After Windsor and Referendum 74: What's Next

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I. Introduction

As of Dec. 6, 2012, same-sex marriage became legal in Washington State. Since Washington allowed for Registered Domestic Partnerships in 2007, there have been gradual but significant changes in Washington law concerning recognition of and protections for same-sex couples and same-sex families. On

A new set of legal issues and opportunities have emerged as a result of the Supreme Court's recent decision in Windsor v. U.S.,[1] which extends the rights and responsibilities of marriage to some same-sex couples.

Despite the changes on the state and federal levels, great legal strides have been made, but barriers to equality remain for same-sex couples and their children still exist.

This outline provides an introduction to the current state of same-sex marriage law on the state and federal levels, and suggestions as to how to advise and draft for issues that may arise under the current patchwork of legislation.

II. Same-Sex Marriage and The Defense of Marriage Act

A. The Defense of Marriage Act.

Congress passed the federal Defense of Marriage Act ("DOMA")[2] in 1996, in response to its concern that as a result of the opinion in *Baehr v. Lewin*[3] (in which Hawaii's Supreme Court found that there was no fundamental right to same-sex marriage under the Hawaiian Constitution, but that its current law denied the same-sex couples equal protection, in violation of art. 1, §5 of the Hawaii Constitution) courts around the country would allow same-sex couples to marry.[4]

B. Federal Legislation.

§3 of DOMA specifically defines marriage as a legal union between one man and one woman as husband and wife.[5] It further provides that a state shall not be required to give effect to any public act or judicial proceeding of any other state respecting marriage between persons of the same sex if the state has determined that it will not recognize same-sex marriages.[6]

To date, nearly 40 states have adopted statutory versions of DOMA, or have legislation banning same-sex marriage predating the federal DOMA, and many have constitutional provisions

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[1] *Windsor v. U.S.*, 570 U.S. _____, 133 S.Ct. 2675 (June 26, 2013).

[2] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. §7 and 28 U.S.C. §1738C).

[3] 74 Haw. 530, 852 P.2d 44 (1993).

[4] H. Rep. No. 104-664 (1996), *reprinted* in 1996 U.S.C.C.A.N. 2905, 2906.

[5] 28 U.S.C. §1738C(3).

[6] 28 U.S.C. §1738C(2).

defining marriage.[7]

DOMA's prohibition against same-sex marriage does not extend to heterosexual marriages where one of the spouses subsequently undergoes gender transition surgery.[8]

C. Challenges to DOMA.

On June 26, 2013, the United States Supreme Court found §3 of DOMA unconstitutional. While this decision did not require states to recognize same-sex marriages, it did broaden the federal definition of marriage to include same-sex marriages.

1. Windsor v. United States.

The federal law case is *Windsor v. United States*.[9] On November 9, 2010, Edith Windsor filed a lawsuit against the federal government for refusing to recognize her marriage to her partner of 44 years, Thea Spyer. At Thea's death, in 2009, Edith paid more than $350,000 in federal estates taxes because Thea's estate was not eligible for the marital deduction. She filed a lawsuit in New York's District Court for a refund of taxes and claimed §3 violated the equal protection guarantee of the U.S. Constitution.

The Court of Appeals for the 2nd Circuit ruled on October 15, 2012, that §3 is unconstitutional because it denies legally married same-sex couples the benefits and opportunities under law that are available to opposite-sex married couples, affirming the lower court's ruling. In arriving at its holding the 2nd Circuit applied heightened scrutiny. This standard is applied to determine whether government policy claimed to discriminate against individuals based on their sexual identity actually serves a significant government policy. This is a much stricter standard than the lower standard known as "rational basis review," under which almost any government policy can withstand attack if there is a reasonable justification. This case raises the bar for sexual-orientation based legislation of any kind in the 2nd Circuit.

On June 26, 2013, the Supreme Court found §3 of DOMA unconstitutional.[10] § 3 defined marriage as a "legal union between one man and one woman," and goes on to define a spouse as "a person of the opposite sex who is a husband or wife." The Court found that this provision of DOMA violates the Equal Protection Clause of the U.S. Constitution by denying same-sex couples residing in recognition states the benefits and burdens of a federally recognized marriage. The Court also held that marriage is the exclusive domain of the states.

The ruling did not legalize same-sex marriage in all states.

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[7] National Conference of State Legislatures, Same-Sex Marriage, Civil Union and Domestic Partnerships, www.ncsl.org/programs/cyf/samesex.htm (updated July 14, 2011).

[8] *Matter of Lovo*-Lara, 23 I&N Dec. 746 (BIA 2005).

[9] *Windsor v. U.S.,* 699 F.3d 169 (2d Cir. 2012), affg *Windsor v. U.S.,* 833 F. Supp. 2d 394 (S.D.N.Y 2012), *Cert. granted,* Dec. 7, 2012.

[10] *Windsor v. U.S.*, 570 U.S. _____, 2013 WL 3196928 (S.Ct., June 26, 2013).

2. *In Re Marriage Cases; Perry v. Schwarzenegger.*

The state law case involves the constitutionality of California's Proposition 8–a voter-approved amendment to the California Constitution that limited marriages to those between one man and one woman. The Court agreed to examine whether the proponents even had standing.

This case has its origins in 2000, when California voters approved Proposition 22 that amended the California Family Code to provide that "only marriage between a man and a woman is recognized in California." In 2008, the California Supreme Court ruled that Proposition 22 violated the state constitution, which granted a right to same-sex marriage. The California Supreme Court ordered the state to start issuing marriage licenses to same-sex couples who wanted to marry in *In re Marriage Cases*,[11] (a case involving 6 consolidated cases) finding that the California Constitution mandates that same-sex couples have the right to marry. The Court held that reserving marriage for opposite-sex couples, while permitting same-sex couples only to enter into domestic partnerships, violates the state Constitution. In addition, the Court found that prohibiting same-sex couples from marrying deprives them of equal protection under the law. For six months, beginning May 15, 2008, California had legal same-sex marriage and nearly 18,000 same-sex couples were married.

Same-sex marriages continued for almost six months, until November 4, 2008, when Proposition 8, known as the California Marriage Protection Act, went into effect. It limited marriage to one man and one woman under a new section of the California Constitution.[12] It was subsequently upheld by the California Supreme Court on May 26, 2009 in *Strauss v. Horton*, which banned further marriages.[13] *Strauss v. Horton* also held that the approximately 18,000 marriages entered into for the six months before November 4, 2008 in California as well as marriages validly entered into elsewhere prior to that date, would still be considered valid.[14] Couples married after that date are recognized as registered domestics partners [hereinafter "RDPs"].

Then *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), originally filed in the U.S. District Court for the Northern District of California as *Perry v. Schwarzenegger*, challenged the constitutionality of Proposition 8.

On August 4, 2010, Judge Vaughn Walker concluded that California had no rational basis or vested interest in denying same-sex couples marriage licenses and found Proposition 8 unconstitutional. He noted that Proposition 8 was based on traditional and moral disapproval of homosexuality, which is not a legal ground for discrimination. He further noted that gays and lesbians are exactly the type of minority that strict scrutiny was designed to protect.

A Notice of Appeal was filed the same day to the U.S. Court of Appeals for the Ninth Circuit,

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[11] 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008).

[12] Section 7.5 of the Declaration of Rights.

[13] 207 P.3d 48, 93 Cal. Rptr. 3d 591 (2009).

[14] Cal. Fam. Code §308 was amended to provide that same-sex marriages validly entered into outside of California prior to November 5, 2008 remain valid in California, but same-sex couples who entered into marriage on or after that date will instead be treated as California registered domestic partners.

and Judge Walker delayed lifting the stay until the appeals process was completed.[15]

On February 7, 2012, the Court found California's ban on same-sex marriage violates the U.S. Constitution because it served no rational purpose and had no effect, other than to lessen the status and dignity of same-sex couples by reclassifying their relationship as one that is inferior to heterosexual couples, and upheld the District Court decision that found Proposition 8 unconstitutional.[16]

Marriage never went into effect since the proponents of Proposition 8 appealed the case to the U.S. Supreme Court on July 31, 2012 under the new name, *Hollingsworth v. Perry*, constitutionality of Prop. 8 and whether the voter-approved ban on gay marriage is legal under the California state constitution.[17] While the constitutional analysis in this case only applies to Proposition 8 and not to any other state's laws, the basis of the case, that prohibition of gay marriage is rooted in disapproval of homosexuality, could provide a solid basis for other state cases, but may not necessarily bring about uniform results from one jurisdiction to the next.

Also on June 26, 2013, the Court held, in *Hollingsworth v. Perry* (formerly *Perry v. Schwarzenegger)*,[18] that the appellants lacked standing, which holding indirectly allowed same-sex marriages in California to resume. The Court refused to review a California federal district court ruling that struck down, as unconstitutional, California's Proposition 8, which amended California's Constitution to define marriage "as a union between a man and a woman."

Certain government officials, including the Governor, had standing to challenge Proposition 8, but declined to participate in an appeal of the federal court's ruling. Almost immediately, an appeal was brought by private parties. The Ninth Circuit concluded that under California law, the petitioners had the right to assert the State's interest to defend Proposition 8's constitutionality when public officials declined. The Ninth Circuit affirmed the district court's order allowing petitioners to defend Proposition 8.

The Supreme Court's dismissal was based on its determination that the proponents of Proposition 8 were private parties and not public officials. The Court held their generalized grievance was insufficient to confer standing to defend its constitutionality.

The Supreme Court remanded the case back to the Ninth Circuit for dismissal based on lack of standing, and same-sex marriages resumed in California on June 27, 2013, in anticipation of the dismissal.

D. Other Federal Developments.

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[15] *Perry v. Brown*, No. 10-16696 (9th Cir. docketed Aug. 8, 2010) (originally filed in the U.S. District Court for the Northern District of California as *Perry v. Schwarzenegger)*.

[16] *Perry v Brown*, 10-16696 (9th Cir. Docketed Feb. 7, 2012 Doc 398-1).

[17] No. 12-144 (August 1, 2012).

[18] *Hollingsworth v. Perry,* 570 U.S. __, 133 S.Ct. 2652 (2013).

The Windsor opinion is over 40 pages, yet it provides more questions than answers. Because §2 of DOMA has not yet been overturned, the opinion does not make same-sex marriage available on a national basis. States that don't currently permit same-sex marriage will not be required to permit them. Nor will such states be obligated to recognize same-sex marriages legally performed out of state. But, same-sex married couples in states that recognize those marriages will now be eligible for and subject to the same approximately 1,100 benefits and burdens under federal law as previously only applied to heterosexual married couples.

The court only struck down only §3 of DOMA that involves the federal government not recognizing same-sex marriages; the case did not challenge §2 of DOMA that says that states don't need to recognize it. While logically, we might jump to the conclusion that a state must recognize the marriage, it is going to take more litigation to get to that point.

In fact, remains unclear which marriages the federal government will recognize. Some federal statutes provide that federal benefits will be granted to a married couple if their marriage is recognized by the state in which they reside. Other statutes do not rely on the law of the state of residence, such as military spousal benefits. So there is still likely to be a patchwork of federal laws that apply to married same-sex couples in non-recognition states.

On June 2[7,] 2013, President Obama went on record saying that the Federal government should recognize same-sex marriages performed in one state regardless of the residence of the married couple. But he emphasized that "I'm speaking as a president not as a lawyer."

III. Civil Union, Domestic Partnership, Designated Beneficiaries Reciprocal Beneficiaries and Marriage.

Civil union and domestic partnership are each a type of separate legal status providing a range of the rights and responsibilities afforded couples under various state laws. Both confer all or some of the rights conferred by marriage, but without the implicit historical and religious meaning associated with the word "marriage." Civil unions were once distinct from registered domestic partnerships, but the terms are now used more-or-less interchangeably. The level of rights and responsibilities conferred by a civil union or registered domestic partnership varies widely. Some states provide limited rights and responsibilities and some are known as "everything but marriage" statutes.

Informal domestic partnerships are recognized by many employers and municipalities, which have chosen to provide domestic partner benefits such as health insurance, reduced rates for such things as health club memberships, FMLA type leave to care for an ill partner or a partner's child.[19] For example, the City of Seattle's Domestic Partnership Registration program allows unmarried couples in committed family-like relationships to document those relationships. Couples may consist of a man and a woman, two men, or two women. Registration provides for certain benefits otherwise provided only to a spouse of a city employee.[20] This program is

[19] See http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries for a list of city and county domestic partner registries.

[20] Seattle Municipal Code 4.36.185.

separate from Washington's domestic partner registry.

A. Marriage and Recognition of Marriage.

Those jurisdictions that recognize same sex marriage include California,[21]Connecticut,[22] Delaware,[23] Iowa,[24] Maine,[25] Maryland,[26] Massachusetts,[27] Minnesota,[28] New Hampshire,[29] New York,[30] Rhode Island,[31] Vermont,[32] Washington,[33] and the District of Columbia.[34] In addition, the Coquille Tribe of Oregon, the Suquamish Tribe of Washington and the Little Traverse Bay Bands of Odawa Indians recognize same sex marriage.[35] All couples married these laws are still treated as single for purposes of federal law.

A majority of states expressly bar recognition of out-of-state same-sex marriages.[36] While not valid if contracted for, for example, in New Mexico.[37] These states have held that marriages will be recognized by state agencies if solemnized elsewhere, where it is legal. Illinois and New Jersey treat same-sex marriages as civil unions.

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[21] *Hollingsworth v. Perry*, 570 S.Ct. _____ (June 26, 2013).

[22] Conn. Gen. Stat. §1-1m (eff. Oct. 10, 2008 on which date all civil unions converted to marriages).

[23] 147th Delaware General Assembly, House Bill No. 75, An act to amend Title 13 of the Delaware code relating to domestic relations to provide for same-gender civil marriage and to convert existing civil unions to civil marriages (effective July 1, 2013).

[24] *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (eff. April 27, 2009).

[25] Sec. 2. 19-A MRSA §650-A - §701 (eff. Dec. 29, 2012).

[26] Ch. 2, HB 438 entitled the "Civil Marriage Protection Act" (March 1, 2012) (effective Jan. 1, 2013).

[27] Eff. May 17, 2004.

[28] HF 1054 codified at Minnesota Statutes ch. 517, 518 (eff. Aug. 1, 2013).

[29] N.H. Rev. Stat. Ann. §457-A:1, §457-A:6 (eff. Jan. 1, 2010).

[30] "The Marriage Equality Act," N.Y. Dom. Rel. Law §§10-a - 10-b (eff. July 24, 2011).

[31] H 5015B (eff. Aug. 1, 2013).

[32] An Act Relating to Civil Marriage, Vt. Stat. Ann. tit. 15, §§1201-1207 (eff. Sept. 1, 2009).

[33] RCW 26.04.010 (eff. Dec. 6, 2012)

[34] The Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Jan. 1, 2010) (eff. March 3, 2010 with a 3-day waiting period so first marriages took place on March 6, 2010) (codified at D.C. Code §46-401 – 421). The District of Columbia recognized civil unions until March 6, 2010.

[35] Wikipedia Contributors, *Same-Sex Marriage under United States Tribal Jurisdictions*, Wikipedia, http://en.wikipedia.org/wiki/Same-sex_marriage_under_United_States_tribal_jurisdictions (accessed May 11, 2013).

[36] *Op. of Att'y Gen. Gary K. King 11-01* at 2 (New Mexico Jan. 4, 2011).

[37] *Op. of Att'y Gen. Gary K. King* at 1. Notably the opinion states that marriages should be recognized not only for couples who marry legally in another state and later move to New Mexico, but also for New Mexico residents who travel out of state to marry and return. While an Attorney General Opinion is not binding on courts, but is often persuasive.

B. Washington.

Washington was the 36th state to adopt DOMA in 1998, when it passed legislation defining marriage as a civil contract between a male and a female.[38] In two cases brought by the ACLU, Washington's DOMA was found to be constitutional.[39] The first case, *Andersen v. King County*,[40] was brought by 8 same-sex couples seeking the right to marry in Washington. Judge William L. Downing held in their favor and ruled that Washington's prohibition against same-sex marriage is an unlawful violation of the plaintiffs' constitutional rights to equality, liberty and privacy.[41]

Both sides agreed to a direct appeal to the Washington State Supreme Court, and the Order was stayed pending that review. The appeal was filed on September 1, 2004 and consolidated with *Castle v.* Washington,[42] in which the Court ruled in favor of eleven same-sex couples, and found DOMA unconstitutional, in violation of Washington's Privileges and Immunities Clause.[43]

In the consolidated appeal, the State Supreme Court reversed the lower courts and found that the legislature is not prohibited from defining marriage as a civil union between a man and a woman, to the exclusion of same-sex couples.[44]

In response, Washington's legislature enacted a Domestic Partnership Act that went into effect on July 22, 2007, codified at RCW ch. 26.60.[45] The legislature recognized that many Washington residents are in intimate, committed relationships with persons to whom they are not legally married, and many of whom are not permitted to marry. While many (but not all) of the rights granted by the 2007 Act could have been acquired by private agreement, doing so was often costly. These included certain rights and benefits, such as those associated with hospital visitation, health care decision-making, organ donation decisions, and other issues related to illness, incapacity, and death.

Accordingly, the 2007 Act allows certain same-sex couples and unmarried opposite-sex couples, one of whom is 62 or older, to register as domestic partners with the Washington Secretary of State as of July 23, 2007.

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[38] RCW 26.04.010(1).

[39] Washington's DOMA defines marriage as a civil contract between a male and a female, and prohibits marriage for couples consisting of "other than a male and a female." RCW 26.04.020(1).

[40] No. 04-2-04964-4 SEA, 2004 WL 1738447 (King Cty. Super. Ct. Wash. Aug. 4, 2004), *rev'd*, 158 Wn. 2d 1, 138 P.3d 963 (2006).

[41] *Id*. *Memorandum Opinion and Order on Cross Motions for Summary Judgment* at 22 (Aug. 4, 2004).

[42] No. 04-2-00614-4, 2004 WL 1985215 (Thurston Cty. Super. Ct. Wash. Sept. 7, 2004).

[43] Washington Constitution, art. I, § 12.

[44] *Andersen v. King County*, 158 Wn. 2d. 1, 138 P.3d 963 (2006) (*en banc*) Justice Barbara Madsen wrote for the plurality that "limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents." *Id*. at 10.

[45] Laws of 2007, ch. 156, codified at RCW 26.60.

Registrants must share a common residence, be over the age of 18 and members of the same gender, or one member of the couple must be over 62 for opposite-sex couples. The parties cannot be married or a member of another domestic partnership. The parties may not be related in a manner that would prohibit marriage and must have the mental capacity to consent.

Second Substitute House Bill 3104 passed March 12, 2008 and effective June 12, 2008, expanded and amended Washington's Domestic Partnership Act ["HB 3104"]. HB 3104 extended rights and responsibilities provided to spouses in various areas of law to state RDPs. These rights and responsibilities are generally in the areas of: dissolutions; community property; estate planning; taxes; court process; services to indigent veterans and other public assistance; conflicts of interest for public officials; and guardianships.

The 2008 bill provided that a legal relationship between members of a *same-sex* couple, other than a marriage, created in a different state and that is substantially equivalent to a Washington domestic partnership would be recognized in Washington.[46] This recognition does not extend to different-gender couples registered as domestic partners in another state. They would have to register in Washington to obtain recognition here.

As of July 23, 2011, same-sex couples in a marriage validly formed in another jurisdiction were recognized as a domestic partner in Washington.[47]

In 2009 the 2007 Act was again expanded (the "2009 Expansion Bill"), which extends the same rights and obligations to domestic partners under state law that are granted to or imposed on spouses: Any privilege, immunity, right, benefit, or responsibility granted or imposed by state statute, administrative or court rule, policy, common law or any other state law to a person because he or she is a spouse shall also be granted or imposed on equivalent terms, substantive and procedural, to a person because he or she is in a state-registered domestic partnership, to the extent not in conflict with federal law. The prior non-judicial termination process available to domestic partners was repealed; to terminate a domestic partnership the parties must file for dissolution using the same process available to married couples under RCW ch. 26.09.

Following the *Windsor* opinion, the Washington Department of Revenue announced that RCW 83.100.047, Washington's estate tax marital deduction statute applies retroactively to the same-sex spouse of a decedent dying on or after December 6, 2012 (the date Referendum 74 went into effect).[48] Consequently, a Washington state QTIP or QDOT may be created for a surviving spouse under Washington law.

After June 26, 2013, the same Washington state estate tax spousal benefits are permitted same-sex married couples in a marriage recognized by another jurisdiction that is not prohibited under

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[46] § 1101, codified at RCW 26.60.090.

[47] RCW 26.60.090 (effective July 23, 2011).

[48] Washington State DOR ETA 3179.2013 (August 15, 2013) available at http://dor.wa.gov/docs/rules/eta3000/eta3179-2013.pdf.

Washington law.[49]

The state marital deduction will not apply to RDPs until January 1, 2014.

C. Dissolution of the Same-Sex Marriage.

One of the thornier issues is how to deal with the inevitable dissolutions of same-sex marriages.[50] For some, getting divorced is fraught with more complexity than getting married.[51] While the couple may have at one time resided in a state that would grant them a divorce, they may have moved since marrying, so that neither is a resident at the time they wish to end the marriage. This, in itself, is not a problem, unless their current state of residence has a DOMA that would prevent the state from recognizing the marriage, in which case they would be unable to obtain a divorce.[52] Two authors have referred to this state of affairs as being "wedlocked."[53]

A growing number of states will grant dissolutions while not permitting marriages. Nevada and Wyoming, for example, do not recognize a same-sex marriage but will grant a same-sex divorce.[54] New Jersey, while allowing for a civil union, will recognize a same-sex marriage for the purposes of divorce, but no other purposes.[55] At least two jurisdictions, Washington, D.C. and Vermont, while imposing residency requirements for couples married there, will grant dissolutions without a residency requirement to couples residing in a jurisdiction that will not recognize their marriage or grant a dissolution.

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[49] RCW 26.04.020(3).

[50] *See* NCLR's guide for attorneys on how same-sex couples in marriages/civil unions/registered domestic partnerships may be able to divorce even if they live in states that do not recognize their relationships, available at http://www.nclrights.org/site/DocServer/Divorce_in_DOMA_States_Attorney_Guide.pdf. *See also* Raymond Prathers, *Considerations, Pitfalls and Opportunities That Arise When Advising Same-Sex Couples*, 24 Prob. & Prop. 24 (May/June 2010).

[51] *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 Boston Univ. L. R. 1669 (June 2011) for a discussion of the patchwork of applicable state laws and a constitutional analysis of the current legal limitations. *See also* Susan L. Pollet, *Breaking Up Is Hard[er] To Do; Same-Sex Divorce,* 83 N.Y. State Bar J. 10 at 13 (March/April 2011).

[52] *See e.g.*, *In the Matter of the Marriage of J.B. and H.B.*, Case No. 05-09-01170-CV (consolidated with *In re State of Texas*, Case No. 05-09-01208-CV), (Texas App. – Dallas [5th Dist.] 2010), and Jamie Stengle, *Gay Divorce? Texas Says No*, Huffington Post (April 20, 2010) www.huffingtonpost.com/2010/04/20/gay-divorce-texas-says-no_n_543965.html?view=screen (last accessed Jan. 5, 2011).

[53] Mary P. Byrn &Morgan L. Holcomb, Morgan L., *Wedlocked*, 67 U. of Miami L.Rev. 1 (2012) available at http://open.wmitchell.edu/facsch/247.

[54] *Rogers v. Moran*, Case No. D-10426074-D (Nev. Dist. Ct., Clark County, June 12, 2012). *Christiansen v. Christiansen,* 2011 WY 90, 2011 WL 2176486 (Wyo. Sup. Ct., June 6, 2011). In this case, involving a Canadian marriage, the Court held: "Respecting the law of Canada…for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage. Thus, the policy of this state against the creation of same-sex marriages is not violated" and reversed and remanded the matter to the trial court for further proceeding consistent with its opinion. *Port v. Cowan*, 2012 Md. Lexis 283 (May 18, 2012).

[55] *Hammond v. Hammond*, Docket No. FM-11-905-08-B (N.J. Super. Ct., Mercer County, Feb. 6, 2009).

Until recently, California had a 6-month residence requirement for divorce for at least one member of the marriage. Effective January 1, 2012, California law provides that if a couple married in California but now lives in a state that does not recognize that marriage, California courts have jurisdiction to grant the couple a divorce in the county where the marriage was entered into.[56] Whether this will be afforded recognition outside of California remains to be determined. Also not clear is whether the California courts would entertain a claim for spousal support in a legal separation action by a non-resident couple.

Where divorce is not available, one option would be to rely on that lack of recognition and request an annulment based on the fact that, pursuant to local law, it was never valid. This, however, would likely side-step any ability to seek spousal support as in a dissolution matter. It would also require a separate matter to be filed if there were parenting or property division issues and it creates a new question as to whether it will be recognized as void in other states.

Another option is to obtain a legal separation, which does not have a residency requirement. This leaves the couple unable to enter into another marriage, however. Ideally, during the course of the legal separation, one member of the couple would establish residency in a state that recognizes the marriage, long enough to convert the separation to a dissolution action. There are, of course, due process limitations to this solution. So, a couple married in Massachusetts and living in Arkansas is not likely to be able to file for legal separation in California. But a couple married in California, living in Arkansas, should at least be able to file for a California legal separation.

While mostly an academic issue at this point in time, some states still permit "for cause" divorce and 24 states and territories still have laws making adultery a crime.[57] It is not clear whether the definition of adultery would apply to same-sex individuals as a basis for a "for cause" divorce.[58]

D. Joint Return Filing.

The Code provides, in part, "A husband and wife may make a single return jointly of income taxes under subtitle A."[59] Until 2010, the IRS's position regarding registered domestic partner income tax filing was based on *Poe v. Seaborn*,[60] which since 1930 continues to be good law. *Seaborn* allowed spouses to split income between them for income tax purposes, and to split the couple's community property at death, for estate tax purposes. It also recognized that because state law immediately vests community property in both spouses, treatment of the earner *spouse's* income as half owned by the non-earner spouse does not constitute a transfer for gift tax purposes. Some argue that a taxpayer should be able to rely on this case alone to split earned

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[56] Cal. SB 651 (eff. Jan. 1, 2012).

[57] Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 Fla. L.Rev. 97, n. 19 and accompanying text (Jan. 2011).

[58] *Id.*

[59] IRC §6013(a).

[60] *Poe v. Seaborn*, 282 U.S. 101, 51 S.Ct. 58, 75 L.Ed. 239 (1930). *See also U.S. v. Malcolm*, 282 U.S. 792, 51 S.Ct. 184 (1931), involving a similar community property issue under California law.

income in a community property state that recognizes domestic partnerships.

In the Office of Associate Chief Counsel (Income Tax & Accounting) Chief Counsel Advice ("CCA") 200608038 (Feb. 24, 2006), the Service examined whether California domestic partners must file separate returns and report personal earnings separately, rather than 50% by each member of the couple, as with married couples in community property states. It concluded that *Poe v. Seaborn,*[61] a Washington community property law case, does not apply to a state's community property law outside the context of a heterosexual married couple, and domestic partners must file separate returns and report personal earnings separately.

Then, in May 2010, the Service issued two rulings dealing with federal gift and income tax issues faced by same-sex couples who are RDPs or same-sex married couples under California law (collectively RDP's), reversing its prior position, without revoking CCA 200608038. CCA 201021050 (May 5, 2010) recognized community property rights for California RDPs domiciled in California. The CCA instructs California RDPs that when filing their individual federal income tax returns each partner must report one-half of the community income on his or her federal income tax return.[62]

PLR 201021048 (May 5, 2010), is broader than CCA 201021050. It concluded that Seaborn does in fact apply, contrary to its 2006 conclusion. It specifically provides that (1) a California domestic partner must report one-half of his and his partner's combined income on his federal income tax return, (2) he was entitled to half of the credits for income tax withholding from their combined wages, and (3) the requirement under California community property law that one-half of each domestic partner's wages vest in the other occurred by operation of law and was not a gift by the taxpayer to his partner for federal gift tax purposes. In explaining its ruling, the IRS acknowledged that federal tax law generally respected state property law characterizations.[63]

Private letter rulings, technical advice memoranda, Chief Counsel Advice and similar written determinations of various divisions of the IRS hold little precedential value except with respect to the taxpayer to whom such publication was issued. § 6110(k)(3) of the Code provides that a "written determination" may not be "used or cited as precedent." § 6110(b)(1) of the Code defines the term "written determination" as a "ruling, determination letter, technical advice memorandum, or Chief Counsel Advice." Nevertheless, private letter rulings are often helpful in understanding the position of the IRS with respect to certain issues when a taxpayer faces a similar situation; however, the taxpayer may not rely on those rulings. However, a Chief Counsel Advice, which is prepared by the National Office, does have weight *within* the IRS, where it is recognized by the IRS as providing correct and impartial interpretations of the

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[61] *Poe v. Seaborn*, 282 U.S. 101, 51 S.Ct. 58, 75 L.Ed. 239 (1930).

[62] This CCA applies to tax returns filed for 2007 (the year California extended full community property rights to RDPs) forward and further instructs taxpayers who have filed federal tax returns for 2007, 2008 or 2009 under the previous CCA 200608038 that they may amend their prior year returns, but are not required to do so. Note that Treas. Reg. §1.31-1(a) allows prior withholding, but not estimated tax payments, to be split.

[63] The IRS has extended its holding to domestic partners in Nevada and Washington, which, like California, grant full community property rights to domestic partners. PLR 201021048.

internal revenue laws.[64]

In December 2010, *IRS Publication 17* was amended to provide that "[a] registered domestic partner in California, Nevada, or Washington must report half the combined community income earned by the individual and his or her domestic partner."[65] IRS Publication 555 now addresses the federal tax treatment of income subject to community property laws as applicable to RDPs *domiciled* in California (for tax years after 2006), Washington (where community property has also applied since June 12, 2008) and Nevada (as of 2009), as well as same-sex married couples domiciled in California in a recognized California marriage.[66] A new IRS Form 8958, Allocation of Tax Amounts Between Certain Individuals in Community Property States was issued in November of 2012. That form allows a taxpayer to show how income and deductions were split and facilitates e-filing, which previously was unavailable to couples who income split.

While Wisconsin is a community property state, the right to split earned income has not been extended to registered domestic partners in that state.[67]

Nonresident aliens may not be able to split community property. Only the earner domiciled in the community property state with his or her RDP,[68] and unemployment compensation is a wage replacement, so it should be treated as having the same character as the wages it replaces.

Publication 555 does not distinguish the rights of *heterosexual* couples registered as domestic partners. But, a letter from Department of the Treasury regarding Illinois heterosexual registered domestic partners indicates that "[i]n general, the status of individuals of the opposite sex living in a relationship that the state would treat as husband and wife is, for Federal income tax purposes, that of husband and wife."[69] She goes on to say that "[a]ccordingly, if Illinois treats

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[64] *See* IRM 33.1.3.1.1 (Definition of CCA); IRM 4.46.1 (Overview of LMSB Guide for Quality Examinations).

[65] IRS Pub. No. 17, at 5 (rev. Dec. 8, 2010).

[66] http://www.irs.gov/pub/irs-pdf/p555.pdf (revised March 2012). *See also* IRS Documents, Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in Community Property States, *available at* http://www.irs.gov/uac/Questions-and-Answers-for-Registered-Domestic-Partners-and-Same-Sex-Spouses-in-Community-Property-States (last updated Mar. 22, 2013) and IRS Documents, *Answers to Frequently Asked Questions for Same-Sex Couples, available at* http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Couples (last updated Aug. 4, 2012), which address a number of questions that have been asked by same-sex couples in Washington, California and Nevada, the 3 community property/recognition states.

[67] Wisconsin's domestic partner law provides that "the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage." Wis. Stat. 770.001. Furthermore, "there is no provision in marital (community) property law (ch. 776) that applies the marital property provisions to domestic partners." Thus, income splitting is not permitted.

[68] IRC § 879, Tax treatment of certain community income in the case of nonresident alien individuals, provides that for married nonresident aliens, earned income will be reported by the spouse who earned it. But, the statute refers specifically to spouses. So, it is not clear whether DOMA trumps this section of the Code, allowing RDPs in community property states, where one is a non-resident alien, to split their earned community income.

[69] Letter dated August 30, 2011 from Pamela Wilson Fuller, Senior Technician Reviewer, Branch 2 to Robert Shair, Senior Tax Advisor, H&R Block, *available at* http://law.scu.edu/blog/samesextax/file/IRS%20Civil%20Union%20letter.pdf.

the parties to an Illinois civil union who are of opposite sex as husband and wife, they are considered 'husband and wife' for purposes of § 6013 of the Internal Revenue Code, and are not precluded from filing jointly, unless prohibited by other exceptions under the Code." The effect and authority of this letter remain to be seen, but the letter could open the door to heterosexual unmarried but registered couples filing jointly for both state and federal income tax purposes.

On August 29, 2013, the Department of the Treasury and the IRS announced that same-sex married couples will be treated as married for all federal tax purposes no matter what state they live in. Therefore, if a couple is married in a state that recognizes same-sex marriages, but live in a state that does not recognize same-sex marriages, they can still file a federal income tax return jointly. However, they will still have to file separately for state income taxes. It is important to note that this ruling only affects legal marriages and not civil unions or domestic partnerships. The ruling allows couples to amend their previous taxes returns for any years they were married and within the statute of limitations to amend.

E. Capital Gains

Property passing at death receives a new cost basis for income tax purposes equal to the fair market value of the property as determined for federal estate tax purposes. As a result, the appreciation on the property occurring during the decedent's life is sheltered from income taxation. This benefit is doubled for community property owned at death, as both the decedent's one-half and the surviving spouse's one-half of all community property obtain the new cost basis at the decedent's date of death. This is often referred to as the "double step-up." It will now be available to same-sex married couples residing in community property states, which currently include only Washington and California.

F. Gift and Estate Tax

Until now same-sex spouses reported gifts in excess of the annual exclusion from gift tax on separate gift tax returns. Members of a same-sex married couple may now make a gift of separate property in excess of the annual exclusion from gift tax, and with the other spouse's consent have the gift treated as if it came one-half from each of them. This technique, known as "gift-splitting," allows the gift to be subject to two annual exclusions rather than just the annual exclusion of the donor spouse. The result is that in some cases using any of the donor spouse's applicable exemption amount can be avoided, and in other cases it can be reduced.

Similarly, couples may be eligible for the marital deduction from gift and estate tax as well as being able to use the Deceased Spousal Unused Exemption Amount. They may also be able to split gifts on a federal gift tax return, even when the gift was made from the separate funds of one spouse. Subject to the applicable statutes of limitations, it also may be possible to amend a donor's gift tax return to take advantage of gift splitting.

The Applicable Exemption Amount is currently $5,250,000 (as adjusted annually for inflation). For those clients who might benefit from this exemption, wills should be structured like traditional married couples' wills to take advantage of the maximum estate tax deferral available.

As with gift tax returns, it may be possible, as in *Windsor*, for a surviving spouse to file an amended federal estate tax return to claim a marital deduction and request a corresponding refund.

G. Commuting Community Property to Separate.

Couples may enter into separate property agreements to avoid the requirement that community income vest equally in both members of the relationship and the associated filing requirements. This could result in unintended federal gift tax consequences. For instance, transmutation of community property (other than earned income post registration) to separate property of the earning partner following registration could be treated as a gift from the non-earning partner back to the earning partner.[70] The transmutation of community income into the separate property of both partners in equal shares should not result in gift tax consequences, but the transmutation of one party's share of community property to the separate property of the other would likely be a gift. This can be particularly problematic for registered domestic partners whose property was retroactively converted to community property as of the earlier of the applicable date that community property laws went into effect for registered domestic partners in their state, or their date of registration. Creation of community property between same-sex spouses should no longer trigger gift tax for spouses living in community property recognition states (currently, Washington and California).

H. State Income Tax Returns.

California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, New Jersey, New York, Oregon and Vermont allow same-sex partners to file joint income tax returns and estate tax returns where applicable. Nevada, New Hampshire and Washington do not have individual income taxes. Nevada, New Hampshire and Washington do not have individual income taxes.

I. Federal Tax Exemptions Upon Separation, Dissolution or Death.

There are generally no tax consequences for a division of property in the case of a heterosexual marital dissolution.[71] Revenue Ruling 2013-17 states that all legally married couples will be treated the same no matter in what state they live. Therefore, same-sex couples will now have the same access to tax benefits and obligations as a heterosexual couple has.

However, transfers upon termination of a domestic partnership or civil union may not be eligible

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[70] Patricia A. Cain, *Planning for Same-Sex Couples in 2011*, 17 ALI-ABA Estate Planning Course Materials J. 5, 20 (June 2011) (*citing* Rev. Rul. 75-551, 1975-2 C.B. 378).

[71] IRC §1041 exempts transfers incident to divorce from federal gift tax. Transfers of property and payments between ex-spouses pursuant to a written settlement of marital property rights, or for support of minor children of the marriage, are deemed for adequate consideration, and therefore not a gift, even if the transferor did not actually receive adequate consideration in return for payments to the transferee, provided that the parties divorce within the three-year period that begins one year before the agreement is executed. IRC §2516.

for the federal tax exemptions that apply to married couples, thereby triggering gain or loss.[72] Alternatively, these payments may be taxed as ordinary income to the recipient and may not be treated as a deduction by the payor, or may be treated as a taxable gift.[73]

In Revenue Ruling 68-379,[74] the Service determined that the release of support rights by a spouse constitutes valid consideration in money or money's worth. Therefore there would only be a gift to the extent the value of property exceeded those rights. To the extent it is reasonable to make such an argument, the parties should classify a property transfer as one in return for the release of support rights.

When drafting a separation agreement with respect to the payment of maintenance or alimony, the parties still might consider including a provision such as the following:

> The parties to this Agreement recognize that the tax consequences of an alimony/maintenance payment under Federal income tax law is not settled and is likely to be denied treatment under IRC §71 as deductible by the payor and includible as income by the payee. Because the income tax consequences are uncertain, it is agreed that support maintenance/alimony will be adjusted as follows to take into the tax consequences should they differ from what the parties assumptions (described above):_____.

Furthermore, the payment of an obligation at death to a surviving non-spouse is not deductible as a claim against the estate of the decedent partner, as it is between former spouses.[75]

J. Head-of-Household Status.

To qualify for head of household status, the following tests must be met with respect to the taxpayer:

1. The taxpayer may not be married or be a surviving spouse at the end of the taxable year;

2. The taxpayer must maintain a household which constitutes the principal residence of a qualifying person (defined as a child, step-child, or a descendant of a child of the taxpayer, or any other person who is a

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[72] IRC §1001.

[73] Upon divorce in a heterosexual marriage, the burden of paying income tax on alimony and maintenance is shifted. Alimony or separate maintenance payments are included in the payee spouse's income under IRC §71(a), and the payor of the "alimony or separate maintenance payments" may claim a deduction for such payments under IRC §215.

[74] Rev. Rul. 68-379, 1968-2 C.B. 414. *See also* Rev. Rul. 81-292, 1981-2 C.B. 158 in which the Service determined that "An approximately equal division of the total value of jointly owned property in a state that is not a community property state, under a divorce settlement agreement that provides for transferring some assets in their entirety to one spouse or the other, is a nontaxable division and does not result in the realization of gain or loss."

[75] Treas. Reg. §20.2053-4(d)(5); IRC §2043(b)(2).

dependent of the taxpayer under IRC §152[76]), if the taxpayer is entitled to a deduction for the taxable year for such person under IRC §151; and

3. The qualifying person must have lived with the taxpayer for more than half the year.[77]

IRC §152(f)(3) precludes an individual from being "a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law."[78] Head of household status does not depend upon whether a state recognizes a civil union, domestic partnership or marriage. Rather, head of household status should be available unless that status is illegal under local law (most likely because it violates a state's cohabitation restrictions, which still remain on the books in some states).[79]

K. Dependency Exemptions.

The Code allows a taxpayer to claim a dependency exemption if: (i) the cohabitant receives 50% or more of his or her support from the taxpayer; (ii) the cohabitant is considered a household member of the taxpayer; and (iii) the relationship of the taxpayer and the cohabitant does not violate local law.[80] For purposes of the dependency exemption, a dependent is generally defined by IRC §152(a); non-relative dependents may be recognized if the taxpayer provides a majority of their financial support and they are not being claimed as dependents on another taxpayer's return.[81] Like head-of-household status, dependency exemptions are only allowed to cohabitants whose relationship does not violate local law.[82] If earnings are split in a community property state, both partners will be treated as paying for their own support, resulting in the working partner no longer being able to claim the non-working partner as a dependent. Whereas, where one partner is the sole earner and claims her partner as a dependent for purposes of the dependency exemption, the domestic partner health benefits received through an employer are

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[76] IRC §152 was amended by §501(c) of Pub. L. No. 110-351, The Fostering Connections to Success and Increasing Adoptions Act of 2008, effective for tax years beginning after Dec. 31, 2008.

[77] IRC §2(b)(1)(A).

[78] IRC §152(f)(3). *But see infra* n. 79.

[79] *See* Fla. Stat. §798.02; Mich. Comp. Laws Serv. §750.335; Miss. Code Ann. §97-29-1; S.C. Code Ann. §16-15-60 (based on definition of fornication which includes cohabitation); Va. Code Ann. §18.2-345. However, as the Supreme Court has struck down all laws prohibiting private sexual contact between consenting adults, it appears that domestic partnerships between persons of the same or opposite sex cannot be deemed a violation of local laws. *Lawrence v. Texas*, 539 U.S. 558 (2003). Accordingly, it is not clear that this requirement is enforceable.

[80] IRC §151(c), Treas. Reg. §1.151-1(a)(1)(iv) and IRC §152(f)(3), which preclude an individual from being a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.

[81] *See* IRS Notice 2008-5, 2008-1 C.B. 256 (allowing a dependency exemption deduction for the child of the taxpayer's unrelated friend where the "friend" was not required by IRC §6012 to file an income tax return and did not, in fact, file a return). *See also Leonard v. Comm'r*, T.C. Summ. Op. 2008-141, Docket No. 12719-07S, 2008 WL 4822173 (U.S. Tax Ct. Nov. 4, 2008), where the Tax Court permitted a *pro se* taxpayer to take dependency exemption deductions for the two grandchildren of an adult woman with whom the taxpayer had been living for 11 years.

[82] Treas. Reg. §1.152-1(b). *But see supra* note 79.

not taxable. On the other hand, because the non-working partner is now reporting half of the earned income, she may be able to claim the personal exemption deduction, instead of being claimed as a dependent.

L. Mortgage Interest Deductions.

Section 163(h)(2) of the Code generally permits a deduction for interest paid on home mortgage acquisition indebtedness and home equity loans on a qualified residence (as defined by IRC §163(h)(3)(A)). The statute limits the deduction to interest on the first $1 million of mortgage indebtedness and $100,000 of home equity indebtedness. Spouses must split these amounts if filing separately.

In *Sophy v. Comm'r* the U.S. Tax Court held that the statutory caps apply the same way for married couples and unmarried couples.[83] They argued that the deduction applies per residence and not per taxpayer, effectively eliminating one of the few benefits that unmarried partners otherwise assumed existed.

M. Obligation of Support.

Donative transfers between non-spouses may be taxable gifts if in excess of the annual exclusion, which is $14,000 in 2013.[84] Yet, parties to a domestic partnership or civil union have a legal obligation to support each other under state law, and "gift tax is not applicable to a transfer for a full and adequate consideration in money or money's worth."[85] Support in excess of the annual exclusion from one partner in excess of the value received from the other *may* still be characterized as a gift under IRC §2503(b) or taxable compensation under IRC §61, even if required by state law.

In TAM 8135032 (June 1, 1981), the IRS suggests that where a legally enforceable obligation to support exists pursuant to local law, certain transfers would not be treated as gifts (however, the transfers at issue in this case were found not to be pursuant to legal obligations). In PLR 8225091 (March 25, 1982) the IRS determined that "to the extent that current income of the trust is applied in satisfaction of the donor's legal obligation to support or maintain his parents there is no gift." Thus it is possible that an argument could be made that the support of a partner pursuant to local law is not a gift.

Revenue Ruling 2013-17 ensures that all legally married couples will be treated identically for federal tax purposes. Therefore, same-sex spouses will now enjoy the freedom to gift to each other without restriction for federal purposes.

N. Adoption Credits.

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[83] *Sophy v. Comm'r*, 138 TC No. 8 (March 5, 2012).

[84] I.R.C. §2503(b). Gifts to a noncitizen spouse in 2013 are not included in the donor's annual amount of taxable gifts under I.R.C. §2503 or §2523(i)(2) up to $143,000.

[85] Treas. Reg. §25.2511-1(g)(1).

Generally, an adoption tax credit is available, beginning in 2013, under IRC §23.[86] The maximum adoption credit will be $12,970 (gradually phased out for taxpayers with modified AGI between $194,580 and $ 234,580). A married couple is limited to one credit, and the credit is not available for expenses incurred in the adoption of a spouse's child if the spouse does not concurrently give up parental rights.[87] Previously, because DOMA caused an unmarried couple to be treated as legal strangers, both partners were eligible for the credit, subject to a qualifying AGI. However, after the overturn of DOMA, same-sex couples will be limited to one credit. In addition, when an unmarried individual adopts a partner's child, this is not a joint adoption, and an adopting partner with a qualifying AGI is eligible for the full credit.[88]

O. Taxation of Domestic Partner Benefits.

When an employer provides health insurance for the spouse or dependents of an employee, federal income tax law allows the value of the health insurance coverage to be excluded from the employee's gross income.[89] When an employer provides the same health insurance coverage for the partner or the dependents of the partner of an employee, the fair market value of that coverage, including the employee's pre-tax contributions, is treated as imputed income of the employee and must be reported by the employee.[90] Additionally, employees cannot use pre-tax dollars to pay for a domestic partner's coverage, precluding them from the full benefits of an FSA or HSA.

Because the imputed income increases the employee's overall taxable income, it also increases the employer's payroll taxes - the Social Security and unemployment insurance taxes. As a result, an employer's must pay higher payroll taxes for that imputed income as well. Even where partner A receives health insurance through partner B's trade or business, it would not be a valid self-employment health insurance deduction for partner A, only partner B.[91]

However, if the employee's domestic partner is a qualifying dependent, the value of the health insurance coverage should be eligible to be excluded for federal tax purposes.[92] This also appears to apply to a same-sex Massachusetts, California and foreign marriage.

Now that §3 of DOMA is invalid, the same benefits should be extended to legally married same-

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[86] Rev. Proc. 2011-52; 2011-45 IRB 701 (Oct. 20, 2011).

[87] IRC §23(d)(1)(C).

[88] Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 Wash. & Lee L.Rev. 1529, 1580 (2008).

[89] IRC §106(a); §105(a). Although several states have legislatively exempted domestic partner benefits from state income tax.

[90] IRC §61(a) and Treas. Regs. §§1.61-21(a)(3) and (a)(4). *See* Patricia A. Cain, *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F.L. Rev. 481 (Fall 2010).

[91] IRS Pub. No. 502, at 23 (Mar. 3, 2011).

[92] Treas. Reg. §1.106-1. A qualifying dependent is one that: (i) has the same principal place of abode as the employee; (ii) receives over half of his or her support from the employee (an employed domestic partner is likely to fail this test, and the community property implications of registered domestic partners in Washington, California and Nevada also affect this test; (iii) is not anyone's qualifying child; and (iv) is a citizen or nation of the U.S. or a resident of the U.S. or a country contiguous with the U.S. IRC §152(d).

sex couples. Even though the IRS has not issued guidance on the subject, technically employers no longer have to withhold FICA or federal income tax on imputed income for medical, dental and vision benefits provided to a same-sex spouse under an employer's health plan. Nor should they be required to pay their portion of FICA and federal unemployment taxes.

IV. Federal Preemption, Federal Benefits and Federal Programs

A. Background.

Employers are not generally required to provide employee benefits. But, once they do, a whole host of laws apply. One of those laws, the Employee Retirement Income Security Act ("ERISA")[93] provides that title I of ERISA supersedes all state laws insofar as they "relate to" an ERISA plan. Federal preemption over state law applies to assets such as Treasury bonds, and to federal pensions, ERISA regulated pensions, and Medicare and Social Security benefits.[94] Accordingly, there is no federal law basis for resolving state law domestic partnership ownership issues concerning employee benefits between current and former domestic partners. State law equitable remedies must be relied upon instead. However, employee benefits that are not part of an ERISA, such as unpaid family leave, family use of employer facilities, family discounts, memberships, and similar fringe benefits are subject only to state regulation.

On June 2, 2010, President Obama signed an executive memorandum directing all federal agencies to extend fringe benefits to gay and lesbian employees, to the extent permitted by DOMA.[95] These benefits include long-term care insurance and expanded sick leave for civil service employees and medical care abroad, eligibility for employment at posts, relocation expenses, cost-of-living adjustments abroad and medical evacuation for domestic partners of foreign service members. It also requires agencies that extend any new benefits to employees' opposite-sex spouses to make those benefits available on equal terms to employees' same-sex domestic partners to the extent permitted by law. Now that § 3 of DOMA is unconstitutional, presumably all federal benefits will be provided to legally married same-sex couples.

A. Non-Spouse Rollover Provision for Retirement Plans.

Before 2007, inherited retirement plan benefits could not be rolled over to an IRA on a tax-free basis if the deceased participant's beneficiary was anyone other than a spouse.

§ 829 of the Pension Protection Act of 2006[96] ("PPA") added IRC §402(c)(11)(A), effective

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[93] §514(a), 29 U.S.C. §1144(a).

[94] ERISA does not apply to certain plans, such as: federal, state or local government plans, including those of certain international organizations; religious or religious-affiliated plans; plans established by employee organizations such as unions; plans maintained solely to comply with state workers' compensation, unemployment compensation or disability insurance laws; plans maintained outside the United States primarily for non-resident aliens; and unfunded excess benefit plans, which are those that are maintained solely to provide benefits or contributions in excess of those allowable for tax-qualified plans.

[95] Office of the Press Secretary, The White House, "Statement by the President on the Extension of Benefits to Same-Sex Domestic Partners of Federal Employees," 2010 WL 2211943 (June 2, 2010).

[96] Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C).

January 1, 2007, allowing a non-spouse designated beneficiary to directly rollover qualified retirement plan benefits, via plan-to-plan transfer, to an "inherited individual retirement account" (an IRA opened after the participant's death, in the name of the deceased participant payable to the beneficiary). In IRS Notice 2007-7 the Service provided that qualified plans were not required to allow such non-spouse beneficiary rollovers.

The Worker, Retiree and Employer Recovery Act of 2008 (WRERA)[97] made the ability to rollover a plan mandatory by a non-spouse. As of January 1, 2010, all qualifying plans were required to permit any non-spouse beneficiary to roll over inherited retirement benefits paid in the form of a lump sum to an inherited IRA on a tax-free basis.[98]

The new laws affect tax-qualified retirement plans — including defined benefit plans (pensions) that pay benefits in the form of a lump sum, 401(k) plans, employee stock ownership plans (ESOPs), profit-sharing plans and money purchase plans — as well as some 403(b) plans and governmental 457(b) plans.

The law is unsettled as to whether a non-spouse beneficiary of a traditional IRA may convert that inherited account to a Roth IRA.

B. Defined Benefit Plan Survivor Annuities.

ERISA mandates that qualified defined benefit plans make benefits payable in certain forms of distributions. A death benefit must be provided for an opposite-sex surviving spouse if the participant dies prior to retirement. The default benefit distribution form under ERISA for a single or non-married individual is a single life annuity. In contrast, when a participant is married, ERISA mandates that the default benefit distribution form be a qualified joint and survivor annuity ("QJSA") or qualified pre-retirement survivor annuity ("QPSA"), which guarantees the spouse of the employee a benefit in the event of the employee's death.

Now that the federal definition of "spouse" to include those in same-sex marriages, plans will likely be required to provide a QJSA or QPSA to the same-sex domestic partner or spouse of a participant. Before, employers were not required but could provide such benefit payments for same-sex couples.

C. QDROs.

For domestic partners, there is no federal provision for a qualified domestic relations order ("QDRO"), an order issued by a state court in a domestic relations proceeding, dividing retirement plan benefits held by an employee pursuant to a marital dissolution.[99]

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[97] Pub. L. No. 110-458, 122 Stat. 5092 (codified as amended in scattered sections of 26 U.S.C.).

[98] *See* IRS Notice 2008-30, IRB 2008-12.

[99] ERISA §206(d)(3)(C)(i)-(iv) (codified at 29 U.S.C. §1056(d)(3)); IRC §414(p)(2)(A)-(D) contains the requirements for a valid QDRO. *See* Albert Feuer, *Who is Entitled to Survivor Benefits from ERISA Plans?* 40 J. Marshall L. Rev. 919 (Spring 2007) for a discussion of the requirements of DROs and QDROs.

While a state court may issue a QDRO that purports to require a retirement plan to make distributions to a former partner in a dissolved domestic partnership, ERISA recognizes the rights of a spouse (among other persons), but not a domestic partner to receive all or a part of a participant's interest in a retirement plan.

ERISA plans are not bound by state-court orders that conflict with ERISA, and federal DOMA provided that ERISA preempts the application of state law to retirement plans.[100] While an ERISA plan must follow a state court domestic relations order that qualifies as a QDRO, it is not likely that a domestic partner will be able to enforce a QDRO. On the other hand, not complying with the terms of a QDRO could be grounds for a state law cause of action for contempt against the plan administrator. It is not clear whether a plan can be amended to recognize the rights of a domestic partner to a QDRO.

Generally, the anti-alienation provisions of ERISA protect a plan participant's benefits from being assigned to another party, except under limited circumstances, where the party meets the definition of an "alternate payee," and the order issuing such payment meets the criteria of a QDRO. ERISA defines the term "alternate payee" as any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. Whether an individual qualifies as a dependent is based on the definition found in IRC §152(d)(2)(H). IRC §152(d)(2)(H) defines the term "dependent" as "an individual (other than the spouse of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household."

In *Owens v. Automotive Machinists Pension Trust,*[101] the Ninth Circuit held that Norma Owens, who had been in a non-marital relationship with Phillip Owens for over 30 years, was entitled to half of Mr. Owens' monthly pension benefit pursuant to a valid QDRO. The Ninth Circuit Court recognized Norma qualified as an "other dependent" under IRC §152(d)(2)(H) and therefore an "alternate payee" pursuant to 29 U.S.C. §1056(d)(3)(B)(i)(I). Note, however, because the recipient of the QDRO interest is a dependent, not a spouse, Mr. Owens would be the taxpayer for the entire payment.[102] Had Ms. Owens been a spouse and not an "other dependent" she would have been the proper taxpayer.

Whether an individual qualifies as a dependent is based on the definition found in IRC §152(d)(2)(H), which defines a "dependent" as "an individual (other than the spouse of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household."

Another approach that has been successfully used by some practitioners is to obtain a domestic relations order or "DRO." This is an order issued by the court that binds the employee to share a percentage of his or her post-tax retirement payment when it is actually received, but is not

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[100] ERISA §514(s) (codified at 29 U.S.C. §1144(a)).

[101] 551 F.3d 1138, 1141 (9th Cir. 2009).

[102] IRC §402(e)(1)A).

binding on the plan administrator. A DRO would not violate ERISA, but it also requires the non-employee partner to wait for the employee partner to begin taking payments and perhaps seek specific performance.

D. COBRA.

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")[103] requires most employers to offer certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage in the event that their coverage ends due to certain events such as divorce, job termination or a reduction in work hours.[104] It is likely that COBRA will now apply to same-sex spouses as well.

E. Social Security.

Generally, ERISA precluded recognition of a surviving domestic partner or same-sex spouse.[105] However, certain exemptions allow for limited recognition. Where a marriage between persons of the opposite sex occurs and one spouse subsequently undergoes gender transition surgery, DOMA did not preclude a surviving spouse or former spouse (who would otherwise be eligible) from receiving Social Security benefits that would otherwise have been available had the surgery not occurred Currently the Social Security Administration is limited to offering benefits only to those couples living in states that recognize same-sex marriage.[106] It is likely that the Administration will end up following the place of celebration rule as well because if it continues to follow the place of residency rule, it would unconstitutionally deny federal benefits to same-sex couples.

For purposes of determining eligibility, the Social Security Act defines a "child" by reference to the relevant state inheritance statute.[107] Where state law provides that parentage laws apply to same-sex couples and married couples in the same manner, so that the natural child of one member of the relationship is deemed to be the child of the other for purposes of intestacy law, then the non-biological child of a member of the relationship is eligible for Social Security benefits based on his or her relationship to the non-biological member of the couple.[108]

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[103] Pub. L. No. 99-272, 100 Stat. 82 (1986).

[104] IRC §4980B; ERISA §601, §607 (now codified at 29 U.S.C. §1161, §1167). These rules generally don't apply to employers who typically employ fewer than 20 employees per day in the prior calendar year. §4980B(d)(1).

[105] Social Security Handbook §306.1 A. Footnote (last revised Sept. 1, 2009).

[106] Social Security Programs Operations Manual System, Windsor Same-Sex Marriage Claims (August 2013), *available at* https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM.

[107] 42 U.S.C. §416(h)(2)(A). A surviving spouse for purposes of Social Security survivor benefits is also determined based on recognition under state law, 42 U.S.C. §416(h)(1)(A)(i), resulting in disparate treatment for heterosexual couples where one member of the couple has undergone gender reassignment surgery either before or after the marriage.

[108] Steven N. Engel, Deputy Assistant Attorney General, Memorandum Opinion for the Acting General Counsel Social Security Administration, *Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits under the Social Security Act* (Oct. 16, 2007), *available at* http://www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf.

Furthermore, California,[109] Oregon and Vermont, Washington[110] now have presumptions of parentage for domestic partners. There is now a basis for a child to obtain benefits based on a relationship to a disabled non-biological partner.

Some practitioners advocate preparing for Social Security benefits now, in the event they later become available. If a partner or spouse would be eligible for benefits but for living in a state that does not recognize same-sex marriages, one approach would be to apply for benefits now, knowing they will be denied, and then file an appeal. Because DOMA was repealed, the benefits, including back benefits, may then be granted.

F. Medicare and Medicaid

Because Medicaid is determined based on the state of residency, same-sex couples in non-recognition states still will not be eligible to receive spousal benefits. Further, Medicaid eligibility takes into account both spouses' incomes if you are married which may disqualify same-sex married individuals. HHS has announced certain changes it is making while implementing the repeal of DOMA including ensuring that same-sex spouses will have access to equal coverage under Medicare when it comes to care in a nursing home where their spouse lives.[111] This announcement was presented as "guidance" and may be an indication that same-sex couples will receive all Medicare and Medicaid benefits no matter what state they live in.

The Social Security Act (the "Act")[112] allows certain exceptions for legal spouses under Medicaid's authority to take action against the assets of a benefits recipient, either by filing a lien against real property, by seeking to void certain asset transfers, or to recover against the estate of a Medicaid beneficiary.[113] Generally, a lien may not be filed against the real property of a Medicaid recipient where the real property is occupied by a spouse, transfers of assets to spouses are protected from Medicaid recovery, and actions to enforce a lien against an estate are precluded where there is a surviving spouse.

§§ 1917(b)(3) and 1917(c)(2)(D) of the Act provide certain exemptions if application of the strict rules were to create an undue hardship. An undue hardship exists when application of the transfer of assets penalty and denial of eligibility for Medicaid payment for long-term care would deprive the individual of medical care such that the individual's health or life would be endangered, or the individual would be deprived of food, clothing, shelter, or other necessities of

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[109] Cal. Fam. Code §297.5(d).

[110] Under RCW 26.26.116, a person is presumed to be the parent of a child if that person and the mother of the child are registered and the child is born during the term of the registration, or within 300 days of the registration's termination by death, annulment, dissolution of marriage, legal separation, or declaration of invalidity.

[111] Press Release, U.S. Department of Health and Human Services, HHS announces first guidance implementing Supreme Court's decision on the Defense of Marriage Act (August 29, 2013) *available at* http://www.hhs.gov/news/press/2013pres/08/20130829a.html.

[112] The Social Security Act is codified at Chapter 7 of Title 42 of the U.S. Code. *See generally* 42 U.S.C. §§301-1399.

[113] Section 1917(a)(2) of the Social Security Act (codified at 42 U.S.C. §1396p).

life.[114]

HHS has given states flexibility to design reasonable criteria for determining what constitutes an undue hardship and who may be afforded protection from estate recovery, which may include extending protections previously afforded spouses to the domestic partner of a deceased Medicaid recipient.[115] As a result, states that recognize other legal relationships may provide hardship exemptions.[116]

G. Military Benefits.

Registration or marriage previously violated the Military "Don't Ask Don't Tell"[117] policy applicable to those serving in the U.S. military. With the repeal of those rules, discrimination based on sexual orientation is no longer permitted in the military. The Secretary of Defense issued a memorandum requiring that all branches of the U.S. Military revise their policies so that same-sex domestic partners of Service members and their families receive all benefits by October 1, 2013.[118] After the repeal of DOMA, the Department of Defense announced that it will begin implementing changes to ensure same-sex married couples receive the same benefits as heterosexual married couples.[119]

H. Domestic Partner Employee Benefit Hardship Withdrawals.

Employee benefit plans may allow a participant to withdraw funds from the plan due to certain financial hardships, which generally include unreimbursed expenses described in Treas. Reg. §§1.401(k)-1(d)(3)(iii)(B)(1), (3), or (5) (relating to medical, tuition, and funeral expenses, respectively), incurred by the participant, the participant's spouse or federally-defined tax dependents. Prior to enactment of the Pension Protection Act of 2006[120] (the "PPA"), an

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[114] The Deficit Reduction Act of 2005 (DRA, Pub. L. No. 109-171). The Centers for Medicare & Medicaid Services has provided guidance on undue hardship determinations in the State Medicaid Manual and in a State Medicaid Director letter, The Centers for Medicare & Medicaid Services, SMD #06-018 (July 27, 2006) emphasizing that States have considerable flexibility in determining whether undue hardship exists, and the circumstances under which they will not impose transfer of assets penalties.

[115] Center for Medicaid, CHIP and Survey Certification, SMDL # 11-006 (June 10, 2011), *available at* www.cms.gov/smdl/downloads/SMD11-006.pdf.

[116] WAC 182-513-1367 now permits hardship waivers for transfers between RDPs and legally recognized same-sex marriages in Washington. Such a transfer will not cause a period of ineligibility if made between an opposite sex married couple under WAC 182-513-1363.

[117] Pub.L. 103-160, §571, 107 Stat. 1547, 1670-1673 (1993) (codified at 10 U.S.C. §654).

[118] Memorandum for Secretaries of the Military Departments Acting Under Secretary of Defense for Personnel and Readiness, *Extending Benefits to Same-Sex Domestic Partners of Military Members* (February 11, 2013), *available at* http://www.defense.gov/news/Same-SexBenefitsMemo.pdf.

[119] Memorandum for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness (August 13, 2013, *available at* http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf. But note that in certain instances, states have refused benefits to members of their military forces. For example, the Texas National Guard refused to provide benefits to same-sex spouses citing the Texas constitutional prohibition on same-sex marriage.

[120] Pub. L. No. 109-280, 120 Stat. 780 (2006).

employee benefit plan could only allow a participant to receive a hardship withdrawal due to a financial hardship affecting the participant, a spouse or dependent of the participant. § 826 of the PPA permits hardship withdrawals from a plan for certain expenses for a "beneficiary" under the plan, beginning on August 17, 2006.

A primary beneficiary is an individual who is named as beneficiary under the plan and has a right to all or a fraction of the participant's account balance following the death of the participant, which need not be a spouse.

§ 826 of the PPA applies to most retirement plans, including 401(k) plans, 403(b) plans, 457(b) plans, employee stock ownership plans (ESOPs), profit-sharing plans, and nonqualified deferred compensation plans. It does not apply to defined benefit plans (pensions) or money purchase plans. Furthermore, state and local government 457(b) plans and nonqualified deferred compensation plans may permit hardship withdrawals only to pay for expenses associated with an unforeseeable emergency.

An employer is not required to permit hardship withdrawals. If an employer's plan has not previously permitted hardship withdrawals and the employer now wishes to do so, an amendment will be needed by the end of the plan year in which hardship withdrawals are first offered.

I. Flexible Spending Accounts and Health Savings Accounts.

Flexible Spending Accounts (FSAs), permitted under IRC §125 (often referred to as "cafeteria plans"), allow employees to use pre-federal-tax dollars to pay for medical and dental as well as dependent care expenses for themselves, spouses or qualifying dependents as defined by IRC §152.[121] Medical expenses of a non-dependent domestic partner are not eligible for tax-free reimbursement from an FSA, even if the employer offers partner health insurance benefits. Nevertheless, while a domestic partner may not be given the opportunity to select or purchase benefits offered by the plan, a domestic partner may benefit from the employee's selection of family medical insurance coverage or of coverage under a dependent care assistance program.

An FSA may provide that plan participants may change their plan elections (including revoking a prior election) if there is a "change in status event." A change in marital status is a "change in status event."[122] Now, because of the repeal of DOMA, a same-sex marriage, domestic partnership or civil union will likely qualify as a "change in status event."

As with an FSA, medical expenses incurred by or on behalf of domestic partners (and their children) that are not qualifying dependents under IRC §152 are not eligible for tax-free

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[121] Treas. Reg. §1.106-1. A qualifying dependent is one that: (i) has the same principal place of abode as the employee; (ii) receives over half of his or her support from the employee (an employed domestic partner is likely to fail this test and the community property implications of registered domestic partners in Washington, California and Nevada also affect this test;, (iii) is not anyone's qualifying child; and (iv) is a citizen or nation of the U.S., or a resident of the U.S. or a country contiguous with the U.S. IRC §152(d).

[122] Treas. Reg. §1.125-4(c)(2)(i).

reimbursement from a Health Savings Account (HSA) used in conjunction with high deductible healthcare plans. Similar change in status event rules apply as well.

J. Family and Medical Leave Act (FMLA).

Under the Family and Medical Leave Act ("FMLA"),[123] enacted by Congress in 1993, certain employers with 50 or more employees must grant eligible employees up to 12 work weeks of unpaid leave during any 12-month period to care for a family member,[124] including a newborn child, or a newly placed adopted or foster child, to care for an immediate family member (spouse, child, or parent) with a serious health condition, or when the employee cannot work due to a serious health condition.

The OPM has issued regulations making it explicit that the *in loco parentis* provisions of the Act[125] allow federal workers to take leave to care for a stepchild as well as the child of an ill domestic partner or same-sex spouse.[126] While the OPM has the power to add explicit language to the interpretive regulations to the FMLA, the changes do not apply to the Family and Medical Leave Act itself, which only Congress can change.

Now that § 3 of DOMA is repealed, it is more likely that an employee will be eligible for FMLA leave to care for a spouse, regardless of such spouse's gender.

K. Bankruptcy.

It was long assumed that same-sex married couples would be barred from filing a bankruptcy petition jointly.[127] In *Kandu*, the Court opposed a bankruptcy petition filed by two women who had previously married in British Columbia, on the grounds that federal law prohibited their marriage. Lee Kandu (Ann Kandu died prior to trial) argued that the federal DOMA should not be construed to apply to the word "spouse" in the Bankruptcy Code, and that to apply it that way would violate the 10th Amendment's reservation of unenumerated powers to the states. She also contended that DOMA violates the federal right to marry under the Constitution's guarantees of due process and protection of sexual orientation under the equal protection clause. Finally, she argued that there is no rational justification for DOMA. The Court determined that the federal DOMA precludes same-sex marriage and thus public policy prevented its recognition by the Court.

But DOMA barrier is beginning to break down in the bankruptcy realm, among others. In a California bankruptcy case involving registered domestic partners, *In re Rabin*,[128] the Ninth

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[123] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§2601-2654).

[124] As defined by 29 CFR 825.122.

[125] 29 U.S.C. §2611(7) (2006).

[126] 5 C.F.R. pt. 630.201.

[127] *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

[128] 336 B.R. 459 (9th Cir. 2006).

Circuit determined that registered domestic partners, like married couples, would only be entitled to one homestead exemption. Washington, like California, limits the marital community to the same homestead exemption available to an individual.[129] Furthermore, a bankruptcy judge in the United States Bankruptcy Court for the Central District of California issued a decision in the case of *In re Gene D. Balas and Carlos A. Morales,*[130] in which the court held that DOMA, as applied to a same-sex couple legally married under state law, violated the couple's equal protection rights afforded under the Fifth Amendment of the United States Constitution, and therefore allowed them to file a joint petition for relief.

In a less publicized case, a New York bankruptcy judge also denied the U.S. Trustee's motion to dismiss a joint Chapter 7 case filed by a same-sex couple who had been legally married. The court held that "cause" did not exist under 11 U.S.C. §707(a) to dismiss the case solely on the basis of DOMA, which the executive branch had declined to enforce.[131]

With the repeal of DOMA, federal bankruptcy judges are justified in ignoring its existence with respect to the cases within their jurisdiction.

L. Copyrights.

Generally, copyrights have been granted for a fixed term, with the possibility of renewal for a further term. Beginning in 1978, the United States changed the renewal rules and extended the term of a copyright.[132] In the case of individual authors (not subject to work for hire arrangements), the renewal and termination rights belong to the individual. At the individual's death, the class that may exercise those rights includes the author's surviving spouse or children.[133]

Where same-sex marriage is permitted, whether a same-sex surviving spouse may exercise renewal or termination rights under the Copyright Act remains to be seen. Again, generally, a same-sex marriage is governed by state law. Both the statutory definition of spouse,[134] as well as the Copyright Office's internal practice manual for staff, recognize that whether a union is a valid marriage is a question governed by state law where the individual lives. Living in a non-recognition state may prevent the Copyright Office from recognizing a surviving same sex spouse. This may create a period of confusion as to who holds the rights to renew a copyright until the state of the law is sorted out.

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[129] RCW 6.13.020.

[130] 449 B.R. 567 (June 2011).

[131] *See In re Somers*, 448 B.R. 677 (May 2011).

[132] An individual author of a copyrighted work created in 1978 or thereafter and which was not a work for hire has a copyright which lasts until his or her death and then for another 70 years (extended in 1998 to 95 years in some cases). 17 U.S.C. §§302(a), 304(b).

[133] 17 U.S.C. §304(c)(2)(A) (termination); 17 U.S.C. §304(a)(1)(C)(ii) (renewal).

[134] 17 U.S.C. §101 defines "widow" or "widower" as "the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried."

V. Wills, Revocable Trusts, and Nonprobate Transfers

As indicated above, state and federal laws contain default statutes giving spouses various rights to a spouse's intestate estate, the right to handle funeral arrangements, and Social Security survivor benefits, as well as the right to serve as a surrogate decision-maker. For the most part, unmarried and same-sex couples do not enjoy these default rights. The estate planning documents discussed below are the same as those used for opposite-sex couples, with additional, specialized drafting, to close the legal gap and avoid potential conflict.

A. Wills.

There are certain powers that are often statutorily limited to exercise under a will, including: the ability to name a guardian of minor children (in some states),[135] the exercise of a testamentary power of appointment;[136] and gifts of tangible personal property by separate writing.[137] Consequently, in some instances, having a will is critical.

A testamentary gift to an unmarried partner, especially a same-sex partner, may if often subject to challenge by the decedent's relatives. As a result, other forms of testamentary transfers, such as joint tenancy with right of survivorship (discussed below), beneficiary designations and revocable trusts, may be used as will substitutes.

B. Revocable Trusts.

Many clients establish revocable trusts to transfer assets to a partner outside of probate. Revocable trusts are also useful as vehicles for the management of a client's assets in the event of incompetence. Some practitioners advise that if a client anticipates that his or her will may be contested, it may be prudent to establish a revocable trust, which may be more difficult to challenge on theories such as incompetence or undue influence. If the estate is not taxable, then the beneficiary need not ever report receiving the gift. But, if there is a taxable estate, estate tax apportionment between family members and a surviving partner may compromise a primary beneficiary's ability to keep the receipt of assets entirely confidential from a decedent's family members since a trustee is likely to have common law as well as state statutory duties to disclose such information.[138]

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[135] RCW 11.88.080. Effective July 24, 2005, RCW 11.88.080 was amended to permit designation of a guardian for a minor child in a durable power of attorney, effective upon either the death or incapacity of the parent/principal. This designation may also authorize an agent to make health care decisions on behalf of the minor if no other parent or legal guardian is available to give consent.

[136] RCW 11.95.060(2).

[137] RCW 11.12.260.

[138] Trustees "are required to make full disclosure of all facts within their knowledge which are material for beneficiaries to know for the protection of their interests. *In re Dryden's Estate,* 155 *Neb.* 552, 52 *N.W.2d* 737, 746 (*Sup. Ct.* 1952); *Mayfield v. First National Bank of Chattanooga, Tenn.,* 137 *F.2d* 1013, 1018 (6 *Cir.* 1943); *Zottarelli v. Pacific States Savings & Loan Co.,* 94 *Cal. App.* 2*d* 480, 211 *P.2d* 23, 28 (*D. Ct. App.* 1949); see *comment* (d) to §173, *Restatement, (Second) of the Law of Trusts, pp* 378-379; and *see generally Bogert, Trusts & Trustees* (2*d ed.* 1952), §961, and 2 *Scott, Trusts* (3*rd ed.* 1967), §164." *Branch v. White,* 99 N.J.Super. 295, 306,

(continued . . .)

C. Beneficiary Designations.

Clients should confirm beneficiary designations for bank accounts, investment accounts, life insurance and retirement accounts. They may also consider restating those designations in their will or revocable trust as additional evidence in the event of a challenge by hostile family members.

D. Miscellaneous Considerations and Definitions.

With any estate planning document, definitions need to be carefully considered.

1. Partner.

In Washington, RCW 11.12.051 provides for the revocation of a provision in a will for a spouse upon divorce, and RCW 11.07.010 provides for the revocation of a beneficiary designation naming a spouse as beneficiary of certain nonprobate assets. No equivalent statutes apply to a partner upon separation. Therefore, it is important to define "partner" carefully. A partner may be "the person living with me at my death," but consideration should also be given to the possibility of temporary job relocation or one person having moved to a residential care facility.[139] One option is to provide specific guidelines for the personal representative, who would make a final and binding determination as to whether an individual was a partner at the time of death.

(a) The following is an example of a definition of life partner where the parties have entered into a legal relationship:

The term "Life Partner" shall be deemed to mean _____, if he/she at the time of my death, was (i) cohabitating with me in a committed relationship and (ii) not separated from me by reason of domestic discord, unless and until one of the following circumstances should occur:

i. If our Washington State domestic partnership registration is recognized in the state in which we are residing, and either of us files for dissolution, termination or annulment of such Washington State domestic partnership registration in a state that recognizes such registration; or

ii. _____ and I marry, and subsequently either of us files for dissolution, termination or annulment of the marriage in a state that

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(. . . continued)

239 A.2d 665 (App. Div.), *cert.. denied,* 51 N.J. 464, 242 A.2d 13 (1968). *See also* Scott Bieber, *Trustee's Duties Extend to Remainder Beneficiaries Too*, 38 Est. Pl. 23 (Nov. 2011).

[139] Gail E. Cohen, *Estate Planning for the Unique Needs of Unmarried Partners*, 30 Est. Plan. 188, 189 (April 2003).

recognizes such marriage; or

iii. _____ and I reside in a state that does not recognize the Washington State domestic partnership registration or a subsequent marriage of _____ and me, and I deliver to the Personal Representative/Trustee a signed, written instrument declaring that _____ is not my Life Partner.

For all purposes of this Paragraph, an individual shall be deemed to have been "cohabitating with me in a committed relationship" if at the time of my death said individual and I have lived together as a couple for three hundred (300) of the previous three hundred sixty-five (365) days; provided, however, that in calculating the number of days we have lived together any days that we spent living separate and apart due to travel required for business or for the educational needs or the medical needs of either of us shall be excluded.

Any determination of whether an individual is my Partner for purposes of this Agreement shall be made in my Personal Representative/Trustee's sole discretion and shall be binding and conclusive on any individuals interested in any trust established under this Will/Agreement.

(b) If a couple is in a legally recognized relationship, it is good practice to incorporate that fact into the definition. For example:

_____ and I were legally married in California on _____. Accordingly, throughout this Will, all references to _____ shall be construed as references to my "spouse" to the fullest extent of applicable federal, state and local law.

(c) If the parties have not entered into a legal relationship but are cohabitants, the following could be used:

The term "Life Partner/Partner/_____" shall be deemed to mean _____, if he/she at the time of my death, was (i) cohabitating with me in a committed relationship and (ii) not separated from me by reason of domestic discord, unless and until one of the following circumstances should occur::

i. A written notice of the termination of our relationship has been provided by one of us to the other.

ii. _____ is no longer cohabitating with me in a committed relationship and either party has no intention of resuming the committed intimate relationship.

iii. If we file for legal domestic partnership, civil union, or a similar legal status, and either of us files for dissolution, termination or

annulment of such legal relationship in a state that recognizes such legal relationship.

iv. _____ and I marry, and subsequently either of us files for dissolution, termination or annulment of the marriage in a state that recognizes such marriage.

v. _____ and I reside in a state that does not recognize a domestic partnership registration, civil union, a similar legal status, or a subsequent marriage of _____ and me, and I deliver to the Personal Representative/Trustee a signed, written instrument declaring that _____ is not my Life Partner.

vi. Either party has filed a Petition for Dissolution of Relationship, Petition to Enforce Contract or Petition to Dissolve a Registered Domestic Partnership or any like lawsuit.

vii. If any of the foregoing occurs, _____ shall be treated as if he/she predeceased me.

For all purposes of this Paragraph, an individual shall be deemed to have been "cohabitating with me in a committed relationship" if at the time of my death said individual and I have lived together as a couple for three hundred (300) of the previous three hundred sixty-five (365) days; provided, however, that in calculating the number of days we have lived together any days that we spent living separate and apart due to travel required for business or for the educational needs or the medical needs of either of us shall be excluded.

Any determination of whether an individual is my Partner for purposes of this Agreement shall be made in my Personal Representative/Trustee's sole discretion and shall be binding and conclusive on any individuals interested in any trust established under this Will/Agreement.

(d) Alternatively, an adaptation of the New York statutory definition of a domestic partner (based on criteria originally set forth in *Braschi v. Stahl Assocs. Co.,* 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989)) set forth in New York Public Health Law §4201, which defines the priority of persons entitled to make funeral arrangements for a decedent, may also provide a useful starting point for defining a domestic partner. New York Public Health Law §4201(c) provides, in part, as follows:

"Domestic partner" means a person who, with respect to another person:

i. is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to

the laws of the United States or any state, local or foreign jurisdiction, or registered as the domestic partner of the person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction; or

ii. is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or

iii. is dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under subparagraph (i) or (ii) of this paragraph; or the length of the personal relationship of the persons.

2. Spouse.[140]

The term "my spouse" means [NAME], if my marriage has not been terminated and we are living together as a married couple at the time of my death (or, with regard to any earlier distribution pursuant to the provisions of this Agreement). For this purpose, my marriage shall be deemed to have been terminated upon the entry of a decree of dissolution or the entry of a legal separation, or annulment recognized under the laws of the jurisdiction in which either or both of us is domiciled at the time of my death or such other jurisdiction as may be legally authorized to terminate such marriage (or, with regard to any earlier distribution pursuant to the provisions of this Agreement). In addition, we shall be deemed not to be living together as a married couple if we have been living separate and apart for a period of three (3) continuous months at the time of my death (or, with regard to any earlier distribution pursuant to the provisions of this Agreement). Notwithstanding any provision of the immediately preceding sentence of this Paragraph to the contrary, we shall not be deemed not to be living together as a married couple at the time of my death if we are living separately because of the ill health of one or both of us or due to conditions of employment and/or if either or both of us is residing in a nursing home. If at the time of my death (or, with regard to any earlier distribution pursuant to the provisions of this Agreement), my marriage to [NAME] has been terminated and/or we are not then living

[140] The author thanks Frank Berall of Copp & Berall for the use of the definitions in this section.

together as a married couple, [NAME] shall be deemed to have predeceased me for all purposes of this Agreement, including the provisions regarding trustees.

3. Marriage.

"Marriage" shall mean a legally recognized ceremonial marriage, namely, one entered into in a ceremony performed by a person licenses to marry couples and shall not include a common law marriage or any informal living arrangement unless followed at a later date by such a ceremonial marriage.

OR

"Marriage" shall include a legally recognized common law marriage or any informal living arrangement, as well as a ceremonial marriage, regardless of the state of residence at the time this term is being construed.

4. Parent and Child.

Similarly, the terms "children" and "descendants" should be defined to include children of a partner, who are neither biologically related nor adopted, but whom the testator intends to provide for. It should also be kept in mind that anti-lapse statutes may not protect descendants of a predeceased child of a partner.[141] Furthermore, a client may still want to provide for those children even if the relationship with the partner has ended.

Assisted reproductive technology raises a number of moral, ethical as well as legal issues for clients. The definition of "parent" and "child" should also be carefully considered when science may have made those definitions ambiguous. One issue that must now be considered is whether any genetic material has been stored, and what the plans are to use that material to conceive children. The law is inconsistent from state to state with respect to children conceived via the use of a gestational carrier as well as after the death of a parent.[142]

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[141] *See, e.g.,* RCW 11.12.120.

[142] Bass, *infra* note 196, at 21. A gestational carrier is a woman who gives birth to a baby for another person who cannot have children. A gestational carrier is sometimes distinguished from a surrogate because a surrogate provides the egg as well as giving birth, while a gestational carrier uses a fertilized egg that is implanted in her. *See also* Kristine S. Knaplund, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 Val. U.L. Rev. 1361, 1380 (2011) for a discussion regarding planning issues for children conceived by synthetic gametes and children conceived after one or both of the intended parents have died.

(a) The following is a provision that takes into account the statutory presumption of parentage and assisted reproductive technology:

The term "descendants" shall mean all naturally born or legally adopted descendants of the person indicated. For the purpose of this instrument, a second-parent adoption or joint adoption by a same-sex couple, or parent/child status granted by state law to children born during a domestic partnership, civil union, or marriage, shall be considered a valid legally effective parent/child relationship. For the purpose of this instrument, all children or descendants deemed children or descendants of the person indicated by a civil union, domestic partner registration or marriage entered into by the person indicated shall be considered children or descendants.

My partner, _____, (sometimes referred to hereafter as "____"), and I are planning to have children through assisted reproductive technology and/or a gestational carrier arrangement ["ART"]. ____ and I agree, and both intend, that any child conceived by, born to (through ART), or adopted by either or both of us at any future time shall be deemed for all purposes to be the child of both of us from the moment of conception, regardless of whether the child has yet been born, or whether we are both named as parents on the child's birth certificate, or whether any legal proceeding has been commenced or completed to have us both recognized as the legal co-parents of said child. For purposes of this instrument, any reference to "my child", "my children" or "child of mine", shall include any biological or adopted child of mine or of ____ or of both of us, even while such child is *in utero,* and all children born as a result of an IVF embryo transfer or gestational carrier arrangement we may have entered into during my lifetime.

E. Tax, Debt and Expense Allocation.

Another important component of an estate plan is the tax, debt and expense allocation clause in the will or revocable trust. Estate plans often allocate tax, debts and expenses of administration to the residue. Alternatively, a plan may rely on the state's default statutes,[143] which generally provide that each beneficiary of an asset will bear a pro rata share of taxes and expenses of administration.

The effect of the state statute regarding abatement of assets to pay tax, debts and expenses should also be considered when drafting a will or revocable trust.[144]

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[143] *E.g*,. RCW ch. 83.110A, Washington Uniform Estate Tax Apportionment Act.

[144] *See, e.g.,* RCW ch. 11.104A, Washington's Principal and Income Act of 2002; RCW ch. 83.110A, Washington's Uniform Estate Tax Apportionment Act; and RCW 11.10.010, Washington's general abatement scheme that applies when no other specific rule applies.

Even when a client elects to rely on a state's default allocation rules, because of the migratory nature of clients and the fact that the laws of multiples states may apply, the client's intent should be clearly stated in the testamentary documents.

F. Drafting for the Marital Deduction.

While the federal marital deduction will be available to all couples in a same sex marriage, a state marital deduction may not currently be available to the same couple, depending on their state of residence. Nevertheless, estate planning documents should be drafted in anticipation of a state marital deduction for same sex couples, even though many states still fail to recognize the validity of their marriage.[145]

One alternative to a traditional QTIP trust, is one where, to the extent a marital deduction is *not* taken by the fiduciary, assets instead would be distributed to a credit trust, providing discretionary income provisions, or even outright, rather than to a trust containing mandatory income distribution as required in a marital trust. This is often referred to as a *Clayton* contingent QTIP trust.[146] Or, rather than a mandatory marital deduction, a credit trust could be drafted to qualify as a marital trust, only to the extent a marital deduction is taken. Provisions for the non-marital share need not require that all income be paid to the beneficiary or that the beneficiary has the right to require the assets to be made productive. With a *Clayton* QTIP, it is considered prudent to have an independent fiduciary (someone other than the surviving partner, spouse or other trust beneficiaries) make the QTIP election. [147] The tax and expense allocation clause should ensure that estate taxes attributable to the non-QTIP portion are not apportioned against the QTIP property. Typically property subject to the charitable deduction is also exempted from tax and expenses.

VI. Planning for Personal Needs

Because most unmarried partners, unless they are in another type of legally recognized relationship, do not have the benefit of a legal family relationship, it is important that they name agents to make financial and health care decisions while they are alive, and for burial decisions at death. As with the documents discussed above, each of these documents requires additional considerations not necessarily applicable to married couples.

Most states recognize a hierarchy of individuals who may make decisions for an incapacitated

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[145] Note that in some states, such as Illinois, that have estate tax but do not have a gift tax, these issues could be resolved through lifetime gifts by one spouse to the other.

[146] In response to *Est. of Clayton v. Comm'r*, 976 F.2d 1486 (5th Cir. 1992), the Service issued regulations allowing a surviving spouse's income interest in a trust to qualify for QTIP treatment, contingent on a fiduciary's election accordingly, and allowing that portion of the property for which the QTIP election is not made to pass to the surviving spouse and/or other beneficiaries (e.g., a credit shelter trust). Treas. Reg. §20.2056(b)-7(d)(3).

[147] Blattmachr & Zaritsky, *Coping with the New Clayton Trust Regulations*, 136 Trusts & Estates 41 (May 1997); Michael D. Mulligan, *Updated Planning for Marital Dispositions, Lifetime QTIPs and QDOTs*, 29 Est. Pl. 396 (Nov. 1999).

person in the absence of a directive.[148] For example, in Washington, in the absence of a medical power of attorney, the law provides that the following individuals may give informed consent on behalf of an individual unable to consent, which includes: (i) the patient's spouse or RDP; (ii) children of the patient who are at least eighteen years of age; (iii) parents of the patient; and (iv) adult brothers and sisters of the patient.[149] Illinois, and New York have similar statutes.[150]

States that recognize same-sex marriages, civil union or domestic partnership will recognize partners in those relationships as a spouse for purposes of the hierarchy. But generally, states that do not recognize those relationships do not recognize a partner anywhere in the hierarchy.

Few state laws give any authority to an *unregistered* domestic partner, although some will recognize one partner as a "close friend" who will be called upon only when nobody else in the hierarchy is available.[151] New York is one of the few states to have adopted a surrogate decision-maker statute that recognizes individuals in an intimate (but not legally recognized) relationship to be on par with a spouse, with respect to decision-making authority for an incapacitated partner.[152]

A. Durable Powers of Attorney.

The durable power of attorney grants another person (the "attorney-in-fact" or "agent") the authority to act on the principal's behalf during the principal's life, including any periods of incapacity. Generally, the principal executing the durable power of attorney would designate his partner as primary attorney-in-fact and one or more alternate attorneys-in-fact if the partner is unable or unwilling to serve. The primary advantage of this document is that it avoids the need for expensive, cumbersome guardianship proceedings in the event of disability. As with testamentary documents, clients should be aware that a durable power of attorney designation is not revoked by the termination of a relationship.

Certain powers must be specifically stated in the power of attorney in order for the attorney-in-fact to be authorized to perform such acts.[153] The powers that may be especially important for the unmarried couple, include the powers to:

(A) Execute, amend or revoke any trust agreement;

(B) Fund, with the principal's assets, any trust not created by the principal;

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[148] *See* Rebecca K. Glatzer, *Equality at the End: Amending State Surrogacy Statutes to Honor Same-Sex Couples' End-of-Life Decisions*, 13 Elder L.J. 255 (2005) for an examination of the many statutory approaches to surrogate decision making for same-sex and unmarried couples.

[149] RCW 7.70.065.

[150] 755 ILCS 40/25; Laws of New York 2010, Family Health Care Decisions Act, Art. 29B, §2965, ("Surrogate Decision-Making").

[151] Timothy F. Murphy, *Surrogate Health Care Decisions and Same-Sex Relationships*, 41 Hastings Ctr. Rep. No. 3, 24-27 (May-June 2011).

[152] "Surrogate Decision-Making," 2010 N.Y. Laws, Art 29-B, §2965.

[153] *See* RCW ch. 11.94 (Washington's power of attorney statute).

(C) Make a gift from the principal;

(D) Create or change survivorship interests in the principal's property or in property in which the principal may have interest;

(E) Designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;

(F) Give consent to an autopsy or postmortem examination of the principal;

(G) Make a gift of the principal's body parts under the Uniform Anatomical Gift Act;

(H) Give consent to, or prohibit, any type of health care, medical care, treatment or procedure; or

(I) Direct the withholding or withdrawal of artificially supplied nutrition or hydration.

In some states, a durable power of attorney or separate legal documents may be used to nominate a guardian of minor children, in the event the appointment of one is necessary during the lifetime of the principal.[154] Designation outside of a Will is especially important for same-sex couples who have children for whom only one is the biological or adoptive parent.

A "springing" durable power of attorney (one that takes effect upon the disability or incompetence of the principal) may be problematic as a result of the HIPAA regulations concerning the confidentiality and disclosure of health care information.[155] A typical springing durable power of attorney requires an opinion of a health care professional as to disability or incompetence to be effective. However, HIPAA may prevent a physician from disclosing medical information without the authorization of the patient, who would not be able to give a valid authorization if already incompetent. To avoid this Catch-22, a durable power of attorney could be effective immediately, the principal could either execute a separate HIPAA authorization, or the durable power of attorney should contain a HIPAA authorization to allow a physician to disclose protected health information for purposes of the springing power to be effective.[156]

B. Medical Powers of Attorney.

The Medical Power of Attorney, sometimes called a Durable Power of Attorney for Health Care, is a statutory form in each state that allows patients to select a surrogate decision-maker to make certain medical decisions when patients are temporarily or permanently unable to communicate or make such decisions. A medical power of attorney should specifically grant a partner

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[154] In Washington, RCW 11.88.010(4) allows for the use of a durable power of attorney.

[155] 45 C.F.R. §§164.500-.534.

[156] *Id.* RCW 70.02.030 sets forth the requirements for a valid authorization to disclose the health care information of the principal.

visitation rights and the power to control other visitors, in order to eliminate visitation by hostile family members.

On January 18, 2011, new regulations went into effect providing that hospitals participating in Medicare or Medicaid respect the rights of patients to designate visitors.[157] Hospitals covered by these rules are now required to have written policies and procedures detailing patients' visitation rights, as well as the circumstances under which the hospitals may restrict patient access to visitors based on reasonable clinical needs. But, the regulations have no impact on who may serve as a surrogate medical decision-maker on behalf of a patient who is unable to make decisions for himself or herself.

C. Health Care Directives and Directive to Physicians.

The Health care directive (also sometimes known by a number of names including "Directive to Physicians, Family or Surrogates" in Texas[158], "advance directive" or "living will"), is a statutory document authorizing the withdrawal or withholding of life-sustaining procedures for a terminal condition if death is imminent.[159] It may include provisions regarding the withdrawal or withholding of hydration and intravenous nutrition, as well as intubation and cardiopulmonary resuscitation in the event of a terminal or irreversible condition. In the absence of a directive, the wishes of the principal may not be able to be carried out, or even known.

Health care directives are important documents for all individuals. In the unmarried and same-sex couple context, where the possibility of conflict is inherently higher, they are even more necessary to eliminate doubt as to what end-of-life care an individual may have wanted.

D. Mental Health Directives.

In Washington, Texas, and some other states, including Arizona, California, Minnesota and Texas, a medical power of attorney may also be used to allow a mentally ill person to express his or her preferences regarding mental health treatment from psychiatrists and other mental health care professionals.[160] The mental health advance directive allows individuals to bind themselves to psychiatric treatment in advance of needing it for the purpose of overcoming illness-induced refusals of treatment. Between 1991 and 2006, 27 states enacted statutes authorizing psychiatric advance directives in some form.[161] Like the health care directive, this is an important document to reduce the possibility of conflict and doubt as to an individual's preferences.

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[157] 42 CFR §482.13. The regulations have no impact on who may serve as a surrogate medical decision-maker on behalf of a patient who is unable to make decisions for himself or herself.

[158] Tex. Health & Safety Code §166.033.

[159] Washington Natural Death Act, RCW ch. 70.122; Wis. Stat. ch. §154; ORS 127.531. *See* www.noah-health.org/en/rights/endoflife/adforms.html (last updated Aug. 3, 2011) for printable state forms. No representation is made as to the accuracy of these forms.

[160] RCW 71.32.010; Tex. Civ. P. Rem. Code § 137.001.

[161] Breanne M. Sheetz, *The Choice to Limit Choice: Using Psychiatric Advance Directives to Manage the Effects of Mental Illness and Support Self-Responsibility*, 40 U. Mich. J.L. Reform 401, 408 (Winter 2007).

E. Physicians Orders for Life Sustaining Treatment.

Many states, including Washington,[162] California[163], West Virginia[164] and New York[165] have variations of Physician Orders for Life-Sustaining Treatment ("POLST") forms, a document developed by health care professionals as a standardized method to summarize a patient's wishes regarding life-sustaining treatment. This document supplements a health care directive. The form varies from state to state, but it is generally signed by both the patient and the doctor and becomes part of the patient's medical record. It is printed on a bright colored card stock so as to be visible in a patient's file (e.g., bright green in Washington, hot pink in West Virginia).

POLST forms replace what were formally known as DNR or Do Not Resuscitate Orders. While a POLST form is typically broader than a DNR Order, it in part simply represents a paradigm shift from a discussion of withholding treatment versus a newer concept of allowing a natural death, along with an ability to provide explicit instructions for making critical decisions concerning a patient's care.[166] The older DNR Orders were less precise. POLST, while often leading to the same outcome, offers more detail, which has the potential of relieving the burden of decision-making by others who may not know what the patient would have chosen. Studies have shown that this paradigm shift has allowed patients to, in many cases, receive the care they want and avoid unwanted treatment.[167]

The form is intended to be portable and must be on file with a particular physician in order for it to be followed. The form allows an individual to express his or her wishes with respect to resuscitation, various types of medical interventions, feeding tubes, ventilators, and antibiotics. POLST is currently used in over a dozen states and is in development in at least 20 more.

F. Death With Dignity Directives.

State Natural Death Acts generally allow a competent adult, pursuant to a properly executed directive, to express his or her wishes regarding the removal or withholding of life-sustaining treatment where such treatment would only artificially prolong the time of death, which is otherwise imminent due to an incurable injury, disease or illness. What the Natural Death Acts do not deal with is the right to obtain medication from one's physician to be self-administered to control the time, place and manner of one's own impending death. Both Washington's and Oregon's Death With Dignity Acts permit a competent individual with less than 6 months to live

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[162] RCW 43.70.480.

[163] Cal. Prob. Code §4780.

[164] W. Virginia Health Care Decisions Act §16-30-3(u), referred to as Physicians Orders for Scope of Treatment ("POST").

[165] N.Y. Pub. Health L. 2994-aa – 2994-gg, referred to as Medical Orders for Life-Sustaining Treatment ("MOLST"). *See* www.nyhealth.gov/professionals/patients/patient_rights/molst/ for further information (revised Jan. 2011).

[166] Paula Span, *D.N.R. by Another Name*, The New York Times, *The New Old Age Blog* (Dec. 6, 2010).

[167] Susan E. Hickman, Ph.D., et al., *A Comparison of Methods to Communicate Treatment Preferences in Nursing Facilities: Traditional Practices Versus the Physician Orders for Life-Sustaining Treatment Program*, 58 J. Am. Geriatr. Soc'y 1241 (July 2010).

to receive a prescription for medication, to be self-administered, to control the time, place and manner of such individual's death.[168]

The American College of Legal Medicine issued a statement on October 6, 2008 recognizing patient autonomy and the right of a mentally competent, though terminally ill, person to hasten what might otherwise be objectively considered a protracted, undignified, or painful death, *provided*, however, that such person strictly complies with law specifically enacted to regulate and control such a right.[169] A number of other medical organizations have also issued similar statements in support of such measures.[170] Nevertheless, this remains a controversial topic.[171]

G. Ethical Wills.

In his book *Healthy Aging: A Lifelong Guide to Your Physical and Spiritual Well-Being,*[172] Dr. Andrew Weil advised that preparing an ethical will is a "gift of spiritual health" that one can leave for his or her family. An ethical will can communicate to one's descendants a person's cultural history, and ethical and spiritual values.[173] The goal of writing an ethical will is to link a person to both their family and cultural history, clarify their ethical and spiritual values, and communicate a legacy to future generations. It can also be used as a tool for spiritual healing by the writer and the readers. Where a rift may have been created because of a lifestyle choice family members do not understand or accept, an ethical will is one tool to aid in possibly bridging that gap.

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[168] Or. Rev. Stat 127.800.995 and RCW 70.245.903 (commonly known as I-1000), both permit a patient to do just this. Note that the Montana Supreme Court issued a decision in favor of plaintiffs seeking physician aid in dying, making it legal for competent, consenting, terminally ill adults in Montana to seek aid in dying. *Baxter v. Montana*, 354 Mont. 234, 224 P.3d 1211 (2009). But the medical professionals involved have no statutory protection against criminal, civil or professional liability for agreeing to do so. Thus, until it is statutorily permitted, it is not likely that it will be carried out with much frequency in Montana.

[169] *See The American College of Legal Medicine Policy on Aid in Dying*, www.aclm.org/resources/amicus_briefs/ACLM%20Aid%20in%20Dying%20Policy.pdf (effective Oct. 6, 2008). *See also* www.doh.wa.gov/dwda/ for information about I-1000, forms, statistics and related information (last updated Mar. 10, 2011).

[170] *See, e.g.*, American Public Health Association's policy, *Supporting Appropriate Language Used To Discuss End of Life Choices,* https://community.compassionandchoices.org/document/doc?=id%3f268 (Nov. 8, 2006); American Medical Women's Association Position Statement on Aid in Dying, http://www.amwa-doc.org/gallery2-219/aidindying (approved Sept. 9, 2009).

[171] For a discussion of the issues raised, *see* Pamela J. Hanlon, *The Washington Death with Dignity Act: What Should You Know?,* 63 Wash. State Bar News 11 (April 2009); and Margaret K. Dore, *"Death With Dignity": A Recipe For Elder Abuse And Homicide (Albeit Not By Name),* 11 Marq. Elder's Advisor 387 (2010). *See also* Kristina Ebbott, *The Future Of Elder Law: Article: A "Good Death" Defined By Law: Comparing The Legality Of Aid-In-Dying Around The World,* 37 Wm. Mitchell L. Rev. 170 (2010) for a thorough analysis of the origins of this movement, and its current status.

[172] Andrew Weil, MD, *Healthy Aging: A Lifelong Guide to Your Physical and Spiritual Well-Being (*Knopf 2005).

[173] *See* Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 ACTEC Law J. 154 (Winter 2007) for a thorough discussion of the history of ethical wills beginning with its Old Testament origins, possible content and forms.

H. Burial, Cremation and Funeral Instructions, and Organ Donation.

Making advance arrangements for funerals, disposition of remains, and burial or cremation is critical for unmarried couples.

1. Disposition of Remains.

Powers of Attorney are extinguished upon the death of the principal. However, Washington law provides that "[a] valid written document expressing the decedent's wishes regarding the place or method of disposition of his or her remains, signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished."[174] As with the documents discussed above, in the absence of enforceable, written instructions, state law creates a hierarchy of persons who have the authority to make these decisions, and the unmarried partner of a decedent is not found in that hierarchy.[175]

Instructions regarding disposition of remains may be in a will or in a separate document. If the instructions in a will comply with the requirements for instructions regarding the disposition of remains, they are considered valid, regardless of the will's validity. Nevertheless**,** instructions separate from a will are usually preferable, because of the increased likelihood that the instructions will be found prior to any alternate arrangements being made. Clients should also tell their partner or another trusted friend where to find the instructions.

2. Anatomical Gifts.

The Uniform Anatomical Gift Act was passed by the United States in 1968 to harmonize the various practices related to the increasing organ transplantations.[176] It has been adopted in Washington as RCW ch. 68.64. The Uniform Anatomical Gift Act covers anatomical gifts for transplantation as well as donation of bodies to medical institutions and to hospitals for teaching and experimentation, and provides protocols to ensure that donations of organs are carried out in an ethical manner.

If an individual wishes to donate organs upon death, the best way to evidence that wish is through a Uniform Donor wallet card. Many state departments of licensing, including Washington, provide the opportunity for residents to register their intent to donate organs on the back of their driver's license.[177] Many individuals may also incorporate their wishes regarding anatomical gifts into other advance directives to make sure that these wishes are known.

VII. Cohabitation Agreements and Related Arrangements

A. Background.

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[174] RCW 68.50.160(1).

[175] *See, e.g.,* RCW 68.50.160(3). *See also Funeral Consumer Alliance, Who Has the Right to Make Decisions About Your Funeral*, www.funerals.org/your-legal-rights/funeral-decision-rights (last updated March 1, 2011).

[176] *Unif. Anatomical Gift Act* (1968) (Amended 2006), U.L.A. 109 (Supp. 2011).

[177] Tex. Trans. Code §521.401; RCW 68.64.040(1)(a); Wis. Stat. §343.175(3).

Unmarried couples are able to enter into legal relationships through bilateral contracts that define the rights, duties, obligations, responsibilities, and other parameters of their relationship. Like a prenuptial agreement, the purpose of a cohabitation agreement is to create a degree of certainty for a couple with respect to how expenses will be handled, how income will be shared or separated, how assets will be acquired and under whose name, what will happen to assets in the event the relationship terminates, and how disputes are to be resolved. Unlike a prenuptial agreement, however, cohabitation agreements may bring into being rights and obligations that may not otherwise have existed. Furthermore, where a prenuptial agreement generally becomes effective upon marriage and has no effect if the marriage does not take place, cohabitation agreements generally take effect upon execution and terminate upon death or the termination of the relationship, which can be harder to define than legal dissolution.

The parties have tremendous flexibility in deciding how comprehensive they want the agreement to be. Most courts now enforce explicit agreements between unmarried persons as long as the consideration is severable from the sexual aspect of the relationship. Consideration based on sexual services will invalidate any agreement.[178]

A. The Law in the Absence of a Written Agreement.

Whereas California confers rights of cohabitants based on an implied or an express contract,[179] and Washington confers rights on cohabitants based merely on their status as such.[180]

A line of cases has developed in Washington that has the effect of eliminating unjust enrichment when an unmarried couple separates with no prior agreement. Washington State Appellate Division III has ruled that equitable distribution principles could even be applied by the court to address property division issues of terminated same-sex unregistered domestic partnership.[181]

The relevant factors for finding an intimate committed relationship in Washington include, but are not limited to: "[c]ontinuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[182] Additional factors include whether the parties held themselves out as a couple; whether the

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[178] Frank S. Berall, *Estate Planning Considerations for Unmarried Same or Opposite Sex Cohabitants*, 23 Quinnipiac L.Rev. 361, 383 (2004) [hereinafter "Berall, *Estate Planning Considerations*"]. *See also* Linda J. Ravdin, 849 Tax Mgmt. (BNA), *Marital Agreements*, A-48-49 (2003).

[179] In *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 110 (1976), the California Supreme Court found that an implied contract for support, in return for homemaking services, could exist under some circumstances and would be enforceable. Ironically, in this case, the plaintiff, Michelle Marvin (who had legally changed her surname from Triola), was not awarded a recovery, because no such contract was found to exist. But, one of the key outcomes of the case was that California courts were authorized to enforce contracts between cohabiting couples where the requisite elements of a contract are found to exist, unless the contract was explicitly founded on sexual services as consideration.

[180] But Washington confers additional rights to persons registered pursuant to the Registered Domestic Partnership Act.

[181] *In re Long and Fregeau*, 158 Wn. App. 919, 244 P.3d 26 (2010).

[182] *In re Pennington*, 142 Wn. 2d 592, 601, 14 P.3d 764, 770 (2000).

parties named each other as beneficiaries on life insurance and employee benefits, and in their estate planning documents; and whether the couple parented children together. Not all of the factors are required but, taken as a whole, they must show the existence of a stable marital-like relationship.[183] Washington law does not distinguish between same-sex and opposite-sex unmarried couples when applying these factors.[184]

In the absence of a prior agreement, a court must examine the relationship of the parties, and the property accumulated during the relationship, and make a "just and equitable" distribution of that property.[185] Property acquired during the relationship is presumed to belong to both parties.[186] If the presumption of joint ownership is not rebutted, the court may look to RCW 26.09.080, Washington's dissolution statute, for guidance as to the fair and equitable distribution of property acquired during the relationship.[187]

The distinction between marital dissolution cases and cohabitation property division cases is that property that would have been separate property had the couple been legally married is *not* subject to equitable division.[188] Another distinction exists, at least in Washington, with respect to when a claim for fair and equitable distribution must be brought. While there is no statute of limitations applicable to married couples for asserting a claim to community property, there is one with respect to unmarried cohabiting couples in Washington. In *Kelly v. Moesslang*, the Washington Court of Appeals addressed the statute of limitations applicable to committed intimate relationships for the first time.[189] The Court held that party to the relationship must file a complaint to establish that the relationship existed within three years of the end of the relationship.

B. Drafting Cohabitation Agreements.

Cohabitation agreements may be oral in some states.[190] But prohibited in a number of others, including Texas.[191] Because of the migratory nature of individuals, the potential applicability of the laws of multiple states, and difficulty in proving and enforcing oral agreements, a couple's

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[183] *Id*. at 603, 14 P.3d at 770.

[184] *Gormley v. Robertson,* 120 Wn. App. 31, 38, 83 P.3d 1042, 1046 (2004).

[185] *Marriage of Lindsey*, 101 Wn. 2d 299, 304, 678 P.2d 328, 331 (1984) (citations omitted). *See also In re Long and Fregeau*, 158 Wn. App. 919, 244 P.3d 26 (Div. 3 2010) where the Court held that infidelity of both parties did not take away from their shared purpose in the relationship and did not preclude a finding of intimate committed relationship.

[186] *Pennington*, 142 Wn. 2d at 602, 14 P.3d at 770 (*citing Connell*, 127 Wn. 2d at 351).

[187] *Id.* at 607-608.

[188] *Connell*, 127 Wn. 2d at 351-2, 898 P.2d at 837.

[189] 170 Wn. App. 722, 287 P.3d 12 (Div. III, 2012).

[190] *See Relationship of Eggers*, 30 Wn. App. 867, 638 P.2d 1267 (1982) (holding that express oral contracts between persons living together are enforceable in Washington), and *Whorton v. Dillingham*, 202 Cal. App. 3d 447 (1988). *See also* Richard M. Horwood *et al.*, 813-3rd Tax Mgmt. (BNA), *Estate Planning for the Unmarried Adult,* A-48 (2010).

[191] Tex. Bus. & Commerce Code § 26.01(b)(3).

intent should be clearly stated in a written agreement. And, because the goal of the domestic partnership agreement or cohabitation agreement is to eliminate any factual disputes and ambiguities about what the parties intended, a written agreement is preferable.

The following are some of the more important issues that should be addressed in the agreement.

1. Recitals.

The agreement should contain recitals that document the circumstances of the parties at the time the agreement is entered into and outline their intention with respect to creating the agreement. The recitals should set forth the date the parties began living together and a brief history of the couple's relationship together. The recitals should demonstrate, based on the facts, and not on boilerplate provisions, that an enforceable contract with good and valuable consideration exists between the parties.

2. Disclosure of Assets and Liabilities.

As with prenuptial agreements, both parties must disclose the nature and value of their property. Depending upon the applicable state law, it is possible that the same principles applicable to prenuptial agreements may also apply to cohabitation agreements, including the ability to set aside the agreement in the absence of full and fair disclosure.

Gifts in the cohabitation agreement context require special consideration. Because of the lack of a marital deduction, a gift upon finalization of the agreement (common in the prenuptial agreement context) could give rise to a taxable gift. Similarly, conversion of separate property income to community, also common in a prenuptial agreement, will result in the income earned to be taxed to the earner and treated as a gift to the community (as to the other partner's 50% interest). Agreements that what would otherwise be community income is to be split equally as separate property should not result in gift tax liability, so long as the income is split equally. If the split were not equal, however, a gift would occur.

3. Expenses While Living Together.

The agreement should address how expenses will be handled during the relationship, how assets purchased will be titled, and any post-termination support commitments. Many of these issues can and should be provided for in the wills of the partners as well as in the cohabitation agreement.

4. Dispute Resolution.

It is advisable to include dispute resolution provisions. If the parties agree to mediation or arbitration, the agreement should specify who would pay the mediator/arbitrator. The agreement should also indicate when the parties might abandon mediation for either arbitration or going directly to court. In addition, if attorneys or court costs are involved, it should cover how these costs will be paid for as well.

5. Parenting.

Agreements regarding parenting that recognize the roles, affections and responsibilities that have developed between the child and a non-biological parent, may violate public policy and therefore would not be enforceable.[192] But such an agreement may be useful in establishing the terms of a parent-child relationship that has been formed if it is later called into question and may still carry some weight with the court.[193] Accordingly, the couple may want to try to agree in advance, and document, how they will handle issues such as primary parent/custody, visitation and how the children will be raised, keeping in mind that the best interest of the children, as determined by the court, will ultimately prevail.[194] Similar provisions for pets may also be documented.

6. Assisted Reproductive Technology.

If a couple has or plans to store genetic material it is important to deal with its use and/or disposition in a written agreement.[195] The couple should document its plans to use that material to conceive children, and whether those plans should be altered if the couple does not stay together or if one member of the couple dies.[196] If genetic material is received from a donor, the parties should agree in writing that the donor will not have any parental rights and will agree, if necessary, to having any parental rights terminated (which may not be binding, but does memorialize the intent of the parties at the time of the agreement). Exhibit C contains one form of provision that could be used to define eligible beneficiaries, in light of assisted reproductive technology, during and after the lifetime of a parent.

7. Marriage or Civil Unions.

If marriage or civil unions are legal options for a couple, the parties should indicate whether they intend the agreement to remain in effect should they marry or enter into a civil union. Alternatively, the agreement may terminate upon marriage, at which time the

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[192] *See, e.g.,* RCW 26.09.070(3) and *Unif. Premarital Agreement Act* §3(b) (1983), 9C U.L.A. 35, 43 (2001) ("The right of a child to support may not be adversely affected by a premarital agreement."). *See also Coparenting Agreements* https://www.oag.state.tx.us/ag_publications/pdfs/coparenting.pdf (last visited August 5, 2012).

[193] *Tenth Annual Review of Gender and Sexuality Law: Family Law Chapter: Child Custody, Visitation & Termination of Parental Rights*, 10 Geo. J.Gender & L. 713, 740, Meredith Larson, ed. (2009) [hereinafter Larson, *Child Custody*].

[194] "The agreement may be considered by the court, in light of the circumstances and knowledge of the parties when the agreement was made, but it is not enforceable." *Marriage of Littlefield*, 133 Wn. 2d 39, 58, 940 P.2d 1362, 1372 (1997).

[195] Washington presumes that a contract regarding the disposition of embryos is enforceable at the time it was entered into. *Litowitz v. Litowitz*, 146 Wn. 2d 514, 48 P.3d 261, 268 (2002), *cert. den.*, 537 U.S. 1191 (2003). Washington's Uniform Parentage Act, RCW ch. 26.26 governs surrogacy contracts. *See* Dominic J. Campisi, Claudia Lowder, and Naznin Bomi Challa, *Heirs in the Freezer Bronze Age Biology Confronts Biotechnology*, 36 ACTEC J. 179, Appendix for a Model IVF Contract.

[196] *See* Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154 (Winter 2008); Carole M. Bass, *What If You Die, And Then Have Children? Know How to Plan for Offspring Who Are Born – Sometimes Even Conceived – Posthumously. A State-by-State Guide*, 145 Tr. & Est. 20 (April 2006).

couple would be required to enter into a new agreement or rely on the state default rules applicable to married couples. If marriage would not be legal, a couple should not state an intent to live as husband and wife, thereby creating a possibility in certain states that the agreement will be found void because it violates public policy.[197] The following is a sample clause where the Agreement is intended to continue in effect:

> The Parties intend this Agreement to continue in full force and effect in the event of a marriage between them is recognized in _____, and the parties agree to take all such action as may be necessary, appropriate and/or expedient to accomplish such purpose. In such event, the parties agree to accept the provisions of this Agreement in full and complete discharge of any and every claim and/or right he/she may hereafter have against the other party for an equitable distribution of marital property and for spousal support, maintenance and/or alimony, and the parties waive any such claims and/or rights except to the extent set forth in this Agreement.

8. Termination of the Relationship/Death.

The Agreement should contemplate what the parties will provide for the other in the event the relationship terminates or one party dies.[198]

9. Choice of Law.

Because of the mobile nature of couples in our society, a choice of law provision is also advisable. Confirm that the state law where the parties reside at the time of execution allows such agreements and their particular provisions.[199] Assuming that the agreement is enforceable in the state where executed, the parties may want to include a provision such as the following: "To establish reasonable certainty in their respective financial affairs, the parties agree that, without regard to where they may reside or be domiciled in the future, or where any or all of their real or personal property may be located, all property rights of the parties and their rights under this Agreement shall be determined according to the substantive laws of [state where executed], without regard to conflict of law rules applicable in [state where executed] or in any other state."

10. Severability.

Because the law is so uncertain in this area, it is critical to include a severability clause

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[197] Berall, *Estate Planning Considerations, supra* note 178*,* at 383-384.

[198] *See supra* notes 71-75 and accompanying text for a discussion of the related federal tax consequences in these situations.

[199] Linda J. Ravdin, *Marital Agreements*, *supra* note 178, B-1101-1107, for a table by state indicating the enforceability of domestic partnership agreements regarding property and support. *See also* William A. Reppy, Jr., *Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. Rev. 273, 275 (Winter 2002) for an examination of the issues affecting cohabitants with respect to choice of law rules after the termination of the relationship or the death of one member of the couple.

allowing an unenforceable provision to be severed from the remainder of an agreement.[200]

VIII. Forming a Family, Parenting Arrangements.

Same-sex couples may have children from prior marriages or relationships, foster children, adopted children (either adopted jointly or by one partner adopting the other partner's biological child), or children as a result of assisted reproductive technology, including the use of preserved reproductive material for possible future use and/or children via assisted reproductive technology.[201]

A. Adoption.

Adoption can take a number of forms.[202] It may be pursued by an individual alone or by a couple jointly, or as a second-parent adoption, where one partner adopts his or her partner's biological or adopted child without terminating the original legal parent's rights is also available in some states. Same-sex adoption is not yet permitted in all states, but some have gone so far as to revise their adoption statutes to be gender-neutral, paving the way for same-sex adoptions.[203]

California law permits an adult related to the child, a person named in a deceased parent's will, a legal guardian, or a person with whom the child has been placed for adoption, to petition to adopt.[204] It also specifically provides for step-parent adoption.[205] In 2003, the California Supreme Court affirmed that a same-sex co-parent can petition to adopt his or her partner's child

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[200] Only a few states permit compensation of gestational carriers. *See also* Ark. Code. §9-10-201(c)(2), *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (1998), 750 Ill. Comp. Stat. 47/5 and *R.R. v. M.H.*, 426 Mass. 501, 689 N.E.2d 790 (1998).

[201] According to the U.S. Centers for Disease Control, Assisted Reproductive Technology ("ART"), "ART includes all fertility treatments in which both eggs and sperm are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved." For a discussion of the issues raised by assisted reproductive technology, *see* Mary F. Radford, *Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 Est. Plan. & Community Prop. L.J. 33 (2009); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century,* 5 Stan. J.C.R. & C.L. 201 (2009).

[202] *See www.theadoptionguide.com/files/StateAdoptionLaws.pdf* for an analysis of adoption, custody and visitation laws on a state-by-state basis; and Susan L. Pollet, *Breaking Up Is Hard[er] To Do; Same-Sex Divorce,* 83 N.Y. State Bar J. 10, 19 (Mar./Apr. 2011) for another state-by-state chart of states permitting gay and lesbian adoption, second parent adoption and joint adoption, *www.nycourts.gov/ip/parent-ed/pdf/SameSexDivorce.pdf*.

[203] Washington allows "Any person who is legally competent and who is eighteen years of age or older" to be an adoptive parent. RCW 26.33.140(2). In *Jacob v. Shultz-Jacob*, 2007 Pa. Super 118 (2007), a unanimous court held that a child may have three parents, in this case a former lesbian couple and the man who donated sperm to the couple.

[204] Cal. Fam. Code §8802.

[205] Cal. Fam. Code §§9000-9007.

or child of the relationship.[206]

While the Uniform Parentage Act (UPA) deals with the donation of sperm, ova and surrogacy, the laws on these issues vary from state to state, and are in flux.[207] Any type of assisted reproduction agreement should be documented in writing that includes the intent and expectation of the parties. Donor and surrogacy agreements are beyond the scope of this outline.[208]

Note that the Uniform Probate Code (UPC) does not adopt the definitions from the UPA for determining legal parentage; rather it contains its own. § 2-119 of the UPC does not contemplate a second-parent adoption. It allows for the genetic parent's parent-child relationship to continue when a step-parent adopts a child. But when an unmarried partner adopts the child as the second-parent, it would terminate the genetic parent's parent-child relationship for inheritance purposes, making it even more critical that the parents have valid wills in place.[209]

B. De Facto Parentage.

When legal parentage has not been or cannot be established, several states, including Delaware, Oregon and Washington, as well as the District of Columbia, recognize the equitable concept of the "de facto" parent, in the absence of a legal adoption.[210] The Washington Court of Appeals adopted the following four-part test to determine the existence of a *de facto* parent-child relationship, as follows:

1. the natural or legal parent consented to and fostered the parent-like relationship;

2. the petitioner and the child lived together in the same household;

3. the petitioner assumed obligations of parenthood without expectation of financial compensation; and

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[206] *Sharon S. v. Superior Court,* 73 P.3d 554 (Cal. 2003).

[207] *See* RCW §§26.26.700-740 (adopted in 2002), Cal Fam. Code §§7600-7606. *See also* Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC Journal 171 (Winter 2008). *E.g.*, surrogacy contracts are permitted in California, Cal. Fam. Code §7613. They are illegal in New York, N.Y., Dom. Rel. Law §122, and it is a felony for an attorney to assist in the preparation of such contracts. *Id* at §123.

[208] *See* Charles P. Kindregan, Jr. & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science* (2d ed. 2011) for sample agreements and a checklist of issues to be covered.

[209] *See* Lee-Ford Tritt, *Parent Child Property Succession*, 148 Tr. & Est. 14 (Aug. 2009) for an in-depth discussion of the Uniform Probate Code's attempt to deal with the changing definition of family caused by new types of family structures and by artificial reproductive technologies. *See also* Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, Duke Journal of Gender Law & Policy (forthcoming Spring 2011); *also available at* www.ssrn.com/abstract=1636531 (Pepperdine University Legal Studies Research Paper No. 2010/14, July 2010) for a further discussion of this topic

[210] *See, e.g.*, Del. Code Ann. tit. 13, §8-201(a)(4), (b)(6) (2009); ORS 109.119; D.C. Code §16-831.01 (2001); *Smith v. Guest*, 16 A.3d 920 (2011); *In re Parentage of L.B.*, 155 Wn. 2d 679, 122 P.3d 161 (2005), *cert. denied*, sub nom., *Britain v. Carvin*, 547 U.S. 1143 (2006).

4. the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[211]

While the *de facto* parent stands in legal parity with a legal parent, because it is an equitable remedy and not statutory, a written agreement would always be preferable to assuming that this remedy will be available. In the absence of either a biological parent-child relationship or a legal adoption, there is little certainty with respect to the rights and responsibilities between an adult and child.

IX. Federal Tax Consequences of Federal Non-Recognition and Resulting Planning Opportunities.

A. General Federal Estate and Gift Tax Considerations.

The marital deduction, allowing most transfers between U.S. citizen spouses (which now includes same-sex couples no matter where they live) to avoid transfer or income taxes does not apply to unmarried couples.[212] Accordingly, any transfers between unmarried partners may be treated as taxable gifts (subject to the IRC §2503(b) annual exclusion, the donor's available applicable exclusion, and the exclusion from gift tax for tuition and medical expenses under IRC §2503(e)).[213]

For purposes of determining whether a decedent possessed an interest in property includible in his or her estate under IRC §2033, or whether a transfer constituted a taxable give under IRC §2501, reference is first made to state property laws. Thus, results can differ substantially from one state to another, specifically where community property is involved.

B. Indirect Gifts Arising From Pooled Expenses.

The value of taxable gifts between unmarried partners becomes difficult to quantify in the context of shared living expenses. When partners pool income and one party receives more income than the other, pooling may cause a net transfer to the party with less income, resulting in a taxable gift. This result may be partially ameliorated by entering into a contractual arrangement between the partners providing for mutual and adequate consideration. The amount of the gift is the difference between the value of the property transferred and the consideration received.[214] However, the exchange of consideration sufficient to make a promised transfer enforceable for state contract law purposes will not necessarily prevent some part of the transfer from being a gift for federal tax purposes, unless the transferor receives consideration having an economic value equal to the property transferred.

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[211] *Parentage of M.F.*, 141 Wn. App. 558, 563, 170 P.3d 601 (2007) *citing Parentage of L.B.*, 121 Wn. App. 460, 485, 89 P.3d 271 (2004).

[212] IRC §2056(a), §2523(a), and §1041.

[213] *Pascarelli v. Comm'r*, 55 T.C. 1082 (1971), *aff'd* 485 F.2d 681 (3rd Cir. 1973).

[214] IRC §2512(b).

To the extent a net transfer from the greater income earner to the lower income earner is viewed as being paid in consideration for the lower income earner's love, emotional support, or other services upon which a monetary value may not be placed, the transfer is a gift.

If the contractual arrangement provides that the net transfer from the higher income earner to the lower income earner is an advance to be repaid upon the happening of some event, e.g., the lower income partner finishing school, or becoming gainfully employed, or the higher income partner retiring, the couple will be treated as being in a debtor-creditor relationship. These types of arrangements should be avoided unless the arrangement provides for adequate stated interest and the advanced sums will actually be repaid. §§163(h), 1274 and 7872 of the Code address below-market interest and gift loans by imputing interest income in the amount of the applicable federal rate to the creditor, taxing the creditor as making a gift of the interest, and denying the debtor's interest deductions. If the debt is never repaid, IRC §61(a)(12) treats the amount advanced as income to the debtor from the discharge of indebtedness. § 7872(c)(2)(A) of the Code provides a *de minimis* exception for gift loans between individuals for amounts of $10,000 or less. Thus, generally, for smaller loans there is neither imputed interest nor a taxable gift.

C. Joint Tenancies.

Joint tenancy ownership of assets is one of the most popular estate planning devices for unmarried couples.[215] When contributions by both parties are equal, and where the intentions of both parties with regard to management and disposition of the assets are identical, joint tenancy is an efficient and economical estate planning tool. Joint tenancy in the nontaxable estate may avoid the need for disclosure to family members at the time of the disposition. And if a joint tenancy is challenged, the presumption of a gift of funds in joint tenancy must be rebutted by clear and convincing evidence of a contrary intent, which is typically difficult to overcome.[216]

(a) Joint Tenancy May Result In An Unintended Gift.

For the client with a taxable estate, joint tenancy can result in unintended consequences. When an asset, such as a house, is purchased in joint tenancy, if the parties contribute equally to the purchase, then acquiring the asset in joint tenancy is not a taxable event. However, if one partner purchases or contributes to an asset (other than a bank account or U.S. bonds), and has it conveyed to himself and his partner in joint tenancy with right of survivorship, then the purchase constitutes an immediate gift of the value of the transfer in excess of the annual exclusion.[217]

Upon the death of one joint tenant, the entire value of the jointly held property is included

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[215] For a thorough history of joint tenancy with right of survivorship since feudal England and the Battle of Hastings, *see* Stephanie J. Willbanks, *Tax Once, Taxing Twice, Taxing Joint Tenants (Again) at Death Isn't Nice,* 9 Pittsburgh Tax Review 1 (2011).

[216] RCW 30.22.100(3); James L. Ryan, *The Inconvenient Truth About Convenience Accounts*, 23 The Jour. of the DuPage County Bar Assoc. 34 (Mar. 2011) *citing Vitacco v. Eckberg,* 271 Ill.App.3d 408, 648 N.E.2d 1010 (3d Dist. 1995) (*available at* http://www.dcbabrief.org/vol230311art2.html).

[217] IRC §2503(b) and Treas. Reg. §25.2511-1(h)(5).

in the decedent's gross estate, unless it can be shown that the surviving joint owner actually contributed to the acquisition of the asset.[218] The burden of proof is on the taxpayer and may be difficult to sustain without meticulous record keeping. If clients intend to own real property in joint tenancy, they should document their intentions, their contributions to points and the down payment, mortgage payments, and home improvements.

There is an exception to the present gift rule for joint bank accounts and U.S. bonds: the transfer, and a completed gift, does not occur until the joint holder withdraws money from the account.[219]

(b) Non-Tax Disadvantages of Joint Tenancies.

In addition to the tax disadvantages, there are other problems with joint tenancies. A joint owner of a bank account can withdraw the other party's money from the account without the party's consent or knowledge.[220] This could be avoided by requiring two signatures on an account.

Assets titled jointly, such as real estate, stock, or a motor vehicle, cannot be sold without the consent of both joint owners. This protects the owners, but it also often results in a deadlock between partners on the appropriate disposition of an asset.

(c) Alternatives to Joint Tenancies.

Some practitioners recommend that partners establish a partnership or limited liability company to take title to a home, to facilitate accurate record keeping, and also provide protection against a creditor or a partner forcing partition. Using an entity for a principal residence acquisition, however, may prevent the unmarried couple from using the exclusion for capital gain on sale under IRC §121 unless it is treated as a disregarded entity.[221] This exclusion is available to persons, but not entities.

Alternatively, legal title could be held in a revocable title holding trust with a separate schedule of beneficial interests. The trust agreement could further define how the beneficial interests are to be adjusted over time based on the relative financial

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[218] IRC §2040(a) and Treas. Reg. §20.2040-1(a)(2).

[219] Treas. Reg. §25.2511-1(h)(4). The definitions in Treas. Reg. §25.2518-2(c)(4)(iii) extend the exception to the immediate gift presumption to brokerage accounts and other investment accounts, including mutual funds.

[220] RCW 30.22.110. Washington does not have a statutory equivalent applicable to securities accounts. Rev. Rul. 69-148 provides that a joint tenancy securities account constitutes a completed gift except when the account agreement allows the donor to remove assets from the account without the consent of the donee. Thus, unless an account agreement allows for a unilateral withdrawal, a securities account does not constitute a completed gift.

[221] The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, amended IRC §121 (formerly providing a one-time exclusion of gain from sale of a principal residence by an individual who has attained age 55) and permits exclusion of up to $250,000 of gain by an individual or $500,000 by a married couple on the sale or exchange of a principal residence, if the property was a principal residence for 2 of the last 5 years.

contributions of the partners.

X. Conclusion

While the repeal of § 3 of DOMA has led to the federal recognition of same-sex marriages, until all states recognize same-sex marriages, there will continue to be complications in planning for same-sex couples. As states are persuaded to adopt same-sex marriage or some form of quasi-marital relationship, it will be necessary to develop a new body of law to define the rights and responsibilities that come with it. Until parity is brought to the laws applicable to unmarried couples, the bias in favor of married couples that is inherent in the transfer tax laws means that unmarried couples will often bear a heavier income, gift and estate tax burden.

The estate plans of unmarried partners, and partners in marriages not legally recognized, needs special attention to insure that their objectives are met with a minimum of income, gift, and estate tax liabilities, as well as a minimum of conflict. Unmarried partners need to understand that no default legal structure exists in the absence of an estate plan, as there is for married couples. Their advisors need to understand the disparities in the law relative to unmarried couples, and need to be able to recommend steps, if any, to mitigate the lack of parity with married couples. Furthermore, family dynamics and hostile family members often play a large role in shaping the plan of an unmarried couple. It is critical to consider this when recommending a plan, and to take steps to reduce the risks.

EXHIBIT A
Bibliography of Internet Resources

1. ABA AIDS Coordination Project – a Committee of the ABA to Educate the Bench, Bar and Public about Legal Issues Concerning HIV/AIDS: http://www.americanbar.org/groups/individual_rights/projects/aids_coordinating_project.html.

2. Human Rights Campaign – A comprehensive web site dealing with a wide range of legal issues, including marriage, for the gay, lesbian and transgender community, and a section providing information concerning state adoption laws: www.hrc.org/.

3. Immigration Equality – An organization seeking equal application of U.S. Immigration laws and for those facing discrimination due to sexual orientation: www.immigrationequality.org/.

4. LAMBDA Legal – Gay Rights By State: www.lambdalegal.org/our-work/states/.

5. Legal Marriage Court Cases – A Timeline – U.S. Constitutional cases from 1971 – Present: www.buddybuddy.com/t-line-1.html.

6. National Conference of State Legislatures (NCSL): Compilation of state laws on marriage, family law, same sex marriage, civil union and related issues: http://www.ncsl.org/default.aspx?tabid=16444

7. New York Times - Same-Sex Marriage, Civil Unions and Domestic Partnership stories and commentary: http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html.

8. Open Directory Project – Same-Sex Marriage and Domestic Partnership collected articles: www.law-library.rutgers.edu/resources/SSM.html: http://www.dmoz.org/Society/Gay,_Lesbian,_and_Bisexual/Law/Marriage_and_Domestic_Partnership/.

9. Out, Safe and Respected Toolkit: http://www.lambdalegal.org/publications/out-safe-respected and resources for parents and students dealing with bullying/harassment based on actual or perceived sexual orientation or gender identity:

10. Rutgers Selective Bibliography of Legal Literature on Same Sex Marriage: www.law-library.rutgers.edu/resources/SSM.html.

11. Wikipedia entries on several topics including same-sex marriage, the history of legislation and the status of legislation worldwide: www.en.wikipedia.org/wiki/Same-sex_marriage.

12. Compilations of links for transgender legal resources can be found at National Center for Transgender Equality: http://transequality.org/Resources/index.html, The Transgender Law & Policy Institute: www.transgenderlaw.org/, the ACLU: www.aclu.org/lgbt-rights/transgender, the Transgender Legal Defense Fund: www.transgenderlegal.org/, and the Transgender Law Center: www.transgenderlawcenter.org/ (with many resources specific to California).