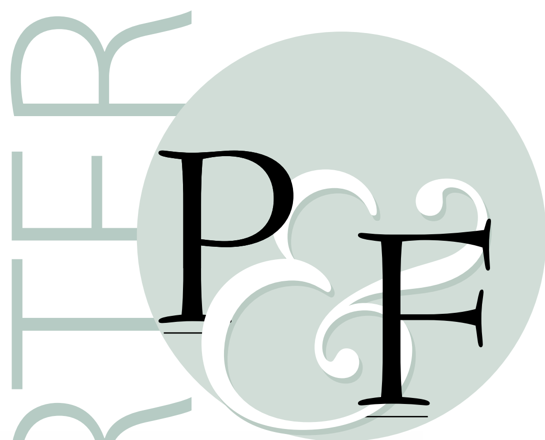
February 2005

INSIDE
Joint Property — Blessing or Curse?
Validity of Domestic Partnership Agreements in the Metro Area
Spotlight on P & F Partner J. Michael Conroy
Developments to Watch
P&F News



REPORTER

Joint Property– Blessing or Curse?

by Nancy G. Fax

Clients often think that holding assets jointly with adult children or siblings makes things easier, but the reality is that often it only makes things harder. Frequently, clients say to me "I have everything jointly titled with my daughter so that she can distribute the assets at my death to herself and my other two children without the need for probate" or "My son's name is on all my accounts so he can write checks for me if I become disabled" or "I have my sisters' names as co-owners of my house to avoid estate taxes."

All of these goals sound reasonable, but is joint ownership the best way to accomplish them? The answer usually is "no."

Let's take the first scenario - joint titling with your daughter so she can distribute assets at death without probate. Upon your death, the assets will pass to your daughter as the surviving owner. What if she is disabled and cannot make the distributions to your other children as planned? What if she has large debts and her creditors attach the assets before she can carry out your wishes? What if she simply changes her mind about sharing with her siblings? Even assuming your daughter has the ability and the desire to transfer assets to her siblings, those transfers will be viewed as gifts by the IRS and will have gift tax consequences to your daughter.

The second scenario assumes that the only way your son can write checks for you is to put his name on your account as a joint owner. In reality, there are better ways to permit your son to act for you without causing confusion about the ownership of the account. One simple way is to execute a power of attorney to permit your son to act as your agent with regard to your accounts. The power of attorney can name a successor attorney-in-fact so that, if your son becomes incapacitated, the named successor can manage your accounts for you. An even more complete solution to the problem of managing assets upon disability is a revocable living trust that gives the successor trustee the power to manage all of your assets for your benefit.

The third scenario assumes that titling assets with your siblings will somehow save estate taxes. Not so. The federal estate tax rule is very clear on this point: A jointly titled asset is fully includible in the estate of the first joint owner to die unless the surviving owner can prove that he or she furnished consideration for the acquisition of the asset. In other words, unless the surviving joint owner has records showing that he or she contributed to the purchase of the asset, the asset is fully subject to estate tax in the deceased owner's estate. This result can be particularly troublesome when the surviving owner did contribute but can't prove it.

Sometimes clients have different assets titled jointly with different children with the expectation that each child will receive equal value upon the client's death. But often the values are unequal at the time of death (because of withdrawals during lifetime or fluctuations in value) and there's no easy way to remedy that inequality after death.

—continued on page 4

Linda J. Ravdin was named in the December, 2004 *Washingtonian* Magazine List of Top Lawyers for the DC area.

The Pasternak & Fidis Reporter

Pasternak & Fidis, P.C.
7735 Old Georgetown Road
Suite 1100
Bethesda, Maryland
20814-6183
301-656-8850
Fax: 301-656-3053
www.pasternakfidis.com

Pasternak & Fidis, P.C.
Attorneys at Law

7735 Old Georgetown Road
Suite 1100
Bethesda, MD 20814-6183
(301) 656-8850
Fax: (301) 656-3053
www.pasternakfidis.com

Business, Real Estate & Litigation Group
N. Alfred Pasternak
Mitchell I. Alkon
Roger A. Hayden, II
J. Michael Conroy
Jason W. Henderson

Divorce & Family Law Group
Anne (Jan) W. White
Linda J. Ravdin
Vicki Viramontes-LaFree
Lucy E. Nichols

Estate Planning & Administration Group
N. Alfred Pasternak
Marcia C. Fidis
Nancy G. Fax
Patrick M. Schoshinski
Lauren D. Krauthamer

Validity of Domestic Partnership Agreements in the Metro Area

by Linda J. Ravdin

While the debate continues over same-sex marriage, lawyers should have the tools to offer their clients who cannot marry, or who choose not to do so, options to protect their property interests in the event of the death of a partner or the dissolution of the relationship. This article addresses one option, the domestic partnership contract. Under current law domestic partners have no property rights at death or dissolution solely by virtue of their status as domestic partners as do married persons. Their property and support rights, if any, arise out of express contract, oral or written, or other legal theories.

HISTORY

Early cases prohibited enforcement of domestic partnership agreements that provided for property rights upon death or dissolution without regard to a party's actual direct monetary contributions to acquisition of specific property or for post-dissolution support. Courts refused to enforce these agreements because they viewed them as a subterfuge for prostitution. As societal attitudes have changed courts in the majority of states have held that a domestic partnership contract is enforceable if it meets the basic standards for validity of any contract.

Most of the reported cases have involved a post-death or post-dissolution claim that the parties had an oral contract. An oral contract is difficult to prove as inevitably after a death or dissolution one party has an incentive to deny the existence of the oral agreement. A written agreement signed by the parties can benefit both parties by making their intentions clear before a dispute arises.

MARVIN V. MARVIN

The 1976 California case of *Marvin v. Marvin*, began the modern trend. In *Marvin* the court recognized the right of unmarried cohabitants to enter into a contract to pool resources and in which nonmonetary contributions to the family could be recognized as consideration for the acquisition of property and support rights. To date, at least 39 states and the District of Columbia have approved enforcement of domestic partnership agreements. As the New Mexico Supreme Court put it in *Dominguez v. Cruz*, a 1980 case, "if an agreement can exist between business associates, one can exist between cohabiting adults if the essential elements of the contractual relationship are present."

DEVELOPMENT OF MARYLAND LAW

Maryland appears to have joined the majority of states that permit recognition of a domestic partnership agreement, but Maryland law is still evolving. As early as 1940, in *Baxter v. Wilburn*, the Maryland Court of Appeals (Maryland's highest court) said: "Contracts based upon ... illicit sexual intercourse are void and unenforceable .... But the mere fact that a man and a woman are living together in an unlawful relation does not disable them from making an enforceable contract with

—continued on page 3

Linda J. Ravdin is a member of the firm's Divorce & Family Law Group where she concentrates in separation and divorce, including premarital, postmarital, marital separation, and domestic partnership agreements. She is licensed in Maryland, D.C. and Virginia. She is the author of *TM 849 Marital Agreements* (Tax Management, Inc. 2003), a guide for attorneys to negotiating and drafting premarital and domestic partnership agreements and is a Fellow of the American Academy of Matrimonial Lawyers.

In 2005 MICPEL will publish a manual on negotiating and drafting premarital and domestic partnership agreements authored by Marcia C. Fidis and Linda J. Ravdin. This article is excerpted from the manuscript for that publication.

Validity of Domestic Partnership Agreements in the Metro Area

—continued from page 2

each other, if it . . . is only incidentally connected with it, and may be supported independently of it."

More recently, Maryland's intermediate appeals court said: "[The cohabitation] relationship does not disable parties from making an enforceable contract with each other so long as it does not stand or fall upon the sexual relationship." (*Donovan v. Scuderi*, 1982). In *Donovan,* Judge Wilner discussed some of the reasons couples may choose cohabitation over marriage. These include more favorable income tax treatment, desire to protect assets, inability to marry, and avoiding loss of benefits, such as social security or pension benefits payable on account of a deceased or former spouse. In advocating for a more accepting position, he said: "I would restrict the bar [to such contracts] to express contracts for sexual acts that the law itself declares to be illegal. In this area, at least, I would divorce the law of contracts from what appears to be a shifting and somewhat uncertain public sense of morality." Since 1982, Maryland appeals courts have decided several cases that hint at a more liberal acceptance of domestic partnership agreements. Moreover, a recent U.S. Supreme Court case, *Lawrence v. Texas*, contains broad language about the right to privacy in intimate relations that seems to sweep away much of what little remains of the legal foundation that limited parties' freedom to enter into such contracts. *Lawrence* is discussed further below.

There are no published Maryland cases involving a contract claim arising out of a same-sex relationship. However, as discussed below, the Supreme Court has rejected laws singling out homosexuals as a class for discriminatory treatment. Contracts of same-sex couples should therefore be as enforceable in Maryland as contracts of heterosexual couples.

DISTRICT OF COLUMBIA

In *Mason v. Rostad*, decided in 1984, the D.C. Court of Appeals unequivocally adopted the modern approach to domestic partnership agreements, observing: "Cohabitation is held not to disable the parties from entering into a contract within the recognized rules of contract law. The bargain made is not invalidated or rendered unenforceable by the mere fact that the parties thereto are unmarried persons living together." A 2004 case, *Helmer v. Doletskaya*, decided by the U.S. Court of Appeals for the D.C. Circuit, is interesting for what it does not say. The case arose out of an oral contract between two former cohabitants. In ruling on certain preliminary issues the court treated the case as a routine contract dispute. It mentioned the parties' prior cohabitation only as part of the factual background; otherwise it was not an issue that required adjudication or even comment.

SAME-SEX AGREEMENTS IN D.C.

An express written domestic partnership agreement between domestic partners of the same sex is as enforceable in D.C. as one between heterosexual partners. D.C. has enacted or amended a number of statutes that provide for benefits for domestic partners on the same basis as for married couples. D.C. law provides a procedure under which domestic partners may register as such. These provisions are available to both same-sex and opposite sex couples. The enactment of such statutes evidences a public policy to treat domestic partners equally regardless of the gender makeup of the couple.

VIRGINIA

There are no published Virginia cases addressing the general subject of enforceability of cohabitation agreements between opposite sex couples. In 2004 the Virginia legislature seemingly outlawed contractual arrangements between partners of the same sex:

> **Civil unions between persons of same sex.** — A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Until the viability of this statute (Code of Virginia § 20-45.3) is resolved in the courts, entering into a domestic partnership contract in Virginia is a risky proposition and not only for same-sex couples. In 1996, in *Romer v. Evans*, the U.S. Supreme

—continued on page 5

Spotlight on P & F Partner J. Michae

President-Elect of the Maryland State Bar

In July 2004, Mike Conroy joined Pasternak & Fidis as a principal in the Business, Real Estate & Litigation Group. Before joining the firm, he had been in private practice for 32 years in a firm founded by his father in 1946.

Mike is a lifelong resident of the Washington area. He graduated from St. John's High School and received his undergraduate degree from Notre Dame University in 1967. After Notre Dame he joined the U.S. Army serving in Louisiana and Texas. As a reservist he worked as a medic at Walter Reed Army Medical Center. He received his law degree from Georgetown University in 1971 and received a Masters of Laws in taxation also from Georgetown in 1986.

It was natural that Mike would decide to go to law school. His father was a lawyer who briefly practiced before serving in World War II and then restarted his practice upon his return. Mike had worked around courthouses since the age of 15 doing land title searches for his uncle. Law seemed like a sensible pursuit particularly for someone coming out of college during the Vietnam War. At the same time it was somewhat intimidating to follow in the footsteps of his father who was admitted to practice law at the age of 19 and had led an industry.

After law school, Mike worked for his father's firm, then joined the Montgomery County Public Defender's Office. The public defender job gave him an opportunity to be in court every day. There he worked with public defenders and State's Attorneys who, although opposing counsel, were models of collegiality and professionalism. He was impressed by their fairness and integrity.

In 1980, after leaving the Public Defender's Office he returned to his father's firm where he put together a merger with two other firms. As a young lawyer, in addition to his

F

l Conroy

Association

father and uncle, Mike was particularly influenced by several Montgomery County judges and lawyers. Those men and women were the embodiment of civility, integrity and compassion. He feels he learned a great deal from them.

Mike has always viewed being in court, arguing cases before judges and juries, as a great privilege. For the past 25 years, he has concentrated in litigation, primarily involving real estate matters, construction disputes, representation of real estate brokers, and real estate title insurance disputes. He also handles transactional matters, including corporate counseling and real estate contracts. He has long been a leader and innovator in the development of documents for real estate transactions, including the sales contract of the Montgomery County Board of Realtors, area builders and land sale installment contracts.

Mike's wife, Claudia Remington Conroy, is also a lawyer. They have two children, a son who attended Auburn University and a daughter who is a graduate of Notre Dame University and a first year law student at Catholic University. When he is not practicing law and spending time with family, he runs five to six miles several times a week. He is former tennis player, having played competitively during high school. At Notre Dame, and later as a member of the U.S. Rugby Team, he played rugby all over the world. He still enjoys the game. Mike's other interests include reading, particularly about Irish history, and involvement in Irish-American organizations such as the Friendly Sons of Saint Patrick. In June 2005, Mike will become president of the 20,000 member Maryland State Bar Association.

Joint Property—Blessing or Curse?

—continued from cover page

We've also seen an increase in the use of pay on death (POD) and transfer on death (TOD) designations on accounts. The usual explanation, again, is that it's a way to avoid probate. However, a POD or TOD designation may not work out the way it's intended. For example, suppose Mother has designated Tom, Dick and Harry as the transferees of an account upon her death. Suppose further that Tom predeceases Mother and that Tom has two children (Mother's grandchildren). Ordinarily, parents want the share of a deceased child to go to his children. But with the TOD designation, upon Mother's death, the entire account will be transferred to Dick and Harry, with nothing going to Tom's children. With a will or revocable trust, this situation is easily avoided simply by including provisions about the disposition of assets in the event a beneficiary predeceases. In this case, Mother's will would provide for distribution of a deceased child's share to his children or, if they are young, to trusts or custodial accounts for their benefit.

Joint titling of assets and POD or TOD designations also can result in unfortunate tax consequences. In estate plans where the tax planning is done in the will or revocable living trust, jointly titled POD and TOD assets that pass outside the will or trust cannot be part of the tax plan.

If you really want to make life (and death) simple, avoid holding property jointly with your children or your siblings and avoid POD and TOD designations. There is no substitute for thoughtful and comprehensive estate planning.

N.B. The above discussion does not pertain to joint ownership between husband and wife.

For more information, please contact one of the attorneys in our Estate Planning and Administration Group.

PASTERNAK & FIDIS, P.C.

NEWS

Pasternak & Fidis is pleased to announce that Vicki Viramontes-LaFree has become a partner in the firm. Vicki has been with the firm since 2001, and is a member of the Maryland, D.C. and New Mexico Bars. A native of New Mexico, law is actually Vicki's second career—she spent a number of years as a successful business manager at the Xerox Corporation. P & F is capitalizing on Vicki's talents by having her take on management responsibility in addition to practicing law, as the head of the Divorce & Family Law Group.

The Business, Real Estate & Litigation Group welcomes a new associate attorney, Jason W. Henderson, who joined us in November. A native of Colorado, Jason has an undergraduate degree from the University of Maryland and received his law degree from Syracuse University College of Law. His expertise is in general business and commercial litigation. He is admitted to the Bars of Maryland and D.C. as well as the United States District Court of Maryland. Jason is an avid Denver Broncos fan who is trying to live quietly in Washington Redskins territory.

P & F also welcomes Lucy E. Nichols as an associate in the Divorce & Family Law Group. Lucy recently moved to the DC area from Richmond, Virginia where she was in private practice for 14 years. She is an experienced litigator admitted to the Virginia Bar as well as the Federal District Courts for the Eastern and Western Districts of Virginia and the United States Court of Appeals (4th Circuit). A graduate of the University of Virginia, she holds a

—continued on page 6

Validity of Domestic Partnership Agreements in the Metro Area

—continued from page 3

Court held unconstitutional a Colorado constitutional amendment that prohibited all legislation aimed at outlawing discrimination based on sexual orientation. The amendment failed because it singled out homosexuals as a class for disparate treatment. More recently, in 2003, in *Lawrence v. Texas*, the Supreme Court struck down a statute that criminalized same-sex sodomy. The court held the statute violated the Due Process Clause, observing that it sought to "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose . . . ."

To maintain a position consistent with the holding in *Romer v. Evans*, Virginia courts would have to hold that all domestic partnership contracts are unenforceable, regardless of gender. However, the sweeping language of *Lawrence v. Texas*, suggests that option may not be available. In *Lawrence* the five-justice majority—Justice O'Connor voted with the majority but on Equal Protection grounds—held that a statute criminalizing "adult consensual sexual intimacy" deprived parties of their liberty under the Due Process Clause. *Lawrence*'s holding is not limited to same-sex conduct. Its discussion of the liberty interest of adults in private, intimate conduct that may nevertheless be offensive to the majority, is very broad indeed.

A 2005 Virginia Supreme Court case, *Martin v. Ziherl*, relied heavily on *Lawrence* to throw out Virginia's criminal fornication law. In doing so it adopted the rationale of *Lawrence* that "decisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationship that are entitled to due process protection." The right to enter into a contract regarding the financial incidents of an intimate personal relationship is equally a matter of private, not governmental, concern. Under the line of cases discussed above, persons in a cohabitation relationship should be at liberty to enter into such a contract in Virginia and elsewhere. And if a heterosexual couple can enter into a contract, homosexuals cannot be denied the same right. The holding of *Martin v. Ziherl* suggests the Virginia Supreme Court may well agree when it has the opportunity to address the issue directly.

CRITERIA TO CREATE A VALID DOMESTIC PARTNERSHIP CONTRACT

In general parties may form a valid domestic partnership contract in accordance with the same validity criteria as any other contract:

- The parties must have legal capacity to contract;
- There must be consideration, i.e., something of value exchanged in return for the benefits to be received under the contract;
- The contract must have been executed voluntarily, without fraud or duress.

The consideration requirement bears special attention. Because of the historical ban, which remains in place, on contracts for sexual services, the description of the consideration in the contract should be drafted carefully. The consideration supporting a domestic partnership contract that creates property or support rights that would not exist but for the contract should be described in a way that makes it clear it is something other than sexual services.

Where both parties will make financial contributions to their common living expenses and acquisition of property, their mutual promise to share expenses and property acquired through their labor will readily pass the test of adequate consideration. The financial contributions need not be equal. Unpaid services applied directly to the acquisition or improvement of property, in a business, or as an agent or promoter of a career or professional practice should also be adequate consideration. Most courts that have been asked to address the issue have upheld domestic partnership contracts that contemplated that one party's contribution would be primarily domestic services.

CONCLUSION

Domestic partners can benefit from entering into a written contract defining their financial rights and obligations in the event of death or dissolution before a dispute arises. The law in Maryland and the District has evolved to the point where courts will enforce such agreements if they meet the requirements for a valid contract. Enforceability in Virginia is in doubt at present, but that doubt is likely to be cleared up in the future.

DEVELOPMENTS TO WATCH

SAME-SEX MARRIAGE IN MARYLAND:

A Maryland statute defines marriage as a union between a man and woman. In July 2004 the American Civil Liberties Union filed a lawsuit in Baltimore City on behalf of gay and lesbian couples. The suit seeks a ruling that the statute violates Maryland's Declaration of Rights which prohibits gender discrimination. The case is still in the trial court but is likely headed to the Maryland Court of Appeals.

SAME-SEX DOMESTIC PARTNER CONTRACTS IN VIRGINIA:

The ACLU has brought a suit in federal court challenging a Nebraska statute that appears to prohibit same sex domestic partnership contracts. The statute is similar to the Virginia law discussed in the accompanying article. That case may land in the U.S. Supreme Court.

WASHINGTON, D.C. CITY COUNCIL TO CONSIDER BILL TO EXPAND DOMESTIC PARTNERSHIP LAW:

Washington, D.C.'s City Council will review a bill introduced in late January, 2005 that would add seven new benefits to the District's domestic partner program. Eight members of the 13-member Council have signed on as co-sponsors to the bill indicating that the measure already has enough votes to pass. Mayor Anthony Williams has also expressed strong support.

Do you have an Advance Health Care Directive? In an emergency would your family or medical team be aware of this? The Estate Planning & Administration Group has printed wallet sized cards you can fill out informing emergency medical personnel or family members that you have an Advance Health Care Directive and providing them with contact data for your designated agent. If you would like a card to carry in your purse or wallet, please call Sandra Lucas in our Estate Planning & Administration Group.

J.D. from T.C. Williams School of Law at the University of Richmond, and has studied law at Cambridge University in England.

In November, 2004, Vicki Viramontes-LaFree, Jan White and Linda Ravdin presented a program of advanced training on financial aspects of divorce including retirement, property transfers, and taxes for the mediators of the District of Columbia's Multi-Door Dispute Resolution Division.

The Pasternak & Fidis Reporter

Pasternak & Fidis, P.C.
7735 Old Georgetown Road
Suite 1100
Bethesda, Maryland
20814-6183

STD PRST
U.S. POSTAGE
PAID
SOUTHERN MD
PERMIT 4507