

## The D.C. Domestic Partnership Equality Amendment Act of 2006 —

# *Important New Rights for Registered Domestic Partners*

By Linda J. Ravdin

**T**he D.C. City Council has enacted the Domestic Partnership Equality Amendment Act of 2006, which became effective on April 6, 2006. Prior to the 2006 Act, domestic partners could register their partnership, but the rights they acquired by virtue of their status as registered domestic partners were quite limited. The Act creates important new rights for couples who are eligible and opt to register as domestic partners. The Act provides for:

- Inheritance rights, including the right to an elective share of a deceased partner's estate so that, like a deceased spouse, a deceased domestic partner cannot completely disinherit his or her surviving partner;
- Property rights upon termination of the partnership;
- Support (alimony) for a former partner if appropriate under the same statutory criteria that apply to spouses;
- The right to enter into a "premarital agreement" under the same validity criteria and for the same purposes as couples who are about to marry.

The Act does not change current D.C. law regarding custody of or support for minor children of the parties. D.C. law permits same-sex couples to adopt and D.C. law requires that children of unmarried couples be treated the same for custody and support purposes as the children of married parents. However, the expanded property and support rights of partners will provide greater financial security for the children of these nontraditional families.

The Act creates property and support rights under D.C. law by virtue of parties' status as domestic partners very much like the rights under D.C. law that belong to married persons by virtue of marital status.

### Who May Register as Domestic Partners

To register as domestic partners, parties must fulfill the following requirements:

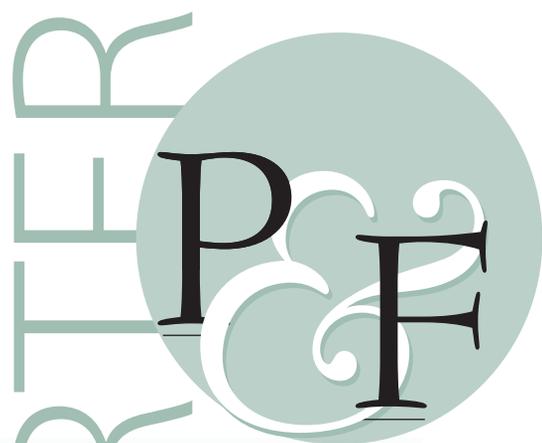
- Be in a committed relationship and share a residence;
- Be at least 18 years old and competent to enter into a contract;
- Each must be the sole domestic partner of the other;
- Neither can be married.

The Act does not require either party to be a resident of the District. Partners can be of the same gender or opposite genders. Registration is a simple matter of filing a registration statement with the Mayor of the District of Columbia.

### Property and Support Rights upon the Dissolution of a Registered Domestic Partnership

Domestic partners who have registered their partnership with the Mayor of the District of Columbia may terminate the partnership by jointly filing a termination statement with the Mayor. One partner may terminate the partnership by filing a termination statement and serving it on the other partner. The termination is effective six months after the termination statement is filed.

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# Important Change to Maryland Estate

By Nancy G. Fax

If you are a married Maryland resident and if your estate may be subject to estate tax, you should have your estate plan reviewed to make sure that your estate will be positioned to optimize all available federal and state estate tax exemptions and deductions.

The 2006 session of the Maryland General Assembly amended the Maryland estate tax law in several ways. Probably the most important feature of the new Maryland estate tax law, and the only new provision that may require special drafting in wills and revocable living trusts, is the state-only QTIP election. The new law permits an election to treat property as marital deduction qualified terminable interest property (QTIP) in calculating the Maryland estate tax even if an inconsistent election is made for the same decedent for federal estate tax purposes.

The problem under current law is that the exemption amount for federal estate tax purposes is \$2 million (and is scheduled to increase to \$3.5 million in 2009) and the amount that triggers Maryland tax is \$1 million. The state-

only QTIP election provides welcome relief to the conundrum that has been faced by Maryland surviving spouses (and their attorneys): Is it better to fund the bypass trust with the full federal exemption amount, thus triggering Maryland estate tax on the differential between the federal exemption and the Maryland threshold of \$1 million, or should the bypass trust be funded with just the amount that is exempt from Maryland estate tax, thus avoiding all taxes at the death of the first spouse to die but wasting a portion of the federal exemption amount? (Note: Technically, Maryland does not provide for an exemption from the Maryland estate tax. Rather, the \$1 million amount is a threshold for taxation; if an estate is greater than \$1 million, the entire estate is subject to Maryland estate tax, not just the excess over \$1 million).

Under the new law, with appropriate drafting, it is possible to avoid both federal and Maryland estate tax at the death of the first spouse to die, without wasting any federal estate tax exemption.

## Pasternak & Fidis Says Goodbye to Mike Conroy, Judge, District

On June 9, 2006, our partner, J. Michael Conroy, was sworn in as a judge of the District Court of Maryland for Montgomery County. Prior to becoming a judge Mike had a distinguished career as a lawyer and a leader of the Bar. Just as importantly he has been a husband and father and a contributor of many hours of volunteer work to his community and church.

Mike received his undergraduate degree from Notre Dame, a law degree from Georgetown University Law School and a Masters of Laws in Taxation, also from Georgetown University. He served honorably in the United States Army for two years, and then in the Army Reserves for another five years. His first job out of law school was as an assistant public defender in Montgomery County.

Before his appointment to the bench, Mike practiced law in Montgomery County for 35 years, working primarily as a trial practitioner in the construction, banking and brokerage industries.

He also handled real estate transactions, estate planning and probate, tax and administrative matters. His experience includes over 500 criminal and civil trials, arbitrations of commercial and residential real estate disputes, and appeals in both the federal and state courts. He has been an expert witness in real estate matters and has served as counsel to the Montgomery County Board of Realtors.

Mike has been president of the Montgomery County Bar Association and the Montgomery County Bar Foundation. Most recently he served as president of the Maryland State Bar Association from 2005-2006. In 2005 he received the Leadership in Law Award from *The Daily Record* of Maryland. Mike's civic activities include serving as a director of the Ronald McDonald House for Children with Cancer, as a volunteer legal services provider for Catholic Charities, Archdiocese of Washington, as President of the Little Flower Church Council, and as President of Congressional Country Club.

This is accomplished by establishing a trust for the benefit of the surviving spouse to be funded with the differential between the federal exemption amount and the Maryland threshold amount and making a state QTIP election for that trust and not making a federal QTIP election, thus sheltering the trust from federal estate tax at the death of the surviving spouse. The remaining federal exemption amount would pass to a standard bypass trust for the benefit of the surviving spouse (or directly to children or other beneficiaries) and thus would not be part of the surviving spouse's taxable estate. The assets remaining in the state-only QTIP trust upon the death of the surviving spouse would be included in the surviving spouse's gross estate for Maryland estate tax purposes, but would not be included in the surviving spouse's gross estate for federal estate tax purposes.

The new law is applicable to decedents dying after December 31, 2005. ●

## District Court of Maryland

Mike's wife, Claudia Remington Conroy, is also a lawyer and their daughter, Aindrea, is currently a student at the Catholic University School of Law. Their son, John, attended Auburn University.

At Mike's swearing in ceremony, senior partner Al Pasternak had this to say about Mike: "We know that you will dedicate yourself to this new role as diligently as you have dedicated yourself to all your other activities in the past and we know that you will make an excellent judge. You are fair-minded, honest, articulate and well-versed in the law. Those qualities will serve you well on the bench."

Looking back at his tenure at P&F Mike said, "I feel privileged and honored to have had the opportunity to work with such fine attorneys at Pasternak & Fidis." All of the lawyers and staff at Pasternak & Fidis wish Mike well as he begins a new phase of his career. ●

## Domestic Partnerships —continued from cover page

The Domestic Partnership Equality Amendment Act of 2006 amended the equitable distribution statute and the statutes relating to alimony to include domestic partners. As a result, a domestic partner may file suit in D.C. Superior Court incident to terminating the partnership and request alimony and equitable distribution of partnership property.

### Equitable Distribution of Domestic Partnership Property

Equitable distribution is a scheme for dividing up property accumulated during a marriage, and, now, during a domestic partnership. Property includes anything of value, including real estate, stocks, bonds, and other securities, motor vehicles, furniture and household items, and art, antiques and collectibles. The definitions of separate and partnership property are the same as for married persons. Separate property is defined as:

- Property acquired prior to the partnership, including appreciation, provided the property remains separately titled;
- Property acquired during the partnership by inheritance or by gift from a third party, and any appreciation, provided the property remains separately titled;
- Separately titled property acquired in exchange for separate property;
- Property excluded from the partnership assets by agreement;
- The portion of retirement benefits earned prior to the partnership or after the termination of the partnership.

Partnership property is defined as all other property acquired during the partnership, including:

- All property titled jointly in a survivorship form regardless of its source;
- Wages and other compensation earned during the partnership;
- Property acquired with other partnership property, such as compensation earned during the partnership and used to acquire assets, such as real estate or securities;
- A business or professional services practice started and built during the partnership;
- The portion of retirement benefits earned during the partnership;
- Property that a valid pre- or post-registration agreement declares to be partnership property even if it started out as separate property.

One question that the new Act does not answer is how it applies to persons who registered as domestic partners prior to the April 6, 2006 effective date. When equitable distribution became the

law of D.C. in 1977, it applied to all divorces granted thereafter regardless of when the marriage took place or when property was acquired. A court decision in 1983 rejected an argument that equitable distribution should not apply to property acquired by one spouse before the new law. If D.C. courts apply the same analysis to domestic partners, those who registered prior to April 6, 2006, will have acquired the newly created rights to property described in this article. Moreover, partnership property rights will have begun to accrue when the partnership was originally registered and not when the 2006 Act became law. It is also possible the courts will decide that only a partnership registered after the statute's effective date, or only property acquired after the effective date, is subject to the new law. Until this and other questions are answered by the courts there will be some uncertainty. In the meantime, **partners can avoid uncertainty by entering into a domestic partnership agreement that clearly states their intentions regarding division of property in the event of termination.**

In the event partners terminating their partnership are unable to agree, a judge of the Superior Court will determine a fair and equitable division of partnership property. An equal division of property is not automatic. The court must consider a list of criteria, the same criteria that apply to division of marital property, including:

- Duration of the partnership;
- Age, health, occupation, vocational skills, employability;
- Amount and sources of income;
- Assets and debts of each party, including a party's separate property;
- A party's obligations from a prior marriage or domestic partnership;
- Provisions for custody of minor children;
- A party's increase or decrease in income as a result of the partnership or the duties of home-making and child care;
- Whether distribution of property is in lieu of or in addition to alimony;
- Opportunity for future acquisition of property;
- Each party's contributions to the education of the other, to acquisition of property, and to the home and family, including nonmonetary contributions;
- Circumstances leading to the estrangement;
- Tax consequences.

The trial judge has a great deal of discretion to decide what is fair using the criteria above. Like married couples facing divorce, domestic partners will benefit from avoiding the courts and entering

into negotiated settlements that avoid the high cost and the uncertainty of putting their fate in the hands of a stranger.

### Treatment of Retirement Benefits

One way in which domestic partners are treated differently than married persons is in the area of retirement benefits. Federal law permits a court to order the administrator of a private sector retirement plan as well as federal government plans (Civil Service, military, Foreign Service, CIA), to make a direct payment of pension benefits and survivor benefits to a former spouse. D.C. Government plan benefits can also be paid directly to a former spouse under a court order. The 2006 Act did not amend D.C. law to permit direct pay orders for D.C. Government pension benefits nor to provide for survivor benefits for surviving domestic partners. D.C. law has no power to modify the provisions of federal law that permit direct pay orders for private and federal government plans. What this means for partners who are terminating is that, while their retirement benefits earned during the partnership will be partnership property, the plan benefits themselves cannot be divided up. These assets can still be taken into account in dividing up the partnership assets as a whole but implementing a division of assets will be more challenging when there are retirement benefits to account for.

### Support Claims of Domestic Partners

The new Act amended the alimony statutes to include domestic partners. As a result, the Superior Court may consider a claim of a partner for alimony using the same criteria as it uses for spousal claims. When there is a significant disparity in income, or one partner makes career sacrifices to promote the business interests or career of the other, or to be primary caretaker for children, he or she may have a viable claim for support when the partnership terminates. The court may award indefinite alimony, meaning alimony that has no specific ending point other than death, or it may award support for a fixed period. The court considers the following criteria in deciding whether to award support, how much, and for how long:

- Ability of the party seeking alimony to become self-supporting and the time necessary to obtain sufficient education or training to do so;
- Standard of living established during the partnership;

- Duration of the partnership;
- Age, physical and mental condition, financial needs and resources;
- Ability of the party from whom support is sought to meet his or her own needs while meeting the needs of the other party;
- Circumstances that contributed to the estrangement.

There is no provision in the alimony statute for alimony to terminate automatically when a former spouse or partner marries someone else, cohabits in a relationship like marriage, or enters into a registered domestic partnership. Therefore, when the court makes an award of alimony, it is appropriate for the payor to request that the order provide for automatic termination upon marriage or entry into a new domestic partnership.

Like the provisions of the new Act regarding property division, there are questions not answered by the statute and which the courts will have to address as issues are presented in actual cases. Parties can resolve uncertainties in the law by entering into a contract that clearly defines their support rights, or, for parties who are both self-supporting, by clearly stating their intent to give up any such claims.

### Pre-Registration Domestic Partnership (or Premarital) Agreements

The Act also amended D.C.'s version of the Uniform Premarital Agreement Act. As a result of these amendments, domestic partners have the right to enter into a written agreement prior to registration that resolves in advance what property rights a surviving domestic partner will have upon death and what support and property rights they will have in the event the relationship is dissolved. Prior to the amendments, there was some case law that authorized domestic partners to enter into contracts that provided rights for each other like the rights spouses acquire by virtue of marriage. The 2006 Act removes any doubt that such contracts are valid. The criteria for validity are the same as for premarital agreements:

- The parties must be legally competent to enter into a contract;
- The agreement must be entered into voluntarily;
- The agreement must be in writing and signed by the parties;
- If the terms of the agreement are extremely unfair to one party (i.e., unconscionable), the party seeking to enforce the agreement must

have provided a fair financial disclosure, or he or she must prove that the other party had adequate knowledge, or the disadvantaged party must have voluntarily and expressly waived financial disclosure.

Parties who wish to do so may enter into an agreement prior to registration, or may enter into the same kind of agreement after registration, that determines **in advance** how they will divide their property in the event the partnership is dissolved. They may, for example, decide that each will keep whatever he or she earns and titles separately and that they will equally share all property that is jointly titled. Or, they may decide that each will keep separate property and that they will equally share partnership property. There is no single correct type of agreement. Parties must decide for themselves what is right for them.

A common problem that partners may wish to address in an agreement is treatment of a home. One party may own a home with a lot of equity that the parties intend to use as their principal residence, or both parties may contribute cash to acquisition of a new home but one will contribute substantially more than the other. They may wish to own the home jointly so that it will go to the other partner automatically in the event of death. They may also wish to recover their separate contributions in the event the relationship does not work out as hoped. An agreement allows the parties to accomplish both by providing specifically for what rights a surviving partner will have in the home or, in the event of dissolution, what rights each will have when the property is sold or there is a buyout of one partner's interest.

### Conclusion

The D.C. Domestic Partnership Equality Amendment Act of 2006 has created important new rights for domestic partners when the relationship fails. This can be seen as both a blessing and a curse. A blessing because domestic partners in the District of Columbia have now achieved something approaching, if not identical to, the rights afforded married couples at divorce. A curse because divorce can be costly and difficult when parties are unable to agree on what is a fair division of their property or whether one is entitled to support after termination. **Much of that cost and uncertainty can be mitigated if parties enter into a written partnership agreement.** ●

# Amendments to Maryland's UTMA: More Flexibility for Transfers to Minors

By Brian R. Della Rocca

## MARYLAND UNIFORM TRANSFERS TO MINORS ACT

The Maryland Uniform Transfers to Minors Act (the "UTMA") allows a person to transfer property, during lifetime or at death, to a custodian for the benefit of a minor person (defined under the UTMA as a person under age 21). The custodian manages the property for the minor, who is the owner of the property, and may make distributions to or for the benefit of the minor. When the owner attains age 21, the custodian is required to transfer the custodial property to the owner.

While some 21 year olds are responsible, others are not and most have little or no experience handling substantial assets. In many cases, it is not in the owner's long term best interests to receive the custodial property at age 21. Until recently, the custodian had no choice.

## QUALIFIED MINOR'S TRUST

The Maryland General Assembly recently amended the UTMA to permit the transfer of custodial property to a trust known as a "qualified minor's trust" ("QMT"). While transferring assets to a QMT does not solve all problems inherent in the transfer of significant assets to a minor, it provides a reasonable alternative to mandatory distribution at the age of 21.

A QMT, as with a custodial account, must be created for the sole benefit of one beneficiary. Upon attaining the age of 21, the beneficiary will have the unrestricted right to withdraw the assets of the trust for a reasonable period of time (typically 30 days). If the assets are not withdrawn within the applicable period of time, the beneficiary's right of withdrawal lapses and the assets remain in the trust until the age specified in the trust instrument. After the right of withdrawal lapses, the beneficiary will continue to benefit from the trust assets because the trustee typically will be authorized to make discretionary payments to or for the benefit of the beneficiary from the income and principal of the trust for his or her health, education, and other purposes. The beneficiary also can be given a general testamentary power of appointment providing him or her with the ability to appoint the trust assets to whomever he or she desires upon death.

## NOW, THE CATCH:

**Catch #1:** The law is effective prospectively only. Therefore, any custodial account created prior to the effective date of the law (October 1, 2005) does not qualify for this new treatment.

**Catch #2:** The law requires the instrument creating the custodial account, whether a

testamentary transfer through a will or a life-time transfer, to expressly authorize a transfer from the custodial account to a QMT. Thus, unless expressly authorized, a custodian does not have the authority to transfer the property to a QMT.

If you plan to transfer property to a custodian for the benefit of a minor, be sure to include in the instrument creating the custodianship the following language:

*"I authorize the custodian to transfer any portion or all of the custodial property to a qualified minor's trust without a court order."*

In addition, your will should include a provision permitting any custodian under your will to transfer property to a QMT.

## JOINT CUSTODIANS

Historically, the UTMA has explicitly prohibited the appointment of more than one custodian. Often it is convenient to name both parents as custodians for the benefit of a minor, yet this was not permitted under the UTMA. The Maryland General Assembly remedied this problem by authorizing the naming of two custodians under the UTMA. This amendment to the UTMA became effective June 1, 2006.

The new law authorizes joint custodianship over the property of a minor under the UTMA and grants to each custodian the full authority to act alone unless otherwise specified in the instrument creating the custodianship. If you prefer to have both joint custodians sign off on transactions and distributions for the benefit of the minor, the following language should be included in the instrument creating the custodianship:

*"At all times when there are two persons acting together as custodian hereunder, both of such persons must agree in making decisions and taking actions as custodian."*

These two amendments to the UTMA make transfers under the UTMA more user-friendly. However, there are many situations where establishing a trust for the benefit of a minor (or other young person), rather than a custodianship, will provide more flexibility and protection. ●

## PASTERNAK & FIDIS, P.C.

# NEWS

The firm's domestic attorneys are now offering Collaborative Law as an option to resolve family law matters without litigation. Collaborative Law is a process that encourages commitment to resolving a family law matter without litigation in a constructive and dignified manner and that allows parties to control the outcome of their case. **Jan White** has been named to the Board of Directors of the new DC Collaborative Law Association. She is also a member, along with **Vicki Viramontes-LaFree** and **Lucy Nichols**, of the Rockville, Maryland based, Collaborative Dispute Resolution Professionals (CDRP) organization. Vicki will act as Secretary for the CDRP for the next year. To learn more about the Collaborative Law Process, contact one of our CL-trained attorneys, Jan White, Vicki Viramontes-LaFree, Faith Dornbrand, Linda Ravdin, and Lucy Nichols.

## PASTERNAK & FIDIS, P.C.

# N E W S

**Nancy Fax** and **Marcia Fidis** have been selected to be included in the 2007 edition of *The Best Lawyers in America*, in the specialty of Trusts and Estates, and **Linda Ravidin** has been selected in Divorce and Family Law. *Best Lawyers* is a highly regarded reference book based on an exhaustive and rigorous peer-review survey by the top attorneys in the nation.

P & F congratulates **Lauren Krauthamer** and **Lucy Nichols** on passing the Maryland State Bar. Lauren is also licensed to practice in the District of Columbia, New York, New Jersey and Florida. Lucy is also licensed in Virginia.

On May 5, 2006 **Faith Dornbrand** was a presenter at the American Bar Association's Family Law Section annual CLE meeting. Faith spoke at the plenary session on "Executive Compensation: Is it Income or is it Property?" and specifically addressed information divorce lawyers will be able to find about executive compensation packages in public filings under the new Securities and Exchange Commission (SEC) proposed new disclosure rules.

**Jason Henderson** is featured in an article in the 2006 *Legal Review* supplement to *The Gazette of Politics and Business*. "Becoming a Landlord? Do Your Homework

First," offers a quick overview of the basics that anyone thinking about converting an investment property into a rental unit should understand. Please contact our offices if you would like a reprint of the article.

**Marcia Fidis** chaired the MICPEL Divorce Tax workshop held on May 23. She was joined by **Jan White** as a faculty member. The workshop teaches divorce attorneys the tax implications of marital dissolution.

**Lucy Nichols** has become a volunteer conciliator with the Fairfax Circuit and the Fairfax Juvenile and Domestic Relations District Courts. Conciliators are experienced trial lawyers who help resolve motions and other preliminary disputes before these courts.

On June 13, 2006, **Linda Ravidin** and **Vicki Viramontes-LaFree** received an award at the Annual Northern Virginia Pro Bono Reception for their contributions to Legal Services of Northern Virginia. Vicki and Linda presented continuing legal education programs on dividing retirement benefits at divorce.



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