, and could also establish a lawful heir to inherit or beneficiary to take under existing will or trust agreement.

Adult adoption might be a useful tool in a relationship where an older partner is significantly older than the younger partner, and a transfer from the older partner to the younger would result in a generation skipping transfer tax. It would, however, terminate any inheritance rights from the adoptee's biological family and could limit marriage rights in the future if those laws continue to evolve.

i. Validity. Different states have had very different responses to adult adoption. For example, a New York, adopting same-gender partners has been held to be a violation of public policy and not permitted by the highest court. *In re Adoption*

[23] For example, in Florida, a DoMA state, we define life partner in a revocable trust as follows:
"My life partner is Partner Name ("Partner"). I have made provision for Partner in this agreement. All distributions to Partner, and appointments of him in fiduciary positions hereunder, are contingent upon him being my life partner at the time of my death. Because there is no official legal recognition of our relationship that is honored in all jurisdictions, Partner shall be deemed my surviving life partner under this agreement unless, prior to my death: (i) my relationship with Partner has been legally sanctioned in a jurisdiction permitting our marriage, civil union, domestic partnership or the like ("Official Union") and that Official Union has been terminated as evidenced by a divorce, registration of a declaration of termination of domestic partnership, or some similar document legally cognizable in the jurisdiction where we obtained our Official Union; or (ii) Partner and I never obtained an Official Union, and I signed a written declaration in the presence of two attesting witnesses that Partner is no longer my life partner and deliver it to my Trustee. In either of those cases, Partner will be deemed to have predeceased me for all purposes of this agreement."

of Paul, 471 NE 2d 424 (NY 1984). Many states statutorily allow adults to adopt other adults. *See, e.g, Tex. Stat. § 162.501.*

ii. Termination. One of the primary problems with adult adoption is that unlike marriage, adoption is generally irrevocable. *But see Cal. Civ. Code §* 227(p)(6).

iii. Beneficiary Under Will or Trust Instrument. Some state courts have held that adult adoption rights are less than child adoption rights. *See, e.g., In re Tafel Est.*, 296 A2d 797 (Pa. 1972). Even when statutory language indicates that adopted adults may qualify as members of a class, courts will not necessarily interpret or apply the law in that manner when construing wills and trust instruments.

2. Concerns about marriage

A. Defense of Marriage Acts and Amendments

i. Federal. In 1996, the United State Congress passed the "Defense of Marriage Act" ("DOMA") which was signed by President Clinton. 1 USC § 7. (This was, at the time, a reaction to the case in Hawaii that looked as though its court was going to grant rights to same sex couples to marry, which was later undone by legislative action and a public vote to amend Hawaii's constitution.) Essentially DOMA provided that for purposes of federal law, marriage was defined as "a legal union between one man and one woman as husband-and-wife" and a "spouse" was defined as referring "only to a person of the opposite sex who is a husband or wife." The act requires that the definitions apply "in determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." The IRS has applied DOMA in its interpretation of the Code. See, e.g., PLR 200339001.

DOMA also permits states to legally discriminate against same-gender marriages or other unions performed in other states. 28 USC § 1738C. Thus, under DOMA, Alabama does not have to honor Vermont civil unions. And a couple with a Vermont civil union, does not obtain the federal protections and privileges afforded married couples, including the unlimited spousal deduction for federal estate and gift tax.[24]

On July 8, 2010, a pair of cases out of federal court in (where else) Massachusetts held the first part of DOMA (defining marriage as a legal union between one man and one woman) to be unconstitutional. In *Gill v. Office of Personnel Management*[25], a case brought by individual plaintiffs, the court found DOMA violated the equal protection clause of the constitution in that it did not even pass a rational basis test for equal protection. Rather, "Congress undertook this

[24] DOMA has been sharply criticized by family law scholars. See, e.g., Herma Hill Kay, 'From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century', 88 Calif. L. Rev. 2017 (2000) in which she states, in part, "[DOMA] introduced a federal definition of "marriage" and "spouse" that displaces a uniform and long-standing…deference to state law on matters affecting the family. Eligibility for federal entitlement programs, such as social security, Medicare, and veteran's benefits, traditionally have been measured by state, not federal law." *Id.* at 2077-2078

[25] Gill et al. v. Office of Pers. Mgmt. et al., No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.)

classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit."[26] In the companion case brought by the Massachusetts Attorney General on behalf of the state, *Commonwealth v. Dep't of Health & Human Services*[27], the court found that Congress had no constitutional authority to enact DOMA, and that regulation of marriage and family law is reserved to the states under the tenth amendment.

Practitioners should be aware of these and other cases around the country in federal court challenging DOMA on constitutional grounds. Their outcomes will affect same sex couples' planning in a variety of ways.[28]

ii. States. In response to the federal legislation, many states passed their own versions of the law which expressed that state's intent to refuse to grant or recognize same-gender marriages performed in any state. Two states, Nebraska and Texas are the only states specifically prohibiting recognition of same-sex civil unions.[29] And, one state, Virginia, has been openly hostile to any agreements which purport to give civil union type rights or privileges (even in a private contract) to partners in a same sex couple. In 2004 Virginia enacted the 'Marriage Affirmation Act'. It states, "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges and obligations of marriage is prohibited." It goes on to add that any such union, contract or arrangement entered into in any other state, "and any contractual rights created thereby," are "void and unenforceable in Virginia."[30] Broad prohibitions in Alaska,[31] Florida,[32] and West Virginia[33] statutes might be interpreted as applying to civil unions, domestic partnerships or other arrangements affording couples rights usually available to the married. This is

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[26] *Id.* at 38.

[27] Commonwealth of Mass. v. Dep't of Health and Human Servs.,et al., No. 09-cv-11156-JLT (D.Mass. July 8, 2010) (Tauro, J.)

[28] http://www.domawatch.org/currentchallenges.html

[29] Nebraska's constitution says that "[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized . . ." NEB. CONST. Art. 1, § 29. A pending 30 April 2003 federal case challenges the federal constitutionality of this provision. *Citizens for Equal Protection v. Governor Johamns* (D.C. Nebr).

[30] Va. St. § 20-45.3 (2004)

[31] The relevant portion of Alaska's statute provides that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of a marriage." ALASKA CODE § 255.05. 011(2001). This was enacted, as was a constitutional amendment prohibiting same-sex marriages, ALASKA CONSTITUTION Art. I, § 23 (2001) as the result of a decision favoring same-sex marriage in *Brause v. Alaska*, 21 P.3d 357 (Alka. 2001).

[32] Florida's statute states that: "Marriages between persons of the same sex entered into in any jurisdiction . . . or relationship between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state. The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state . . . respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship." FLA. STAT. ANN. § 741.212.

[33] West Virginia's law states that "[a] public act, record or judicial proceeding of any other state … respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state … or a right or claim arising from such relationship, shall not be given effect in this state" W. VA. CODE § 48-2-603.

now exacerbated by the fairly large number of states, including Florida, which have passed state constitutional amendments.[34]

B. Complete lack of clarity about status

In part because of these laws, unlike traditional marriages, couples who enter into a same-gender marriage, simultaneously step into a "no person's land" as far as their legal status is concerned. Some examples:

i. Portability & Recognition. For those individuals living in jurisdictions that permit these marriages, matters are somewhat more certain—until they travel. For example, suppose a couple legally married in Massachusetts is in an automobile accident in a state with a strong DOMA law and policy, query whether any action for wrongful death would exist. And for the many couples that will take advantage of the opportunity to wed with no residency requirement, and who will return to their home jurisdictions, things will be necessarily more complicated. For example, their home state may also have passed a "Defense of Marriage Act", and so will deny enforcement of rights and responsibilities that would have been honored in the state in which the marriage was performed.

This is perhaps even more of concern with civil unions, since few other states have this status, and consequently would not necessarily know what to do with it. Consider:

a. New York appellate court reversed a trial judge who had held that a surviving civil union partner had the right to sue under New York law as a spouse for the wrongful death of his partner. *Langan v. St. Vincent's Hospital of NY*, 25 A.D.3d 90 (App. Div. 2d Dep't 2005) *rev'g* NYLJ 4/18/2003, p. 23, Co. 3 (N.Y. Sup. Ct. 2003);

b. A Georgia court which held an ex-wife in violation of a custody order for exercising her visitation rights in the presence of her partner, with whom she had entered into a civil union (a violation which would not have existed had she been "married"). *Burns v. Burns*, 560 SE 2nd 47 (Ga. App. 2002).

ii. Taxes

a. Filing: The question has been raised whether a married, same- gender couple must file a joint federal and state tax return. Married couples are legally required to pay taxes as a married couple. On the other hand, as discussed below, current Federal law prohibits the federal government from respecting the validity of marriages between same gender couples[35]. Many

[34] Florida's amendment reads: "This amendment protects marriage as the legal union of only one man and one woman as husband and wife and provides that no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."

[35] This, however, was one of the grounds for the successful challenges to DOMA in *Gill et al. v. Office of Pers. Mgmt. et al.*, No. 09-cv-10309-JLT (D. Mass. July 8, 2010) (Tauro, J.), discussed at notes 25- 25 *supra* and accompanying text

states require that couples use the same marital classification for state returns as for federal.

Possible ways to treat this are: (1) file as a single person, but indicate that the taxpayer is married to a same-gender partner on the form or in a cover letter; (2) file two sets of tax returns, one as a single individual and the other as a married couple, and pay which ever tax is higher, and include a cover letter explaining that as a same-gender couple they're simply trying to comply with all applicable laws; or (3) file a single, with a cover letter indicating they are married and demand a refund.

There was an article in the Boston Globe on March 14, 2005[36], describing the problems married same sex couples were facing—state return dependent on the federal return which couldn't be filed; have to do 4 returns: federal joint (the phantom), state joint, and 2 federal singles—and then write a letter explaining why they were filing singly though they were married.

b. Taxation of Employee Benefits : In private letter rulings, the IRS made clear that the tax code is subject to the federal Defense of Marriage Act. *See*, *e.g.*, PLR 200339001, in which the service, citing DOMA, ruled that medical or dental benefits provided to an employee's domestic partner would be taxable income to the employee. However, the service did allow that if a domestic partner met the definition of a "dependent" in Section 152(a)(9), the benefits might not be taxable. That section defines dependent as one who: (a) receives more than half of his or her support from the taxpayer for the year; and (b) has the home of the taxpayer as his or her principal abode and is a member of the taxpayer's household during the entire taxable year of the taxpayer. In addition, an individual is not considered a member of the taxpayer's household if the relationship between the individual and the taxpayer is in violation of local law. In this private letter ruling, the service used the employee's domestic partner certification to prove that the support and relationship tests of section 152(a)(9) were met.

c. The entire issue of taxes for same-gender couples got a huge jolt recently. The IRS has ruled that for those couples registered in California as Domestic Partners, all income should be split 50/50 as community income for income tax reporting and that the creation of community property, even if attributable to the earnings of one partner, is not a transfer for gift tax purposes.[37] The implications of this are huge and include:

   (i.) Presumably only a decedent's share of the community property would be in the estate of the first to die, section 2041 notwithstanding.

[36] http://www.boston.com/news/specials/gay_marriage/articles/2005/03/14.
[37] See *CCA 201021050* and *PLR 201021048*.

(ii.) In a inter-sex marriage, there is a double step-up in basis. Since the statute uses the word "spouse", DoMA would likely prohibit that for same-sex couples. Or would it?

(iii.) Parties now have to "elect out" of community property treatment with a transmutation agreement.

(iv.) If one of 2 partners in a registered relationship of any kind live in a community property state like California, and the other doesn't, earnings may be considered to be community under California's laws, but not under those of another state!

iii. Public Benefits. Even if a same-gender marriage is not respected for many other reasons, it seems possible that states will respect the union for purposes of determining eligibility for public benefits. In other words, a spouse's assets or income will likely be taken into account.

iv. Alimony. Similarly, it is possible that a court would take this marriage into consideration in determining eligibility for continuing spousal support from a prior marriage.

v. Immigration. Unlike traditional couples, getting married will not permit the partner to remain in United States. In fact, it may even lead to a partner being deported. As indicated below, the federal government will not honor any marriages between same-gender couples. However, the immigration service may use the fact that the couple was married to deport the partner if he or she is here on a non-immigrant visa, on the grounds that he or she does not actually intend to return to his or her home country. In addition, individuals who are legally married in one of the states that currently recognize gay marriage, must essentially perjure themselves upon re-entry to the United States on customs declaration forms by stating that they are 'single.'

vi. Debt and Loans. It is difficult to believe that any lending institution would miss the opportunity to consider a same-gender spouse as being equally responsible for debts of his or her partner.

vii. Other areas in which a same-gender marriage may or may not be honored:

a. hospital clerks, (although recent Obama Administration Executive Order may mitigate this problem.)[38]

b. state taxing authorities,

c. adoption agencies,

d. bank officers, mortgage lenders

e. prison superintendents,

f. probate judges,

[38] http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation

g. insurance administrators,

h. school nurses and other school administrators,

i. credit card companies, coroner's offices,

j. utility companies

C. Divorce

Many jurisdictions have no residency requirement for couples to be married. Most jurisdictions, however, have residency requirements to dissolve any such marriage. In a typical marriage, a couple married in one jurisdiction can readily be divorced in their home state. That is not likely to be the case with same-gender couples. Consider:

i. Civil Union Dissolution. Under Vermont law, a civil union is dissolved by the same procedure as a divorce. To be divorced in Vermont, a person must have resided there for at least six months before filing the divorce action, and a divorce cannot be granted until one-party resided in Vermont for at least one year.

a. *Rosengarten v. Downes*: In this case, a Connecticut Court of Appeals held it because Connecticut did not recognize a civil union, it had no jurisdiction to dissolve the civil union relationship. While the case was still pending before the Connecticut Supreme Court, the plaintiff passed away and the appeal was dismissed.

b. Texas case: A judge in Texas initially granted a divorce to a same-gender couple that had entered into a civil union. After the story hit the press, the Texas Attorney General intervened in the case and the judge reversed himself and set aside his order.[39]

ii. Divorce

If any of those out-of-state couples who married in Canada or elsewhere decide to divorce, they may be surprised to find that their own state may refuse to honor their marriage even for purposes of granting a divorce. They may be even more surprised to learn that they will have to establish residency in another jurisdiction just to get the divorce.

For example, when two Rhode Island women who got married in Massachusetts wanted a divorce in their home state, a sharply divided Supreme Court of Rhode Island basically took the position that since the couple couldn't be married in Rhode Island, they couldn't be divorced there either. It's difficult not to view the majority opinion critically, because, as the dissent points out, the majority really had to stretch to come to the conclusion they did. *Chambers v. Ormiston*, 916 A.2d 758 (Rhode Island 2006).

In a similar situation, a Pennsylvania judge refused to divorce two women who had been married in Massachusetts[40] . Since Pennsylvania has a DoMA on its books, the marriage was not recognized under Pennsylvania law. "Relief under

[39] *See, e.g., Judge Dismisses Divorce Filed by Gay Texas Couple,* AP Newswires (April 2, 2003).
[40] http://www.bostonherald.com/news/regional/view.bg?articleid=1242532

the divorce code can only be obtained by parties who are recognized to be married," wrote the judge in his ruling. That followed a similar ruling in Texas.[41]

iii. Other Legal Issues:

a. Impact of Federal and State DOMAs, and their intersection with the full faith & credit clause;

b. Creditors;

c. Loan applications: If a couple is married, the spouse will generally have to be on the loan. If on an application, one party applies as a single person (and tax filings would back this up), arguably they can be sued for fraud.

d. Retirement benefits & Social Security: Same-sex marriages are not recognized by the federal government, so a surviving partner is not able to collect on the deceased partner's social security; most private retirement plans will not allow a joint retirement annuity with any one other than a "spouse" and many will only allow blood relatives to be named as a beneficiary.

D. The Bottom Line

As long as the legal status of same-gender unions is as unclear as it is at present, regardless of whether couples get married, they should also do their planning as if marriage were not possible—and at the same time, take into account that the marriage has occurred to take advantage of it if available. Moreover, if they do elect to marry, they must be aware that under the laws of some states (such as Massachusetts, for example), a subsequent marriage voids a will, so newlyweds in those states should either redo their wills or reaffirm them.

Part 3
Overview – Challenges and Opportunities

1. The Basics—and Why it matters

For unmarried couples, pro-active planning is essential to accomplish even the most basic client goals because unmarried couples do not have favorable federal or state law as a default. In addition, unmarried couples without children may have different contingent beneficiaries necessitating more complex drafting.

A. Federal Law

A January 23, 2004 letter from the General Accounting Office to the Honorable Bill Frist, Majority Leader of United States Senate, states the following: "The Defense of Marriage Act (DOMA) provides definitions of "marriage" and "spouse" that are to be used in construing the meaning of a federal law and thus, affect the interpretation of wide variety of federal laws in which marital status is a factor." It goes on to state that

[41] http://news.yahoo.com/s/ap/20100420/ap_on_re_us/us_gay_div

"as of December 31, 2003, our research identified a total of 1138 federal statutory provisions classified to the United States code in which marital status is a factor in determining or receiving benefits, rights, and privileges." (Emphasis added). Attached to the letter is an 18 page appendix listing all of these various benefits, rights and privileges. Some of these will be discussed below.[42]

B. State Law

It is estimated that marital status affects approximately 500 rights, benefits, and privileges under state law.[43]

C. Planning as an Emotional Substitute for Marriage

i. Reflect relationship in legal status

ii. A way to affirm commitment to each other in society

iii. Legitimize relationship commitment

D. Ethical Issues.

i. Issues Presented:

The same ethical issues arise when representing unmarried couples as when you represent spouses, and practitioners should include in a written fee agreement the conflict disclosures, the duty of loyalty authorizing the attorney to reveal to one partner information provided by the other partner, and an explanation of the right to seek separate independent counsel. Because state laws do not protect domestic partners in the event the relationship terminates prior to death, an attorney should be on heightened alert to potential conflicts and seek/encourage separate representation when necessary or obtain the necessary consents and waivers at the outset of the engagement for a joint representation.

ii. Model Rule of Prof'l Conduct 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyers own interests, unless:

a. the lawyer reasonably believes the representation will not be adversely affected; and

b. the client consults after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and advantages and risks involved.

iii. Scrupulous adherence to policy

[42] This letter and its accompanying appendix can be found at the NCLR web site, www.nclrights.org, together with other, excellent materials on the subject of same-gender unions.

[43] For an overview of the catalog of just one state's laws affected by marital status, see NCLR's publication *Left at the Altar: a Partial List of Marital Rights and Responsibilities that are Denied to Same-Sex Couples and Their Families in California* which is available at NCLR's web site

2. The Challenges

What follows are some of the challenges to planning with unmarried couples.

A. Social Concerns

i. Statutory Preferences. Most state statutes give spouses and blood family preference for intestacy inheritance, court appointments (conservators and executors), and health care decision making. The unmarried couple must complete binding documents to overcome these statutory preferences.

ii. Court Bias. Depending upon your location and judge, there may be a great deal of court bias against unmarried couples, particularly gays and lesbians (which is reason why that a trust-based plan might be preferable, even in a very simple probate state like New Jersey or Utah).

iii. Confidentiality (Part 1). Many unmarried couples are not open or public regarding their relationship. This is particularly the case with gay and lesbian couples who are older, or not "out" to their families. Imagine the shock a family faces if an adult child dies and the blood family is now dealing with this previously unknown partner in addition to wrestling with the fact that their child/brother/sister was gay. It can cause anger and resentment that wrecks havoc on any planning. It is essential that the court does not have an opportunity to intervene in the planning. Again, this suggests the use of a living trust based plan which is fully funded and remains so during lifetime as the best opportunity for no court involvement.

iv. Confidentiality (Part 2) Make sure you get the whole story:

a. Family Relationships: The existence of a gay man or lesbian in a family relationship, even when the family is aware of the individual's sexual orientation, can create certain challenges and dynamics within a family of origin.

(a) Family Socio-economic situation

(b) Where do the documents get stored?

b. Other Challenges

(a) No Roles; Fewer Prescriptions

Even in times of changing roles in traditional marital relationships, there are fewer prescriptions for roles in alternative families.

(b) More Challenging Client Dynamics

What to call who? How do the clients refer to each other? Do they call each other partner, friend, or spouse? Have they had a commitment ceremony (or even gotten married)? If so, you would want to include this in their documents, and state that even though the State may not recognize their "marriage", the couple, their

family, and their friends do. Be careful, however, to the minority of jurisdictions that would be hostile to this approach, such as Virginia. There, the best thinking these days seems to be to treat each partner as a business partner and steer clear of identifiers that could suggest a more intimate relationship.

B. For planning purposes, some basic state laws that are inapplicable:

   i. State substitutes for health care generally inapplicable

   ii. State substitutes for disposition at death generally inapplicable

   iii. State substitutes in event of dissolution of relationship generally inapplicable

   iv. State substitutes regarding parenting/guardianship generally inapplicable

C. Challenges involving Federal Estate and Gift Tax

   i. No "spouse" for estate and gift taxes. The federal tax code provides that married couples may transfer assets during lifetime (gifts) and at death without tax consequences through the unlimited marital deduction. This deduction is not available to unmarried couples.

      a. No unlimited marital deduction (prepare for tax on the death of the first to die). At death the decedent's estate will only be able to utilize the deceased partner's individual exemption amount from estate taxes, and will not be able to use the marital deduction for the balance of the assets.

      b. No "evening out estates" so both can take advantage of their lifetime exemptions.

         For example, if one partner transfers partial ownership of a $200,000 residence to the other partner, the transferring partner has made a gift to the recipient and a gift tax return must be filed. It is very common in same gender relationships for one partner to have more wealth than the other. Always be sure to inquire about real property: how was the purchase funded; how is it titled and how are current obligations funded ? Very often, gay couples inadvertently 'trip up' gifting and corrective action may be appropriate when doing estate planning.

      c. No ability to benefit from disclaimed property (spousal disclaimer exception under 2518). A surviving partner cannot disclaim assets into a disclaimer trust for the benefit of the surviving partner, so an unmarried couple must be more cautious in planning with the use of disclaimers.

      d. No gift splitting

      e. No tax free separation. 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. Thus, at separation, settlement between partners might result in transactions that are gifts unless transfer is for full and adequate consideration in money or money's worth, or would be a taxable exchange.

ii. Gift tax issues in cohabitation agreements/ shared living expenses

iii. Joint Tenants with Right of Survivorship.

Many unmarried couples want to leave everything to the surviving partner. Joint Tenancy with Rights of Survivorship is considered by many of these couples to be best and easiest method to do so. It also has the satisfaction of being similar to ownership by a legally married couple. But it has some big planning problems:

a. Ownership at death: Legal Spouses are deemed to own joint assets 50/50 for purposes of estate taxes so that only 50% of the value of a jointly held asset is included in the deceased spouse's estate.

When unmarrieds own property as joint tenants with rights of survivorship, tax law puts 100% of an assets asset's value in the estate of the first to die. The survivor has the burden of proving his or her contribution to equity. And who keeps those kind of records? See: Estate of Albert Fratini v Commissioner, T.C. Memo 1998-308.

Not only that, but unless there's a credit because the partners die in a "timely fashion" the same property will be taxed twice at full value in both estates!

b. Taxable Gifts: And getting to joint tenancy itself may involve taxable gifts, if for example, one party owned real property first, and deeded it to both as joint tenants with rights of survivorship. Whether that's a gift when transferred as opposed to when the property is sold depends upon local state law. Home purchases may be an ideal time to use up some of the lifetime exemption amount if indeed, one partner is funding the purchase.

iv. GST issues

If one partner is more than 371/2 years younger than the other, then the younger partner is a "skip" person for purposes of a generation skip transfer.

In addition, if one partner has children more than 37½ years younger than the other partner, then gifts and bequests to that partner's children may be subject to generation skip tax.

D. Challenges Not Involving Gift & Estate Taxes

i. No "spouse" for domestic partner employer benefits

Many employers provide benefits for spouses and domestic partners, for instance health insurance. While the benefit for a spouse is generally received tax free, the benefits afforded a domestic partner are generally *taxable to the employee*. *But see* PLR 200339001

ii. Retirement Plans

Unmarried partners who are beneficiaries of a deceased partners retirement plan cannot "roll over" the retirement plan into his/her own retirement account, unlike a surviving spouse. Rather, for individual retirement accounts, minimum required

withdrawals must begin the year after the deceased partner's death based upon the life expectancy of the surviving beneficiary.

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

A practitioner should check the qualified retirement plan document to determine what other options the surviving partner may have; many qualified plans may require a lump sum payout of the benefits which could subject the surviving partner to high income taxes in the year(s) of payment. Certain plans may only permit a spouse or blood relative to be the beneficiary.

iii. Social Security

At this time, an unmarried partner cannot "draw" on the deceased partner's social security. And an unmarried partner cannot "tack on" to a partner's higher salary for greater overall benefits.

iv. Life Insurance

Domestic partners may not have an "insurable interest" in each other for purposes of funding and owning life insurance on the other partner. Check your state law.

Often unmarried couples may qualify as having a business interest in each other if they own property together.

If there is no insurable interest, then one partner can purchase the policy on his life and name the partner as the beneficiary; however the proceeds will be included in the estate of the partner owning the policy. An irrevocable life insurance trust may be the best method for handling insurance in a taxable estate.

v. Due on Sale Clauses.

Quite often a couple will want to gift assets to each other, for instance changing the deed on real property from one partner to both partners as joint tenants. As discussed more extensively below, this may trigger the "due on sale" clause under the mortgage.

vi. No family allowance or homestead entitlement

vii. No family or bereavement leave associated with illness or death

viii. No child custody rights

ix. No immigration rights or preferences

x. No application of anti-lapse statutes

xi. No exemption in transfer restrictions in partnership agreements and other private contracts

xii. No tenancies by the entireties

xiii. No automatic transfer to surviving partner of a residential lease agreement in deceased partner's name

xiv. No crime victim's assistance and probably no wrongful death rights

xv. No immunity from testifying against one's partner

xvi. No immigration rights for non-citizen partner

3. Opportunities

A. No joint and several tax liability.

B. Married couples are generally jointly and severally liable for each other's tax liability.

C. No liability for Partner's debts

D. Federal Tax issues:

No family attribution or related party limitation: Example: inability to recognize loss in transaction between related parties (sec 267) not applicable. Similarly, restriction on subsequent sale of property acquired from related party in Section 1031 tax deferred exchange won't apply.

E. Chapter 14 generally inapplicable

i. The restrictions contained in Sections 2701, 2702, 2704 are generally inapplicable to transfers between partners. Thus, the common law GRIT is still possible.[44]

ii. **Exception**: 2703 effectively has a definition of "family member" that is broader than under other Chapter 14 sections, in that it includes, inter alia, "any other individual who is a natural object of the transferor's bounty", which Treasury has said may include persons not related by blood or marriage.

iii. Moreover, 2703 also requires that a price for a buy-sell is result of arms-length negotiation for full and adequate consideration.

[44] See Scott E. Squillace, "GRIT's for Gays and Other Unique Planning Opportunities for Same Sex Couples", Practical Estate Planning (CCH), December, 2009.

F. Ability to sell assets between partners below basis and claim loss

G. Partner not a "disqualified person" under private foundation rules

H. No need to be restricted by QTIP structure in planning trust for surviving partner (though arguably, this is not "needed" in the marital situation either—you just wouldn't get the deduction!)

I. No need for spousal impoverishment for Medicaid

4. State Estate Tax Issues

Some states that now recognize same sex marriage also have a state estate tax that would recognize unlimited marital deduction planning for state estate tax purposes. First determine whether there is a state estate tax (decoupled from the federal tax), such as Massachusetts, Vermont or Connecticut and then determine whether a separate state QTIP election (ie one not requiring a federal QTIP election) is available.

Part 4
Property, Cohabitation, & Domestic Partnership Agreements

1. Property, Cohabitation, and Domestic Partnership Agreements.

As Estate Planners we seek to assist our clients in controlling their assets-during lifetime and after death. With the increase in unmarried couples, extra planning is needed to give our clients the control they need and want over their assets. All relationships must end. If they do not end by mutual termination, they end by the death of one member of the couple.

The most common mechanism unmarried couples use to control the distribution of assets upon termination of the relationship is a written property or domestic partnership agreement. An agreement may not be appropriate for every couple and practitioners must carefully analyze the needs of the client(s) before proceeding. Agreements are recommended to protect the clarity of ownership of property acquired prior to the commencement of the relationship, allocate debts, characterize ownership of assets accumulated during the relationship and set forth the distribution of property at the termination of the relationship and at death. Use of these agreements can minimize disputes and attorney fees and can permit the parties to focus on the emotional demands inherent in any termination without arguing over property.

A. Caveat Regarding State Law

The practitioner must research state law before drafting an agreement. Statutory and case law requirements must be followed to ensure enforceability of the agreement. For instance, as discussed below, a property agreement which includes a "contract to make a will" clause may be enforceable in some states and not in others.

Further some states may not recognize domestic partnerships and construe a domestic partnership agreement between unmarried couples as voidable as a contract for sex. In those instances, the agreement must be drafted to reflect a business agreement.

B. The Basics

i. Written agreement

ii. Executed by both parties –

Unmarried couples may execute the agreement at any time, subject to state contract laws. In most states, however, there must be consideration for the agreement.

iii. Full disclosure of assets –

A domestic partnership agreement may not be as extensive as a prenuptial, thus full disclosure of assets may not be necessary. For instance, if the only asset subject to the agreement is the joint residence, and all other assets will remain separate, then full disclosure may not be necessary, as in most states unmarried couples have few statutory rights to the assets of the other party. Nevertheless, full disclosure is insurance against claims that may arise after the termination of the relationship, for instance fraud or misrepresentation.

iv. With both parties represented by counsel.

The practitioner should carefully consider all the ethical issues involved in representing both parties. See the discussion above on ethics. When in doubt, always clarify who you are representing and use independent counsel when necessary.

C. Terms of the Agreement

i. Format.

The format of the Agreement will vary with the intent and needs of the parties. Domestic Partnership Agreements can range from the simple contract (generally covering one asset, primarily the joint residence) to the "kitchen sink" which covers not only the division and use of assets, but also setting forth household duties and responsibilities during the relationship. Disclosure.

A statement should be included regarding the disclosure of assets as discussed above.

ii. Title.

How parties hold title may determine who receives the asset at death or who may control the asset during lifetime. Thus, the practitioner must examine title documents to be assured that the agreement will work effectively.

a. Tenants in Common vs. Joint Tenancy with Rights of Survivorship vs. Tenants by the Entirety: Note that unmarried couples cannot take title as tenants by the entirety. Parties may take title as tenants in common with proportional interests (i.e.: 2/3 to Pat and 1/3 to Chris)

b. Unique problems with title for unmarried couples: Joint Tenants with Rights of Survivorship avoids probate at death, however the entire value of the joint asset will be included in the decedent's estate on the death of the first partner unless the surviving party can demonstrate "contribution".

c. Living Trusts: placing the interests of both parties in separate living trusts with the deed titled as tenants in common in the names of the trustees of those trusts avoids probate and the estate tax issues.

d. Changing Title: unmarried clients should be cautioned about changing title on real property. If one party holds title as an individual and then records a deed adding the name of the other party as tenants in common, a gift has been made and if the value is over $11,000 a gift tax return must be filed.

iii. Due on Sale clauses.

Before changing title on deeds be certain that the mortgage documents will not trigger an acceleration clause that will cause the entire mortgage to be immediately due and payable. Often the mortgage will contain a clause accelerating the mortgage whenever any transfer of an interest is made. In our experience local banks holding their own mortgage paper will permit the transfer provided that the original borrower remains on the title; however banks who sell their paper may require a complete refinance to put the partner's name on the deed. Further, such a transfer under certain VA loans may change the interest rate applicable to the loan.

iv. Records

Who will keep the records? How will they be kept—on computer, in ledger, etc.? What rights of review does the other party have? Do those rights ever expire?

v. Separate Property vs. Joint Property

The agreement should clarify what property the parties wish to keep separate. This is generally done through attaching separate lists of each party's assets to the Agreement thus providing a snapshot of the assets today. Also include a provision addressing each party's rights in the appreciation of that property.

Most often the agreement includes a provision that no property is joint unless the parties exhibit the intent to make it joint by titling the property in joint name, or by drafting amendments to the Agreement stating the intent for joint ownership. Individual schedules delineating joint and separate property are advisable and should be updated frequently.

For unmarried couples with separate living trusts the domestic partner agreement can be amended to add the joint property to the agreement subjecting it to all the terms of the domestic partnership agreement notwithstanding the placement of the joint asset solely in one partner's trust. (See further discussion on "contract to make a will").

vi. Joint Property.

a. Expenses: The agreement should clearly set forth the obligations to pay expenses and maintenance of joint assets, and the mechanism for decisions regarding improvements to the property. Payment may be equally allocated or shared in different percentages.

b. Joint Accounts.: Quite often the parties will establish a joint account for joint expenses and contribute monthly to cover these costs. If paying separately, a mechanism should be drafted to force a party to make contributions in the event one party does not do so.

vii. Taxes.

Unmarried couples cannot file their federal income taxes jointly. In some states that now recognize same-sex marriage, a married same-sex couple can file jointly.[45]) They may want to allocate the tax benefits to one party to maximize the use of the mortgage interest deduction and tax deductions. A provision should be included setting forth whether the parties will share in the tax benefit. For instance, if one party takes 100 percent of the tax deductions, therefore saving $300 in taxes, will that $300 tax savings be divided equally among the parties, shared in different percentage, or shared at all?

viii. Liabilities.

Responsibility for any pre-relationship debts should be clarified, and if necessary an indemnification clause inserted to protect the other party.

ix. Foreseeable issues.

The agreement should address foreseeable issues relating to separate property. For instance, if the non-owning partner spends time improving real property (ie: the residence), should that party receive an interest in the house?

x. Termination.

a. What constitutes Termination of Relationship? It is important to clarify how termination will be effected. One party moving out? Another moving in? A letter?

b. Separate Property stays Separate.

c. Joint Property

d. A mechanism should be included regarding the disposition of the joint property upon termination of the relationship.

(a) Distribution of specific assets: The parties may agree in advance who will receive specific joint assets by maintaining a list on an annual basis which becomes an amendment to the Agreement. This saves a tremendous amount of controversy at the time of dissolution.

[45] Compare CCA 201021050 with NYS Dept of Taxation & Finance Advisory Opinion Petition No 1090921A (5/12/2010).

(b) Personal Property: A process may be included for the parties to divide personal property first by agreement, and if no agreement can be reached, by some other process. For instance, the parties flip a coin and the winner selects first, the other party selects second and third, and then the parties alternate until the assets are distributed in full. Another option is to allow the party with the larger capital account to choose first.

A provision should be included for the party receiving the asset to assume any debt obligations on that property and indemnify the other party for any default.

(c) Buyout of Major Assets: The buyout may come in many flavors, the most common of which is the buy-out of the leaving partner, or the parties may in advance designate who has the right to buy out the other on an asset by asset basis. The process usually is as follows:

(i.) fair market value is determined by agreement or appraisal

(ii.) net equity is the FMV less any joint obligations (mortgages, assessments)

(iii.) determine each party's share of net equity if not equal

(iv.) Sale of the interest for that party's share of net equity

(v.) buying party must obtain new financing or a release of the selling party from any mortgages or liabilities on the Property.

(vi.) Timelines to accomplish the process

xi. Debt.

If joint assets are encumbered by debts, a provision should be made for the allocation of the debt. Generally, the party who receives the asset agrees to assume the debt. Because most parties are jointly liable on joint debt, a provision should be made, if possible, for the partner receiving the property to refinance the obligation or otherwise obtain a release of the partner not receiving the debt from the creditor. If the creditor will not release the partner who no longer has the asset, then the agreement should provide that the partner with the asset should indemnify, defend, and hold harmless the other party from the debt. Advise your clients that even with the indemnification, if the party's name is on the debt it will appear on a credit report and may prevent that party from obtaining new or additional credit. Further advise your clients that the agreement of the parties does not affect the rights of creditors. Thus, if the assuming party fails to pay the debt, the other party may be liable, regardless of the indemnity.

D. Issues Regarding Children

If children are part of this family unit, it is important to describe the various parties' rights and responsibilities, both during the relationship and in the event of its termination.

i. Issues of Support

ii. Child Custody, Visitation, and support in the event of dissolution

iii. Issues of child rearing

This could include issues concerning education, religion, discipline, etc.

E. Death of a Party.

i. Waiver of inheritance.

The parties may waive any inheritance rights from the deceased partner's estate. Check state law for the legality of waiving a statutory share arising under civil unions or domestic partner laws.

ii. Living Trust.

A support (HEMS) trust is an excellent device to allow the surviving partner access to funds and assets, keep the assets outside the survivor's estate, and still allow the decedent to maintain control of the ultimate distribution

iii. Contract to Make a Will.

Many states will enforce a contractual promise to leave assets to specific individuals at death, regardless of contrary provisions in a Will. In those states if the agreement contains specific promises of distribution of assets to the survivor, then the statutory language should be included to augment the enforceability of these covenants. In states that do not enforce a contract to make a Will check to see if cases have applied equity to impose a constructive trust where there was a promise to make a will and detrimental reliance on that promise.

F. Drafting for the Future.

The agreement should be drafted to meet the needs of both parties. THOSE NEEDS MAY CHANGE OVER TIME. Provisions that are fair during the early stages of a relationship may not be fair in the later years. Thus, the agreement should be flexible enough to accommodate changes over time. For instance, if one party currently owns the residence and is hesitant to gift the new partner an interest in the house, the agreement may provide that the non-owner party shall not have an interest in the property for the first seven years, however after that date the non-owning party may acquire an interest at the rate of a certain percentage per year.

G. Additional Clauses.

i. Support

The agreement should provide if either party will be providing more than half the support for the other and whether either partner will be classified as a tax

dependent. If there are children of the relationship, the agreement should also provide which partner will include the children as dependents on his or her tax return. If support is to continue in the event of the dissolution of the relationship, that should be provided as well and, if so, who will bear the tax burden of such payments.

ii. Household duties.

Certain couples may want to clarify the household obligations of each party during the relationship. If one party is not employed outside the home and is primarily handling the duties of homemaker, the issue of compensation should be covered.

iii. Household Expenses.

The couple may want to delineate the division of household expenses, and how they will be handled—each party pays specific debts; one party handles from joint checking account, etc.

iv. Life Insurance.

One or both members of the couple may be required to carry life insurance with the other party as beneficiary to assist the beneficiary in maintaining the home in the event of death of a party.

v. Health Insurance

The agreement should recite whether one party is providing health insurance for the other, and if so, whether that responsibility is to continue in the event of the dissolution of the relationship.

vi. Property Insurance

Generally, property insurance and the obligation to continue with it will go with the property in question.

vii. Good Faith and Fair Dealing.

The agreement should contain a clause stating that the parties will act in good faith.

viii. Dispute Resolution—Mediation and Arbitration.

The Agreement should contain an agreement to mediate any disputes with a mutually agreed upon mediator. If mediation does not resolve the dispute, then the parties will arbitrate the matter. This will keep disputes out of court.

ix. Recording.

If the agreement includes real property the parties may want to record a memorandum of contract at the recorder's office so the agreement is acknowledged in the chain of title.

x. Miscellaneous Clauses.

Customary contractual clauses should be included such as:

a. Choice of Law: The agreement entered into in one state may not be valid under another state law if the parties happen to move. Choice of law provisions will direct the court to apply the state law where the agreement was created. However, the court may ignore this provision, thus if the parties move, they should have the agreement reviewed by an attorney in the new state for an opinion on enforceability.

b. Integration/Entire agreement:

(a) Severability

(b) Amendments

(c) Attorney Fees

(d) Independent Representation

(e) Notice

H. Challenges To The Agreement

i. Contractual Challenges.

The standard challenges to any contract may be used, for instance:

a. fraud

b. duress

c. mistake

d. undue influence

ii. Fairness.

Some states may require that the agreement be fair and reasonable with full knowledge and disclosure of assets to preclude one partner from overreaching.

iii. Separate Counsel.

If each party retains separate counsel who certifies representation in the document, most of the challenges may be avoided.

I. Tax Considerations For The Unmarried Couple

Practitioners are advised to work closely with an accountant who will be preparing the tax returns of the parties or an attorney who is well-versed in taxation issues that arise with unmarried couples. This is a gray area with the Internal Revenue Service without much case law and few rulings.

i. Allocation of Tax Benefits

The parties may be able to allocate the deductions of mortgage, interest, or other tax deductions to one party to maximize the benefit of those deductions. In order to make such an allocation, however, the receiving party must be liable on the

mortgage, or the debt, have a beneficial or equitable interest in the property, and must have made the payment that is being deducted. See: Daya v Commissioner, T.C. Memo 2000-360. Clients should be advised to keep records to withstand any IRS audit. As discussed previously, the parties may wish to decide how to share in any tax benefit. For instance, if the tax deduction is allocated 100 percent to one party and that party receives a $300 decrease in taxes, then the parties should decide whether the $300 tax benefit should be shared by the parties or simply kept by the party taking the deduction.

ii. Malpractice Trap:

Practitioners should be aware of a Tax Court memorandum that allowed taxpayers to deduct expenses only in proportion to their ownership interest, regardless of who paid the expense. James, TC Memo 1995-562.

iii. Capital Gains

If one partner owns a personal residence and puts the other partner's name on the title, it could be considered a "sale" of the property. This may also trigger a due on sale clause in the existing mortgage. If the IRS considers it a sale, then capital gains taxes may be due unless such gain meets the requirements for exclusion from capital gains taxes on the sale of a primary residence. Further, if the partner being added is not named on the mortgage, then the non-obligated partner may not be able to deduct the interest that that partner may be paying on the property.

If the IRS does not consider the placing of a partner's name on the deed as a sale, the IRS may construe it as a "gift" and if it exceeds the personal exemption for gift tax of $11,000 per year per individual, then a gift tax return may have to be filed.

J. Ethical Considerations

i. Separate Representation.

An attorney should not represent both parties to a property agreement without full disclosure. A written waiver of representation of potentially adverse interests may not be sufficient protection for the parties, or counsel, in the long run.

ii. Communications with an Adverse Party.

If an attorney knows an adverse party is represented by counsel, the attorney should not have contact with the represented party outside the presence of counsel, without the explicit permission of counsel.

iii. Confidential Communications.

Be careful to insure that the attorney-client privilege is not waived as a result of communications with the other party.

iv. Subsequent Representation of the Couple in Estate Planning.

Written waivers of conflict should be obtained from both parties. You may wish to obtain written permission from the counsel who represented the other party in the domestic partnership agreement.

Part 5
The Planning Documents

1. Living Trusts vs. Wills

A. Living Trusts are often the ideal planning base for unmarried couples.

Initially, most partners want to leave everything to each other by titling everything as joint tenants with rights of survivorship. Once planning begins, however, they can see the advantages of a living trust based plan. A living trust based plan provides a better alternative for disability planning, ultimate control of the disposition of the assets, creditor protection, and minimizing the potential of challenges and contests by family members.

Use of a living trust avoids court involvement during disability and death. This is important because there are statutory preferences in any court proceeding that favor blood relatives who may not share the unmarried couple's views of their relationship, and a judge may be biased against unmarried couples. A will based plan may open the couple to court involvement, for instance if one partner is disabled and a guardian and conservator must be named. When a court case is involved the burden is usually on the partner to bring the case, for instance an appointment of a conservator for a disabled partner. With the use of a living trust, the non-disabled partner can be the successor trustee, and the burden shifts to the blood family to bear the cost and expense of bringing a case to challenge to partner and the trust documents. More important, many gay couples are not public about their relationship and a court case opens the case to public scrutiny and disclosure of the relationship.

In addition, unmarried couples quite often have different contingent beneficiaries and the trust allows the deceased partner to control the ultimate distribution of assets. Assets left directly to the surviving partner through joint tenancy laws or through a will, are subject to distribution at the survivor's death at the whim and desire of the surviving partner.

A trust provides creditor protection for the surviving partner by protecting the assets in the deceased partner's trust from the creditors of the surviving partner. If the assets were left outright to the surviving partner (as with joint tenancy assets) there would be no creditor protection.

We recommend the use of separate living trusts. If joint trusts are used, the IRS may argue that gifts have been made requiring the filing of gift tax returns. While this could be avoided by meticulous bookkeeping, most clients will not keep sufficient records.

Finally, it often makes sense to add some definition to the term 'spouse' or life partner as used in a living trust. It may make sense to use marital status to assist the definition.[46]

B. Trustees

Partners can be co-trustees of each other's trusts although some practitioners believe even this could cause some inadvertent gift tax issues[47]. On the death or disability of one partner, the other may be the sole trustee of the disabled/deceased partner's trust, or the partners may want to appoint another trustee to act with the surviving partner. Having an independent co-trustee upon death could help provide some additional creditor protection. If this is done, it would be important to give 'remove & replace' power to the surviving partner. (If estate taxes are an issue, use an ascertainable standard to prevent inclusion in the surviving partner's estate – See E below.) If individuals are named as successor trustees, list several alternate trustees so that in the absence of the first named trustee, it is unlikely that a dissident blood family member will ever be appointed by a court.

To the extent possible, make sure the trustee, particularly an institutional trustee, is aware of the nature of the parties' relationship; care should be taken to ensure that the trustee will respect that relationship. It is interesting to note that a variety of major trust firms, such as Northern Trust, now have dedicated departments and marketing to the gay community.

C. Disability Planning

The same counseling for disability planning as with any other client should be applied including the use of a disability panel, gifting provisions, support of the other partner, disability instructions (for instance, a preference for home care).

D. Personal Property

The partners should be very clear about personal property distributions. While they may want to leave the household goods to each other, there may be specific items they want distributed to other individuals through the use of a personal property memorandum. In addition there may be family heirlooms that they would like distributed back to the family at the death of the surviving partner. Consider using "life estates" for such heirlooms. For instance, "I give my Andrew Wyeth paintings to my partner for use and enjoyment during her lifetime, provided however these paintings are not to be sold, pledged or encumbered in any way and at my partner's death, these paintings are to be distributed to my niece Sally Jones."

E. Continuing Trusts

Most partners want to provide for the surviving partner. However, if assets are left directly to the surviving partner, those assets will be taxed again in the surviving partner's estate. So for estate tax purposes, generally a continuing trust is created at the

[46] Consider the language in note 20 above.

[47] The concern is that if a partner is both trustee and beneficiary, unless the trustee's power is limited to ascertainable standards, there will be a general power of appointment, and arguably a gift has been made.

death of the Trustmaker for the benefit of the surviving partner. The surviving partner may have access to the trust funds by receiving all income, and using principal for the surviving partners health, education, maintenance and support (an ascertainable standard), yet the trust assets will not be included in the surviving partner's estate for estate tax purposes.

Such a continuing trust also allows the deceased partner to control the ultimate beneficiary of the trust. If the assets had been left to the surviving partner outright, then the surviving partner would be able to choose the ultimate beneficiary which may be a new partner or other individuals.

F. Life Estates

If real property is left in trust for the lifetime of the surviving partner, care should be taken to set forth the responsibilities of the trust and the surviving partner regarding the expenses of the real property. While the financial and maintenance obligations will vary greatly depending upon the desires of the couple, below is a sample provision.

> Upon my death, the remaining two properties owned by this trust located in Miami, Florida, as more particularly described in the attached deeds together with all household furnishings and equipment, shall remain in further trust for the benefit of Pat Smith for his lifetime.
>
> Pat Smith shall have the right to reside on this property for the rest of his life. If he chooses not to live on the property, or at his death, my Trustee shall sell the property and distribute the proceeds as set forth in the following Articles of this Trust. While Pat Smith resides on the property he shall be responsible for the general maintenance and upkeep of the property to maintain it in good repair and conditions, payment of insurance premiums, and payment of all utilities, taxes and assessments regarding the property. He shall provide my Trustee, upon request, proof of insurance and payment of taxes [and liens and encumbrances]. The Trust shall be responsible for structural needs and roofing at the sole and absolute discretion of my Trustee. The terms and conditions of any capital improvements must be agreed upon with my Trustee in advance of such improvements.
>
> If Pat Smith predeceases me then this distribution shall lapse and the property subject to this distribution shall instead be distributed under the other provisions of this agreement.
>
> Property passing under this Section shall pass free of any administrative expenses or death taxes, notwithstanding the provisions of this agreement. Property passing under this Section shall pass subject to all liens, mortgages, and all other encumbrances on the property.

My Trustee shall also maintain a reserve fund of up to $50,000 to cover any anticipated trust expenses regarding the property.

OPTION: Pat Smith shall have the sole discretion to sell that property during his lifetime. Upon the sale of the property or upon the death of Pat Smith this trust's interest in the property shall be divided into equal shares, one share for each child of mine who is then living and one share by right of representation for the then surviving descendants of each child of mine who is then deceased. The shares shall be distributed outright to each beneficiary, provided however, if a trust has been established under this Trust agreement for the benefit of that beneficiary, my Trustee shall hold and administer that share in accordance with the trust terms.

OPTION: The trust's interest in this real property is subject to a Property Agreement executed with Pat Smith, and the Trustee is directed to comply with the provisions of that agreement. [Note that the property agreement contains remedies if the life tenant breaches any obligations to maintain].

2. Ancillary documents

A. Durable Power of Attorney – Include power to fund revocable trust.

B. Special Power of Attorney – Consider whether any special powers may be appropriate, such as a business power, if the couple or one of them runs their own firm. In addition, you may want to consider a special power of attorney for tax matters that lists the social security number and otherwise complies with the IRS regulations to allow tax filings to be made during incapacity.

C. Guardianship. Be sure to nominate the partner as guardian/conservator if a court appointment is necessary. Most state laws give preference to the blood family members; however, most courts will give great weight to a written nomination which will overrule the state law preferences. Consider additional language to assist the court in naming the partner; for instance,

> "The persons nominated above have been in important in my life and are persons with whom I have shared my values and thoughts. The persons nominated are familiar with my personal and family history and have the proper temperament for dealing with my emotional needs, are trustworthy human beings, share my values and lifestyles, and will act on my behalf in my best interest in the event I cannot do so".

Name the partner as guardian of any minor children in the event the birth partner/parent is disabled.

D. Pour over Will

Name the partner as the personal representative/executor and consider appointing several alternates if the partner cannot serve. A list of alternates may discourage

dissident blood family members from challenging the appointment if they know that someone else sympathetic to the couple will be next-in-line for appointment. When naming the partner in the Will and the Trust, we suggest adding some language after the identification of the person as a 'spouse' to the effect: "whether or not [Jane/Joe] is recognized as my lawful spouse or my marriage is recognized under the applicable law of any jurisdiction in which my estate or any portion of my estate is administered or enforced."

Name the surviving partner as guardian of the minor children and augment that language to give the court the facts necessary to make that appointment and withstand any blood family interference. For instance,

> "My partner has raised my children from birth, has established strong parental bonds with my children, shares my parenting values and it would be in the best interest of my children to be continued to raise in the consistent and loving environment by my partner".
>
> Add if necessary: "My blood family does not share my values and it would be disruptive and harmful to my children to be removed from my partner and placed in an environment where they are confronted with different parenting styles and values".

List blood family members so none can challenge the will or trust by arguing that the deceased partner "forgot" them. Add a paragraph in the Will and Trust stating that the client has intentionally not provided for blood family except as specifically provided in the will or trust.

E. Health Care Documents

Give the partner the rights of next-of-kin under any medical facility regulations, for instance the right to visit in the ICU, the right to stay 24 hours in the hospital, etc. Sample language is as follows:

> "Chris Smith is to be given the right to visit me under all circumstances as would be extended to any family member of a patient. I state that Chris Smith is my closest living friend, that she is closer than any living relative, and that it is my express desire that she be extended the privileges and benefits of hospital and medical rules given to relatives of patients. Of the rights and benefits extended to a family member of a patient, and therefore to be extended to Chris Smith, I include that she should be allowed to discuss my prognosis and treatment candidly with my physician, request and be given copies of my medical records, and stay with me twenty-four hours per day including in any intensive care unit. These rights and benefits so specified do not exclude other rights and benefits extended to relatives of patients".

If necessary, give the partner the <u>sole</u> authority to discuss the medical situation with health care staff and doctors, to control all visitors, and to make all medical decisions.

Despite the written appointment of the partner as a health care representative, many doctors and medical institutions will give deference to the blood relatives. Give the partner the language necessary to overcome those biases. For instance:

> "I realize that I am placing a heavy burden on my healthcare representative at a difficult time, in requesting that she make decisions for me in the event I cannot do so. In order to minimize the stress on my representative and to provide the least contentious environment for decision making, I instruct and direct the medical professionals who are providing for my care to only consult with, and take input from, my appointed representative. My health care representative shall have the sole and final authority regarding my health care decisions. Other family members are not to participate in, nor interfere with, the decision making process. I have discussed my health care wishes with my appointed representatives and they are in the best position to act in my best interest and in accordance with my desires."

Consider using a separate HIPAA authorization giving the partners the right to access medical records and to discuss medical situations with the medical providers.

Advise the partners to file copies of the health care documents with the physicians and other health care providers and to keep copies of the health care documents handy. It doesn't do the health care agent any good if the documents are in the bank vault while the partner is in the emergency room.

F. Disposition of Remains

Give the partner the right to make the decisions; if state law gives this authority to blood relatives, consider having the couple make the plans now with the funeral home so that the plans will be carried out by contract. Have each partner set forth their desires for memorial services, attendees, religious preferences, burial plots/cremation urns, the obituary, etc; this will lessen the ability of blood relatives to countermand the surviving partner. Possibly prepare a document directing the disposition of bodily remains, and designating who should receive them, and have the right to make arrangements with them.

Part 6
Advanced Gift & Estate Tax Planning Opportunities and Case Studies

1. Annual gifts; Gifts utilizing lifetime exemption

A. Issues

i. Irrevocable

ii. Use of lifetime exemption (other than annual gifts)

iii. Non-tax issues: equalize respective assets during lifetime to achieve balance of power in relationship—compare to marriage

B. Annual Exclusion Gifts

i. $13,000 gifts

ii. Medical and Educational Expenses

2. LLCs and Partnerships

A. Joint Management and control of assets

B. May not want to include residence

Including a residence in a limited liability company or limited partnership will, in some cases, defeat homestead protection that would be otherwise afforded to the residence. In addition, the partnership may not take advantage of the exclusion on gain from the sale of a principal residence.

C. Benefits

D. Discounts in valuation

i. No problems with Chapter 14

ii. Use to provide insurable interest for ownership

E. 2036 & 2035

Make sure transferred interests not still included because of "strings".

F. Use with hostile family members

i. Buyout of interest at death with insurance or Note with favorable terms

ii. Change of status of interest holder to assignee in the event of disability or hostile family member becoming guardian, etc.

3. GRITS[48]

Grantor Retained Income Trusts were largely eliminated from use in a traditional family's estate plan by the provisions of IRC Section 2702. However, for the non-traditional family, the tool is still available because life partners are not included in the definitions of family, and thus the intra-family transfer prohibitions do not apply. This is one situation where *not* being legally family is an advantage.

Quite simply, in a GRIT, the grantor transfers an interest in trust, retaining the income therefrom for a period of time. At the end of the trust term, the assets are distributed to the beneficiary. Similar to a Qualified Personal Residence Trust[49] in the traditional family situation, because the ultimate beneficiary must wait for the end of the trust term for ownership of the asset to vest, a discount is placed on the value of the gift made.

[48] Id.
[49] See Reg. 25-2702-5.

The GRIT is particularly useful if the domestic partners function as an economic unit because the gifted property will provide an income stream to the partners during the retained trust term and the principal will remain within the economic unit at the expiration of the term. If there is a great disparity in the partners of wealth, the GRIT can also be an effective way to transfer property (in the absence of the marital deduction) to the less wealthy partner at a reduced transfer tax cost so that each partner can fully utilize his or her sections 2010 applicable credit amount.

4. PRTs

Since you're not skirting intrafamily planning rules of Chapter 14, you don't necessarily have to use a *qualified* personal residence trust. You can, but don't have to.

5. Charitable Planning

A. CRT

Often times there will be no children, and a CRT can be an excellent way for one partner to continue to provide for the surviving partner, with the ultimate disposition going to charity. If one partner is creating an intervivos CRT, however, if the other partner is also named as the unitrust/annuity recipient, then a gift has been made and a gift tax return must be filed. This situation can be avoided if the CRT creator grants a testamentary right to the unitrust/annuity stream to the surviving partner, however, retains the testamentary right to revoke that interest; thus there is no gift on formation.

B. CLT

This can be used to augment principal of bypass trust at point in surviving partner's life at anticipated retirement, etc. For example, partner 1 creates HEMS trust with exempt amount, and CLT with balance that transfers out to partner at 65 or anticipated age of retirement.

C. Private Foundation