REPORTER

P&F

October 2006

INSIDE

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

Important New Rights for Registered Domestic Partners Part 2, Wills and Estates

By Lauren D. Krauthamer

The District of Columbia City Council recently passed the Domestic Partnership Equality Amendment Act of 2006 (the "Act"), which gives legal rights to registered domestic partners similar to those rights that are available to married persons. Domestic partners who want their relationship to be legally recognized under the new Act must register with the District of Columbia's Department of Health, Vital Records Division. In order to register as domestic partners, parties must share a residence, must be at least 18 years of age and competent to enter into a contract; each party must be the sole domestic partner of the other and neither can be married or a member of another domestic partnership. In the last issue of the *P&F Reporter*, Linda J. Ravdin discussed the support and property rights granted by the Act upon dissolution of a domestic partnership. This article explains how the legal rights provided to married persons both during their lifetime and upon death have been extended to registered domestic partners. It also explains how to avoid the default provisions of the law, if desired.

Property Rights at Death

A surviving spouse has always been entitled to a certain percentage of the deceased spouse's estate, whether the deceased spouse dies with a will (testate) or without a will (intestate). If a married person dies without a will, the surviving spouse is entitled to an intestate share of the deceased spouse's property. In the District of Columbia, the intestate share ranges from fifty percent of the estate, when the deceased spouse has surviving children, grandchildren or parents, to one hundred percent when the deceased has no surviving direct descendents or parents.

If a spouse dies with a will and the will leaves a bequest to the surviving spouse, the surviving spouse can renounce the bequest and elect to take his or her *statutory share* of the decedent's assets. This is often called the *elective share*. A spouse would typically elect the statutory share if it is larger than the bequest under the will. D.C. law provides that if a spouse renounces a bequest, he or she will receive not more than fifty percent of the assets passing under the will. Similarly, if a spouse dies with a will and leaves nothing to the surviving spouse, the surviving spouse is entitled to a statutory share of no more than fifty percent of the assets distributed under the will.

With the passage of the Act, domestic partners who have registered their partnership are entitled to be treated as spouses for purposes of elective share rights and rights to an intestate share of a deceased partner's estate. Previously, if a domestic partner died without a will, the surviving domestic partner had no entitlement to any of the estate. Rather, the estate assets would go to the other family members of the deceased partner. If there were no surviving

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The Pasternak & Fidis Reporter

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New Developments: Maryland Divorce Law Now Allows Transfer of a Family Home to One Spouse

by Faith D. Dornbrand

Maryland courts, as well as the courts of D.C. and Virginia, equitably distribute property at divorce. A recent Maryland legislative change, effective for cases filed after October 1, 2006, will enhance the power of Maryland judges to do equity at divorce. The new law is a significant step towards giving Maryland courts tools comparable to those available to divorce judges in the District of Columbia and Virginia.

The change in the law will allow a Maryland divorce court, for the first time, to transfer jointly titled real estate to one of the two owners. The court will only be able to do so, first, if the property was used as the principal residence of the parties when they lived together. Second, the spouse receiving the property must obtain the release of the other party from any loans secured by the home. The new statute gives the divorce court another important tool. It explicitly authorizes a judge to allow one party in a divorce to purchase the other's interest in the jointly titled principal residence in accordance with "terms and conditions ordered by the court."

Previously in Maryland, the court could only do two things with a jointly titled marital home. First, it could order the parties to sell the home and split the proceeds equally. If the equal division of the proceeds was inequitable, it could enter a "monetary award" in favor of one party. A monetary award is basically an order requiring one spouse to pay the other a sum of money. The divorce court could, secondly, award a party the right exclusively to live in the home, provided that party had joint or sole custody of at least one of the couple's minor children. This is known as a "use and possession" award. However, a judge could only grant such a use and possession award for up to three years following the divorce. Then the property had to be sold. This often gave substantial leverage in settlement discussions to the spouse who did not particularly want the marital home. A spouse with young children who wished to live in the marital home until the last child left home for college, or who wished to have sole ownership of the home, frequently had to make concessions to settle the case to achieve such a result, because such a result could not be obtained through the court.

The change in Maryland law gives Maryland divorce courts some of the powers that other local courts wield. In Virginia, the divorce court may order a transfer of any jointly titled marital property in order to achieve equity, provided the recipient assumes liability for debt secured by the property. Moreover, Virginia courts can order a transfer of any jointly titled marital property, such as a jointly titled brokerage account or jointly titled investment real estate. Among the Metro area jurisdictions, D.C. courts have the broadest powers to do equity. In D. C., a Superior Court divorce judge has the power to transfer title to any marital property, even separately titled marital real estate, to bring about an equitable result. This power is not limited to the primary residence of the parties, or even to property in joint names. Moreover, D.C. law does not require the judge to condition a transfer on the recipient spouse refinancing a mortgage on the property, although the judge may do so.

The change in Maryland law is helpful but not complete. Maryland courts can transfer title to pensions and retirement plans, tangible personal property in the marital home such as the furniture and furnishings, the car used primarily for family purposes, and now a jointly titled residence that was the principal residence of the parties when living together. A Maryland divorce judge still cannot transfer ownership of other jointly titled marital assets such as bank accounts, stock holdings and investment accounts, second homes, boats, livestock, and cars that are not used primarily for family purposes.

While the new statute does not give Maryland divorce courts the broader range of powers to carry out an equitable division of property exercised by divorce courts in D.C., or even in Virginia, it is a step in the right direction.

Faith Dornbrand practices family law in Maryland and the District of Columbia. P&F has family law practitioners licensed in all three jurisdictions—Maryland, D.C. and Virginia.

family members, the decedent's property would go to the District of Columbia government. If a domestic partner died with a will and left a small amount or nothing to the surviving domestic partner, the surviving partner had no right to a larger elective share. The Act now affords a surviving domestic partner of a registered domestic partnership the same rights as a surviving spouse.

Appointment of a Personal Representative

A personal representative of an estate has the responsibility to gather and inventory all of the decedent's property and pay his or her debts. The personal representative then distributes the remaining property to those named in the decedent's will or in accordance with the law. Generally, if a spouse dies without a will, or dies with a will but fails to name a personal representative, the surviving spouse has first priority to be appointed to serve as the personal representative of the estate of the deceased spouse. Domestic partners had no such rights before the new Act. Domestic partners were not specifically included in the categories of people who could be appointed; rather, they fell into the category of "any other person," which came last in the order of preference for appointment. As a result, a remote relative who may have had little contact with or interest in the decedent had priority over a longstanding domestic partner. Under D.C. Law registered domestic partners are now the equivalent of spouses in the hierarchy of determining who will be appointed to serve as the personal representative of the estate of the deceased partner.

Disability and Appointment of a Guardian for an Incapacitated Adult

If an individual becomes incapacitated during his or her lifetime and has not designated someone to act on his or her behalf, the court can appoint a guardian for the incapacitated person. By statute, as with the designation of a personal representative, a spouse is given priority with regard to appointment as a guardian. A domestic partner previously had no such entitlement. The Act gave registered domestic partners the same entitlement as a spouse and the same priority over others to be appointed as guardian of his or her incapacitated partner.

Means to Alter Statutory Rights

Once domestic partners register under the Act, the foregoing rights apply. Domestic partners, like spouses, can avoid or alter some of these statutory rights in one or more of the following ways.

Domestic Partnership (Premarital) Agreements

A domestic partnership agreement, like a premarital (or postmarital) agreement, defines each party's rights to his or her assets in the event of the death of a partner, a contested separation, or the amicable termination of the partnership. Now that registered domestic partners are treated as spouses, they should consider establishing agreements for the same reasons as spouses. For example, if a partner has children from a prior relationship, and the partner wants his or her assets to pass to his or her children at death, rather than to the other partner, he or she will need an agreement that sets out his or her rights to control the disposition of the property at his or her death. Similarly, a partner who does not have children going into a relationship and who may want to provide for blood relatives, such as nieces and nephews, upon his or her death, rather than have assets go to the surviving partner, should execute an agreement with his or her partner.

Some partners may want to control the ultimate distribution of their assets but at the same time may want to provide for a surviving partner. An agreement can provide that the partner will leave assets in trust for the benefit of the surviving partner during his or her lifetime. The trust can provide that upon the death of the surviving partner, the remaining trust assets will be distributed in accordance with the wishes of the partner who created the trust, i.e., to his or her children, relatives, and/or charitable organizations. A domestic partnership agreement, as with a premarital agreement for spouses, if properly prepared, will be binding on the parties to alter or eliminate some or all of the legal rights now provided by the law.

Last Will and Testament

If a person dies without a will, the court will appoint a personal representative. As discussed above, a registered domestic partner or a spouse of a deceased person has priority to be appointed by the court to serve as personal representative of the estate of the decedent. Although a registered domestic partner or spouse cannot completely disinherit his or her partner by executing a will, that partner can execute a will naming someone other than the surviving registered domestic partner or surviving spouse to serve as personal representative of his or her estate, if so desired. If a will is executed and someone other than the surviving registered domestic partner or surviving spouse, as the case may be, is designated under the will to serve as the personal representative of the decedent's estate, that person takes priority to serve as personal representative over a surviving spouse or surviving domestic partner.

Power of Attorney and Advance Health Care Directive

A power of attorney is a means to avoid the court process of appointing a guardian when a person becomes incapacitated. As discussed above, if a partner becomes disabled or incapacitated and is unable to make financial decisions, a registered domestic partner has statutory priority to be designated as the guardian of his or her partner. The court will select a guardian unless the incapacitated person has a general power of attorney. If a spouse or registered domestic partner wishes to have someone other than his or her partner act on his or her behalf in the event he or she becomes disabled, then he or she must execute a power of attorney designating that other person. Otherwise, the spouse or registered domestic partner has priority to be designated as guardian.

Unanswered Questions

The new rights discussed here are part of the movement toward equality between domestic partners and spouses. However, many questions remain unanswered. For example, federal and state laws provide spouses with an unlimited marital deduction. The unlimited marital deduction permits a spouse to transfer an unlimited amount of assets to or in trust for the benefit of his or her surviving spouse without being subject to estate tax. Currently, domestic partners are not afforded the same tax benefits as spouses. Whether the law will change in order to allow domestic partners to have tax benefits similar to spouses is not known.

Another issue is what rights domestic partners registered in one state will have if they move to another state and one of them dies. Will the rights afforded to surviving domestic partners registered in D.C. be enforced in the other state? Will partners who registered in another state and later move to the District be afforded the rights of partners who registered under D.C. law?

Registered domestic partners, like spouses,

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may now need to consider the protection of their assets from the legal rights of their partners. In addition, all individuals, married, partnered, or single, should decide whom they want to make decisions on their behalf in the event of incapacity. Some steps that can be taken include executing one or more of the following documents:

- Last Will and Testament (or similar testamentary instrument)
- Domestic Partnership (Premarital) Agreement
- General Power of Attorney
- Advance Health Care Directive

Lauren D. Krauthamer is an associate in the Firm's estate planning and administration group. Ms. Krauthamer has a joint JD/MBA from American University and an LL.M in taxation from Georgetown University. She focuses her practice on federal and state taxation concerns as they relate to estate planning. She also assists clients with probate and trust administration matters.

Becoming a Landlord in Maryland? Do Your Homework First

By Jason W. Henderson

Thinking of converting your real estate into an income-producing property occupied by a tenant? Have an extra room in your home that you are considering renting out to defray your increasing costs? You're not alone.

Over the last several years many counties across Maryland have seen a serious decline in the number of rental units available. In large part the decrease in available rental units has been fueled by the robust real estate market. Owners of large apartment complexes previously occupied by renters have chosen to convert their complexes into condominium units for sale. In this real estate market that is usually bad news for renters who cannot afford to purchase the unit they live in. While most experts agree that the real estate sales market is slowing down, it is clear that the rental market has never been hotter.

A growing number of homeowners and investors are taking advantage of the demand for rental housing and combating the rising cost of owning property by becoming landlords. The problem, however, is that too many prospective landlords are not taking the time to learn the requirements of the law before renting their property to members of the public.

Property owners are sometimes loath to spend time and money complying with the law. As a result, many landlords enter into the landlord-tenant relationship without doing their homework or attending to the basics like getting a rental license and drafting an enforceable written lease. It's not surprising that these landlords often end up in court spending hundreds or thousands of dollars to rectify problems that might have been avoided had they made the proper investment of time and money at the outset.

Recently, many counties around Maryland, in response to a growing number of tenant complaints, have begun to send a message to landlords operating outside the law: Comply or else!! Fear not, however, because while compliance can be confusing and intimidating at first, with legal guidance and some planning the landlord-tenant relationship can be a cost-effective, even lucrative way to defray costs and build equity. To that end, current and prospective landlords should start with the basics:

- **Get licensed.** Generally, there are two types of licenses for rental property:
  1. A multi-family license is required for:
     a. An individually owned and rented unit located in a condominium or cooperative building;
     b. An accessory apartment—i.e., a completely independent living facility within or added to a single family home with separate cooking, sleeping and eating facilities;
     c. A mobile home development.
  2. A single family license is required for:
     a. A detached single-family home;
     b. A townhouse.

The following types of rental property need not be licensed:

1. A room in a private home;
2. A rental property in certain incorporated municipalities;
3. Transient housing, i.e. hotels, boarding houses, motels, etc.;
4. Commercial rental property;
5. Housing operated for religious or charitable purposes.

Effective October 1, 2004 those property owners who own property built before 1950 must also comply with the state Lead Poisoning Prevention Program in order to be licensed.

- **Get a written lease.**

A well-written lease agreement will define the rights and responsibilities of the landlord and the tenant. When parties to a lease sign on the bottom line it becomes a binding contract. This protects each party to the lease from any changes or oral promises not agreed to in writing. Every landlord must comply with myriad rules and regulations, ranging from the federal Fair Housing Act (making it illegal to discriminate based on race, color, national origin, religion, sex and disability), the Code of Maryland, and county and local codes and ordinances.

Most counties have landlord-tenant affairs outreach offices that can assist in some of the basic information to get a new landlord started. However, each tenancy is unique and the arrangements in any given situation should be tailored to meet the objectives of the property owner and to comply with all applicable laws. For the best results, get legal advice right from the start to avoid problems later.

Jason W. Henderson is an associate in the Firm's real estate and litigation practice group. Mr. Henderson concentrates his practice on complex business and commercial matters, including construction contract disputes, real estate and leasing issues, creditors' rights, fiduciary matters and general civil and commercial litigation.

Spotlight on **Roger Hayden**

Roger Hayden is a partner of the firm and chair of the Real Estate, Business and Litigation Department where he concentrates in real estate, finance, employment, insurance and fiduciary disputes (including will and trust contests and contested guardianships). He has broad experience in many areas of the law bridging complex transactions and litigation.

Roger is a native of the Washington area. He was born and raised in Poolesville, Maryland, where he grew up on a farm. The primary crop was cut-your-own Christmas trees. He still lives in Poolesville with his wife, Diane, a government contracts attorney and three school aged children. He has been a lifelong member of St. Mary's Catholic Shrine in Barnesville, Maryland.

Both of his parents were Washington natives. His mother attended Roosevelt High School in the District while his father, who described himself as a "Herbert Hoover Rugged Individualist," quit school early to help his family impoverished by the Great Depression. After serving in World War II, in addition to farming, he founded a family business, Congressional Tile Company located in Northwest Washington. Roger attended Bullis High School, worked in the family tile business, and graduated from Randolph- Macon College, where he majored in history. After working for a year, he entered the George Mason University School of Law when it was new, receiving his law degree in 1982. He met his wife in law school.

After law school, Roger gravitated toward real estate law. Because of his involvement in his family business, which brought him in contact with many people in the construction industry, as well as his family's real estate interests, he felt he understood real estate transactions. He started out with a small law firm in Potomac, Maryland, then moved to manage a local office for Sentinel Title in Frederick, Maryland. After that, he took a position in the General Counsel Department for Trustbank Federal Savings Bank in Tysons Corner, Virginia, which, at that time, was a $2 billion financial institution. There, he was promoted to Deputy General Counsel and Vice President. He was originally employed to oversee the bank's compliance with consumer lending laws such as the Truth-in-Lending Act , Fair Credit Reporting Act, and Real Estate Settlements Procedure Act. As the job expanded, he became involved in lender representation in commercial loans ranging from hundreds of thousands to hundreds of millions of dollars and involving land for residential development, office buildings, multi-family dwellings, hotels, healthcare facilities, and the like. As some projects were financed through industrial revenue bonds he became involved in securities law. He also expanded the scope of his expertise into buying and selling mortgages in the secondary market, a specialized area of real estate financing. Later, as economic conditions worsened, he took the lead in working out troubled loans. He remembers this work as "a great learning experience."

In the early 1990s, as banks and savings and loans began to fail, Roger took a position as Regional Counsel and Vice President for the mid-Atlantic Region (covering Maryland, DC, Virginia and West Virginia) for First American Title Insurance Company, then the second largest national title insurance company. The mess created by the failure of so many banks and S & Ls had repercussions for title insurers who suddenly found themselves with many new claims. As the highest legal officer for the region, he was responsible for assisting with decisions about whether to insure problem titles, and defending and settling adverse title claims. This work kept him busy for several years.

In 1994, Roger decided to try private practice. He opened his practice as a solo practitioner and established an of counsel relationship with a small law firm in McLean, Virginia. He started out doing real estate transactional work, but soon expanded into business and commercial transactions, litigation, and employment law. His clients were growing businesses, from mom and pop shops operating out of a garage to businesses with hundreds of employees. Increasingly he was called upon to review employment agreements for key employees. He also began to get calls to serve as an expert witness in disputes involving real estate settlement practices. A now retired partner of Pasternak & Fidis, Theresa Hall, hired him as an expert witness on behalf of a mortgage lender in a contract dispute. His involvement in that case led to his joining Pasternak & Fidis, P.C. as a partner in 1996. Eventually, he was asked to take over the handling of the case which went to the Maryland Court of Appeals. *Calomiris v. Woods* became the key case that set the standard for contract interpretation in Maryland.

Roger has a reputation as a tenacious yet thoughtful representative for his clients, whether negotiating a complex contract matter, resolving an employment dispute, or finding a solution to reconcile feuding heirs. He maintains an active practice in all three local jurisdictions. He has also handled litigation in a number of other states, including New York, Florida, Utah, Texas and Indiana. While he enjoys the representation of business interests, Roger is ready to assist clients in need with all types of issues. Recently, a nationally recognized breeder of prize-winning goats found himself in conflict with the administrators of an important state fair who sought to bar his goats from competition. Roger represented this client in federal court and before administrative tribunals where the client was fully vindicated. To an outsider a goat being barred from a state fair might have seemed humorous. However, Roger understood how important the matter was to the client and to his livelihood.

Today, in addition to maintaining a demanding law practice, Roger juggles a busy schedule attending his three children's school, sports, and music events. He has served as president of the Poolesville High School P.T.A., teaches at his church, is Youth Director for the local Knights of Columbus chapter, and is becoming involved with the Boy Scouts of America with his son.

Premarital Agreements and the Young Couple

by Linda J. Ravdin

A premarital agreement is a legally binding contract between two people who intend to marry that determines the property rights of the surviving spouse upon the death of the first spouse and that may also determine property and support rights if the marriage ends in divorce. (See, Frequently Asked Questions about Premarital Agreements in the October, 2004 issue of this newsletter, available at www.pasternakfidis.com).

Not so long ago the typical person considering a premarital agreement was older, had been widowed or divorced and had children from a prior marriage whom he or she wanted to provide for at death. A premarital agreement remains a useful planning tool for such individuals. When there is a significant disparity in property and income the economically better off partner may wish to limit his or her financial obligations, especially in the event the marriage ends in divorce. Even when such persons are in comparable economic circumstances, they may each wish to preserve their own assets and to avoid disputes with each other if the marriage ends in divorce, or with the other heirs of the deceased spouse if the marriage ends in death. Often, because of their ages there is no expectation that the couple will have children together.

As premarital agreements have gained favor as a means to resolve financial and property rights in advance, more younger couples entering into first marriages are seeking them. There are no reliable statistics documenting this trend, or the reasons for it, but the experience of the author and other attorneys at Pasternak & Fidis, coupled with an informal and unscientific survey of colleagues, suggests that the trend is real. There appear to be several reasons for it:

- Today's young adults will be the beneficiaries of the tremendous wealth built by their grandparents or great-grandparents, the frugal children of the depression and the post-World War II period, and their own successful parents. Sometimes the wealth coming from the older generation is in the form of a family business that the bride or groom is, or expects to become, active in. Parents, wishing to preserve their wealth in the family, urge their children toward a premarital agreement. The reality of this factor is borne out by the frequency with which the longtime attorney for the parents of the bride or groom is called upon to draft and negotiate the agreement.
- Many of today's young adults had a front row seat at their parents' divorce and are seeking an alternative to the sometimes bitter fighting that sapped energy and resources from the family. Some of these young adults witnessed the tensions that can arise over disposition of property after the death of a parent or grandparent who was married several times and did not plan for allocation of property among the widow or widower and the children and stepchildren.
- Many young adults are delaying marriage until their early 30s. Some of these more mature young people have become established in a career and have built up some assets, often have acquired a home and retirement benefits, or have become wealthy as entrepreneurs. A premarital agreement is one way for such persons to protect that premarital wealth as a separate asset.
- Premarital agreements have gained much wider acceptance generally. The notion that a premarital agreement is a token of lack of faith in the future of the marriage has begun to fade. More persons getting married are able to consider whether a premarital agreement is appropriate for them – and they are not for everyone – while still holding on to their belief in romantic love.

When the couple is young, they, and the attorneys who represent them, must recognize that the approach to formulating the specific terms of the agreement should not necessarily be the same as if the couple were over 50 with independent assets and the means of supporting themselves. There are several key factors that parties and their attorneys should take into account:

- The couple may have children together. Children change everything. Even if the couple assumes they will both continue to work fulltime, their plans may prove unworkable. A child may be disabled or otherwise require an unusual level of parental attention. The couple may discover after a child is born that having a parent at home suits both of them. Or, the couple may realize that it is in their common economic interest that one career take a backseat.
- The younger the couple, the longer the timeline that must be taken into account. A 30-year old couple getting married today may still be together in 60 years. The number of unknowns in their lives is virtually impossible to contemplate and plan for in a contract. Younger couples tend to focus on the possibility the marriage may end in 5 or 10 years and on terms that may be appropriate if that occurs. They have much greater difficulty contemplating a 60-year marriage that ends in death and the terms that would be appropriate and fair after so many years.
- A corollary to the above is that any provision of the agreement that fixes the rights of the economically disadvantaged party at some predetermined level will likely prove to be grossly unfair to that party if the marriage ends, whether by death or divorce, after 20 or 30 years. He or she may develop health problems and be unable to work. Inflation may erode the value of a fixed cash payment. There are also risks for the wealthier party in fixing an obligation at a predetermined level. If that party loses his or her wealth as a result of business reverses or bad investments he or she will remain liable to meet the financial obligations established under the agreement.

There are a number of options younger couples and their counsel may wish to consider in formulating the terms of a premarital agreement that will meet their objectives and still stand the test of time:

- The agreement could provide that each party retains the right to seek spousal support in the event of divorce, or that the economically weaker party retains such a right while the wealthier party waives his or her claim. Of course, in the event of divorce that party would still have to prove the need for support. There are variations on this theme. For example, parties who wish to avoid court could agree to binding arbitration of a spousal support claim. Or, the agreement could provide for a limited duration support waiver; for example, a waiver that stays in effect until a child is born or the fifth anniversary of the marriage with the right to seek support reinstated thereafter. Such a provision would provide some security for an economically weaker party who may leave fulltime work to be a homemaker.
- The agreement could provide that in the event of divorce each party would retain exclusive rights to his or her premarital assets and any assets received by gift or inheritance in the future while also providing for the parties to share the fruits of their common labor.

This is similar to the property rights divorcing parties currently have in the three Metro area jurisdictions. For parties whose primary objective is to protect their right to inherited assets, and who will be working during the marriage and creating shared assets, such an agreement can work well for both parties. It would allow both to build some financial security through savings and investment during the marriage while allowing each to decide how they wish to deal with their inherited assets. Over time some may wish to contribute more of their separate assets to the household, but a party who wants to keep his or her inheritance separate would have the right to do so.

- A variation on the above is an agreement that singles out a specific asset for special treatment in the event of divorce. Often the asset is an ownership interest in an existing business or a professional services practice, such as a law or CPA firm. Under the law of all three Metro area jurisdictions a premarital business that appreciates in value as a result of the efforts of either or both parties during the marriage could be subject to an equitable distribution claim. An agreement could preclude such a claim and the costly litigation that goes along with it while retaining the non-owner spouse's right to share in retirement benefits and other assets acquired with the compensation received by the owner-spouse for working in the business.
- When a wealthier party wishes to retain his or her exclusive right to property in his or her name, the agreement could include some compensating features to provide financial security to the other spouse. For example, the agreement could provide that the wealthier party would transfer specific property, such as a home, into the joint names of the parties. It could provide that the wealthier party would make a specified cash gift to the other party upon marriage, or on a specified schedule thereafter, to enable him or her to build up an investment portfolio for future financial security. There are a variety of ways such an obligation could be structured, limited only by the desires and the imaginations of the parties and their counsel.
- To address the death scenario, one option is the parties could simply retain their rights under state law in the event of death. This means that the surviving spouse would be entitled to survivor benefits under a private, qualified retirement plan and under most governmental retirement plans just as he or she would if there were no agreement. It would mean he or she would have the same right to a spouse's share of the deceased spouse's estate as would be in effect if the parties did not have an agreement.
- Another option for providing for the death of a spouse is for the wealthier spouse to agree to create a trust funded at a specified level, or with specified assets, that provides for the survivor to have the income, and, if necessary, to invade the principal. However, as discussed above, parties and their counsel should consider the possibility that the death may occur very far into the future and that the terms will be either inadequate for the survivor or unreasonably burdensome for the decedent's estate.
- Parties may also wish to consider provisions for life insurance. Again, however, as discussed above, an amount that may seem entirely adequate today may be wholly inadequate 20 years from now. Moreover, if the spouse obligated to maintain insurance opts for term insurance, which will be very inexpensive when the parties are young, he or she may discover that the cost of maintaining it is prohibitively expensive in the later years. For some couples, a life insurance product that builds cash value may be a better option.
- An option parties may wish to consider to provide financial security for the economically weaker spouse under either the death or divorce scenario is an obligation on the part of the wealthier spouse to pay the premiums on a policy of long-term care insurance. Such a policy will provide for at least some of the cost of nursing home care for a spouse who needs such care.
- Finally, parties may wish to consider a provision that automatically terminates the agreement in its entirety after a specified number of years, often called a sunset provision. When an agreement terminates under a sunset clause, the parties are restored to the rights under state and federal law they would have at the end of the marriage, whether by death or divorce, if they had never had a premarital agreement. A variation on this theme is an agreement under which certain provisions terminate after a specified number of years. For example, as suggested above, an alimony waiver could terminate after a certain number of years or the birth of a child. Similarly, a waiver of spousal rights at death under state law could terminate after a specified number of years without terminating the agreement as a whole.

A good premarital agreement will be tailored to meet the specific desires and circumstances of the parties. The solutions suggested above to achieve such an agreement are by no means the only options nor are they mutually exclusive.

Ideally, a party who wishes to have a premarital agreement will broach the subject and begin negotiations well before the wedding date. The proposed agreement will be drafted and given to the other party in sufficient time to get meaningful legal advice about whether to sign it as is or seek modifications. When the couple is young, it is even more important that the discussions and drafting begin far in advance of the wedding. Many couples decide to get married, pick a date, and start making financial commitments for a venue, caterer, and other vendors. Only then do they focus on a premarital agreement. Negotiations that take place in the midst of wedding plans with invitations about to go out can be extremely stressful for both and too often unfair to one of them. Ideally, the couple would decide to get married, start the discussion about a premarital agreement, resolve any disagreements, and only then start making deposits for catering and invitations.

Linda J. Ravdin is the author of TM849 Marital Agreements (Tax Management Inc., 2003), a treatise on premarital, postmarital and domestic partnership agreements. In June, 2005, ***Washingtonian*** *called her "one of the nation's leading specialists" in premarital agreements. She and Pasternak & Fidis partner Marcia Fidis are currently working on a manual for drafting and negotiating premarital agreements and domestic partnership agreements for the Maryland Institute for Continuing Professional Education of Lawyers.*

PASTERNAK & FIDIS, P.C.

NEWS

Elizabeth Morris was sworn into the DC Bar. Liz, an Associate in the Divorce & Family Law Group, is also licensed to practice in Maryland.

P & F Managing Partner, Nancy Fax, will become the Chair of the American College of Trust and Estate Council (ACTEC) State Laws Committee in 2007 for a three year term. She is currently ACTEC's Maryland State Chair.

In July, Nancy Fax gave a presentation on Practical Drafting under the DC Uniform Trust Code in a program sponsored by the DC Bar. She also has written an article on this topic entitled "Practical Drafting Under the Uniform Trust Code" which will appear in the fall edition of *Wealth Strategies Journal*, a new on-line publication for wealth advisors.

P & F congratulates our three new parents all of whom have added daughters to their families. Lucy Nichols is the proud mother of Eleanor Grace born in April; Brian Della Rocca is a new father to Catherine Eva born in July; and Jason Henderson welcomed Allana Beth in August.

In October, Marcia Fids was a co-presenter of a program on estate planning at the Georgetown University Law Center Reunion. The program was entitled "Estate Planning Today: Basics and Beyond."

Linda Ravdin was reappointed as Chair of the Publications Development Board of the American Bar Association's Family Law Section.

The Firm's domestic relations attorneys have continued their training in collaborative law, created by Minnesota attorney Stuart Webb. Collaborative law seeks to enable divorcing couples, both working with attorneys, to achieve a settlement without the trauma of litigation. In September, P & F attorneys were among the thirty trainees in a special workshop for collaborative law practitioners, co-taught by Stuart Webb himself, as well as Ron Ousky, president-elect of the International Academy of Collaborative Professionals. More information on this exciting new dispute resolution model can be found in the just-published book, *The Collaborative Way to Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids – Without Going to Court*, by Stuart G. Webb and Ronald D. Ousky (Hudson Street Press, 2006).

P&F

The Pasternak & Fidis Reporter

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