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PASTERNAK & FIDIS REPORTER

Estate Planning for Same-Sex Couples

by Nancy G. Fax

The Legal Landscape Six jurisdictions in the United States recognize same-sex marriages: the District of Columbia, Connecticut, Iowa, Massachusetts, New Hampshire and Vermont. California recognized same-sex marriages for a few months in 2008 (and approximately 18,000 same-sex couples were married in that period). The Maryland legislature voted against same-sex marriages in 2011. It is likely that a same-sex marriage bill will be introduced in the General Assembly in 2012.

Several states do not permit same-sex marriage but do recognize valid same-sex marriages entered into elsewhere. Other states have created a legal relationship that provides financial and other rights comparable to marriage, such as civil union or registered domestic partnership. The vast majority of the states, however, ban same-sex marriage, and some of those states prohibit civil unions and registered domestic partnerships as well.

Aside from the myriad approaches taken by the states, the federal Defense of Marriage Act defines marriage as a legal union between one man and one woman for all purposes under federal law, including the tax code. It also provides that any state may refuse to recognize a marriage, or comparable legal relationship, between persons of the same sex even if valid in the state where the parties married or entered into the relationship.

Basic Estate Planning The basic elements of an estate plan – will, power of attorney, advance health care directive, beneficiary designations – are important for everyone, but they are even more important for same-sex couples. This is because the state and federal law rights and protections available to spouses and other family members often are not available to same-sex couples. Even if the same-sex couple was married in one of the states that recognizes same-sex marriage, the couple is not recognized as married under federal law and may not be recognized as married in another state.

Let's look at an example: Ozzie and Harriet, a married heterosexual couple, neglect to put together a basic estate plan. They have no wills, no powers of attorney, no advance health care directives and no beneficiary designations. Ozzie becomes incapacitated and can no longer conduct his own financial affairs or make his own health care decisions. Under state law, Harriet will have priority to be appointed as Ozzie's guardian and she will have the authority to make health care decisions for him. Upon Ozzie's death, under state law, Harriet will automatically inherit some portion or all of Ozzie's estate and, under federal law, she will automatically be entitled to 100% of any qualified retirement plan survivor benefits Ozzie had. With regard to Ozzie's funeral and burial/cremation arrangements, Harriet will be in charge of all decisions. All of these results will occur even without any planning because of applicable state and federal laws.

Now let's look at another example: Olive and Hannah are an unmarried lesbian couple and they have not entered into a civil union or registered as domestic partners. Like Ozzie and Harriet, they have lived together in a stable relationship for many years and, like Ozzie and Harriet, Olive and Hannah have no estate plan in place. When Olive becomes incapacitated, Hannah has no priority to become Olive's guardian and has no authority to make health care decisions for Olive. Under

—continued on page 3

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INSIDE ▶

P&F Pro Bono
Same-Sex Couples and Premarital Agreements
The 2010 Tax Relief Act
Round House Theatre

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At Pasternak & Fidis, we firmly believe that we have a responsibility not only to our paying clients but also to our community as a whole. Our lawyers have taken on a great many pro bono and charitable activities in recent years that center on the communities in which we live and on the administration of justice. Here are some highlights of those activities.

Managing partner **Nancy Fax** serves on the board of the Community Foundation for Montgomery County. The foundation houses a large variety of funds through which individuals, families and businesses in Montgomery County do their charitable giving, and it maintains the Sharing Montgomery Fund which provides grants to dozens of local non-profit organizations each year. Nancy previously served as chair of the foundation's board from 2004 to 2006.

Nancy also serves on the Board of Directors of the Bethesda-Chevy Chase High School Educational Foundation. The foundation funds programs that provide support for B-CC High School students to reach their academic potential and help them build a pathway to college.

Partner **Anne Coventry** serves on the Board of Directors of Friends of Fillmore Arts Center in the District. The center is a co-operative program in the D.C. public schools that provides skills-based education for students in creative writing, theater, music and other visual and performing arts.

Anne is also a member of the board of the American Dance Institute in Rockville. The institute is dedicated to advancing artistic excellence through education, performance and a strong commitment to emerging companies and new works.

Partner **Linda Ravdin** is a member of the Board of Trustees of the Bethesda-based Round House Theatre. Round House is a critically acclaimed performing arts institution that is celebrating its 32nd season. Its mission includes the production of classic and contemporary works for the stage as well as the development of community-based education programs. The firm has been a sponsor of two of Round House's recent productions.

Partner **Anne (Jan) White** will become the President of the District of Columbia Academy of Collaborative Professionals in June. The group's mission is to promote collaborative practice as a method of resolving family and civil law matters in the D.C. area. It provides training, education, and coordination for collaborative professionals in the region. Jan previously served for a year as President-Elect of the group.

Partner **Vicki Viramontes-LaFree** is serving as President-Elect of another group that promotes collaborative practice, the Collaborative Dispute Resolution Professionals (CDRP). She will become President of CDRP in June 2011. CDRP is made up of a diverse group of lawyers, mental health and financial professionals who practice in Montgomery County, Maryland. CDRP is committed to furthering the collaborative practice movement and educating the public on a client-centered dispute resolution process.

Partner **N. Alfred Pasternak** is a member of the Maryland Attorney Grievance Commission's Peer Review Committee. The committee reviews complaints against Maryland attorneys and makes recommendations for possible attorney discipline.

Partner **Marcia Fidis** is a frequent teacher in continuing legal education courses on such topics as estate planning and premarital agreements at such venues as the Bar Association of Montgomery County and the Maryland State Bar Association. She has also taught the basics of estate planning to members of the general public to inform nonlawyers of their rights and responsibilities.

Associate **Jeremy Rachlin** serves as a representative on the Montgomery County Circuit Court Bench-Bar Committee, which is composed of local attorneys, judges, representatives from the Sheriff's office and the Clerk's office, and court administrators. The goal of the committee is to establish an open dialogue to maintain the high quality of service and practice before the county's Circuit Court.

Roger A. Hayden, II, a partner in the Business, Real Estate & Litigation group, was elected to the George Washington University Parent Association Advisory Council (PAAC). The PAAC's mission is to develop a strong parental constituency, establish a bond with the university administration, advocate for students, parents and the university, and assist in promoting and enhancing the university.

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Estate Planning for Same-Sex Couples

—continued from cover page

most state laws, assuming Olive has no adult children, Olive's parents or siblings would have the right to oversee Olive's care. Upon Olive's death, Hannah would receive nothing from Olive's estate and she would have no claim to any portion of Olive's qualified retirement plan survivor benefits. Finally, Hannah would have no authority to make any funeral or burial/cremation arrangements for Olive; Olive's next of kin would have the authority to do so.

These contrasting examples demonstrate how important it is for married same-sex couples and unmarried partners (same-sex or otherwise) to create a basic estate plan, including a will, a power of attorney, an advance health care directive and beneficiary designations for life insurance and retirement accounts. In addition, if desired, each member of an unmarried couple should consider executing a written statement designating his or her partner as the person authorized to make funeral arrangements and decisions about burial or cremation.

Gift and Estate Tax Planning Under federal law, a married couple enjoys the benefits of the unlimited gift and estate tax marital deductions. Because of these deductions, a married person can transfer unlimited assets to his or her spouse by gift during lifetime or by bequest at death with no federal gift or estate tax. The gift and estate tax deductions are not available to same-sex couples, whether or not validly married under state law, because of the federal Defense of Marriage Act, which defines marriage as a heterosexual relationship. In those states that impose a state level estate tax or an inheritance tax, the status of the same-sex couple (whether or not married, in a civil union or registered domestic partnership) will determine the applicability of the state tax.

Same-sex couples, therefore, are more likely to face gift and estate taxes on transfers between them than similarly situated married heterosexual couples. Accordingly, it is important to plan for potential imposition of estate or inheritance tax at the death of the first to die. In these situations, the acquisition of life insurance and the ownership of the life insurance in an irrevocable life insurance trust may be a good option to provide liquidity and reduce estate shrinkage. In considering the acquisition of life insurance, unmarried same-sex couples should be aware of the possibility that an insurance company may question whether they have an insurable interest in each other and may require additional documentation to establish the existence of an insurable interest.

At least for 2011 and 2012, the federal gift and estate tax exemptions are set at $5 million, so many people will not be affected by federal transfer taxes. We do not know what the exemptions will be after 2012. In addition to the federal transfer taxes, 21 states and the District of Columbia impose estate and/or inheritance taxes, and these taxes need to be taken into consideration. In the District of Columbia and Maryland, the threshold for estate tax is $1 million and the rates range from 5.6% to 16%. Virginia has no state estate tax.

One Estate Planning Advantage There is one type of estate planning strategy that same-sex couples can take advantage of in a way that married or related parties cannot. Chapter 14 of the Internal Revenue Code deals with transfers among traditional family members and prohibits "freeze" transactions which are used to pass property from one generation to the next at a reduced transfer tax cost. A freeze transaction can be defined as a gift by one member of a family to another member of the family to freeze the gift at its gift tax value. Any post-gift appreciation is removed from the donor's gross estate and shifted to the donee.

Among other things, Chapter 14 prohibits the use of common-law grantor retained income trusts (GRITs) for the transfer of assets to members of a family. A GRIT is an irrevocable trust to which the grantor transfers assets such as a residence, business or other assets for a period of years. The grantor retains the right to occupy the residence or the right to the income produced by the trust for the term of the trust. Upon expiration of the term of the trust, the assets are distributed to the beneficiary of the trust (the grantor's partner or spouse). The benefit of the GRIT is that the fair market value of the property transferred to the trust is reduced by the value of the grantor's retained interest in determining the gift tax value of the transfer. In addition, any appreciation in the trust property is transferred to the beneficiary.

Neither a same-sex spouse nor a same-sex partner constitutes a family member for purposes of Chapter 14. Accordingly, this tax-efficient planning technique, which cannot be used by a traditional family, is available to same-sex couples.

Asset Ownership It is critically important to make deliberate decisions about how to title assets. This is true for all couples, but it has particularly important ramifications for same-sex couples. Joint ownership of assets by same-sex couples may create the potential for unintended gifts or inadvertently inflate the estate of the first owner to die, possibly resulting in an increase in taxation on assets left to the survivor.

With jointly owned accounts, gifts occur not when money is deposited into an account, but rather when assets are withdrawn from the joint account. If contributions to the account are not equal, the excess of contributions that are beyond the annual gift tax exclusion (currently $13,000 for the year in which withdrawals occur) would be a taxable gift. If either party's withdrawal exceeds this amount, a gift tax return may be required, although no gift tax is likely to be due because of the lifetime gift tax exemption ($5 million in 2011 and 2012).

When same-sex spouses or partners title real property jointly, a gift can occur at the time of purchase if the parties contribute disproportionate amounts for a down payment and the contribution difference between the parties exceeds the annual gift tax exclusion amount ($13,000 in 2011). A gift can also be triggered upon paying the mortgage on the property if one party contributes an amount above his or her pro rata obligation that exceeds the annual gift exclusion.

Another complication is that the Internal Revenue Code provides that when an asset (including real property) is jointly titled, the entire value of the asset is included in the gross estate of the first to die, unless the surviving party can prove his or her contributions. For this reason, when a same-sex couple establishes jointly owned accounts or has jointly owned real estate, it is critically important to keep records of each party's contributions.

In some cases, acquiring assets individually or as tenants in common may be advisable in order to avoid the adverse transfer tax consequences described above. If assets are already jointly titled, then it might make sense to consider moving joint accounts to individual or tenancy in common accounts

—continued on page 7

Anne (Jan) White, partner in the Divorce & Family Law group, has been named to the Ethics Committee of the Maryland Collaborative Practice Council.

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Same-Sex Couples and Premarital Agreements

By Linda J. Ravdin

With the advent of marriage equality, a same-sex couple will have the same reasons for thinking about whether to enter into a premarital agreement as an opposite-sex couple. There are additional reasons for same-sex couples to consider a premarital agreement, and several drafting issues require special attention. This article will address both aspects of same-sex premarital agreements.

Why a Premarital Agreement?

A premarital agreement is a contract that determines spousal rights when the marriage ends by death or divorce. A premarital agreement substitutes the parties' contract for the spousal rights that would otherwise apply under state law at the end of the marriage. Some couples choose to predetermine their financial rights and obligations rather than rely on state law. When a party has children from a previous marriage or relationship, or other family members he or she wishes to provide for at death, it can make sense to have a premarital agreement to allow for allocation of property among them in a way that is tailored to the needs and wishes of the parties. Many persons considering marriage prefer to decide in advance about their property and support rights if the marriage does not work out, rather than subject themselves to the uncertainties of a court-based resolution.

Why It Matters More to the Same-Sex Couple

If an opposite-sex couple marries without a premarital agreement, state law will step in to determine their rights at the end of the marriage. Opposite-sex marriage is recognized everywhere; therefore, there will be a court that has the power to determine their rights. Not so when a same-sex couple marries. If a spouse moves to a state that does not recognize their marriage, if they move together to such a state, or if a spouse owns property in a state that does not recognize their status as spouses, they may not have meaningful access to a court to resolve issues arising from a death or dissolution. For example, a Texas court refused to divorce two women who had married in Massachusetts and later moved to Texas. As a result, there was no court available to them to decide on equitable division of property or consider a spousal support claim. There was no state law to fall back on.

A premarital agreement can remedy this problem because it can predetermine parties' financial rights; they do not need to fall back on state law. If there is a dispute about their rights under the contract, they would be able to go into court to have a court interpret the contract. The court should not need to decide whether the marriage is valid in order to interpret a valid contract or decide a claim of breach. Alternatively, the parties could opt for another form of dispute resolution and stay out of court.

Drafting Issues Requiring Special Attention

Many of the issues requiring special attention in the drafting of a same-sex premarital agreement arise from lack of uniform recognition of same-sex marriage and the possibility that one of the parties or both parties will move to a state that does not recognize their marriage or that a party will own property in a state that does not recognize their status as spouses. A premarital agreement can take account of this. Moreover, even if the couple lives in the District of Columbia or a state that recognizes their marriage, their rights will be affected by federal law in some fashion. The federal Defense of Marriage Act (DOMA), 1 U.S.C. §7, prohibits recognition of a same-sex marriage for all purposes under the U.S. Code. A premarital agreement can take account of these gaps in the law's protection of marriage.

Validity A basic requirement for validity of any contract is consideration. Consideration is something of value given or received in exchange for something else of value. The law deems marriage itself so valuable that it is sufficient to fulfill the requirement for consideration for a valid premarital agreement. In general, therefore, a premarital agreement may state that the consideration is the marriage; it need not identify any other consideration to be a valid contract. Marriage alone may not be sufficient, however, under the law of a state that considers the marriage void. A court in such a state could rule that the premarital agreement is void for lack of consideration because the marriage is void. A 2010 New Mexico case, *Rivera v. Rivera*, held that a premarital agreement would have been void had the husband succeeded in proving that the marriage was void. Therefore, a same-sex premarital agreement should identify additional consideration beyond the marriage itself so as to better protect the agreement from an attack on its validity. Some examples of other forms of consideration that may be applicable for a given couple include:

- Mutual waivers of spousal claims to division of property, spousal support, and rights as a surviving spouse;
- Mutual waivers of non-spouse claims, such as property claims based on other legal theories, e.g., oral contract, quasi-contract, unjust enrichment, or business partnership;
- Agreement to share economic resources;
- Agreement to share noneconomic resources, such as caring for a home and children, providing companionship, and other domestic activities;
- Financial and moral support for a career, education, or a business;
- Agreement to make contributions, monetary and nonmonetary, to acquisition of a specific asset, such as a home or a business.

For consideration to be legally sufficient, it need not be equal in monetary value or of the same character. So, for example, a premarital agreement in which one spouse agrees to provide more financial resources and the other agrees to manage a home and children should be valid as a contract. (But such a contract can have tax consequences that should be considered. See the article by Nancy G. Fax in this issue.)

Broadening the Scope The agreement could be broadened in scope and called a "Premarital and Domestic Partnership Agreement." The majority of states' laws recognize the general validity of domestic partnership agreements; courts have acknowledged that unmarried cohabiting adults have a right to enter into a contract governing the financial incidents of their relationship. The agreement should state the parties' intent that the agreement be a valid

—continued on page 5

On April 20, 2011, **Linda Ravdin**, partner in the Divorce and Family Law group, will present a teleseminar sponsored by the American Bar Association Family Law Section entitled: "Premarital Agreements: Representing the Stronger Party; Representing the Weaker Party."

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The 2010 Tax Relief Act

by N. Alfred Pasternak

As we all know by now, in December 2010 Congress passed and the President signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act. This is a brief overview of some of the important federal estate, gift and generation-skipping transfer tax provisions of the new law.

Estate Tax: The new law brings back the estate tax -- through the end of 2012, anyway. During 2011 and 2012, the estate tax rate will be 35%. For 2011, the exemption amount (sometimes called the applicable exclusion amount) will be $5 million per individual. The exemption will be indexed for inflation after 2011. At these levels, it is estimated that only about 3,500 estates will be subject to the federal estate tax in 2011.

Gift Tax: For gifts made after December 31, 2010, the gift tax will be unified with the estate tax, so that only taxable gifts in excess of $5 million will be subject to the gift tax rate of 35%. The $5 million lifetime exemption amount must be reduced by any exemption amount utilized in prior years, but not by the amount of gifts in prior years on which gift taxes were paid.

The annual exclusion for transfers of present interests in property to each donee during the year remains in effect. The amount of the exclusion for 2011 is $13,000, and will be indexed for inflation for 2012.

It may be advantageous to make gifts during 2011 and 2012 to utilize the $5 million gift tax exemption while it is available, especially if gifts are made through use of one or more planning strategies that can leverage the gift tax exemption for additional tax savings.

GST Tax: The generation-skipping transfer (GST) tax is a tax on gifts and bequests to grandchildren while their parents are still alive. The exemption from the GST tax is also $5 million per individual and will be indexed for inflation after 2011. The tax rate for transfers made in 2011 and 2012 in excess of the $5 million exemption will be 35%.

Portability: From a planning standpoint, a nice feature of the new law is that it makes it easier to transfer any unused portion of the $5 million exemption of the first of a married couple to die to a surviving spouse. So, married couples can shield up to $10 million of their assets from estate and gift taxes. Tax professionals call this "portability." Portability does not apply to the generation-skipping transfer tax, and it does not provide the asset protection, flexibility, or control that can be achieved with traditional estate planning (i.e., the use of trusts for the surviving spouse). Portability also does not remove future appreciation on assets from the surviving spouse's taxable estate. Despite these drawbacks, portability will be a very helpful feature for married individuals if it becomes permanent. The current law provides for portability only in 2011 and 2012, meaning both spouses would need to die before 2013 for portability to do them any good. Whether portability eliminates the need for a by-pass or credit shelter trust in your estate planning should be discussed with your attorney.

What will happen after 2012 is anybody's guess. So be prepared for increasing uncertainty, and ensure that your estate plan is flexible and can adapt to changing tax laws. Existing estate plans that divide the estate between one set of beneficiaries and another based on a formula that depends on the amount of the estate tax exemption or GST tax exemption should be reviewed to ensure that they are still appropriate in light of increased exemption levels.

Same-Sex Couples and Premarital Agreements

—continued from page 4

contract regardless of whether the marriage is recognized in the state where a dispute may arise. A broader agreement of this type need not be recognized as a premarital agreement in a state that does not recognize the marriage; it can still be a valid domestic partnership contract.

Defining Marriage and Divorce/Dissolution A premarital agreement does not usually define the word "marriage" because the term has had a universally understood meaning. However, because a court in a non-recognition state may interpret the term in a contract to refer only to a marriage that is legal in that state, the same-sex premarital agreement should define the term. The definition can embrace: the legal status of marriage as recognized where celebrated; a registered domestic partnership if the parties' legal status is recognized as such under the laws of a state where a dispute arises; and the parties' contractual relationship as defined in the agreement.

Similarly, the word "divorce" does not usually need to be defined. However, in a same-sex premarital agreement, it is appropriate to use a more inclusive term, such as dissolution. Further, the term can be defined to include a formal divorce in a state that recognizes the marriage as well as dissolution under a different statutory scheme, such as a domestic partnership statute. It should also include a decision to end the relationship without formality insofar as no formal procedure is available at the time and in the place where the parties end their relationship.

Creating Parentage Many same-sex couples intend to make children a part of their family and they may wish to establish legal parentage in both partners. The law regarding the rights of de facto parents varies and it is in flux. Same-sex couples who choose to enter into a premarital agreement may wish to foreclose litigation over parentage in favor of contractual terms that, to the extent permitted by law, predetermine their parentage rights. Nevertheless, a contract alone may not be sufficient to fully protect both parties and their children. Some terms to consider:

- Agreement to a second-parent adoption, if permitted by state law;
- An agreement by the legal parent to a consent joint custody order during the marriage so as to create custodial rights in the other parent if permitted by law;
- A provision that both parties will be financially responsible for any child they agree to bring into their family during the marriage and in the event of dissolution;
- An acknowledgement that the parties intend that each spouse be considered the de facto parent of a child born to or adopted by the other.

When a party already has a child, he or she may wish to consider some of the same options so that a spouse will have parental rights in the event of death or dissolution. Alternatively, a parent may not want a new spouse to acquire de facto parent status. In that event, the agreement could express that intent.

—continued on page 6

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Same-Sex Couples and Premarital Agreements

—continued from page 5

Parties who enter into an agreement for parentage need to understand that once parentage is created, a parent cannot be divested of his or her parental rights simply because the parties are no longer a couple or the biological parent decides that the other parent is unsuitable.

The discussion of parentage is distinct from the question of a court's authority to resolve a dispute between legally recognized parents regarding allocation of time and decision-making authority incident to dissolution. A contract cannot predetermine custodial rights before a dispute arises, especially of an unborn child, regardless of the gender of the parents.

Agreement Terms for Buyout of a Marital Home When an agreement will give one spouse the right to buy out the interest of the other in a home or other real estate they may acquire together, the agreement should require the buyer to refinance the mortgage to remove the other as a debtor. Most mortgages have a due-on-sale clause that requires immediate payoff upon sale or transfer to a third party. There is a federal law that prevents a lender from invoking the due-on-sale clause when the property is transferred to a spouse. However, because of DOMA, the law does not protect a same-sex couple. The agreement should therefore require a payoff or refinance simultaneously with a buyout, and for a sale in the event a refinance is not possible.

Post-Dissolution Support Some premarital agreements predetermine an amount and duration of support for a spouse in the event of divorce. Because of DOMA, a same-sex couple will not be able to take advantage of income tax laws that allow the payor to deduct these payments from income and to shift the income to the recipient. Other parties may want the agreement to allow for a spouse to seek post-dissolution support, but may not wish to predetermine an amount or duration, preferring to allow this decision to be based on the circumstances existing at dissolution. The agreement could provide for this decision to be made in binding arbitration so as to take account of the possibility there will not be a court available to them to make a decision about support. They may also want to provide in advance for using the services of a CPA to advise about how to structure support to take account of the tax consequences for both parties.

Tax Consequences of Property Transfers There are tax consequences when a married couple transfers or divides property between them as part of a divorce. The tax consequences of property transfers between same-sex divorced or divorcing spouses are different. A premarital agreement can anticipate this. The parties could agree in advance that any division of property will adjust for tax consequences so that each party bears an equal or other agreed share. This could mean, for example, determining, based on current tax rates, the amount of tax one party will bear upon sale of an asset in the future and adjusting the value of that asset down to reflect that future cost. The parties could agree in advance on appointment of a neutral CPA to help them figure it out or could even agree to treat the CPA's decision as binding. Similarly, the agreement could anticipate the different tax consequences that apply to same-sex spouses when one spouse dies and provide for a fair mechanism to address them.

Retirement Benefits Some agreements provide for sharing retirement benefits earned during the marriage. If there is likely to be a disparity in value, so that there will need to be an equalizing transfer in the event of dissolution, the drafting stage is the best time to consider implementation. A court will not be able to order a plan administrator to make direct payment of retirement benefits to a same-sex former spouse; this mechanism is only available to opposite-sex spouses. Therefore, the agreement could provide for another means to allocate the value of these benefits. For example, the value of the nonparticipant's share of the plan could be determined and the nonparticipant would receive other property to equalize. The agreement should also anticipate tax consequences, as discussed above, and provide for making an appropriate adjustment. When one party has a defined contribution account, such as a 401(k), and the other has a defined benefit pension plan, such as a federal pension, the agreement could provide for hiring, and sharing the cost of, an actuary to determine the present value of the pension so as to have a basis for comparison of value of these two different forms of benefit. .

Dispute Resolution Parties to a same-sex premarital agreement should consider including provisions for resolution of a dispute regarding implementation of the agreement. They may wish to provide for mediation or for a collaborative process. Collaborative law is ideally suited to same-sex couples because one of its hallmarks is a process that respects the needs and interests of all members of the family, including the children. Neither mediation nor collaborative law imposes a resolution on either party. Thus, even when parties elect one of these processes as their first step to resolving a dispute, they may wish to consider binding arbitration as a last resort.

What a Premarital Agreement Cannot Do

One thing that neither a premarital agreement nor any other contract can do is to constitute a divorce from the bond of matrimony. Take, for example, a couple who marries in the District of Columbia, moves to Missouri, decides to go their separate ways, and carries out a division of property as provided in their premarital agreement. In Missouri, and states that do not recognize their marriage as a marriage or any other legal status, they are two unmarried people. In the District of Columbia and Massachusetts, they are still married; neither is free to remarry without getting a divorce. Most states have a residence requirement, so that, for example, in the District, one spouse must be a resident for six months in order to file for divorce. There may not be a readily available forum to dissolve the marriage.

Conclusion

Until such time as state legislatures and Congress provide full protection for the marriages of same-sex couples, these couples will need to be proactive about putting the appropriate legal documents in place to provide as much legal protection for their family and financial interests as the law allows.

Divorce and Family Law partner **Linda Ravdin** contributed an article to the Winter 2011 issue of *Family Advocate*, the quarterly magazine of the American Bar Association's Family Law Section. The article, entitled "Making Pension Promises in a Prenup: the Impact of ERISA," covers the important and highly technical requirements of federal law (the Employee Retirement Income Security Act) governing private qualified retirement benefits and employer-sponsored life insurance when these benefits are addressed in a premarital agreement.

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Estate Planning for Same-Sex Couples

—continued from page 3

(pro rata based on ownership). If a couple has made disproportionate contributions to the acquisition of jointly titled real property, the parties may wish to execute a new deed titling the property in their names as tenants in common in percentages that reflect their respective contributions.

Asset Protection Same-sex couples, like other couples, need to consider how best to protect assets from future creditors of either member of the couple. A married couple can own property as tenants by the entirety, which is a form of ownership available only to married people. If property is owned as tenants by the entirety, it cannot be attached by a creditor of one of the spouses (except the IRS). From an asset protection standpoint, this is one of the benefits of marriage. On the other hand, property owned as joint tenants with right of survivorship, a form of ownership available to married and unmarried people alike, is vulnerable to attachment by a creditor of one owner. For those married couples who wish to own property jointly, tenancy by the entirety is preferable to joint tenancy for protection against creditor claims. In the District of Columbia and any state that recognizes same-sex marriage, same-sex married couples can own real estate in tenancy by the entirety.

Cohabitation or Domestic Partnership Agreements Same-sex couples planning to marry should consider whether to have a premarital agreement. For those same-sex couples who cannot or do not wish to marry, a cohabitation or domestic partnership agreement may be an important part of their overall plan. Such an agreement will provide a degree of certainty with respect to how expenses will be handled, how income will be shared or separated, how assets will be titled, what will happen to assets in the event the relationship terminates (by death or dissolution), and how disputes will be resolved.

Conclusion As is true for any couple, the right estate plan for a same-sex couple depends on the particular wishes and objectives of the parties. Planning for the same-sex couple is especially important and challenging, however, because of the complex legal and tax considerations that must be taken into account. Unless and until same-sex marriage is universally recognized, we will continue to have to deal with these complexities in planning for same-sex couples.

On February 17, **Anne (Jan) White** made a presentation with other collaborative law practitioners to the Montgomery County Bar Family Law Section on "Ten Myths about Collaborative Practice."

In February, Divorce & Family Law partner **Vicki Viramontes-LaFree** made a presentation to the D.C. Superior Court Family Court judges and law clerks entitled "Retirement Benefits at Divorce." Vicki has lectured throughout the DC Metropolitan area on the division of retirement plans at divorce, including private employer-sponsored plans, federal and state statutory plans, and the plans offered by the World Bank, IMF and other international organizations.

On March 2-4, **Anne (Jan) White**, as part of the Collaborative Practice Training Institute, taught a group of over 100 attorneys how to represent a client in a collaborative case. This training was sponsored by the Administrative Office of the Maryland Courts and the Maryland State Bar Association. Collaborative law is increasingly being used by parties who want to settle their cases out of court by interest-based negotiation.

In March, Estate Planning & Administration attorney **Anne Coventry** will be speaking at the DC Bar on estate planning considerations for digital assets. In May, Anne will return to the DC Bar to talk about estate planning and administration concerns affecting same-sex couples.

On April 21, **Anne (Jan) White** will be on a panel of "Legends of the Bar" at the annual Law Day of the Bar Association of Montgomery County, Maryland.

Estate Planning & Administration associate **Oren Goldberg** gave a presentation to a group of life insurance agents in Montgomery County about the new estate and gift tax laws and how these changes will affect estate planning with life insurance.

Estate Planning & Administration partner **Anne Coventry** was quoted in the *Wall Street Journal* in December regarding proposed tax legislation offered in the Senate. She commented on a bill sponsored by Sen. Max Baucus (D-Mont.) that would have reinstated the generation-skipping tax at a 45% rate and raised the gift tax rate from 35% to 45%, both retroactive to December 2, 2010. That would have closed a tax-saving window for wealthy individuals who had been planning to make gifts in 2010 before the rates were scheduled to increase to 55% on January 1 if Congress had failed to act. "There are some people who were thinking about making year-end gifts that would trigger a gift tax, who now will think twice about writing that check," Anne was quoted as saying. The Baucus bill was defeated and Congress ultimately passed different tax legislation, which President Obama signed into law on December 17. (The new law is discussed in Al Pasternak's article in this issue of the newsletter.)

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Round House Theatre

In February 2011, Pasternak & Fidis was delighted to have the opportunity to sponsor its second Round House Theatre production -- one with a very close relationship to our home town of Bethesda. This was the world premiere of *Charming Billy*, a play adapted by Round House's producing artistic director Blake Robison from a prize-winning novel by Bethesda author Alice McDermott.

The play, which is set in a bar in the Bronx, centers on the life of Billy Lynch, a shoe store clerk and poetry lover who drank himself to death but left an indelible mark on his family and friends who have come together to celebrate his life.

The Round House production received excellent reviews and was a box-office hit. It was extended an extra week until Feb. 27, 2011, because of ticket demand.

The Washington Post review said Robison adapted the play "with remarkable skill and faithfulness, pruning characters and subplots and ingeniously reinventing transitions, while preserving much of the book's texture and many of its most affecting scenes." It called the production "a feast of winningly subtle acting turns."

Round House Theatre is one of the largest and most acclaimed professional theatre companies in the D.C. area. It produces nearly 200 theatrical performances each season at its 400-seat Bethesda theatre and its 150-seat black box theatre in Silver Spring.

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