PASTERNAK & FIDIS
REPORTER

District of Columbia Pioneers New Law to Protect Children of Non-Traditional Families

by Lucy E. Nichols

In the first law of its kind in the country, the District of Columbia City Council enacted legislation expanding protection for unmarried couples and their children. The "Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009" became effective July 18, 2009. It specifically applies to a child of registered domestic partners as well as to couples who consent to and have a child by artificial insemination but who are neither married nor registered as domestic partners. The new law affords equal rights and protections to a child born to unmarried parents who intend to create a family together. It provides that their parent-child relationship be assigned all of the same "rights, privileges, duties and obligations" as that of their married counterparts. D.C. Code §16-907 (2009).

Child Born to Registered Domestic Partners. Under the new law, when a child is born in the District to a woman in a registered domestic partnership, there is a rebuttable presumption of the parent-child relationship between the child and the mother's female domestic partner. Similarly, a man is presumed the father of a child born to his female registered domestic partner. The presumption applies if the parties were in a registered domestic partnership at the time of conception or birth, or between conception and birth, and the child is born during the domestic partnership or within 300 days after the termination of the partnership. The new law mandates that the birth certificate include the name of the male or female domestic partner of the birth mother as the other parent of the child.

Child Born to Unregistered Partners by Artificial Insemination. The new law further provides that when two persons sign a written consent that a woman conceive a child via artificial insemination, and the non-biological party intends to be a parent to the child, the parent-child relationship as to the non-biological parent is *conclusively* established. "Conclusively established" means the parent-child relationship is the same legally as if the non-biological parent had adopted the child. An adoptive parent is a legal parent with all the rights and obligations of a parent.

The consent must include acknowledgement by both parties to the insemination and to be a parent of the child, as well as written notice of the legal consequences, rights and responsibilities that arise from signing the consent. If the parties do not sign a consent, but they reside together in the same household with the child and openly hold the child out as their child, the non-biological parent could be conclusively established to be the parent. The new law further provides that the semen donor will not be a parent unless he and the child's mother are married or domestic partners or he and the mother expressly agree in writing that he will be a parent. Thus, two women in a registered domestic partnership could arrange for a male friend or relative to donate semen for artificial insemination, and with the appropriate consents in place the man would not become the legal parent.

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Permanency of the Parent-Child Relationship. It appears that the District has sought to legislatively cement the parent-child relationship based on the intent of the parties at the time they create a family together and to disallow either party from later changing his or her mind. Once a parent-child relationship is created under D.C. law, it continues to exist after the death of a parent or the dissolution of the adult relationship. A child of unmarried partners is afforded the same rights and protections as a child of married parents. As such, the courts will have the authority to determine legal issues concerning the child's custody, access and support when the adult relationship ends. Both parents will have custodial rights and a support obligation. Similarly, upon the death of one parent, the child will have the same right under D.C. law as any other child to inherit from a parent who dies without a will and to surviving child benefits under a D.C. government pension. The surviving parent will have the same rights regarding custody and guardianship as any parent.

To register as domestic partners in the District, the two parties must each be over the age of 18, competent to contract, the sole domestic partner of the other and not married. They may register their partnership by filing the appropriate forms with the Mayor. They need not be residents of the District of Columbia. Domestic partner registration is open to both same-sex and opposite-sex couples.

Family Ties. Also significant, the new law mandates that the child is the "legitimate relative of its parents' relatives by blood or adoption and entitled to all rights, privileges, duties and obligations under the laws of the District of Columbia." D.C. Code §16-908 (2009). Extended family members of a child, such as grandparents, are thus directly affected by the new law. They should consult with their estate planning attorney or other knowledgeable professional in order to adequately understand their rights and obligations in light of these important legislative changes.

Parties who have registered or plan to register as domestic partners, same-sex couples who have married or plan to do so, especially if they have children or plan to do so, should consider the following legal documents: partnership contract or premarital agreement; contract regarding their real estate; formal adoption; wills, trusts and other estate planning documents; health-care power of attorney; formal consent to artificial insemination; for couples where one partner will bear a child whom they do not intend be the child of the other partner, a formal contract to that effect.

A Child-Centered Law. The new law furthers a goal of the lesbian and gay community to achieve equal rights for their family relationships (although it applies equally to unmarried opposite-sex couples). But, the law is not just about the adults. At center stage are the rights and protections afforded to the children. Continuity of the parent-child relationship and financial support for the child in a non-traditional family after the dissolution of the parents' relationship or the death of a parent are the real benefits of this new law. This is a pro-child law.

Unanswered Questions. As is the case with any new law, there are unanswered questions. For example, the U.S. Constitution (Art. IV, Sec. 1) provides: "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Will a District of Columbia birth certificate be treated as a public record entitled to full faith and credit as a binding determination of parentage in a state that does not generally recognize validity of a same-sex adoption? The answer is unknown at this time. Further, the quality and quantity of proof needed to rebut a presumption of parentage has not been tested yet.

Because the law is evolving so quickly, and the rights of unmarried couples and their children have not been firmly established in every state, it is especially important that parties put their legal affairs in order.

(For more information about the property and support rights of domestic partners see the Summer, 2008 issue of the *Pasternak & Fidis Reporter:* "D.C. Omnibus Domestic Partnership Equality Amendment Act of 2008"; "The D.C. Domestic Partnership Equality Act Amendment of 2006 – Important New Rights for Registered Domestic Partners" *Pasternak & Fidis Reporter*, July, 2006; "The D.C. Domestic Partnership Equality Act Amendment of 2006 – Important New Rights for Registered Domestic Partners, Part 2 – Wills and Estates" *Pasternak & Fidis Reporter,* October, 2006).

Client Alert: Same-Sex Marriage Bill Introduced in DC

The District of Columbia City Council has before it a bill introduced by Councilman David Catania that would permit same-sex couples to marry in the nation's capital. The bill was co-introduced by 10 of the Council's 13 members and has the support of Mayor Adrian Fenty. It is expected to win easy passage in the Council but can be blocked by the U.S. Congress which has a right of review over the city's legislation. In addition, a group opposed to marriage equality has asked the DC Board of Elections to authorize a ballot initiative defining marriage as between a man and a woman.

Client Alert: Pet Trusts in Maryland

On April 14, 2009, Governor Martin O'Malley signed into law a bill authorizing the creation of pet trusts in Maryland. The law took effect on October 1, 2009. Maryland now joins Virginia, the District of Columbia, and a number of other states in permitting the creation of a trust for the benefit of an animal companion. A pet trust allows the pet owner to make financial arrangements for the care of his or her pet in the event of the owner's death or incapacity. Without legal authority to create such a trust, pet owners had fewer and less satisfactory means to insure their pets would be properly cared for. This law is thus an important step forward to enable Maryland residents to include their pets as part of their estate planning.

(For a more in-depth treatment of this topic see the Summer, 2008 issue of the *Pasternak & Fidis Reporter*, "Estate Planning for Pets.")

The Uniform Collaborative Law Act

by Anne (Jan) White

The Uniform Collaborative Law Act (UCLA), was passed in July 2009 by the Uniform Law Commission (ULC). The ULC, formerly known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), is a group of lawyers and academics who develop model laws that can be passed by state legislatures on subjects where uniformity of treatment is considered beneficial. The UCLA is the most recent of the Commission's uniform acts. Other subjects of uniform acts include family support enforcement, child custody jurisdiction, premarital agreements, commercial transactions, formation and administration of trusts, and administration of decedent's estates. Individual state legislatures may now pass their own laws based on the UCLA, thereby promoting uniformity among the states as to the legal framework within which collaborative law is practiced.

In collaborative law, the clients and the attorneys sign an agreement that they will not resort to court to settle their dispute. The UCLA authorizes courts to enforce these agreements, allows courts to stay litigation for parties to negotiate collaboratively, requires the parties to make voluntary disclosure, and prevents collaborative attorneys from seeking court intervention. All of these principles are hallmarks of collaborative law as it is now being practiced. The UCLA, once adopted by the states, will provide statutory enforcement of current collaborative practices.

Locally, nationally, and internationally, collaborative law has been most widely adopted in the field of family law. Hundreds of family lawyers in the D. C. metro area, including our Pasternak & Fidis family law attorneys Jan White, Vicki Viramontes-LaFree, Linda Ravdin, and Faith Dornbrand, are trained in collaborative law and offer it as an alternative to traditional divorce litigation.

Significantly the UCLA applies not only to divorce and other family law matters, but also to all types of disputes, including estate and trust matters, corporate, real estate, and other civil disputes. Roger Hayden, of the Pasternak & Fidis Business, Real Estate & Litigation Group, is also trained in collaborative law.

We welcome your inquiries about resolving disputes collaboratively.

(For more information on collaborative divorce see our newsletter article: "A New Way to Divorce – Collaboratively" in the March, 2007 issue of the *Pasternak & Fidis Reporter.*)

Business, Real Estate & Litigation Group Associate Jeremy Rachlin has been selected as an Associate member of the Montgomery County, Maryland chapter of the American Inns of Court for the 2009-2010 term. He was also invited to join and now serves on the Circuit Court Bench-Bar Committee of the Montgomery County Bar Association. This Committee acts as a liaison between the attorneys of the Montgomery County Bar and the Montgomery County Circuit Court judges, court clerk's office, sheriff's office and other Circuit Court personnel.

Vicki Viramontes-LaFree, a partner in the Divorce & Family Law Group, has been selected for inclusion in the 2010 edition of *Best Lawyers in America* in the specialty of Family Law. Linda Ravdin, Faith Dornbrand and Anne(Jan) White, partners in the Divorce & Family Law Group, are also named for the specialty of Family Law. Managing Partner Nancy Fax and Estate Planning & Administration Group partner, Marcia Fidis will be included for the specialty of Estate Planning and Probate. Selection for inclusion in *Best Lawyers* is based on a rigorous peer-review survey and is considered a singular honor.

Time to Take a Long Look at Life Insurance

by Oren Goldberg

Over the past two years, as people have seen the value of their assets contract by an average of 40 per cent, many are taking a long hard look at their investments. One item that may be overlooked is life insurance. While most people do not purchase life insurance as a traditional investment product, insurance products do have an underlying investment component, and many policies can be greatly affected by volatility in the markets.

There are two general types of life insurance: term insurance and permanent insurance. Permanent insurance can be further divided into three general types: whole life, universal life and variable life.

Term insurance provides pure insurance coverage for a death occurring within the specified period. Term policies do not include any cash value buildup inside the policy and, if the insured survives the term, the policy pays no benefit.

A whole life policy generally guarantees a death benefit for the entire life of the insured so long as the premiums are paid. The premium amount is fixed for life, based on the insured's age when the policy is issued. A portion of the premiums from the earlier years (plus earnings) is used to cover the higher actuarial costs of insurance in the later years. Therefore, in setting premiums, along with the insured's age, the insurance company will consider the guaranteed cost levels and guaranteed earnings on the cash value. As the premiums are paid and the cash value of the policy grows, the insurance company pays dividends which are determined based on the performance of the underlying investments.

The value of a whole life policy usually is invested, conservatively, in bonds, real estate mortgages, and other fixed income investments. A typical guaranteed rate, therefore, may be 4 per cent. The dividends can be paid to the owner, but more often are used to supplement the cash value of the policy. If the expected return is exceeded, excess dividends can be used to purchase additional insurance or to fund the policy (i.e., by paying the premiums). However, when returns are less than expected, a policy owner can end up paying premiums longer than originally expected. Ultimately, with a whole life policy, so long as premiums are paid, the cash value and death benefit will not fall below the minimum guaranteed level. Problems arise when, due to insufficient returns, the owner must resume paying cash premiums or higher premiums and is unable to do so.

Universal life policies provide flexibility both in the premium amount and the death benefit. The owner can change these amounts as his or her needs change. Unlike a whole life policy, which will lapse if premiums are not paid, universal life policies will remain in force so long as there is enough cash value to pay the coming month's cost of insurance. These policies are typically designed using cost and earning assumptions, so the owner will pay just enough in premiums to ensure sufficient cash value to keep the policy in force long enough to pay the death benefit. The earnings and cash value are intended to be sufficient to cover the cost of insurance.

Because of the added flexibility and greater risk, the premiums for a universal life policy typically are lower than for a similar whole life policy; however, if expected returns are not achieved, additional cash premiums may be needed for the policy to continue in force. Universal life policies are supported by the same types of conservative investments as whole life policies. Therefore, the expected returns are also typically around 4 per cent. However, based on then prevailing rates, the premiums for a policy issued in 1984 may be based on assumed annual returns of 12 per cent and for a policy issued in 1995 may be based on assumed returns of 8 per cent. In a market where the federal funds rate is less than .25 per cent and the prime rate is 3.25 per cent, products based on returns of 8 per cent or 12 per cent will need significant additional cash contributions.

Variable life policies provide even more flexibility to the owner by allowing the owner to manage the investments made with the policy cash value. Typically, the owner can choose among a variety of mutual funds, including domestic and international equities. This creates an expectation of higher long-term returns, and thus allows for lower cash premiums; however, the insurance company offers no guaranteed returns and the owner assumes the added risk of market volatility. Because the administrative costs of variable life policies are higher than that of other permanent insurance products, if the investments under-perform, these policies can leave the owner vulnerable to significant cost increases. On the other hand, variable life policies are less risky than whole life or universal life because the accumulated cash values of variable policies are segregated from the insurance company's assets and are not subject to the claims of the company's creditors in the event of bankruptcy.

Variable life insurance is often sold as an investment vehicle for retirement planning, because the cash value can grow tax-deferred. However, IRS rules require both a minimum level of diversity to the investments and also limit the extent to which the owner can control the investments. The owner can choose from a pool of investments offered by the insurance company or can choose their own investment manager, but the owner cannot control the selection of investments by the manager.

As noted above, permanent insurance products are subject to the volatility of the markets. The current environment of low interest rates may provide insufficient returns for a policy to pay benefits. The owner may be called upon to pay additional premiums, which he or she may not be able to do. Policies issued in the 1980s and 90s are most at risk. Depending on the terms of the contract, policy changes, including a reduction in the face amount of the insurance, may void any guarantees offered by the insurance company. What's more, if a policy collapses, the owner could find him- or herself holding an income tax bill, especially if the cash surrender value exceeds the owner's basis (i.e., the total of all premiums paid).

It is extremely important that owners of life insurance review their policies from time to time to ensure the viability and appropriateness of the policy. For trustees, it is imperative that they do so with some regularity on account of the heightened duty fiduciaries owe trust beneficiaries.

To ensure that your life insurance continues to serve its intended purpose, follow the following guidelines: (1) review all permanent insurance products to ascertain the exact requirements of the insurer to avoid any lapse or loss of guarantees; (2) request an in-force illustration from the insurer each year; (3) ask for the most recent ratings services reports for the company issuing the policy. If reductions from prior reports appear periodically, consider a replacement policy (if you are insurable). Your insurance agent should be able to provide you with this information, and take the time to review your existing policies and to discuss whether any changes are prescribed.

The DC Academy of Collaborative Professionals, an organization of attorneys and financial and mental health professionals who offer collaborative divorce services to clients, has elected Anne (Jan) White President-elect.

Premarital Agreements: Steps to Avoid Having a Trial about Validity

by Linda J. Ravdin

Increasingly, a premarital agreement has become an acceptable way for an engaged couple to agree in advance about their financial rights and obligations when one of them dies or if the marriage does not work out. Many couples prefer to use a contract rather than rely on state law to define their rights. And, however optimistic they may be about the prospects for a successful marriage, many couples appreciate the opportunity to make decisions in advance about their rights if things do not work out as they hope rather than to take their chances with a judge or having to negotiate a settlement when emotions are high.

Many people considering a premarital agreement have heard stories about how easy it is to get such an agreement thrown out. This is a myth. There are hundreds of reported court opinions involving a challenge to a premarital agreement. Only in a handful of these cases did a court decide the agreement was invalid. One thing these cases can teach us is that there are steps parties and their lawyers can take before the agreement is signed that will reduce the likelihood of a court fight as well as the risk that a judge will void the agreement.

Couples seeking a premarital agreement almost always *underestimate* the amount of time it takes to develop an agreement that is acceptable to both parties. Often they think all they need is a simple agreement which should not take much time to put together. In some cases, this is true. More often, parties think they need a simple agreement only because they are not aware of all the issues they should consider. An unrealistic timetable for completing an agreement can put undue pressure on both parties that may put a damper on prewedding festivities and even cause a level of rancor that can affect the parties' relationship.

The following are some of the steps we recommend:

Voluntary Agreement

- Begin the process as early as possible. The party who wants the agreement should let his/her fiancé(e) know of the desire for a premarital agreement as soon as possible after deciding to get married. He or she should hire a lawyer to draft a proposed agreement well before the wedding date, ideally before either party has made substantial financial commitments for the wedding celebration.

- An agreement is voluntary if each party had a choice about whether to sign it. A party who is unhappy with the proposed terms but decides to sign the agreement anyway, and take a chance that the marriage will work out, needs to know that he or she will be stuck with the agreement no matter how unfair it seems. Judges generally say that, because no one has to get married, a party who chooses marriage with an unfair premarital agreement over no marriage had a real choice. The lawyer for each party should explain this legal principle. This highlights why each party should have separate counsel; how else will the party on the receiving end of a disadvantageous agreement get this important message?

- The lawyer and the party seeking the agreement (the proponent) should work together to decide on the terms that party wants and draft the agreement, or a term sheet outlining the key terms, promptly so that the negotiations can begin well before the wedding.

- Ideally the parties will complete the negotiations and revisions well in advance of the wedding. Each party should set aside time to devote to this important legal matter and expect their lawyers to do the same.

Managing Partner Nancy Fax will be named as a Maryland Super Lawyer in the 2010 edition of *Super Lawyers* in the specialty of Estate Planning and Probate. She is joined by N. Alfred Pasternak and Marcia Fidis who have also been chosen for inclusion in the specialty of Estate Planning and Probate. Anne (Jan) White, partner in the Divorce & Family Law Group, has been selected as a Maryland Super Lawyer in the 2010 edition in the specialty of Family Law along with Divorce & Family Law Group partners, Linda Ravdin and Faith Dornbrand.

In October, the Potomac Legal Aid Society presented a continuing legal education seminar entitled: "Child Custody in Both Traditional and Non-Traditional Families in the Metro Area." Divorce and Family Law Senior Associate Lucy Nichols organized the program and was a presenter. This program covered custody issues in Maryland, Virginia and the District of Columbia.

Independent Representation

- If possible, each party should have his or her own lawyer. An independent lawyer for each party is especially important if there is a big disparity in wealth.

- The lawyer for the proponent should provide assistance to the other party to find a lawyer, if he or she asks for help. The proponent's lawyer should not try to handpick a lawyer for the other party. But he or she can offer to provide the names of at least three lawyers who have expertise and skill in negotiating and drafting premarital agreements.

- The lawyer for the proponent should strongly encourage the unrepresented party to get independent representation and should explain in writing why it is

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so important. The lawyer for the proponent might, under some circumstances, recommend that his or her client pay the legal fees for the other party.

- If a party insists on representing him- or herself, the agreement should include a provision -- in bold type -- acknowledging that the party was advised to retain independent counsel.

Financial Disclosure

- Each party should provide full financial disclosure to the other. Often the disclosure takes the form of a statement attached to the agreement but there are other ways of handling the disclosure. Each party's lawyer should review the client's financial disclosure statement to evaluate whether it is complete. Parties sometimes overlook assets, such as cash value life insurance or a defined benefit retirement plan, and fail to include them. Omission of a valuable asset from a financial disclosure can create an opportunity for otherwise avoidable litigation.

- The party requesting the agreement should complete his or her financial disclosure as soon as possible after deciding to seek a premarital agreement. He or she should not wait until the last minute to provide the disclosure.

- Under some circumstances a party who is expecting a substantial inheritance in the future should consider disclosing it even though it may not be technically necessary.

- The disclosure should include all major assets and liabilities as well as amounts and sources of income. It is not necessary to itemize every item of furniture; but a party with high-value tangible assets, such as works of art or antiques, should consider providing an inventory or a reasonably accurate statement of the aggregate value of these items.

- An owner of a business or a professional practice should take care in stating the value, and, unless he or she has a recent formal valuation, should qualify any statement of value to reflect the absence of a formal valuation, *e.g.*, estimate; book value, actual value may be higher; cost at acquisition. If the value is based on a formal appraisal, the disclosure statement should state the date and the purpose for which the appraisal was done.

- Each party should cooperate to provide additional financial information to the other party if requested.

Meaningful Negotiations and Fairness

- In Maryland, Virginia and the District of Columbia the law says that the terms of a premarital agreement do not have to be fair as long as the process by which the agreement was signed was fair. A fair process means the agreement was signed voluntarily. However, the parties should consider fairness of terms when they are negotiating.

- When each party has sufficient resources, especially when one or both has children already, they may agree that at death or divorce his is his and hers is hers. When there is a substantial disparity in resources, or the couple is young and may have children together, the economically stronger party should consider whether the agreement should make some provisions for the weaker party so that he or she will have some economic security after a death or divorce.

- There are a variety of ways that an agreement can create an obligation for a wealthier party to provide for the less wealthy spouse but still allow each to retain their assets. Parties who are willing to work together can achieve an acceptable agreement. Each should be willing to engage in meaningful negotiations and to hear what the other has to say. An agreement that is presented as a take-it-or-leave-it will often leave a bitter taste in the other party's mouth and may undermine the relationship.

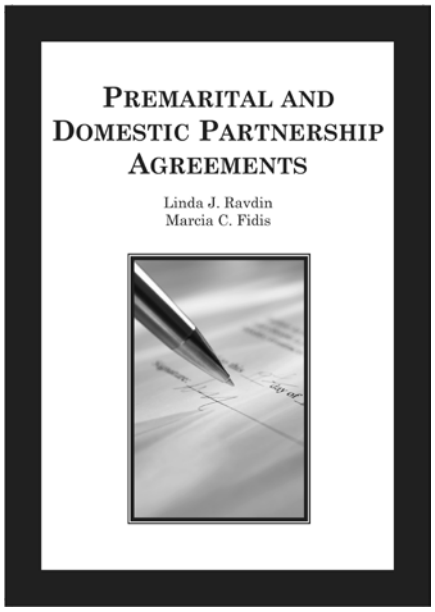
- A party who agrees to make asset transfers during marriage or create a will or trust to benefit the other party should carry out these obligations promptly after the marriage. When a party carries out an obligation under an agreement, and the other party accepts the benefits for which he or she bargained, it strengthens the validity of the agreement.

A premarital agreement is an important legal document that can be in place for many years. It is much easier, and less expensive, to conduct the process leading to the signing of the agreement correctly than it is to do it incorrectly and pay to defend it down the road.

(For more information on premarital agreements see our newsletter article in the October, 2004 issue of the *Pasternak & Fidis Reporter*: "Frequently Asked Questions about Premarital Agreements.")

Estate Planning & Administration Group partner Marcia Fidis and Divorce & Family Law Group partner Linda Ravdin co-chaired a seminar entitled "Premarital Agreements" in September. Marcia and Linda discussed their new book, *Premarital and Domestic Partnership Agreements*, published by MICPEL this fall. The program was sponsored by MICPEL, the Maryland State Bar Association Family Law Section, the University of Maryland School of Law and the University of Baltimore School of Law.

Premarital and Domestic Partnership Agreements



Premarital agreements aren't just for the famous or the affluent, say family law and estate planning attorneys Linda J. Ravdin and Marcia C. Fidis. Their new book, Premarital and Domestic Partnership Agreements was recently published by MICPEL, Maryland's leading source for continuing legal education. Divorced people planning to remarry, older couples with children from a prior relationship, entrepreneurs and those with inherited wealth or the expectation of a future inheritance—all of them are good candidates for a premarital or domestic partnership agreement. The book is intended for estate planners, divorce lawyers, and business attorneys who may be called upon to advise their clients about a premarital or domestic partnership agreement or to draft one. In the book, Ravdin and Fidis offer practical advice on such topics as the best negotiating strategies, the rights of spouses and domestic partners in the absence of a contract, drafting issues of concern to younger and older couples, and issues concerning the marital home, retirement benefits, children and taxes.

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