

ESTATE PLANNING FOR THE NON-TRADITIONAL FAMILY

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I. INTRODUCTION

In February of this year, cities and towns throughout the country began issuing marriage licenses to same-sex couples. The legal validity of the marriages entered into pursuant to these licenses remains in question in several jurisdictions. In addition to the anticipated arguments to legalize same-sex marriage or conversely, to prohibit same-sex marriage, a third possibility has emerged as a potential “resolution” of this issue: Allowing same-sex couples to create a civil union. With many legal battles brewing over the issue, the next several years promise particular estate planning challenges for this demographic.

The number of non-traditional families in the United States has nearly doubled since 1970¹. Census figures estimate that presently there are 5.5 million unmarried cohabitating couples in the United States.² For purposes of this statistic, non-traditional families include unmarried opposite sex couples, same-sex couples, single parents with minor or adult children, and single adults with neither children or a partner. Furthermore, the divorce rate has increased significantly over the last few decades and now almost half of all marriages end in divorce.³ As a result of the increasing divorce rate, more clients are on their second marriage, are getting married later, and have children from previous marriages. This shift in demographic necessitates estate planning alternatives that were generally not required, or at least not widely discussed, prior to the 1990’s.

Despite the growing population of unmarried and non-traditional families, private companies, courts, and legislative bodies have been reluctant to recognize cohabitating unmarried adults as a family unit. Even the possible wide-spread recognition of civil unions and domestic partnerships as legal relationships does not mean that these couples will have the same rights and responsibilities as married persons. Although many of the estate planning techniques used for married couples can be adjusted to fit the context of unmarried or non-traditional clients, planning for these increasingly common family structures requires resourcefulness.

¹ See Richard M. Horwood, Lauren J. Wolven and Jeffrey A. Zaluda, Estate Planning for the Unmarried Adult, TAX MANAGEMENT PORTFOLIO 813-2d, at A-1.

² See Fred Bruning, Altared States: Love It Or Leave It, Marriage For Decades Has Been One Of Many Ways American Couples Get Together, CHICAGO TRIBUNE, March 1, 2004, at www.chicagotribune.com, visited March 3, 2004.

³ *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J.L FAM. STUD. 5, 5 (2002). See also Number, Timing and Duration of Marriages and Divorces: 1996, February 2002 available at <http://www.census.gov/prod/2002pubs/p70-80.pdf> last visited February 9, 2004.

II. MARRIAGE PENALTY AND MARRIAGE ADVANTAGE

A. Tax Advantages For Married Adults.

1. Unlimited marital deduction for transfers, both inter vivos and upon death;
2. Ability to split gifts made by one spouse and treat them as made one-half from each spouse;
3. Nonrecognition of \$500,000 of gain on the sale of a personal residence, regardless of ownership;
4. Exclusion from taxable income of employer-provided health insurance for spouse;
5. Deferral of income for qualified plans and IRAs through rollovers; and
6. Transfer of qualified plan interest on termination of the relationship (QDRO).

B. Tax Advantages For Unmarried Partners.

1. No “marriage penalty” in income tax rates or earned income tax credit;
2. Ability to use planning techniques unavailable to married persons due to Chapter 14;
3. Income is not combined for the ceiling on rental property losses;
4. Depending on asset ownership, domestic partners have the possibility of deducting more capital losses;
5. Nonrecognition of gain on the sale of home up to \$250,000 per person, however, gain is allocated to each partner based on ownership interest in the residence;
6. Possible lower average tax rate due to doubling of alternative minimum tax exemption;
7. Potential added protection for social security benefits due to income threshold differences for married and individual taxpayers; and
8. Income not consolidated for phase-out of the child and dependent care credit.

C. Legal Differentiation Based On Marital Status

1. Qualification for Public Aid Entitlements

- a. For purposes of qualifying their children for public aid, unmarried adults have an advantage over married adults.
- b. In determining income and resources of a potential supplemental security income (SSI) or Medicaid recipient for married persons, the income and resources of an ineligible spouse or an ineligible parent, in the case of a child under age 18 who is living in the same household as the parent, are deemed to be those of the recipient.

2. Statutory Share

- a. A surviving spouse often has a statutory right under state law to take from a deceased spouse's estate despite a valid enforceable will to the contrary.
- b. The individual making the election must be a "spouse" under applicable state law, so domestic partners (unless registered as domestic partners and extended such protections by statute) cannot avail themselves of this right.

3. Spousal Communication Privilege

- a. Unmarried domestic partners are not entitled to the spousal communication privilege.
- b. This privilege generally bars a spouse from testifying as to any communications made between spouses during the marriage without the consent of the other spouse, regardless of whether the testimony is sought during or after the marriage.

4. Wrongful Death and Loss of Consortium

- a. The majority of reported cases deny recovery to unmarried cohabitants.
- b. Most courts deny recovery on the basis of the need to limit liability and to protect the state interest in the "institution of marriage".

5. Tenancy by the Entireties
 - a. Only persons legally married at the time of conveyance can hold property in tenancy by the entireties.
 - b. If unmarried persons hold property in tenancy by the entireties, the title generally will not be held wholly invalid.
 - (1) Courts will assume title in some other form of dual ownership consistent with the parties' intentions.
 - (2) Joint tenancy with the right of survivorship is a common result because it most closely resembles tenancy by the entireties.

III. DEFINING FAMILY MEMBERS

- A. Whether an individual is deemed a "spouse", and the purposes for which the individual is deemed a spouse, are determined under state law.
 1. A person may be deemed a spouse for purposes of collecting health insurance benefits from a party's employer, for example, without being deemed a spouse for any other purpose.
 2. A local civil or religious ceremony does not establish a legal marriage if it is not recognized by state law.
 3. The laws regarding spousal status for certain benefits are in flux in many states, making planning for unmarried and non-traditional clients somewhat of a moving target.
- B. In 2000, there were more than 4.7 million unmarried opposite-sex couples sharing the same household, which is almost nine times the number in 1970⁴.
 1. Historically, a common law marriage could be informally obtained as long as the two competent parties agreed to form a relationship and live together as husband and wife.
 - a. Only a few states continue to recognize common law marriages, including: Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia.

⁴ U.S. Bureau of the Census, Current Population Reports (2002).

2. ERISA does not preempt federal law prohibiting discrimination in employment.
3. When unmarried persons are covered by benefit plans, often the coverage applies only to same-sex couples and not opposite-sex couples.

E. Co-Parenting and Adopting Children

1. Adoption issues are most common in situations in which a second parent or co-parent seeks to become a legal parent without terminating the legal or biological parent's rights, and situations in which a couple, neither of whom is a biological or legal parent, seeks to adopt a child.
 - a. Many times, an unmarried partner who is neither a natural parent nor an adoptive parent has no legal rights or obligations in relation to the other partner's children, even if the partners lived together for many years.
 - b. As a result, the nonbiological partner may seek to adopt the natural parent's child in order to establish a legal relationship.
 - c. As of 2002, 27 states, including Illinois, had granted second parent adoptions for lesbian and gay parents.⁵
2. Advantages and Disadvantages of Adoption
 - a. Some of the advantages afforded by legal adoption include:
 - (1) Health insurance benefits;
 - (2) Social security survivor benefits;
 - (3) Establishment of a legal bond; and
 - (4) Creation of rights as an heir.
 - b. The primary disadvantage of adoption is permanence.

⁵ See Richard M. Horwood, Lauren J. Wolven and Jeffrey A. Zaluda, Estate Planning for the Unmarried Adult, TAX MANAGEMENT PORTFOLIO 813-2d, at A-14.

IV. TRANSFER TAX PLANNING

A. Gift Giving

1. Gift giving is a basic, but significant, estate reduction technique.
2. Unmarried individuals, both singles and domestic partners, are at a distinct disadvantage when it comes to making gifts.
 - a. Unlike married couples, unmarried individuals may not split gifts under IRC § 2513.
 - b. Tax-free transfer of property afforded to spouses under IRC § 1041 is inapplicable to transfers between domestic partners.
 - c. Transfers between unmarried partners are subject to gift tax.
 - (1) May affect placing property in joint tenancy.
 - (2) May cause unanticipated hardship for couples sharing living expenses.
 - d. The gift tax annual exclusion is available.
 - e. Applicable exclusion can be applied, however, this imposes upon domestic partners the burden of filing a gift tax return.

B. Generation–Skipping Transfers

1. Because gift-splitting is not possible for unmarried partners, one member of an unmarried couple is unable to utilize the other partner's exemption.
2. Because transfers between domestic partners are subject to gift tax, except in annual exclusion increments, a partner with substantially greater assets than the other often cannot effectively utilize both partners' full effective exemption amounts.

C. Freezes and Discounts (Chapter 14)

1. Chapter 14 was enacted to address perceived abuses in certain intrafamily transactions that were used to pass property to the next generation at limited transfer tax cost.
 - a. Chapter 14 is designed to ensure that any gift tax value assigned to a retained interest or restriction comports with

the reality of the transaction and the economic value of the retained interest.

- b. Among the techniques Chapter 14 targeted were common law grantor retained interest trusts (GRITs), split-interest purchases, and traditional preferred and common interest freeze transactions.
2. Because Chapter 14 generally deals only with transfers among traditional family members, many techniques that are restricted or no longer available to traditional families remain available to unmarried couples.
 - a. For example, one member of a domestic partnership may make transfers to the children of the other partner.
 - b. Any individual may benefit nieces and nephews without running afoul of Chapter 14.
 - c. GRATs and GRITs
 - (1) The value of the retained interest depends on the value of the property transferred, the length of the retained term, the grantor's age, retention of a contingent reversionary interest, and the §7520 rate in effect in the month of the transfer.
 - (2) GRATs and GRITs were funded with appreciating property can result in substantial transfer tax benefits.
 - (3) Provides an income stream to the partners during the retained trust term.
 - (4) Principal remains within the economic unit at the expiration of the term.

V. LIFE INSURANCE

A. Determination of Need

1. For unmarried individuals or couples, life insurance can be of paramount importance.
2. The traditional use of life insurance is to replace earnings lost by the death of a breadwinner, however, life insurance can be beneficial under many circumstances, such as:

- a. Providing the surviving partner or other loved ones with income;
- b. Ensuring liquidity to pay estate expenses and taxes;
- c. Funding the buy-out of a partner or associate;
- d. Establishing a pool of funds to pay for retirement or college expenses; and
- e. Deferring compensation for business owners and key executives.

B. Tax Treatment

1. Married couples have an advantage over unmarried couples because proceeds on a policy owned by the insured and payable to the surviving spouse can qualify for the marital deduction.
2. An unmarried couple may be taxed twice on insurance proceeds.
 - a. Proceeds on a policy owned by the insured and payable to a domestic partner will be subject to estate tax on the insured's death.
 - b. To the extent the proceeds increase the taxable estate of the surviving partner, the proceeds will be subject to estate tax again when the surviving partner dies.
3. Because no marital deduction is available, ownership alternatives such as irrevocable trusts, partnerships and corporations are extremely important in the unmarried adult context, in order avoid double taxation.

C. Irrevocable Trusts

1. An effective technique to exclude life insurance proceeds from an insured's estate is to transfer all incidents of ownership in an existing policy from the insured to the trustee of an irrevocable trust for the benefit of the domestic partner.
2. If the insured lives for three years from the date of the transfer, the trustee receives the proceeds at the insured's death outside of the insured's taxable estate.
3. If the trustee of the irrevocable trust initially buys the policy, then the policy proceeds are immediately excludable from the insured's estate, even if the insured provides the funds to pay the premiums.

D. Partnerships

1. The use of partnerships in planning for life insurance has become more common.
 - a. It has been questioned whether a partnership whose sole asset is a life insurance policy is carrying on a business such that it qualifies for partnership tax treatment.
 - (1) But see Rev. Proc. 2002-3 (Commissioner will no longer issue rulings on this issue) and PLR 9309021 (partnership established to fund a cross-purchase agreement among shareholders) regarding such partnerships.
 - (2) To be absolutely safe, it may be wise for the partnership to invest and manage assets other than the insurance policy to ensure recognition of the partnership structure.
 - b. Partnerships can eliminate some of the disadvantages of an irrevocable trust, such as irrevocability.
 - c. A limited liability company structured to be taxed as a partnership can also be effective for insurance planning.
2. Formation of Partnership
 - a. A partnership allows single parents, domestic partners, or business partners to be insured and avoid including a substantial portion of the life insurance proceeds in their respective estates.
 - b. A life insurance partnership can be formed with the insured as the sole general partner and the beneficiaries as the limited partners.
3. Insurance Payable to Third Party vs. to Partnership
 - a. To avoid inclusion of the entire policy proceeds in the decedent's gross estate under IRC § 2042, proceeds must be payable to the partnership or to a third party for the benefit of the partnership.
 - b. For domestic partners using a partnership agreement to own insurance on one or both of their lives, it is advisable in order to avoid estate tax inclusion under §2042(2) to include a provision in the partnership agreement negating

any power of the insured to exercise incidents of ownership with respect to the partnership-owned policy on his or her life.

4. Insurable Interest

- a. Domestic partners face an additional insurance issue not generally encountered by married couples: whether the partners have insurable interests in each other.
- b. Nearly all states permit an individual to apply for insurance on his or her own life and name anyone as beneficiary.
 - (1) Many states, however, prohibit certain unmarried individuals from obtaining insurance on the life of another person unless the purchaser has an insurable interest in the life of the insured.
 - (2) Certain familial relationships, such as those of spouse, parent, and child create an insurable interest in almost all states.
 - (3) Likewise, corporations and partnerships generally have an insurable interest in their key employees and partners as long as the individual's death causes economic loss to the entity.
- c. An insurable interest may be easier to establish for domestic partners who have an economic arrangement (such as a partnership agreement that defines the economic terms and other rights and responsibilities of the relationship) than for those who do not.

VI. BENEFITS, ENTITLEMENTS, AND STATE LAW RIGHTS

A. ERISA Qualified Benefits and IRAs

- 1. Retirement plans, including Employee Retirement Income Security Act (ERISA) qualified benefit plans and individual retirement accounts (IRAs), can be effective tax planning tools for many individuals.
 - a. The plan participant must begin receiving distributions by April 1 of the year following the later of the calendar year in which the participant attains age 70.5 or the year of retirement.

- (1) For most participants, the required minimum distribution is calculated using the uniform tables for the joint and survivor life expectancy of the participant and the designated beneficiary.
 - (2) The uniform tables assume a hypothetical designated beneficiary who is 10 years younger than the participant.
 - b. After the death of the participant, distributions can be paid out over the life expectancy of the designated beneficiary.
 - (1) An individual beneficiary or the underlying beneficiary of a designated trust can be, for example, an unmarried domestic partner or a descendant of either partner.
 - (2) Some qualified plans, however, only allow the participant's spouse to be the outright beneficiary.
- 2. Disadvantages for unmarried domestic partners.
 - a. Rollovers, which may permit additional income tax deferral, are not available for unmarried domestic partners.
 - (1) An adult beneficiary who was not married to the participant must commence receiving taxable distributions soon after the death of the participant, regardless of the beneficiary's age.
 - (2) A spouse can defer receipt of distributions to his or her own required beginning date.
 - b. The marital deduction is unavailable.

B. Employee Benefits and Health Insurance

- 1. Single parents should have no problems qualifying their natural or adopted children for the benefits.
- 2. Unmarried couples traditionally do not fall within the definition of a "family member" and may not qualify for benefits.
 - a. Marriage may not be possible or a desirable option for domestic partners.
 - b. Natural or adopted children of a domestic partner also are unlikely to receive coverage.

3. Legal Developments
 - a. Historically, state courts upheld the state's right to deny benefits to a state employee's domestic partner
 - b. As of 2002, however, California, Connecticut, Maine, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. offered domestic partner health benefits to state employees.
 - c. ERISA essentially provides a roadblock to challenging on the basis of discrimination a private employer's denial of coverage to domestic partners.
4. Taxation of Health Plan Coverage
 - a. Employer-provided health coverage is excludible from gross income when coverage is for an employee, an employee's spouse, or an employee's dependents.
 - b. A domestic partner must qualify as either a spouse or a dependent under state law in order for the employee-partner to exclude the value of the benefits from income.
 - (1) With the exception of common law marriage, domestic partners generally must qualify as dependents in order for the insurance benefits to be excluded from income.
 - (2) PLR 9850011 reiterates that a domestic partner does not qualify as a dependent unless he or she receives more than one-half of his or her support for the calendar year from the employee.
5. A domestic partner of an employee has limited rights with respect to COBRA coverage.
 - a. The employee's partner and his or her dependent children can receive health insurance coverage; however they cannot make an independent election of COBRA coverage. Instead, the employee must make the election.
 - b. Though employers sometimes continue coverage where COBRA is technically unavailable, the continuation is not COBRA coverage and most employers retain the right to modify or terminate this continued coverage.

C. Entitlements

1. A critical aspect of estate planning for unmarried individuals is ensuring that disabled individuals, regardless of age, are provided for throughout their lives.
2. If federal or state benefits are available, care should be taken to provide financial support without jeopardizing eligibility for public aid.
3. Single parents and unmarried adults should take special care in providing for a disabled child, because the domestic partner most likely does not have a legal relationship with the child.
 - a. Without a legal relationship, it is unlikely any financial obligation to care for the disabled child could be legally enforced.
 - b. The domestic partner may be unwilling to take on the moral and legal obligations of a parent.
4. For purposes of qualifying their children for public aid, unmarried adults have an advantage.
 - a. The “deeming” rules of most public entitlement programs do not deem the assets of a domestic partner to be those of the parent or child.
 - b. Because of these rules, a substantial portion of the income and assets of the economic unit may be excluded for purposes of determining program eligibility.

D. Statutory and Common Law Rights

1. Statutory Heir
 - a. The consequences of dying without creating a legally valid and enforceable testamentary document can be severe for unmarried adults.
 - b. The laws of the state in which the individual was domiciled at death define the distribution rules of intestacy.
 - (1) The consequence of most states’ intestate laws for unmarried adults is that the surviving partner will take nothing.

- (2) Ultimately, if there are no blood relatives, the property will escheat to the state.
2. Statutory Share
 - a. Another important right is a surviving spouse's statutory right to take from a deceased spouse's estate despite a valid enforceable will otherwise disposing of the property.
 - b. Because domestic partners are not "spouses" under state law, the partner of an unmarried adult cannot successfully make a spousal election.
3. Inheritance Taxes
 - a. Inheritance taxes apply in some states only with respect to assets received by a person who is unrelated to the decedent.
 - b. The effects of adoption on inheritance rights of a child of a domestic partner should be considered.

VII. DEFINING PROPERTY RIGHTS

- A. Rights and Obligations
 1. All states have statutes specifically dealing with the rights, duties, and privileges associated with marriage.
 2. Some states are beginning to draft statutes dealing with the relationship of domestic partners, however, most unmarried couples are without statutory protections.
 3. Because domestic partners generally are not covered by child custody and divorce statutes, a relationship agreement between domestic partners may be the only means of creating an enforceable legal relationship between the parties.
 - a. Domestic relationship agreements are useful for defining and protecting both partners' expectations, and in many ways is the functional equivalent of a premarital agreement.
 - b. The agreement can be recognized and enforced as a contract, thereby permitting both flexibility and creativity in carrying out the expectations of the parties.

B. Domestic Relationship Agreements

1. Issues to address include:
 - a. Division of property upon termination of the relationship;
 - b. Child custody and visitation rights;
 - c. Child rearing;
 - d. Dependent status of partner or children;
 - e. Separate versus commingled property;
 - f. Sharing of expenses and bill payment;
 - g. Signature authority, record keeping, investment strategy, asset disclosure and values, asset contributions, and voting control over certain assets;
 - h. Domestic services (and compensation, if any, for the services);
 - i. Health and disability insurance;
 - j. Dispute resolution;
 - k. Remedies for default on obligations;
 - l. Estate planning;
 - m. Support (both during and after the term of the relationship);
 - n. Life insurance; and
 - o. Cohabitation of primary residence.
2. Effectively, the agreement bestows upon the domestic partners through contract many of the rights and obligations bestowed upon married persons by statute.
 - a. If the agreement is structured as a partnership, it also can also facilitate the purchase and transfer of life insurance, as noted above, and provide for enforceable inheritance rights.
 - b. A relationship agreement may also provide evidence of a “dedicated relationship” to those municipalities and corporations that extend benefits to domestic partners.

3. Consideration
 - a. Cannot be in violation of public policy (e.g., sexual services).
 - b. In most states, claims should be based on economic rights substantially independent of the nonmarital relationship and should not be based on rights arising from the cohabitation or the performance of domestic services.
4. Written Agreements
 - a. Generally must meet the same requirements as a contract.
 - (1) In writing;
 - (2) Signed by both parties; and
 - (3) Valid consideration.
 - b. The agreement should be based on financial matters in order to avoid invalidation of the agreement based on public policy arguments.

C. Tax Issues

1. Income Tax
 - a. If a domestic partner receives payment in exchange for household services, it will be income to the recipient.
 - b. Generally, gift status is preferable in order to take advantage of the annual exclusion and avoid double taxation of the funds as income to both domestic partners.
2. Joint Tenancy
 - a. Joint bank and brokerage accounts generally do not cause a gift upon establishment of the account. A gift occurs when the noncontributing partner withdraws funds from the account. See Regs. § 25.2511-1(h)(4).
 - b. Transfers of assets other than bank or brokerage accounts into joint tenancy generally cause gift tax issues upon retitling.
3. Upon dissolution of the relationship, a lump-sum settlement that cannot be attributed to services or other consideration provided

during the term of the relationship, should be treated as a gift (or, if pursuant to a death claim, a bequest).

VIII. PREMARITAL/PRE-COHABITATION PLANNING

- A. Although a cohabitation agreement generally is enforceable under contract principles and a premarital agreement is often proscribed by statute, they typically will need to address many of the same issues. (See “Defining Property Rights” above for a discussion of additional issues to address in a cohabitation/domestic relationship agreement.)
1. Premarital agreements have a past history of hostile treatment by the courts, but have gained acceptance with the rise in the divorce rate urged their acceptance as a practical resolution.
 2. About half the states have adopted the Uniform Premarital Agreement Act (UPAA) in its entirety or with minor modifications.
 3. Premarital agreements are useful in any situation where the cost of preparation is appropriate in relation to the assets at risk. Common situations that warrant a premarital agreement include:
 - a. Disparate wealth or debt;
 - b. One party does not work;
 - c. Children from a prior marriage;
 - d. A party owns an interest in a family business; or
 - e. Expectation of a substantial inheritance.
 4. Although the requirements for a valid premarital agreement may vary across jurisdictions, three common criteria generally are applicable.
 - a. Absence of fraud, duress, mistake, misrepresentation or nondisclosure of material fact.
 - b. Not unconscionable when signed.
 - c. Circumstances at the time of divorce do not make enforcement of the premarital agreement unfair and unreasonable.

5. Certain aspects of marriage/cohabitation are outside the scope of contract.
 - a. Generally, provisions that regulate day-to-day marriage issues, such as frequency of sexual relations or visits by the in-laws, are unenforceable.⁶
 - b. Some suggestions of provisions that a court would enforce include division of property, specification of support and living expenses, decisions regarding surnames, housework, domicile, and mediation.
6. The following is a non-exhaustive list of issues to consider addressing in a premarital or cohabitation agreement:
 - a. Division of assets upon divorce or death;
 - b. Temporary and permanent support obligations;
 - c. Allocation of debt;
 - d. Occupancy of the common residence;
 - e. Waiver of statutory forced share rights upon death;
 - f. Waiver of the right to act in a fiduciary capacity in the event of incapacity or death;
 - g. Fees and expenses of enforcement of the agreement; and
 - h. Preparation of a joint estate plan.

B. Maintaining The Character Of Separate Property

1. Even if a premarital agreement is not warranted or wanted, it is important to educate clients about the law regarding marriage and property in their state.
 - a. With forethought, it is possible keep separate property from becoming marital property.

⁶ Unenforceable provisions have also included (1) safekeeping of a treasured snowball collection in the freezer, (2) walking the dog, or (3) authorizing a husband to sue for divorce if his wife gains more than 15 pounds. A court, when deciding on the enforceability of a provision that the husband's mother could live with the married couple, stated that prospective spouses, in their marriage enthusiasm, may make promises to one another outside of human nature, and these promises violate public policy. Marston, Allison A., *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 900 (1997) and Belcher, Dennis I. And Pomeroy, Laura O., *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 19.

- b. Educate clients about the conversion of premarital or separate property into marital or community property, and the consequences of conversion.
- 2. Because tracing property over the course of time is so difficult, advise clients to maintain separate records for non-marital property.
 - a. Advise clients not to add funds to premarital bank or investment accounts in order to prevent commingling.
 - b. Advise the establishment of new bank and investment accounts to receive all income earned during the marriage and to be used during the marriage by the couple for “marital” financial activities.

IX. CONCLUSION

- A. As the nature of relationships between consenting adults evolves under the law, estate planners must be increasingly creative to balance out the inability of unmarried adults to avail themselves of tax benefits reserved for traditional families.
- B. Constant changes in this area mandate that estate planners keep apprised of developments regarding state law, income tax, estate tax, and entitlements in order to supplement the gaps in the rights afforded to and obligations imposed on unmarried adults.