

Estate Planning for Cohabitants

by
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Planning for unmarried couples is in many ways similar to the planning done for married couples. However, most states do not have the same protections for unmarried couples built into their laws as they do for married couples. Therefore, it is up to the unmarried couple to seek out legal advice and put those protections into place. Without effective legal planning, the desire of unmarried couples to take care of each other both during life and at death can be thwarted.

As of the 2000 Census, there were 54.5 million opposite sex married couples in the United States and 5.5 million unmarried, same and opposite sex, couples living together.¹ In many metropolitan areas, such as Milwaukee, more children are born to unmarried women than to married women. The issues confronting unmarried couples either already are or will soon be a significant part of the family law practice.

This article first discusses the effect of various federal and state laws on the legal rights of unmarried couples. Part II addresses the enforceability of cohabitation agreements, as well as issues unmarried couples should address within them. Part III examines noncontractual remedies available to unmarried couples at the dissolution of the relationship or at the death of one of the parties if no such agreement exists. Finally, Part IV discusses traditional estate planning tools that unmarried couples should utilize during their lifetime to ensure the results they wish to occur at death (and even during their lives) are accomplished. This article is intended to be a general overview of the options available to unmarried couples and not an in depth discussion of each area.

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¹ Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households, (Feb. 2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

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I. The Effect of Federal and State Laws, Including DOMAs and Domestic Partnership Laws, on Planning

A discussion of the legal rights for unmarried, cohabiting couples cannot occur without a brief overview of the Defense of Marriage Act (“DOMA”) and similar state legislation that affects such couples. Congress passed DOMA in 1996 to make it explicit that a marriage is the legal union of a man and a woman, thereby preventing states from having to recognize same-sex couples in other states.² The Act defines marriage as: “a legal union between one man and one woman as husband-and-wife” and it defines a spouse as “a person of the opposite sex who is a husband or a wife.”³ DOMA restricts rights such as federal benefits for a spouse, ERISA benefits, tax benefits and other rights to opposite sex married couples, and DOMA denies an even greater number of benefits to same sex couples.⁴

Although a number of states, such as Massachusetts,⁵

² Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 1 and 28 U.S.C. § 738C). *See generally* Mark Strasser, *The Future of Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 87 (2008).

³ 1 U.S.C. § 7 (1996).

⁴ In 2004, the United States General Accounting Office identified a total of 1,138 federal statutory provisions classified in the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges. *See* Letter to The Honorable Bill Frist, Senate Majority Leader, from Dayna K. Shah, Associate General Counsel of the GAO (Jan. 23, 2004), <http://www.taskforce.org/downloads/reports/reports/GAOBenefits.pdf>, available at <http://www.nclrights.org/site/DocServer/2004GAO.pdf?docID=1161> (last viewed Jan. 22, 2009). These same 1,138 benefits and many others are denied to same sex couples. In one state, over 500 benefits are denied to same sex couples. *See Left at the Altar: a Partial List of Marital Rights and Responsibilities that Are Denied to Same-Sex Couples and Their Families in California*, http://cdm266301.cdmhost.com/cdm4/item_viewer.php?CISOROOT=/p266301coll9&CISOPTR=60&CISOBX=1&REC=4. (last viewed Feb. 1, 2009).

⁵ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

Connecticut,⁶ Iowa,⁷ and Vermont⁸ have since allowed marriage between same sex partners, DOMA preempts state conferred rights that conflict with this federal law. This is an area of rapidly developing law⁹ and any planning must be done with that in mind. Clients must be informed that while the documents drafted may be effective under current state laws, future interpretation of those state laws could be affected not only by DOMA but also by the state versions of DOMA.

Many states have gone a step further than the DOMA and passed laws sometimes referred to as “Super DOMAs.”¹⁰ These laws purport to restrict the rights not only of same sex couples, but also of opposite sex couples who reside together without the benefit of marriage. These have been passed as statutes in some states and as amendments to the state’s constitution in other states. An example of one such law is the Wisconsin constitu-

⁶ On October 10, 2008, the Connecticut Supreme Court released an opinion in *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407 (Conn. 2008) guaranteeing same-sex marriage rights.

⁷ In *Varum v. Brien*, WL 874044 (Iowa 2009), the Iowa Supreme Court unanimously held that the state’s same-sex marriage ban violates the constitutional rights of same-sex partners.

⁸ On April 7, 2009, Vermont legalized same-sex marriage. Vermont is the first state to legalize same-sex marriage through legislation (Bill H275) rather than by a judicial ruling. The law will be effective on September 1, 2009.

⁹ Between the short time of drafting this article and revising the final draft, Iowa, Vermont, Maine and New Hampshire were added to the list of states recognizing marriage between same-sex partners and California was deleted from that list.

¹⁰ States with constitutional amendments restricting marriage to one man and one woman: Alabama, Alaska, Arkansas, Colorado, Georgia, Kansas, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. Additional states with laws restricting marriage to one man and one woman: Arizona, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Vermont, Washington, West Virginia, and Wyoming. States where the law or amendment is so broadly written that it may affect other legal relationships such as domestic partners or civil unions: Alabama, Arkansas, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

Human Rights Campaign, http://www.hrc.org/documents/marriage_prohibitions.pdf (May 30, 2008).

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tional amendment that was passed as a referendum in 2006 by a 59 to 41 percent majority; it reads: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”¹¹

The state and federal DOMAs have allowed states to refuse to give full faith and credit to what would otherwise be legally enforceable documents in a home state. While the United States Constitution guarantees full faith and credit to state law, the federal DOMA creates an exception under which state laws do not have to be honored.¹² For example, if a couple marries in Massachusetts, their marriage does not have to be recognized in Illinois. Several court challenges to the DOMA have failed.¹³

Regarding planning for unmarried couples, the types of documents that can be drafted and that will withstand scrutiny across state lines is critical to the success of the planning process. Documents that will be helpful during life, such as powers of attorney for finances and health care, are likely to be enforced regardless of state or national DOMAs because such rights and responsibilities are routinely given to a nonspouse.¹⁴ Similarly, a will or trust that confers benefits on a nonspouse will be enforceable under all states’ laws, but may be subject to challenges by disgruntled heirs. The types of documents that may be open to attack would include cohabitation agreements or other designations that attempt to contractually create rights that the state or federal government have attempted to restrict or eliminate.

¹¹ WIS. CONST. Art. XIII §13 (2009).

¹² U.S. CONST. Art. IV, § 1 (2009).

¹³ *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (lesbian couple sought to require Florida to recognize their Massachusetts marriage under full faith and credit argument and constitutional challenges); *In re Kandau*, 315 B.R. 123 (W.D. Wash. 2004) (lesbian couple married in British Columbia, Canada attempted to file bankruptcy as spouses and challenged definition of spouse in DOMA and made constitutional challenges under the Tenth and Fourth amendments). See also Deborah L. Forman, *Interstate Recognition of Same Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2005).

¹⁴ See Richard M. Horwood, Lauren J. Wolven, & Jeffery A. Zaludal., *Estate Planning for the Unmarried Adult*, 813-2d TAX MGMT. (BNA)(2004).

Another area that affects an attorney's ability to do planning for cohabitants is domestic partnership. Domestic partnerships are important to planning for unmarried cohabitants because they may confer certain rights and benefits on those who choose to take advantage of the status. Such benefits can include employment benefits for the domestic partner such as health insurance on a "family" plan, inclusion in family and medical leave definitions, and other benefits that the employer may offer to an employee's unmarried partner, whether of the same or opposite sex.

Domestic partnership is a legal status recognized by various states, cities, counties and employers that may be available to same-sex couples, and some unmarried heterosexual couples, who fit certain criteria. While the definition of "domestic partner" varies by jurisdiction, the most common definitions contain the following elements: (1) the partners are at least 18 years old; (2) neither partner is related by blood closer than what is permitted by state law for marriage; (3) the partners share a committed, exclusive relationship; and, (4) the partners are financially interdependent.¹⁵ The exact level of the rights, responsibilities and benefits conferred upon domestic partners varies widely. Currently, the following seven states and the District of Columbia offer some form of a domestic partner status: California, Hawaii, Maine, Maryland, New Jersey, Oregon, and Washington.

Both California and Oregon domestic partner laws grant domestic partners nearly all of the legal rights and responsibilities conferred upon married couples.¹⁶ These partnerships are more akin to the "civil unions" allowed in Connecticut, New Hampshire, New Jersey, and Vermont.¹⁷

In California, both same-sex couples and heterosexual couples over the age of 62 may choose to register for domestic

¹⁵ Employee Benefit Research Institute, Domestic Partnership Benefits: Facts and Background (Mar. 2004), <http://www.ebri.org/pdf/publications/facts/0304fact.pdf>.

¹⁶ CAL. FAM. CODE §§ 297 & 297.5 (2007); 2007 OR. LAWS ch. 99; *see also In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008) (comparing the various domestic partnership laws).

¹⁷ *In re Marriage Cases*, 183 P.3d at 398.

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partner status. Domestic partner status under the Oregon Family Fairness Act is only available to same-sex couples.¹⁸

In comparison to California and Oregon's more expansive domestic partnership legislation, the District of Columbia, Hawaii, Maine, Maryland, and Washington have adopted domestic partnership or reciprocal beneficiaries legislation that allows same-sex couples to obtain only some of the benefits available to married couples. Domestic partnership in the District of Columbia is open to both same-sex and heterosexual couples.¹⁹ Under the Domestic Partnership Equality Amendment Act of 2006, a domestic partner has the same rights as a spouse regarding inheritance, probate, guardianship, visitation and medical decision-making, domestic partner benefits for District of Columbia employees, and many other property rights.²⁰

In 1997, Hawaii's legislature passed a reciprocal beneficiary law.²¹ This law provides limited state rights to any two adults who are legally prohibited from marrying each other, whether they are a same-sex couple, relatives or even friends.²² The following benefits are accorded reciprocal beneficiaries under this law: inheritance without a will, ability to sue for the wrongful death of their reciprocal beneficiary, hospital visitation and health care decisions, consent to postmortem exams, loan eligibility, property rights, tort liability, and protection under Hawaii domestic violence laws.²³

The Maine Legislature passed a law in 2004 that established a domestic partnership registry.²⁴ Same-sex couples or heterosexual couples who register as domestic partners are afforded rights comparable to those of married couples with respect to matters of probate, guardianships, conservatorship, inheritance, protection from abuse, and related matters.²⁵

¹⁸ 2007 OR. LAWS ch. 99 § 3(1).

¹⁹ 2006 D.C. LAW 16-79.

²⁰ *Id.*

²¹ HAW. REV. STAT. § 572C-1 - C-7 (2004).

²² *Id.* at § 572C-1 (2004).

²³ 1997 Hawaii Reciprocal Beneficiary Act 383, available at <http://www.buddybuddy.com/d-p-hawa.html>.

²⁴ 2003 Maine Pub. Law, c. 672; see also ME. REV. STAT. tit. 22 § 2710 (2008).

²⁵ 2003 Maine Pub. Law, c. 672.

Effective July 1, 2008, domestic partners in Maryland, as defined by statute, are entitled to a handful of protections available to spouses, including the visitation rights in health care facilities, the right to make certain health care decisions, and the right to make funeral decisions.²⁶ Domestic partners are included in the list of family members who can be added to or removed from a deed to residential property without incurring a recording or transfer tax.²⁷

The New Jersey Legislature enacted the Domestic Partnership Act in 2004.²⁸ The statute provided limited healthcare, inheritance and property rights to registered partners.²⁹ However, New Jersey has since enacted a civil union statute.³⁰ Couples who registered for domestic partnership status prior to February 19, 2007, are still eligible for domestic partner benefits.³¹ To be eligible for domestic partnership benefits now, the couple (whether same-sex or heterosexual) must be age 62 or older and must meet the other eligibility requirements.³²

In 2007, the Washington legislature passed a law establishing a domestic partner registry.³³ Same-sex couples over the age of 18 and heterosexual couples in which one partner is over the age of 62 qualify for a domestic partnership.³⁴ Under this law, domestic partners had limited rights, including hospital visitation rights, inheritance rights, and the same power of attorney rights as a spouse.³⁵ In 2008, the Washington Legislature passed a new law that provided for significantly expanded rights for domestic partners in various areas of law.³⁶

²⁶ Human Rights Campaign, Maryland Marriage/Relationship Recognition Law, http://www.hrc.org/laws_and_elections/904.htm (last viewed Oct. 1, 2008).

²⁷ *Id.*

²⁸ 2003 New Jersey Pub. Law, c. 246, available at http://www.njleg.state.nj.us/2002/Bills/PL03/246_.HTM.

²⁹ *Id.*

³⁰ N.J. STAT. ANN. § 37:1-29 (2008).

³¹ New Jersey Department of Health and Senior Services, Domestic Partnership, <http://www.state.nj.us/health/vital/dp2.shtml> (last viewed Oct. 1, 2008).

³² *Id.*

³³ WASH. REV. CODE ANN. § 26.60 (2009); 2007 Washington Pub. Law, c. 156.

³⁴ WASH. REV. CODE § 26.60.030(6) (2009).

³⁵ 2007 Washington Pub. Law, c. 156.

³⁶ H.R. Res. 3104 (Wash. 2008).

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Various cities throughout the United States also confer limited rights on domestic partners.³⁷ In addition, many public and private employers provide health insurance and other benefits to domestic partners of employees. Some employers recognize only same-sex couples, while others recognize heterosexual couples as well. According to the Human Rights Campaign, by 2006, a majority of the Fortune 500 companies were providing health insurance to domestic partners of employees.³⁸

In addition, when an employer provides health insurance coverage for a domestic partner of an employee, federal tax law will impute the fair market value of that coverage, including the employee's pre-tax contributions, as income to the employee.³⁹ Further, employees cannot pay for a domestic partner's coverage using pre-tax dollars, which precludes them from receiving the full benefits of a Flexible Spending Account, Health Reimbursement Account or a Health Savings Account.⁴⁰

It is important to note that while domestic partnerships are available and recognized in these jurisdictions, a domestic partnership does not confer any of the one-thousand plus legal rights afforded to married couples by the federal government due to DOMA's ban on federal recognition of same-sex marriages or other unions.⁴¹ Thus, even though domestic partners are given rights by the state, city, or even by their employer, they will be denied federal benefits.

³⁷ Human Rights Campaign, City and County Domestic Partner Registries, http://www.hrc.org/issues/marriage/domestic_partners/9133/htm (last viewed Oct. 1, 2008).

³⁸ Human Rights Campaign, Domestic Partner Benefits, http://www.hrc.org/issues/workplace/benefits/domestic_partner_benefits.htm (last viewed Oct. 1, 2008).

³⁹ Human Rights Campaign, Taxation of Domestic Partner Benefits, <http://www.hrc.org/issues/workplace/benefits/4820.htm> (last viewed Oct. 1, 2008).

⁴⁰ *Id.* See also Vincent J. Samar, *Privacy and the Debate Over Same-Sex Marriage Versus Unions*, 54 DEPAUL L. REV. 783 (2005).

⁴¹ See Letter to The Honorable Bill Frist, Senate Majority Leader, from Dayna K. Shah, Associate General Counsel of the GAO (Jan. 23, 2004), <http://www.gao.gov/new.items/d04353r.pdf> (last viewed Jan. 22, 2009).

II. Cohabitation Agreements

A. Enforceability

While state and federal laws may grant or attempt to restrict the rights that cohabitants have, in most states cohabitants can use the contract laws to create agreements that will protect their rights as between the partners. Such agreements may be similar to traditional pre or postnuptial agreements but also present special concerns due to the unmarried status of the contracting parties. Historically, these agreements have been unenforceable as against public policy if the sexual relationship was the sole consideration for the agreement, and some states will still not recognize such agreements.⁴² While some states may still refuse to enforce agreements as against public policy, most will enforce a valid cohabitation agreement, recognizing that other considerations such as the financial contributions that each make to the household could be valid consideration for the contract.⁴³

It is imperative that such agreements are entered into in an arms length fashion in which each contracting party is clearly receiving some benefit so that the agreement is not subject to attack for lack of legal consideration.⁴⁴ Similarly, it is important

⁴² Some states will still not recognize such agreements. *See* Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994); Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Schwegman v. Schwegman, 441 So.2d 316 (La. Ct. App. 1983). *But see* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), and 176 Cal. Rptr. 555 (1981); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

⁴³ “Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal and does not automatically preclude one of the parties from seeking judicial relief, such as statutory or common law partition, damages for breach of express or implied contract, constructive trust and quantum meruit, where the party alleges, and later proves, facts supporting the legal theory.” *Watts*, 405 N.W.2d at 305-06; *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004).

⁴⁴ *See* Frank S. Berall, *Estate Planning Considerations for Unmarried, Same or Opposite Sex Cohabitants*, 23 QUINNIPIAC L. REV. 361, 383 (2004), as cited in Wendy S. Goffe, *Estate Planning for the Unmarried Couple/Non-Traditional Family*, SK093 ALI-ABA 1285 (Sept. 24, 2008). *See, e.g.*, *Estate of Steffes*, 290 N.W.2d 697, 706-09 (Wis. 1980), for a discussion about consideration (“a bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain.”).

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for the attorney to deal with cohabitants just as he or she would with a prenuptial agreement from the point of ethics and enforceability. For example, the attorney should not represent both parties in negotiating such a transaction.

While in some states cohabitation agreements may have a basis in state statutes, most states have developed this area of law through case law.⁴⁵ Therefore, the elements necessary to create an agreement that is enforceable will depend on the requirements as stated in these cases. Generally, it is wise, although it may not be required, to have full financial disclosure between the parties who are entering into the agreement. If the agreement relates solely to one asset, the disclosure could relate to only that asset. For example, if the parties are agreeing on how to contribute to a home they will purchase together, it may be sufficient to disclose the incomes of each, and the source of any downpayment.⁴⁶ The better course, however, is to have a full financial disclosure so that one party cannot later claim that he or she did not understand that the other party could not afford to pay his or her share of expenses related to the home if that party loses his or her job. Similar to prenuptial agreements, agreements should not be signed under pressure.⁴⁷

Most states would also have some requirement that the term of the agreement be reasonable and not unconscionable.⁴⁸ So if the parties invest equally, it would not be reasonable to have only one of them take all of the assets if the relationship ends due to fault. Such punitive behavior would not occur in many

⁴⁵ Minnesota has a statute, MINN. STAT. § 513.075, but other states have developed this area by case law. See Elizabeth W. Calloway, *Property and Cohabitation Agreements* Ch 2, in *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg ed., 1985); Linda J. Radvin, *Marital Agreements*, 849 *TAX MGMT.* (BNA) A-48-49 (2003).

⁴⁶ See Jerry Simon Chasen, *Planning for Non-Traditional Families*, SL073 *ALI-ABA* 345, 364 (Feb. 2006).

⁴⁷ See, e.g., Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 372, 373-74 (Robin Fretwell Wilson ed., 2006); *Property and Cohabitation Agreements*, *supra* note 45.

⁴⁸ *RESTATEMENT (SECOND) OF CONTRACTS* § 208 (Unconscionable Contract or Term) (1981).

states under “no fault” divorce law, and is not likely to be considered reasonable in a cohabitation agreement.

Contract law also generally requires that the parties have entered into the agreement without duress, undue hardship or under some impediment.⁴⁹ For this reason, it is wise for both parties to be represented by competent counsel. At least if the agreement is later challenged, a party can defend it on the basis that both had the opportunity to be fully informed of the legal implications of the agreement. Each party should have adequate time to review the agreement, ask questions and obtain legal advice about the implications of the agreement.

B. *Issues to Address in the Cohabitation Agreement*

Assuming the proper foundation of legal advice, timing and arms length negotiations exists, a cohabitation agreement can be as broad or narrow as the couple desire. It may address one asset such as how to allocate expenses for a home and how to divide that home if the couple split up or it may address the many issues one sees in divorce actions including support for partners during and after the relationship, custody and support of children, division of assets and debts.

Similar to prenuptial agreements, a cohabitation agreement may address what will occur if the parties separate, but it can also address what will occur at death. If the parties agree to make certain provisions for each other at death, it is imperative that the documents to carry out such wishes, such as a will or trusts, are also drafted. Unlike in the case of a prenuptial where a couple who marries will, unless negated by the prenuptial, get the benefit at death of certain state laws to protect spouses—such as marital property or community property laws, certain marital elections, courtesy, dower or other common law rights—there are usually no such laws to automatically protect cohabitants. Only a few states have laws to protect cohabitants at death and in each state certain requirements must be met for the statute to apply.⁵⁰

⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 175 (Duress) & § 367 (Unfairness, Hardship, Mistake and Inequitable Contract) (1981).

⁵⁰ *E.g.*, CAL. PROB. CODE §§ 37(b), 6401(c) (2006) (intestacy rights for domestic partners in California); VT. STAT. ANN. tit. 15, ch. 23 § 1204 (2004)

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As stated above, the agreement should provide some consideration between the parties other than a sexual relationship. In addition, it should clearly define what property and income is the subject of the agreement. Will the parties keep their assets and debts from prior to the cohabitation separate? If they plan to combine such assets and/or debts, how will they divide such assets or debts when the relationship concludes? Will the division of assets be equal, in proportion to contribution or by some other method? This is particularly important if one party will work while the other provides noneconomic contributions such as raising children or keeping the home.

The parties should also define when the relationship is over. Will that occur when one party moves out? Or will the relationship have to be dissolved by a dissolution of their domestic partnership?

The agreement should also contain guidance on how the parties will decide disagreements between them. They could choose to include a binding arbitration clause or agree that they must use mediation before either will file a legal action to interpret the agreement. It is also wise to provide for how any such alternative dispute resolution will be paid for, which could be from joint assets, equally or in proportion to their respective incomes or assets.

The parties should address whether they intend to incur any obligation to support each other. If so, such an agreement should be carefully crafted to include not only the term and amounts of support, but whether contingencies such as incapacity or disability will affect the obligation to support or be supported. If the parties have children, they can address custody if they break up or what will occur at the death of one partner, but such agreements may not be binding on the court. Often a guardianship action will be needed after the death of one partner to authorize the other to care for children if that parent has not legally adopted the children. The parties may also wish to define when the relationship has ended. This could occur when the parties actually physically separate or when one party sends written no-

(benefits at death for couples who have civil unions very similar to benefits available to married couples).

tice to the other of intent to separate or requests that the other party vacate the residence.⁵¹

While family law practitioners will be familiar with negotiating such arrangements, the enforceability of such agreements between cohabitants will again depend on the state law.⁵² Since state laws may differ dramatically on this, the parties may wish to include a provision on what law applies to interpret the agreement. Given that clients move frequently, and that the federal and state DOMAs could be used to prevent enforcement of such agreements, it is critical that the parties understand the vulnerability of their agreement in states other than that in which it is originally drafted.⁵³ They may wish to include a provision stating that if the couple moves to another state, they will consult attorneys there to determine whether the agreement is enforceable and what, if anything, needs to be done to ensure that it will be enforced in the new state.

With regard to debts, parties must understand that while they may make an agreement about who will pay a particular debt, the creditor, who is not a party to the agreement will not be bound by that agreement. Unlike in the marital situation where creditors can be bound by a valid pre or postnuptial agreement if they have prior notice of it, such agreements between unmarried individuals are likely to carry little or no weight with a creditor. Creditors will expect to collect from the person to whom the credit was extended. Therefore, cohabitants may need to take additional steps to ensure that their desires, if different from the name on the debt, actually occur. For example, they could create a joint bank account to pay debts, or obtain life insurance naming the other party as a beneficiary for the purpose of paying off debts at death. Again, unlike for married couples where some rights and benefits will be available at death or divorce by statute, cohabitants must create such rights and obligations in their agreement, including a mechanism to ensure that the rights and benefits created can be enforced.

⁵¹ Goffe, *supra* note 44, at 17, citing Frederick C. Hertz, *Drafting Cohabitation Agreements (with Form)*, 12 PRAC. REAL EST. L. 74, 81 (Nov. 1996).

⁵² Ravdin, *supra* note 45, at B 1101-1107 (Table of states permitting enforcement of such agreements for property division and support.)

⁵³ Chasen, *supra* note 46, at 363-64.

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Health, life, disability, and property insurances should also be addressed in the agreement, if it is comprehensive. Do the partners want to require such benefits? If so, what happens if the couple ends the relationship? While domestic partnership laws may permit a cohabitant to be named as an additional insured under a private health insurance plan, that may not be the case if it is an ERISA plan. ERISA as a federal law, preempts state law;⁵⁴ therefore, DOMA may prohibit employers who have ERISA health insurance plans to name the cohabitant as an additional insured. Similarly, a state DOMA, super DOMA, or constitutional amendment could have the same effect.

Life insurance can be similarly complicated as the couple may not have an insurable interest in each other under 26 U.S.C. § 7702. This would prohibit one from buying life insurance on the other's life. While each can buy life insurance on his or her own life and name the other, the death benefit of that insurance will be included in the person's estate when he or she dies. This can complicate the estate planning of cohabitants as discussed below.

As when drafting any good contract, the parties should include standard language on good faith and fair dealing with each other, consequences for breach of the agreement, severability clauses, choice of law provisions, arbitration clauses, modifiability of the agreement, and the binding nature of the agreement on the parties' heirs.

III. Relief in the Absence of Formal Planning: Noncontractual Remedies

While a well-drafted cohabitation agreement may be the best protection for an unmarried couple, other remedies may be available under state law, either at dissolution of the relationship or at the death of one of the parties. These will, again, be very state specific, but the general types of relief can be considered.

Most of the remedies would be in the form of an action for equitable relief. The argument on behalf of the party who seeks relief is essentially that it would be unfair to allow the other party to have all of the property, to not share in the debt that they both created, or to not have to support his or her former partner.

⁵⁴ Egelhoff v. Egelhoff, 532 U.S. 141, 146 (2001).

Such remedies could be argued under state law if common law marriage is sanctioned.⁵⁵ Or palimony could be argued if that remedy exists in the state of residence.⁵⁶

In some states, such as California, a partner in a couple can sue for palimony if the relationship ends and certain requirements are met. Palimony is a “court’s award of post-relationship support or compensation for services, money, and goods contributed during a long-term nonmarital relationship, especially where a common-law marriage cannot be established.”⁵⁷ The requirements to prove palimony are essentially those of an equitable action: that the parties are unmarried adult partners who are in a marriage-like relationship where there is a promise by one to support the other and the partner relies on that promise to his or her detriment.⁵⁸

Once a partner has died, a claim may exist in some states against the estate for support of the surviving partner.⁵⁹ While

⁵⁵ Alabama, Colorado, Georgia (if entered into before January 1, 1997), Idaho (if entered into before January 1, 1996), Iowa, Kansas (unless either party is under age 18), Montana, New Hampshire (for inheritance purposes only), Ohio (if entered into before October 10, 1991), Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

⁵⁶ See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) and 176 Cal. Rptr. 55 (1981); *Crowe v. De Gioia*, 447 A.2d 173 (N.J. 1982); *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979).

⁵⁷ BLACK’S LAW DICTIONARY 1142 (8th ed. 2004).

⁵⁸ *Marvin*, 557 P.2d at 116.

⁵⁹ See, e.g., *In re Estate of Quarg*, 938 A.2d 193 (N.J. 2008) (cohabitant partner of married man who lived with her for over forty years and had a child with her entitled to relief from his estate based on a theory of implied promise); *In re Estate of Roccamonte*, 808 A.2d 838 (N.J. 2002) (female cohabitant’s suit against estate of her partner for support upheld where he had promised in front of others to support her for life; holding that a general promise of support for life made by one party to the other, supported by consideration, will be construed and enforced by the court; upholding judgment awarding a lump sum payment based on the present value of reasonable support for her life expectancy); *McDonald v. Estate of Mavety*, 891 A.2d 1218 (N.J. Super. Ct. App. Div. 2006) (promise of one partner to support the other in a marriage-like relationship can create an enforceable contract). Compare *Bryne v. Laura*, 60 Cal. Rptr. 2d 908 (1997) (summary judgment against cohabitant female and in favor of estate reversed where she argued that decedent’s oral promise of support was enforceable and facts may support that she had relied to her detriment on the decedent’s promise by moving in with him, performing the duties of a spouse and retired from her job at his insistence), with *Jones v. Daly*, 176 Cal.

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early cases indicate that such claims could not prevail because the consideration for the alleged contract was a sexual relationship, later cases support the right to recover as long as sex was not the only consideration for the contract.⁶⁰ At least one commentator has argued for the extension of palimony claims to post death circumstances to address the rights of cohabitants where the parties did not have a written agreement.⁶¹

Other equitable remedies that may be available to an unmarried couple during life include unjust enrichment or *quantum meruit*, and promissory or equitable estoppel. Each of these equitable theories has been used in the case of a dissolving unmarried couple and could be applied at the death of one of the partners.

The theory of unjust enrichment or *quantum meruit*, is based upon the idea that a partner has benefitted from the relationship in some material way and it would be unjust to the party who contributed to allow the party who received the benefit to retain some or all of that benefit.⁶² Three elements must be proven: 1) an accumulation of assets, 2) acquired through the efforts of the two parties, and 3) retained by the other party in circumstances

Rptr. 130 (2d Dist. 1981) (court rejected claim as unenforceable brought by male partner seeking support from estate of deceased partner based upon alleged agreement to support him for the rest of his life because the consideration was based, in part, on sex); *Poe v. Levy's Estate*, 411 So.2d 253 (Fla. Dis. Ct. App. 1982) (unmarried male could recover against estate of unmarried female based upon express cohabitation agreement where the contract was valid, based upon lawful consideration apart from sexual relations). *Contra Norton v. McOsker*, 407 F.3d 501 (1st Cir. 2005) (no recovery allowed for cohabitant who lived for 23 years in an adulterous relationship with decedent, although he had allegedly promised to divorce his wife, marry her and support her for life, because claim for future support is in nature of palimony which is not recognized in the state); *In re Estate of Alexander*, 445 So.2d 836 (Miss. 1984) (woman not entitled to enjoy benefits of man's estate, especially homestead, absent evidence of woman's services accepted by man with expectation of payment for same).

⁶⁰ See *supra* note 59.

⁶¹ Paul J. Buser, *Domestic Partner and Non-marital Claims Against Probate Estates: Marvin Theories Put to a Different Use*, 38 FAM. L.Q. 315 (2004).

⁶² "At common law, a count in an assumpsit action to recover payment for services rendered to another person. Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff can recover even if the contract is unenforceable." BLACK'S LAW DICTIONARY 1276 (8th ed. 2004).

where retaining the benefit would be unjust.⁶³ In cases where unjust enrichment is used, the court will return to the aggrieved party the amount of assets or the thing that it would be unjust to permit the other party to retain. While normally applied when a couple breaks up, this equitable theory could be used at the death of a partner to recover in the estate of the deceased partner.⁶⁴ If a couple had a home together that was in the name of one partner, but the other paid one-half of all mortgage payments, real estate taxes, upkeep and insurances, an action for unjust enrichment might be brought against the estate if the surviving partner did not receive any of the house or other assets that would compensate for a contribution to the house during the relationship. Arguments could certainly be made to prevent recovery if the partner whose name was not on the title was simply making a contribution in the nature of rent.

The doctrine of promissory or equitable estoppel also allows a person to recover if another has made a promise under some circumstances. While promissory estoppel requires a promise, for equitable estoppel the person who wishes to recover must prove the following elements: 1) action or inaction that induces 2) reliance by another, 3) to his or her detriment.⁶⁵ This is another theory that could be advanced if a partner has passed away and the surviving partner is left either without assets that were promised or with debts that the other partner had promised to pay.

⁶³ Gormley v. Robertson, 83 P.3d 1042 (Wash. Ct. App. 2004); Ward v. Jahnke, 583 N.W.2d 656, 659 (Wis. Ct. App. 1998); Waage v. Borer, 525 N.W.2d 96, 98 (Wis. Ct. App. 1994).

⁶⁴ Cf. Vasquez v. Hawthorne, 145 Wash. 2d 103, 104-05, 33 P.3d 735 (2001) (one partner in same sex couple died).

⁶⁵ “Equitable estoppel is distinct from promissory estoppel. Promissory estoppel involves a clear and definite promise, while equitable estoppel involves only representations and inducements. The representations at issue in promissory estoppel go to future intent, while equitable estoppel involves statement of past or present fact. It is also said that equitable estoppel lies in tort, while promissory estoppel lies in contract. The major distinction between equitable estoppel and promissory estoppel is that the former is available only as a defense, while promissory estoppel can be used as the basis of a cause of action for damages.” 28 AM. JUR. 2D *Estoppel and Waiver* § 35 (2008). See, e.g., Hoffman v. Red Owl Stores, Inc. 133 N.W.2d 267, 274 (1965) (adopting promissory estoppel in Wisconsin).

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Some states, such as Washington, have crafted their own equitable approaches. The Washington courts call this the “meretricious relationship” doctrine, which is based upon a stable marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist.⁶⁶ To recover under this theory the court will review factors such as “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”⁶⁷

Each of these equitable doctrines provide a possible remedy, but are really in the nature of arguments of last resort. As with any litigation, the result is not guaranteed and the action is likely to be costly. Clients prefer certainty and nonlitigation alternatives. While equitable remedies may still be available, the best planning is to avoid the need for such alternatives using either a contract or estate planning documents.

IV. Estate Planning

A. *Traditional Estate Planning Tools During Life*

Unmarried couples should have certain documents in place to ensure that the results they wish to occur at death and even during life are accomplished. These include powers of attorney for health care and finances, HIPAA releases, wills and possibly trust documents. While these documents are long standing estate planning tools, certain special considerations apply for unmarried couples that will be discussed below.

1. *Powers of attorney*

Financial powers of attorney, also called advanced directives for finances or durable powers of attorney, are available in all states.⁶⁸ The purpose of a financial power of attorney is to permit a person to act for the principal if he or she cannot or chooses not to act for him or herself. This can occur due to old age, disease, physical absence from the area, or any reason the

⁶⁶ *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995).

⁶⁷ *Id.*

⁶⁸ *See, e.g.*, CAL. PROB. CODE § 4402 (1995); FLA. STAT. § 709.08 (2007); MCKINNEY’S N.Y. GEN. OBLIG. LAW §§ 5-1501, 5-1506 (1993); WIS. STAT. § 243.07 (2007).

principal is unavailable. A well-drafted document will permit the agent, sometimes called the attorney-in-fact, to do any act the principal could do for him or herself, or perform more narrowly defined tasks if that is the principal's wish.

States may require that the power of attorney be signed in front of a notary public.⁶⁹ Even if this is not required, it is advisable so that the power of attorney will be in a recordable form for commercial or real estate transactions. Some states will also have witnessing requirements that must be closely followed.

The principal should name at least one agent and preferably at least one alternate agent. This will ensure that there is a person to act even if the principal and his or her first choice are not available. The principal should also state in the document whether it is currently usable, called a surviving power, or only becomes available if the principal is no longer competent, which is called a springing power. If the document is a springing power, then the principal should state how the agent is to know that the document is in effect, for instance: This power shall become effective "If I am incompetent or unable to handle my own affairs according to my treating physician, Dr. _____" or This power shall become effective "If I am out of the country and not able to handle a necessary financial transaction and leave a written statement authorizing my agent to act."

Most importantly, the document should be durable. This means that the document endures beyond the incapacity of the principal. For the power of attorney to be durable, the document must use language that conveys that concept. Typical language could include: "This document endures beyond my incapacity/incompetence," or "This power of attorney shall not be affected by subsequent disability, incapacity or incompetency of the principal," or "This power of attorney shall become effective upon the disability, incapacity, or incompetency of the principal."

The client must decide, after discussion with the attorney, how broadly or narrowly to grant powers to the agent under the power of attorney. Typically, the power to handle bank accounts, real estate management, asset and portfolio management, and bill paying will be delegated. Powers to delegate more cautiously

⁶⁹ See, e.g., Wis. STAT. § 243.10 (2007).

include the power to make gifts, change beneficiaries, or fund a trust.

Many states have a statutory form for the financial power of attorney.⁷⁰ Such forms may be helpful, but often it is best to consult with an attorney who practices in this area to determine whether the state form adequately protects the client's needs. An attorney-drafted form may provide greater flexibility in choices for the agent and greater direction to third parties, such as financial institutions in following the document.

2. Health care powers of attorney and living wills

Health care powers of attorney are also available in all states. The health care power of attorney designates a person (or persons) to make health care and personal decisions, such as where to live, for the principal if he or she is unable to make such decisions. A health care power of attorney may be, but is not always the same as a living will. In some states, a living will is a more limited document that will only permit certain decisions to be made by a physician if the principal is in a comatose or persistent vegetative state.⁷¹ Clients do not understand this and use the terms interchangeably.

Most states will have a form document that can be used.⁷² Unlike the financial power of attorney, it may be wise to use the form document for health care because it is often a form that health care providers are familiar with and will not question. Many times, attorneys can also draft a customized document that will best address the client's needs. Like the financial power, the health care document may need to be notarized and will often have witnessing requirements.

As with the financial power, an agent and at least one alternate should be named. The document should specify whether the agent may make decisions concerning the administration or withholding of food, water or medical care, admission to group homes or nursing homes or other important decisions. Some

⁷⁰ *Id.*

⁷¹ For example in Wisconsin the Living Will created in Wisconsin Statutes § 154.03 (2007) is superseded by any directly conflicting provisions in a validly executed Health Care Power of Attorney. WIS. STAT. § 155.70(3) (2007).

⁷² See, e.g., 755 ILL. COMP. STAT. ANN. § 45/4-10 (2006); N.Y. PUB. HEALTH LAW § 2981 (2006); WIS. STAT. § 155.30 (2007).

state forms have a check the box format that allows such selections. Others have space to write in such considerations.

If properly executed, the financial and health care powers of attorney are legally enforceable directives for what should occur during life if a person is not able to make decisions due to physical inability or mental incapacity. Such documents are critical for the unmarried couple because in most states, without such documents, a person does not have the legal right to make decisions for his or her relative or partner. Having the properly drafted powers of attorney can avoid the conflicts among family members, with medical personnel, and in the courts that have occurred in cases where the documents either were not in place or were in dispute.⁷³

3. HIPAA release

Another important legal document is the Health Insurance Portability and Accountability Act of 1996 (HIPAA) release. This document authorizes the health care personnel to speak to the individual designated about the principal's health care. Without the release, the federal law, HIPAA,⁷⁴ may prohibit health care providers from giving health care information to the unmarried partner.⁷⁵

⁷³ See *In re* Guardianship of Schiavo, 851 So.2d 182, (Fla. Dist. Ct. App. 2003), review denied *In re* Guardianship of Schiavo, 855 So.2d 621, (Fla. 2003); *In re* Guardianship of Schiavo, 800 So.2d 640 (Fla. Dist. Ct. App. 2001); *In re* Guardianship of Schiavo, 792 So.2d 551 (Fla. Dist. Ct. App. 2001); *In re* Quinlan, 355 A.2d 647 (N.J. 1976).

⁷⁴ 42 U.S.C. § 1320d (2000).

⁷⁵ Typical release language is as follows: I intend for (name of agent) to serve as my health care agent and to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. 1320d (2000), and Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82, 462 (2000) (codified at 45 CFR 160-164 (2007)).

I make this authorization for the following health care professionals: any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health care provider, any insurance company, and the Medical Information Bureau Inc. or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services.

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If a partner has the health care and financial power of attorney and the HIPAA release in place, then he or she should be legally able to care for his or her partner if the partner becomes incapacitated, incompetent, or is otherwise unable to care for him or herself. This is very reassuring to clients who often will care more about this scenario than about what may happen if the partner dies. In addition, having the durable powers of attorney for health care and finances in place will almost always avoid the need for guardianship if the principal becomes incompetent.

Clients must be told how to care for and enforce powers of attorney. Powers of attorney should not be stored in a safe deposit box. They should be at home in a fire proof box so that they are available if needed, including on nights and weekends. Clients must discuss their wishes for financial and health care decision making with the agent so that the agent can carry out those wishes. Typically, agents under powers of attorney are expected to act as the principal would have wanted, which is a substituted judgment standard, not a best interests standard.⁷⁶

Agents can confront a variety of impediments when using the power of attorney to act for the principal. A bank may indicate that the power of attorney is “too old” or a financial institution may not want to carry out the agent’s direction. Similarly, a health care provider may be hesitant to deal with the unmarried partner as agent, when parents or other family members wish to be involved in health care decision making. It is necessary for agents to advocate, sometimes with an attorney’s assistance, to

The above-referenced persons and entities are authorized to give, disclose and release to my health care agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present, or future medical or mental health condition, to include all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse.

The authority given my agent shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider. *See also* Office for Civil Rights, Medical Privacy—National Standards to Protect the Privacy of Personal Health Information, Sept. 16, 2008, <http://www.hhs.gov/ocr/hipaa>.

⁷⁶ *See, e.g., In re Estate of Browning*, 543 So.2d 258, 272 (Fla. Dist. Ct. App. 1989).

make sure that the wishes of the principal are accomplished. Since this is a new role for many people, the attorney should advise the client about the possible problems so that the client will know to seek legal advice to enforce a valid power of attorney.

B. *Estate Planning Tools at Death*

Planning for an unmarried couple at death is usually accomplished using the same tools as planning for a married couple, such as wills, trusts, beneficiary designations, and joint ownership. The difference is that the unmarried couple cannot take advantage of some benefits provided by tax law to married couples, such as the unlimited marital deduction, joining in gifts, or rollover of an IRA into his or her name.⁷⁷

Unmarried couples should be encouraged to make wills that specify each person's wishes at death. Provisions in wills will be followed by courts unless the requirements necessary to make a will have not been met. Such requirements include that the person be of sound mind when the document is executed and that any necessary witnessing provisions have been met.⁷⁸

A person is not required by law to give his or her assets to another, such as a spouse or even children. In some states, a spouse may have elective rights against a will, but usually children do not. Therefore, a partner in an unmarried couple is free to leave his or her assets to that partner, rather than to parents, siblings, children, or others.

When drafting a will, the client must decide who to name as personal representative or executor to carry out his or her wishes, whether to make any specific or charitable gifts or bequests of property or money (e.g., my pearl earrings to my sister Mary), and how to dispose of assets, real and personal. Wills can also include provisions for whom to name as guardian over minor children of the deceased, although such statements may not be binding if the children have a surviving parent.

A will becomes a public document at death. To be followed, it is typically filed in court and the will's provisions are carried

⁷⁷ 26 U.S.C. § 2056 (2000); 26 U.S.C. § 402(c) (2000), 26 U.S.C. § 2513(a) (1988). In the case of gifts, a spouse can gift to the other spouse without using up unified credit if the gift is over \$12,000, while an unmarried partner must use up some of that credit.

⁷⁸ *E.g.*, WIS. STAT. § 853.03 (2007).

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out by the personal representative, executor or other person charged with this responsibility. Laws in every state govern how the will is to be probated. Usually, after filing, the statutes will require notice to creditors, valuation of assets, an accounting of the total assets of the estate, and eventually distribution to the beneficiaries named in the will.⁷⁹ If a person does not sign a will and leaves no other method for distribution of his or her assets, such as beneficiary designations, the assets will pass by intestacy (statutorily stated distributions). If a person is unmarried, the intestacy laws of most states will pass assets first to children, if no children, to parents, if no parents, to siblings, and so on. Nowhere on the intestacy list of almost all states is the deceased person's cohabiting partner named. Therefore, without a will or other legally enforceable provision, the surviving partner will not inherit from the deceased partner.

Whether to have a trust in addition to a will is an individual choice and will depend on the needs and desires of each person. A trust is merely a contract that carries, manages and eventually may distribute assets on behalf of the grantor.⁸⁰ The trust may be a testamentary trust, which is a trust included in the will that is overseen by the court, or a living trust, which is a trust that may be funded during life or at death, but that is held outside of the will and managed outside of the probate process. The testamentary trust is public in nature because it is overseen by the court. The living trust, while it may be funded through the court at death or funded during life, is usually not subject to ongoing court supervision and therefore, considered more private.

Drafting a trust requires the client to make more choices and will usually cost more than a simple will. The grantor will need to name a trustee and either an alternate or a methodology for selecting an alternate. The grantor must decide whether to use a corporate trustee such as a bank or trust company or name an individual to manage the trust assets. The grantor must de-

⁷⁹ See WIS. STAT. § 856-863 (2007).

⁸⁰ "A private trust is a trust created for the financial benefit of one or more designated beneficiaries rather than for the public benefit; an ordinary trust as opposed to a charitable trust. Three elements must be present for a private trust: (1) the demonstrated intent of the settlor, (2) trust property (as res), and (3) a certain beneficiary capable of enforcing the trust." BLACK'S LAW DICTIONARY 1551 (8th ed. 2004).

cide to whom the assets will be distributed and when. Often assets are held in trust for some period of time (sometimes indefinitely) until certain benchmarks are achieved such as a child turning 21, 25, or 30. Sometimes, assets are held but principle is distributed or assets are held, but distributed piecemeal at certain ages, e.g., “to my child as follows: 1/3 at 21, 1/2 of the remaining assets at age 25, and the remainder at age 30.”

Clients may wish to use a trust if they want privacy, wish to retain assets in trust after they die, wish to use a professional manager, or for many other reasons. If the assets are placed into the trust, which means changing title to the name of the trust during the principal's lifetime, then there is often no need to fund the trust at death by a probate. In that case, while tax and other planning must occur at death, the client will keep his or her affairs confidential from others who may wish to disrupt the client's planned distributions.

Wills, trusts and powers of attorney can be modified as long as the principal is alive and of sound mind. If a couple breaks up, however, there is no automatic disregard of the provisions made in such documents as may occur for married couples.⁸¹ Therefore, it is important for an individual to revise his or her documents if the partners split up.

Drafting will and trusts for unmarried individuals is more complex because they cannot take advantage of the federal gift and estate law provisions that allow spouses to gift, either during life or at death, unlimited amounts to each other.⁸² However, where parties have taxable estates, a proficient estate planner can take advantage of the two separate estates and ensure that maximum assets will pass in trust to care for the surviving partner.

C. *Nonprobate Transfers*

Sometimes the best planning is that which occurs automatically at death, without any need for courts or other implementation mechanisms. This is usually accomplished by beneficiary

⁸¹ Uniform Probate Code § 2-802 provides that a former spouse is not a surviving spouse upon consenting to a final divorce judgment. See Kym Miller, Comment, *Statutory Termination of Property Rights and Interests Upon Divorce*, 18 J. AM. ACAD. MATRIM. LAW. 549, 553-54 (2003).

⁸² 26 U.S.C. § 2056 (2000).

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designation or joint ownership of assets. The risk of such planning is that it causes an automatic transfer at death so there is a loss of control over the assets and if a couple breaks up but does not modify the designations, the assets will still pass to that now ex-partner.

Many assets can be transferred by beneficiary designation. In almost all instances, such designations will be followed even if the beneficiary is different than the beneficiaries in the person's will or estate planning. Examples of beneficiary designations include:

1. Retirement accounts, such as pensions, profit sharing plans, 401(k) plans, 403(B) plans, Individual Retirement Accounts ("IRA"), Roth IRAs, Keogh plans, Sep IRAs, deferred compensation plans, railroad retirement plans, and others.
2. Bank accounts where one or more beneficiary is named such as a pay on death account ("POD").
3. Securities or security accounts where one or more beneficiary is named.
4. Life insurance plans.
5. Annuities.
6. Real estate where a beneficiary is named such as a life tenancy with a remainder interest or a transfer on death beneficiary.
7. A declaration of trust ownership to pass property to a trust.

While discussion of the nuances of each of these is beyond the scope of this article, suffice it to say that almost any asset can be passed to another by a beneficiary designation. These designations have the benefit and the danger of being almost automatic at death. Normally, with proof of the death by death certificate, the holder of the asset will distribute the asset according to the beneficiary designations. While this may sometimes require additional paperwork to be completed, the designation typically cannot be changed after death. A beneficiary may choose not to take the benefits by disclaiming them, but a disclaimer must be done voluntarily, it cannot be compelled and it must be done within nine months of death.⁸³

If the couple is unlikely to split up, and if the assets can be easily transferred by beneficiary designation, then this may be the easiest and least costly alternative. Sometimes, however, couples wish to accomplish more complex planning such as: "my home to my partner Mary, to be used for her lifetime and then to

⁸³ 26 U.S.C § 2518 (1983).

my children.” While such planning could be accomplished by a life estate to Mary with a remainder to the children, the management of the asset during life, upkeep, insurance, and other concerns would not be covered by the life estate deed transfer. In such instances, a will or trust will better accomplish the client’s objectives.

Beneficiary designations also have the disadvantage of combining the estates of the two individuals at death because the survivor ends up with all of the couple’s assets in his or her name. As mentioned above, an unmarried couple cannot take advantage of the federal tax planning available by the unlimited marital deduction under federal tax law. If they each have a taxable estate (currently greater than \$2,000,000 per person including death benefits of life insurance policies) then they should not combine the estates of both in the name of the survivor at the death of the second partner. Instead, they may wish to do planning to avoid or reduce the exposure to federal estate tax, and to the state tax that may also apply at death.

Holding assets jointly can have the same benefit as beneficiary designations. In many instances, such as a joint bank account, the asset is passed immediately at death to the survivor if the ownership is joint with right of survivorship. This would include assets held in the “and” form, or if possible, as joint tenants or tenancy by the entirety, which is usually only available to married couples. The joint account holder or joint real estate owner may receive the asset at death.

Like a beneficiary designation, the joint account or jointly held asset has the disadvantage of being irreversible at death. Even more serious, it often may not be reversible during life. For example, if a couple living together puts the home into their joint names even though one partner contributed all of the funds to purchase the home, the other partner now owns an interest in the home. The purchasing partner has made a gift to the other partner. If that gift is greater than \$12,000, then the gift is not only reportable to the federal government, but it also may use up some of the applicable exclusion amount (that amount that passes free of gift and estate tax at death) for the gifting partner. Currently, the amount a person may gift during life without tax, excluding gifts of up to \$12,000 per person per year, is

\$1,000,000.⁸⁴ The amount that can be passed at death is \$2,000,000 per person including up to \$1,000,000 in lifetime gifts.⁸⁵ Most planners wish to avoid using some of the lifetime gift or estate tax exemption amount, if possible. Therefore, making gifts that use up some of the exclusion amount is not wise.

The worst case scenario is if a person gifts an asset to a partner to enable a transfer at death, but the couple split up and the partner who received the gift refuses to return it. That could result in unintended consequences such as the permanent loss of interest in a significant asset. For this reason, such planning should probably not be done, unless a contemporaneous cohabitation or other contractual agreement is signed stating what will happen if the relationship does not endure.

V. Conclusion

Estate planning for unmarried couples can take many forms. The best planning is done using the tools available to accomplish an enforceable result. This should include the use of powers of attorney for finances and health care and a HIPAA release during life and possibly a use of a cohabitation agreement, wills and trust and nonprobate transfers to accomplish transfers at death. If formal estate planning is not done, there may still be equitable relief available to the surviving partner, but that will require court action. This is an area of developing law, but is likely to change significantly as our population and social norms continue to evolve.

⁸⁴ 26 U.S.C. § 2505 (2007).

⁸⁵ 26 U.S.C. § 2010(c) (2007). The amount of the estate that avoids federal estate tax is \$3,500,000 in 2009, will be unlimited in 2010 and will return to \$1,000,000 in 2011 unless amended before then.