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ESTATE PLANNING FOR SAME-SEX COUPLES

Part One: LEGAL STATUS OF UNMARRIED COHABITATION AND SAME-SEX RELATIONSHIPS

Part Two: ESTATE PLANNING CONSIDERATIONS FOR UNMARRIED SAME OR OPPOSITE SEX COHABITANTS

Part Three: TAX CONSEQUENCES OF UNMARRIED COHABITATION, DOMESTIC PARTNERSHIPS, CIVIL UNIONS AND SAME-SEX MARRIAGE

By

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Neither the author, the Connecticut Bar Association nor its Estates and Probate Section are responsible for the applicability, accuracy, validity, tax or legal consequences of the materials or forms contained in this outline as applied to any client's situation.

 This outline is a combined, updated and condensed version (through October 2, 2006) of two previous publications and an outline, all by the author; namely, ***The Non-Traditional Family in the United States and Canada—Estate and Tax Planning Responses***, which itself was one-quarter of a book, **Families and Estates: A Comparative Study**, edited by Rosalind F. Croucher (Kluwer Law International, 2005), and ***Legal and Tax Status of Persons in Connecticut Civil Unions and Other Unmarried Cohabitants,*** 78 Conn. B. J. 261 (#4), distributed in June, 2006. The prior version of this outline (with the same name) was distributed at the Estates & Probate Section's program at the Connecticut Bar Association's Monday, June 12, 2006 annual meeting.

UNCONVENTIONAL RELATIONSHIPS

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PART ONE

LEGAL STATUS OF UNMARRIED COHABITATION AND SAME-SEX RELATIONSHIPS*

I. INTRODUCTION

Throughout recorded history and at least since the development in almost all cultures of the institution of marriage, the traditional nuclear family has consisted of a husband, wife and children. The non-traditional family consists primarily of unmarried heterosexual and gay couples, domestic partners and same-sex couples united in Vermont or Connecticut civil unions,[1] with or without their mutual children or a child or children of one of them. The question now is whether civil union is a stepping stone to same-sex marriage.

A "Census Bureau analysis of marriage, fertility and socioeconomic characteristics [shows that people] in the Northeast marry later and are more likely to live together without marriage and less likely to become teenage mothers than are people in the . . . Midwest, West or South. In New York, New Jersey, Connecticut and Massachusetts, for example, the median age of first marriage is about 29 for men and 26 or 27 for women, about four years later than in Arkansas, Idaho, Kentucky, Oklahoma and Utah. And tracking the red state-blue state divide, those in California, Illinois, Michigan, Minnesota and Wisconsin follow the Northeast patterns, not those of their region."[2]

A. Gradual Recognition of Rights of Unmarried Couples

Starting in the second half of the Twentieth Century, there has been a gradual worldwide recognition that unmarried people living together have certain rights that traditionally had only been granted to married couples. Initially, each person could only enforce claims for support against the other, usually after their break up. Now however, the number of countries, including the United States, give more rights to unmarried couples living together.

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* This part of the outline is an updated and revised version of an article originally published in *Estate Planning*, 31 Estate Planning 307 (July 2004), and subsequently updated again through October 2, 2006. See asterisked footnote at bottom of the cover page to this outline.

[1] 71 VT. STAT. ANN., Ch. 23, §§ 1201 et seq. and Ch. 18 §§ 5160 et seq., effective July 1, 2000.

CONN. GEN. STAT. §§ 46b-38aa through 46b-38pp (CT. P.A. 05-10) effective on and after October 1, 2005.

[2] N.Y. TIMES, October 13, 2005, p. A. 14.

Furthermore, recent developments have substantially increased the rights of unmarried cohabitants to inherit from each other and their children's' rights, including those of posthumous children in both traditional and non-traditional relationships.

1. The most extensive changes in non-traditional family law involve same-sex partners

Beginning slowly, property, support and other rights of same-sex cohabitants have been gradually analogized to those of unmarried partners of the opposite sex. Now, this has evolved into a revolution, with the law concerning gay relationships developing at an increasingly fast pace. Recognition of rights and privileges formerly only given to married couples has now occurred in several countries. Same-sex marriage is now sanctioned in the Netherlands,[3] Belgium,[4] Spain, [5] Canada and South

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[3] Act of December 21, 2000, Title 5, Article 30(1) of the Netherlands Civil Code, amending Book 1 of the latter effective April 1, 2001. One member of the couple must either be a Dutch citizen or else live in the Netherlands.

[4] United Press International January 31, 2003. All rights of marriage are granted, but it does not provide for the presumed paternity of child born during marriage and does not change lack of provision under Belgian law for joint adoption by a same-sex couple. The Netherlands (1998) and Belgium (2000) have permitted both opposite and same-sex couples to enter registered partnerships, as do several Australian states, France and New Zealand. Harris, *Same Sex Unions Around the World*, 19 Probate & Property 32.

[5] "Despite vociferous opposition from the Roman Catholic Church, Spain's Cabinet proposed legislation . . . giving homosexuals the right to marry and adopt children." Boston Globe, p. A6, 30 September, 2004.

On April 21, 2005, "By a vote of 183 to 136, the Congress of Deputies, the lower house in the Spanish Parliament, voted to amend its marital law by adding the words, 'Marriage will have the same requirements and results when the two people entering into the contract are of the same sex or of different sexes.'

"The right to adopt children in implicit in the new language, according to an official at the Justice Ministry . . . Last fall, then-Cardinal Joseph Ratzinger [now Pope Benedict XVI]. . . told the Italian newspaper La Republica [stet] that the Spanish government's position on same-sex marriage was 'profoundly negative' and 'destructive of family and society.'

"Prime Minister José Luis Rodriguez Zapatero seemed to sense that [this] vote would prompt fresh criticism from . . . Pope Benedict XVI.

"If the new pope says something, I am prepared to respect what he says," the prime minister told reporters.

"Spain's Conference of Catholic Bishops said the bill 'introduced a dangerous and disruptive element into the institution of marriage, and thereby into our just social order.'

"The bill [has now been approved by] . . . the Senate, the upper house in the Spanish Parliament.

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Africa.[6] More than 6,800 same-sex couples have married under the United

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"Hundreds of thousands of people marched through downtown Madrid . . . to protest . . . [legalization] of gay marriage, a measure that critics and supporters say makes Spanish laws on same-sex unions [along with those of the Netherlands] the most liberal in Europe.

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"About 500,000 people took part in the march, organizers told Madrid's public television station.

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"[P]olls show that fifty-five percent to sixty-five percent of Spaniards support gay marriage.

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"[Spain has taken] existing law and adds a sentence saying that all married couples will have the same rights regardless of sex. [Thus the law] does more than any law in Europe to equate the rights of heterosexual and same-sex couples. . . [whereas] the Netherlands [has merely created] a category of rights that do not fully match those of heterosexual couples on subjects like adoption . . . ." N.Y. TIMES, June 19, 2005, page 4. Legalization of marriage by same-sex couples in Spain was effective June 3, 2005 and they may adopt children together.

On July 1, 2006, Czech Republic's new registered partnership law came into force, extending to registered couples many of the rights and obligations of traditional marriage, but withholding equality in the areas of adoption, pensions, taxation and joint property ownership. WINDY CITY TIMES World Roundup, August 9, 2006, pp. 1 & 2.

Thus, the Czech Republic became the first former European Communist country to grant legal rights to same-sex partnerships, overriding a Presidential veto and narrowly approving legislation granting same-sex partners legal rights to inheritance and health care. N.Y.TIMES, March 10, 2006, p. A16.

Under Germany's Registered Partnership Act, effective August 1, 2001, same-sex couples received a new status, with many of the advantages of marriage. They can share a last name, refuse to testify against one another in court and have the same inheritance and tenants' rights as heterosexual spouses. A foreigner legally joined in a gay partnership to a German could apply for citizenship. Partners also have the responsibility to maintain and support each other in case of financial difficulties.

A January 1, 2005 amendment gave one partner the right to adopt the other partner's biological child (a so-called stepchild adoption) and other rights were expanded, such as those in the area of property rights, moving registered partnerships closer to heterosexual marriage. But German same-sex partners still do not have the same tax and welfare benefits as heterosexual married couples.

It is estimated that between 14,000 and 20,000 couples have registered partnerships in Germany and same-sex unions have now gained a societal acceptance that exceed even what optimists had predicted. But there is still a tremendous difference concerning income taxes, joint tax assessments and inheritance taxes between registered partners and married couples.

It took ten years in the Netherlands and Denmark before lesbian and gay partnerships were made 100% equal to heterosexual ones in 2001. *German Gay Marriage Law Marks Fifth Anniversary*, www.dw-world.de/c@DeutsheWele. August 2, 2006.

[6] In *Halpern v. Toronto (City)*, 172 O.A.C. 276, *Halpern v. Canada* (A.G.), 215 D.L.R. 4th 223, *aff'd* 225 D.L.R. 4th 529, 2003 O.A.C. 276 (2003), first Ontario, then British Columbia, in *Barbeau v. British Columbia* (A.G.), 2003 BCCA 251 (2003), *modified* 2003 BCCA 406, B.C.J. No. 994 (2003) and *Eagle Canada, Inc. v. Canada* (A.G.). 13 B.C.L.R. (4th) 1 (2003), upheld gay marriage, and in *Catholic Civil Rights League v. Michael Hendricks, et al*, 2004 R.J.Q. 851 (2004), Quebec's Court of Appeals also did so, ordering immediate issuance of marriage licenses (subject to a statutory waiting period). Subsequently, Quebec's Bill 59 (2004, chapter

23), assented to 10 November 2004, amended chapter 64 of its Civil Code to allow couples in a civil union to continue their lives together as a married couple. It authorized the officiant to solemnize their marriage despite their civil union, and provided that the marriage dissolves the civil union while maintaining its civil effects, which are considered to be effects of the marriage from the date of their civil union.

It also amended articles 71 and 73 of the Quebec Civil Code, under which persons who have undergone a sex change are allowed to change the designation of sex and given name on their acts of civil status, to remove the restrictions concerning married persons.

Meanwhile, Manitoba, the three maritime provinces, Newfoundland and Labrador (part of Newfoundland) and the Yukon Territory also agreed to allow gay marriage.

In the Matter of a Reference by the Governor in Council Concerning the Proposal For an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes, 2004 S.C.C.79 (2004), a draft civil marriage bill submitted by the Canadian federal government with constitutional questions, the Canadian Supreme Court ruled that the government has the authority to amend the definition of marriage, but did not rule on whether such a change is required by the equality provision of Canadian Charter of Freedoms.

Then, on February 1, 2005, Canada introduced a bill to legalize same-sex marriages, redefining marriage as "the lawful union of two persons to the exclusion of all others." This bill received a favorable advisory opinion from the Canadian Supreme Court. While, according to the February 2, 2005 Wall St. Journal, p. 1, "pitched battles with the opposition conservatives and religious organizations is certain," a final favorable vote occurred July 19, 2005, thus legalizing same-sex marriage in all 10 Canadian provinces and its 3 territories. *Civil Marriage Act*, S.C. 2005, C.33. The Act recognizes that same-sex couples should have the same access to marriage as different-sex couples, stating that "only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the Canadian Charter of Rights and Freedoms."

"The Canadian Modernization of Benefits and Obligations Act provides that all unmarried couples, opposite- and same-sex, who have lived together for at least one year are entitled to the same benefits and are, for purposes of federal law, under the same obligations as married couples. In . . . [Canada, the Netherlands and Belgium] all otherwise eligible couples, of the same or opposite-sex, have a choice between marriage and some form of domestic partnership. [Canada is apparently the only country without nationality or residency requirements for same-sex couples.]

"A number of countries have registered partnerships, civil unions, or domestic partnerships. In some countries, including France, New Zealand, and some Australian states, the partnership is open to both same- and opposite-sex couples. Couples who register under the French Pacte Civil de Solidarité (PCS), created in 1999, 'obtain most of the rights and obligations traditionally associated with marriage in the fields of social welfare, housing, tax law and property rights, but a few significant distinctions will remain in the areas of inheritance and children, as well as in the event of a possible breakdown of the relationship.' Eva Steiner, *The Spirit of the New French Registered Partnership Law—Promoting Autonomy and Pluralism or Weakening Marriage?* 12 Child & Fam. L.Q. 1 (2000). In December 2004, the New Zealand parliament enacted a civil union law for same-sex couples that gives partners the same rights and duties that married opposite-sex couples have. Legislation in Australian states and territories provides for property distribution at the end of de facto relationships. In the Northern Territories, South Australia, and Tasmania, only heterosexual cohabitants are covered, while statutes in Victoria, Western Australia, the Australian Capital Territory, New South Wales, and Queensland apply to same- and opposite-sex couples. In these countries opposite-sex couples have the same kind of choice of family form that all couples in the Netherlands, Belgium, and Canada do, but same-sex couples are limited to the statutory alternative.

"Other countries, including England and Wales, all the Scandinavian countries, and Germany, offer registered partnerships only to same-sex couples, leaving marriage exclusively for and the only option available to opposite-sex couples. In most of these countries, the legal effects of entering into a registered partnership are similar to those of marriage, through a number of them provide that certain aspects of the law of marriage, often pertaining to children, do not apply to the partnership."

Kingdom's Civil Partnership Act since its December, 2005 effective date. Civil partners are granted all the rights and obligations of traditional marriage.[7] Other countries allowing same-sex registered partnerships or alternatively providing substantially all the benefits of marriage are Andorra, Denmark, Finland, France, Germany, Greenland, Hungary, Iceland, Ireland, New Zealand, Norway and Sweden. But same-sex marriage is bitterly opposed in the United States, although some states are starting to recognize gay rights. Others vehemently reject this concept.

II. FEDERAL AND STATE DEFENSE OF MARRIAGE ACTS (DOMAs), STATE CONSTITUTIONAL AMENDMENTS AND CASE LAW

A. A Federal Defense of Marriage Act (hereafter referred to as DOMA) defines a marriage as a legal union between one man and one woman.[8]

The federal DOMA says:

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administration bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.
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> "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

The above quoted portions of this footnote are from Harris, *Same-Sex Unions Around the World Marriage, Civil Unions, Registered Partnerships—What Are the Differences and Why Do They Matter?*, 19 Probate & Property No. 5, 31, and 32 (September/October 2005).

[7] British law allows same-sex couples in civil partnerships to [receive] some of the same financial benefits as married heterosexual couples, like tax breaks on inherited real estate and pension rights. The ceremony . . . resemble[s] civil marriages between heterosexuals performed in a registry office.

"Homosexuality is still a divisive issue within the Anglican church . . . . But . . . homosexuality seems more accepted than it was a generation ago. The British Military lifted a ban on openly gay people five years ago." N.Y. TIMES, December 6, 2005, p. A.12.

[8] 1 U.S.C.A. §§ 1,7 and 28 U.S.C.A. § 1738C, et seq; 110 *Stat*. 2419, P.L. 104-199 (1996), and P.L. 104-99 (H.R. 3396).

B. State DOMAs

An increasing number of states are enacting DOMAs. Most of these are surviving court challenges. Forty-five states have enacted statutory or constitutional DOMAs designed to define and protect the institution of marriage by allowing states to ignore same sex marriages performed by other states.[9]

1. State constitutional DOMAs

Nineteen states have constitutional amendments protecting "traditional" marriage and another twenty-six have DOMA statutes. On June 6, 2006, Alabama endorsed a DOMA constitutional amendment and six more states have one on their November 2006 election ballot.

a. Colorado may have a ballot initiative both defining marriage and domestic partnership rights.

b. Besides Nebraska's constitutional amendment banning gay marriage being upheld,[24] statutes banning it have been upheld in Georgia,[26] Washington,[28] California,[36] Oregon[91] and New York.[10]

c. However, Illinois election officials voted to keep a referendum against same-sex marriage off the November 2006 ballot, saying supporters did not have sufficient ballot signatures. The measure would have asked whether the Illinois constitution should be amended to ban same-sex marriage. While Illinois has a DOMA, the referendum supporters were concerned that this may be voided. Thus, they brought suit in federal court, alleging Illinois procedures for placing a referendum on the ballot were burdensome and unconstitutional. The suit was dismissed and the referendum supporters are appealing.[11]

d. During the November 2, 2004 election, eleven states: Arkansas (whose wording also prohibits civil unions), Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio (which barred any legal status that "intends to approximate marriage"), Utah and even Oregon, the one state where gay rights activists had hoped to prevail, enacted constitutional amendments

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[9] Connecticut added DOMA language to its Civil Union Act; a condition required by Governor Jodi Rell for her signature. *Infra*, note 133. However, C.G.S. § 45a-727(a)(4) had already stated Connecticut's "current public policy . . . is now limited to a marriage between a man and a woman." 2000, P.A.00 228, § 1.

[10] *Infra*, note 33. *See also* Editorial, THE WALL STREET JOURNAL, June 7, 2006, p. A14.

[11] N.Y. TIMES, August 13, 2006, p. 22.

stating that marriage is an exclusively heterosexual institution, in addition to their statutory DOMAs.

e. Alaska has both a statutory and constitutional DOMA as do Louisiana and Texas. Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, Utah, Mississippi, Montana and Kansas. Arizona, Delaware, Idaho, Illinois, Kansas, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Florida, Indiana, Maine, Minnesota, Nevada, Alabama, Hawaii, Iowa, Washington, California, Colorado, West Virginia, Missouri and New Hampshire all have statutory DOMAs.

f. Missouri approved such a measure in August, 2004.

g. On April 5, 2005, "Kansas overwhelmingly voted to add a ban on same-sex marriage and civil unions to [its] Constitution, but both sides predicted court battles over the amendment. The ban affirms the state's policy of recognizing only marriages between one man and one woman. It also declares that only such unions are entitled to the 'rights and incidents' of marriage."[12]

h. On November 8, 2005, Maine's voters rejected repeal of its 2005 gay-rights law, which expanded its human rights act to outlaw discrimination based on sexual orientation; already done in all five other New England states. However, Texas voters overwhelmingly approved a constitutional ban on same-sex marriage, becoming the nineteenth state to so act.[13] It also bars "this state or a political subdivision of this state from creating or recognizing any legal status identical or similar to marriage."[14]

i. The Tennessee Supreme Court ruled unanimously that the American Civil Liberties Union had no standing to bring a suit in which it contended that Tennessee failed to meet its own notification requirements for a ballot measure asking voters to ban gay marriage. Legislators supporting the proposed amendment wanted it as a backup in case the Tennessee statute banning gay marriage should be overturned.

2. <u>A Massachusetts Constitutional Amendment to Ban Gay Marriage Will be on the 2006 Ballot</u>

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[12] N.Y. TIMES, April 7, 2005, p. A.20.

[13] HARTFORD COURANT, November 9, 2005, p. A. 4. This author has only counted 14.

[14] N.Y. TIMES, October 13, 2005, p. A. 14.

a. Massachusetts' pending amendment to ban gay marriage, and instead create civil unions for same-sex couples, was approved by the legislature acting as a Constitutional Convention on March 29 and 30, 2004 in a 105 to 92 vote. Had it been approved again by the legislature that fall, it would have been submitted to the state's voters in the November 2006 election. Since most legislators elected on November 2, 2004 favored gay marriage, this amendment was disapproved. By outlawing gay marriage and substituting civil unions for it, the foes of gay marriage were alienated, while gay rights supporters were offended because it banned gay marriage.[15]

b. "Instead, a "new amendment, . . . not initiated by the legislature, [will require 65,825 signatures from Massachusetts'] residents on petitions and then the support of only 50 of the [200] Legislators] . . . in each of two consecutive sessions, before it can be voted on in the 2008 general election. Proponents claim to have 60 votes, may enlist churches to favor the amendment and even circulate petitions. Since the churches will not be endorsing candidates, they will not jeopardize their non-profit tax status.

"The new amendment [banning gay marriage without granting civil unions],[16] drafted by a coalition of conservative groups led by the Massachusetts Family Institute, would generate some unusual consequences. It would not, for example, require that same-sex marriages that have already taken place be dissolved or invalidated.

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"[Governor Romney of Massachusetts] said that instead of civil unions, he could support 'certain domestic partnership benefits like hospital visitation rights and rights of survivorship and so forth.'

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"Gay marriage supporters . . . hoped opposition to same-sex marriage has decreased now that about 6,000 same-sex weddings have taken place over the last year. They accused Mr. Romney of trying to appeal to conservatives outside Massachusetts in

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15 HARTFORD COURANT, September 12, 2005.

16 *Id.*

preparation for a possible run for president [in 2008]."[17]

c. Gay and Lesbian Advocates and Defenders (GLAD), in a suit against Massachusetts Attorney General Thomas E. Reilly, challenged his September 2005 ruling approving the ballot question that would prohibit same-sex marriage. GLAD argued such a popular vote could change the *Goodridge*[18] case's legalization of gay marriages.[19] But the Massachusetts Supreme Judicial Court allowed this question on the 2008 ballot.[20]

d. A joint session of the Massachusetts legislature postponed until after the 2006 election any debate and vote on a constitutional amendment banning same-sex marriage, which would, of course, overturn *Goodridge,* by voting 100 to 91 to recess until November 9, 2006.

e. Under the Massachusetts constitution, if the amendment is approved by one-quarter of the legislature both in 2006 and 2007, it will be placed as a referendum on the ballot in the November 2008 election.

f. This postponement infuriated same-sex marriage opponents and galvanized its supporters. A spokesman for the latter said "we now have four more months to show legislators how well marriage equality is working in Massachusetts. The legislature should dispense with this undemocratic, discriminatory amendment and move on to the real concerns facing Massachusetts."

g. Had there been a vote, the supporters of gay marriage would have lost.

h. Same-sex marriage opponents are using the recess as a campaign issue against the Democratic controlled legislature, up for reelection this year. Same-sex marriage supporters challenged the measure's legality, arguing that such an amendment could not challenge the Massachusetts Supreme Judicial Court's ruling in *Goodridge*.

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[17] N.Y. TIMES, Friday, June 17, 2005, p. A16.

[18] *Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941, 2003 Mass. LEXIS 814 (2003), reversing 14 Mass. L. Rptr. 591 (Suffolk Co. Superior Court, May 7, 2002).

[19] N.Y. TIMES, Wednesday, January 4, 2006 and the Hartford Courant p. A6. The *Goodridge* case is cited in note 18, *supra.*

[20] HARTFORD COURANT, July 16, 2006, p. 8.

i. However, that court has also ruled that the petition was legal and should be heard by the legislature.[21]

j. "[T]he head of a conservative Roman Catholic group . . . [asked the Massachusetts Supreme Judicial Court] to keep gay marriages from occurring for at least two and a half years . . . until a constitutional amendment banning it could be voted on . . .

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k. "Legal experts have said the court is unlikely to grant such a stay [a petition for which was filed] after it appeared that Gov. Mitt Romney would be unable to ask the court for a similar stay of gay marriages [since the attorney general] refused to represent [him] in the case.

"[Meanwhile he] asked the . . . legislature for an emergency measure to allow him to sidestep the attorney general and go directly to the Supreme Judicial Court. . . .

[This was not] approved . . . but a measure [was sponsored] that would . . . remove the Justices who voted for legalizing same-sex marriage . . . Experts . . . thought [it] . . . had only a slim chance of succeeding."[22]

3. <u>Challenges to the Federal DOMA and to similar State Constitutional Amendments</u>

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[21] N.Y. TIMES, July 13, 2006, p. A6.

[22] N.Y. TIMES, April 21, 2004, p. A21. Chief Justice Margaret H. Marshall of the Massachusetts Supreme Judicial Court, (who wrote the *Goodridge* opinion), a Yale Law School graduate and former Vice President and General Counsel of Harvard University, was elected to the Board of the Yale Corporation as an alumni fellow for a six-year term in June, 2004.

Former Massachusetts Governor William F. Weld, a former candidate for the Republican nomination for Governor of New York, while a long-time advocate of gay rights, does not support legalizing same-sex marriage outside of Massachusetts. His wife, Leslie Marshall, said he has "always been a huge supporter of the gay and lesbian community and continues to be."

"Mr. Weld, a former United States attorney, ardently supported the [Goodridge case] that legalized same-sex marriage in [Massachusetts]. But in New York, even Democratic politicians dance carefully around the issue, many opting to support civil unions rather than delve into the moral battleground of same-sex marriage.

"[Mr. Weld's] work on gay rights [included creating] a governor's commission on gay and lesbian youth in Massachusetts." N.Y. TIMES, August 22, 2005.

a. In a challenge to the federal DOMA, *In re Lee Kandu and Ann C. Kandu*,[23] two women, who received a marriage license in Canada, sought to file a joint bankruptcy petition as a married couple in the United States, where they lived. They argued that the DOMA should not be construed to apply to the word "spouse" in the Bankruptcy Code, and that to apply it that way would violate the 10th Amendment's reservation of unenumerated powers to the states. The pleadings also contended that the DOMA violates the federal Constitution's guarantees of due process (fundamental right to marry) and equal protection (sex and sexual orientation) and that there is not even a rational justification for the DOMA, based on the Massachusetts *Goodridge* case.

b. The Washington Federal Bankruptcy Court concluded there was no constitutional violation by the DOMA and dismissed the case, unless it was severed and refiled by the surviving petitioner, one of whom had died after filing suit.

c. Nebraska's November 7, 2000 constitutional amendment, defining marriage as a union between a man and a woman, was upheld by the Eighth Circuit in *Citizens for Equal Protection v. Bruning.*[24] That court held that the amendment "and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States."

d. Nebraska's ban on same-sex marriages goes beyond those of other state laws barring it, since it prohibits "same-sex couples from enjoying many of the legal protections heterosexual couples enjoy." Gay men and lesbians who work for the State or University of Nebraska system, for example, are banned from sharing benefits with their partners.[25]

e. The constitutionality of Georgia's 2004 constitutional amendment banning same-sex marriage was upheld in *Perdue v. O'Kelley, et al.*[26] Gay-rights activists have filed challenges to a constitutional

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[23] *In re Lee Kandu and Ann C. Kandu*, 315 B.R. 123 (Bankr. W.D. Wash., 2004). *See Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005), which also rejected a constitutional challenge to the federal DOMA.

[24] *Citizens for Equal Protection v. Bruning*, No. 05-2604, . . . F.3d . . . (8th Cir. July 14, 2006), reversing 368 F. Supp. 2d 980 (D. Neb. 2005), upheld the amendment to Art. I, § 29 of the Nebraska Constitution, which had been adopted by a large majority of its voters on November 7, 2000.

[25] N.Y. TIMES, May 13, 1005, p. A14.

[26] *Perdue v. O'Kelley et al*, 2006 Ga. Slip (SO6A1574), July 6, 2006.

amendment banning same-sex marriage in Oklahoma.

f. A Louisiana judge (on October 5, 2004),[27] struck down a constitutional same-sex marriage ban approved September 18, 2004, on grounds that it improperly dealt with more than one issue by banning not only same-sex marriage but also any legal recognition of domestic partnerships or civil unions. (Louisiana's constitution requires that amendments be limited to a single-subject.)

g. The constitutional amendments in Ohio and Oklahoma also had single-subject requirements. Thus, they may face legal challenges similar to the one in Louisiana.

h. The Washington Supreme Court upheld the validity of its DOMA,[28] stating that the legislature has the power to limit marriage in Washington state to opposite-sex couples under the state constitution and controlling case law.

(i) The Court saw "no reason . . . why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington."

(ii) Justice Madsen's majority opinion was limited to determining the constitutionality of Washington's DOMA. He said "the solid body of constitutional law disfavors the conclusion that there is a right to marry a person of the same sex . . . , [W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it."

(iii) The case is unusual among same-sex marriage ones, because the plaintiffs asked for the right to marry as their sole remedy, rather than requesting a civil union or some other quasi-marital arrangement.

i. President Bush made a major push for a constitutional amendment banning same-sex marriage as part of a new 2006 campaign to appease cultural conservatives. He declared strong support for the amendment for the first time since his 2004 reelection campaign, when he had strongly promoted his opposition to same-sex marriage.

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[27] N.Y. TIMES, Oct. 8, 2004.

[28] *Andersen, et al v. King County et al*, No.75934-1 consolidated with 75956-1 (July 26, 2006).

j. Some social conservative activists were cynical about the President's push (as were Democrats), stating that they viewed the issue as merely a politically convenient tool to motivate core voters. The so-called value voters, Christian radio stations and internet blogs have been quite upset by "activist judges" moves to destroy marriage while other developments dominate the mainstream news media. Some conservatives had expressed moral alarm as the Vice President's daughter, Mary Cheney, a lesbian, promoted her book on national television and discussed her distaste for the President's opposition to same-sex marriage in 2004. But in 2003, First Lady Laura Bush was quoted as saying "I don't think [same-sex marriage] should be used as a campaign tool."

k. The proposed constitutional amendment would not only define marriage as being between a man and a woman, but would also prevent courts from requiring that states allow civil unions. It is questionable as to whether the amendment would prohibit the legal equivalence of marriage, like civil unions, or merely leave it up to the states while taking away the right of courts to impose civil unions on states that have voted to ban same-sex marriage.[29]

l. In June 2006, the Senate defeated a proposed constitutional amendment to ban gay marriage. In July, the House of Representatives also defeated it.[30] The proposed amendment said that "marriage in the United States shall consist of only the union of man and a woman. Neither the [U.S.] Constitution, nor the constitution of any state, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

m. Following its defeat in the Senate, some people on the religious right debated seeking the requisite 34 states needed to call a constitutional convention. The purpose would be to prod Congress and provide hope to dispirited conservatives, although at least one of the backers called the idea "a bit kooky."[31]

n. While New York's gay marriage case was pending in its Court of Appeals, the N.Y. State Bar President, A. Vincent Buzard,

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[29] N.Y. TIMES, June 3, 2006, p. A10.

[30] N.Y. TIMES, July 19, 2006.

[31] WALL STREET JOURNAL, June 9, 2006, p. A4.

announced that among other priorities for the 2006 (current) New York State legislative session was enactment of legislation affording same-sex couples the ability to obtain the comprehensive set of rights and responsibilities now available to opposite sex ones. This would be in the form of a domestic partner registry, civil unions or an amendment to the statutory definition of marriage, leaving it to legislature to determine which of these is the appropriate action.[32]

o. Then, on July 6, 2006, the New York Court of Appeals held, four to two, in *Hernandez v. Robles,*[33] that marriage between same-sex partners is not a constitutional right and its restriction to same-sex couples did not violate the New York Constitution. The plurality opinion was written by one judge and concurred in by two others. A fourth judge agreed to its conclusion, but wrote her own opinion. The dissent by Chief Judge Kaye, was concurred in by another judge, while a seventh judge recused himself.

(i) Thus, there was no majority analysis to serve as a guideline for other courts. The Plaintiffs, in four cases, were 44 same-sex couples who were denied marriage licenses. A great many *amici curiae* briefs were filed. Defendants were New York State, its health department and certain government officials, including a city clerk.

(ii) The Court's plurality found that in laws dating back nearly 100 years the legislature had intended to limit marriage to a union between a man and a woman and that this was rationally based. Thus, neither New York's due process nor equal protection constitutional provisions mandated recognition of the marriages. Therefore the Court held no constitutional provisions were violated.

(iii) The dissenters, in light of both recent social and legal developments, held both clauses were violated, while the plurality opinion considered that New York law implied, if not expressed, the assumption that marriage is recognized only between a man and a woman, with the choice of redefining it to be that of the legislature.[34]

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[32] [NY] *State Bar News,* p. 10 (May/June 2006).

[33] *Hernandez v. Robles,* . . . N.Y. 3d . . . , N.Y.S. 2d . . . 2006 N.Y. Slip Op. 5239, 2006 N.Y. LEXIS 1936 (Ct. App. July 6, 2006).

[34] Digested from *New York State Law Digest* of the New York State Bar Association, No. 559, of July, 2006.

4. <u>Massachusetts is the only state in which gay marriage is legal</u>

a. The Massachusetts' *Goodridge* case[35] validated gay marriages solemnized there after May 16, 2004. A pending New Jersey case[36] may do so also, while Maryland's 1973 law against gay marriage was held to violate that state's constitution's guarantee of equal rights.[37]

b. "The result, for the time being at least, is a legal patchwork in which rights and benefits bestowed in one [state or] country are not always recognized elsewhere."[38]

c. Currently, lawsuits seeking same-sex marriages are pending in at least five states; namely: California, Connecticut, Florida, Indiana and New Jersey, while at least five other states: Georgia, Nebraska, New York, Oregon and Washington,[39] have ruled against it. Most of the suits were modeled after the Massachusetts' *Goodridge* case.

d. Connecticut's gay marriage case, *Kerrigan & Mock v. State*,[40] denied plaintiffs' (eight same-sex couples) motion for summary judgment and granted the defendants' motion.

(i) Plaintiffs claimed that Connecticut's civil union act violated the Connecticut Constitution by reserving the term "marriage" for opposite sex unions and adopting the term "civil union" for unions of same-sex couples. They argued this statutory scheme created a lesser status of civil unions as distinct from the more privileged status of marriage, resulting in a form of "separate but equal" segregation.

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[35] *Supra*, note 18.

[36] *Lewis v. Harris*, 2003 WL 2319114 Mercer Co., N.J. Super Ct. (2003), *aff'd*, 378 N.J. Super. 168, 875 A.2d 259 (N.J. App. 2005), appeal pending in the New Jersey Supreme Court. A similar Indiana case, *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005), held Indiana's DOMA does not violate its Constitution's privileges and immunities clause, as did *Standardt v. Arizona*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Baker v. Nelson* 191 N.W.2d 185 (Minn. Sup. Ct. 1971) and *Smelt v. County of Orange* No. SA CV 04-1042-GLT (U.S. District Court Central District of California Southern Division, June 16, 2005). The latter is probably being appealed to the California Supreme Court.

[37] *Polyak and Deane, et al v. Maryland*, HARTFORD COURANT, January 21, 2006, p. A 14.

[38] N.Y. TIMES, February 15, 2004, p. 3.

[39] *Supra*, note 24, 26, 28, 33, 36 and *infra*, note 91.

[40] *Kerrigan & Mock, et al v. State of Conn. Dept of Public Health, et al*,, 12 Conn. Ops. 782, (July 12, 2006), CONNECTICUT LAW TRIBUNE, (July 24, 2006.)

They pointed out that Connecticut civil unions may not be recognized in other jurisdictions; thus they were denied equal protection, due process and the right of free expression and association.

(ii) The New Haven County Superior Court found no violation of the Connecticut Constitution, nor did Plaintiffs identify any right or benefit conferred by Connecticut that is different for them than for opposite sex married couples. The Court rejected any argument that a rhetorical separation between the institutions of marriage and civil union should invoke an equal-protection or due-process analysis, saying that the Connecticut Constitution does not require that there be equivalent nomenclature for such equal protection and due process.

(iii) The Family Institute of Connecticut's attempted to intervene, contending that Connecticut's Attorney General Blumenthal should have moved to strike the Plaintiffs' complaint, rather than moving for summary judgment, since this raised an inference that he was friendly to the Plaintiffs.

(iv) Justice Norcott of the Connecticut Supreme Court rejected this attempt and held that if the Family Institute's disagreement with the Attorney General's litigation strategy entitled it to intervene, the rules of intervention would be rendered meaningless. The Court held the Institute had no legal interest in how the Supreme Court ruled.[41]

(v) In footnote 15, Justice Norcott stated "[T]his is not a case that is subject to a variety of resolutions; either the marriage laws are constitutional, or they are not."[42]

e. Since Connecticut's civil union law gives same-sex couples the

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[41] *Kerrigan v. Commissioner of Public Health*, 279 Conn. 447 (August 15, 2006). Overturning its 1997 ruling that intervention of right was reversible on appeal only for abuse of the trial judge's discretion, the Supreme Court established different standards of review for intervention of right and permissive intervention, citing *Edwards v. Houston*, 78 F.3d 983 (5th Cir. 1996) in footnote 10, holding that intervention by right deserved broad plenary review, not the difficult "abusive discretion" standard. It found "persuasive the analytical distinction between permissive intervention and intervention as a matter of right, and part[ed] company from both the Second Circuit [*Patricia Hayes Associates, Inc. v. Cammell Laird Holdings*, 339 F.3d 76, 80 (2d Cir. 2003)] and our own prior decision in *Washington Trust. Co. v. Smith*, 241 Conn. 734 [at 747-48, 699 A.2d 73 (1977)]."

[42] THE CONNECTICUT LAW TRIBUNE, week of August 14, 2006.

same rights and privileges as married ones, a pending medical malpractice suit is seeking damages for loss of consortium. Plaintiffs' attorney (Joshua Koskoff) argued that although the diagnosis and much of the medical treatment for cancer predated the civil union law, this should not bar a loss of consortium claim, since prior to enactment of the civil union statute, Plaintiffs were prohibited from consecrating their bond.[43]

f. Citing *Hernandez v. Robles*[44], a New York State Supreme Court (the lowest New York court of original jurisdiction) held that even though two men had been married in 2004 in Ontario, Canada, New York would not recognize it. Plaintiff was trying to obtain spousal health benefits for his partner. The court held "[it] was constrained to follow the recent holdings of the Court of Appeals," and thus could not consider plaintiff and his companion to be spouses or their union to be a marriage. Plaintiff had argued that since same-sex couples cannot marry in New York, out-of-state marriage should be respected.

g. New York's Attorney General, Elliot Spitzer (now the Democratic candidate for Governor), decided not to defend the state agency under his March 2004 advisory order, which said that valid gay marriages from out of state should be recognized by New York. But after Court of Appeals *Hernandez* decision, he said he would draft legislation to legalize gay marriage in New York, if elected Governor.[45]

h. The United States Supreme Court declined to review a Washington Supreme Court ruling preventing a lesbian from seeking parental rights to a child she helped raise with her long-time partner. The latter was the biological mother by artificial insemination. Both parties had been living together for five years before the biological mother decided to be artificially inseminated. They broke up six years later. The biological mother barred her former partner from seeing the girl and then married the sperm donor.[46]

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[43] THE HARTFORD COURANT, July 18, 2006, p.A5.

[44] *Supra*, note 33. This was the first reported case to rely on that New York Court of Appeals decision.

[45] N.Y. TIMES, July 13, 2006, p. B2.

[46] THE HARTFORD COURANT, May 16, 2006, p. A2.

B. Notwithstanding the United States Constitution's Full Faith and Credit Clause,[47] the Federal and state DOMAs and State Constitutional Amendments Probably Permit States To Refuse To Grant Full Faith And Credit To Other States' Lawful Same-Sex Marriages

1. The limited exception to the full faith and credit clause

a. While the U.S. Constitution requires that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State," a limited exception has been created to prevent a violation of a state's strongly held public policy.[48] Thus, other states will probably refuse to recognize Massachusetts' same-sex marriages. Since questioning their validity will arise in more than one jurisdiction, conflicting case law may occur.

b. Arguments will no doubt also be made that, under the doctrine of comity, same-sex marriages contracted in other countries should be recognized in the United States. *Comity* permits the discretionary recognition of the legislative, executive or judicial acts of another nation, so long as this recognition of foreign law does not violate public policy. Thus, a legally contracted foreign same-sex marriage will probably not be recognized because of state and federal DOMA laws.

c. Some legal scholars have argued that both the federal DOMA and federal common law's public policy applying to the full faith and credit clause are unconstitutional.[49] The arguments on both sides are complex, theoretical and must be tested in court. Massachusetts recognizes its residents' out-of-state marriages, but allows out-of-state residents to marry only if the marriages would be valid under their own laws.[50]

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[47] U.S. CONSTITUTION, Art. IV, Sec. 1. *See also* 28 U.S.C. § 1738, which implements the full faith and credit clause.

[48] "There are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." *Pacific Employers Ins. Co. v. Commission*, 306 U.S. 493, 502 (1939). A couple that has entered into a same-sex marriage out of state may legally enter into a civil union in Connecticut with the same partner because Connecticut does not recognize same-sex marriages. Attorney General's Opinion, sixth unnumbered page, after p. 142, *infra.*

[49] *See, e.g.*, Kramer, *Same Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy*, 106 YALE L. REV. 1965 (1977).

[50] *See* MASS. GEN. LAWS ANN. Ch. 207, § 10.

2. Recognition by Connecticut and Vermont of each other's civil union laws

Connecticut will recognize California Domestic Partnerships and Vermont civil unions and other similar arrangements and vice versa, but will not recognize same-sex marriages.[51]

3. Conflict of Laws

"A marriage is valid everywhere if the requirements of the marriage laws of the state [with the] most significant relationship with the spouses and the marriage, [usually the state] where the marriage takes place are met, except in rare instances."[52] The latter include those where recognizing the marriage would violate strong public policy.[53] But if a state's constitution bans sex discrimination,[54] perhaps its courts might give full faith and credit to a same-sex marriage celebrated elsewhere, notwithstanding the DOMAs.[55] However, until recently, laws forbidding same-sex marriages have generally been upheld.[56]

III. LEGAL CONSEQUENCES OF NON-MARITAL COHABITATION

A. Trend Towards Recognizing Non-Marital Cohabitants' Rights

Unlike the property (inheritance) rights of married couples, until recently no states gave any such rights to unmarried ones. However, in the last few years, many courts have abandoned the traditional historical approach of not granting any

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[51] *Supra*, note 48, third and fourth sentences.

[52] 1 RESTATEMENT (SECOND) OF CONFLICTS OF LAWS,§§ 283 and 283 (1) and (2) (1988). This restatement position has now been adopted by a majority of states, according to Hauser, *Survey of Definitions of "Spouse": Validity and Recognition* (10-29-03 draft) p. 29.

[53] From an outline by Missia H. Vaselaney, *Planning for the Remarried, the Unmarried and Other Non-Traditional Families*, 2003 Annual Notre Dame Estate and Tax Planning Institute, Vol. II, 28-2.

[54] *See* for example, Amendment XX to the Connecticut Constitution.

Same-sex marriage bills (Raised Bill 963 and Proposed Bill 264) were introduced in the 2005 session of the Connecticut General Assembly. In addition, Raised H.B. 6601 would have "recognized marriages and substantially similar relationships entered into outside this state that are valid under the laws of the jurisdiction where such marriage or relationship was entered into." None of these were enacted, but a civil union law was passed. *Infra*, Part One, V.A. 3-6. No same-sex marriage bills were introduced in the 2006 session.

[55] *See Goodridge*, *supra*, note 18.

[56] *See Dean, et al. v. D.C., et al.*, 653 A.2d 307 (D.C. 1995), *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd.* 96 S. Ct. 1489 (1976).

relief to parties in a meretricious relationship. At least 25 state court decisions recognize and enforce cohabitation agreements. [57]

1. Obligations of domestic partners and members of civil unions

The new concepts of domestic partnerships and civil unions,[58] which have either been enacted or are being considered by some state legislatures, will increase the mutual obligations of people in these relationships. Ultimately many such arrangements may be replaced by same-sex marriages if legalization of the latter spreads.

2. Recognition of express oral agreements

Recognition of express oral agreements occurred gradually since the 1970s, as courts initially began to recognize express oral agreements of unmarried couples, if entered into independently of a living-together relationship.[59] However, in the absence of such agreements, courts have granted relief on a variety of legal and equitable theories.

3. Quasi contracts, gifts and *quantum meruit*

Quasi-contract (implied contracts in Louisiana and Texas), gift or a theory combining gift, reasonable expectations of the woman and *quantum meruit*[60] are among the theories used to grant relief. Implied and quasi-partnerships in Washington, Arkansas, Indiana, Kansas and Oklahoma have achieved equitable results for a plaintiff who had been acting in good faith.[61] Constructive or resulting trusts or co-tenancies have also been used. [62]

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[57] *2 Lindey and Parley On Separation Agreements And Antenuptial Contracts*, § 100.61 (2d ed. Matthew Bender 2003).

[58] Only Vermont (*supra*, note 1), Quebec (*supra*, note 6, first and second paragraphs) and Connecticut (*supra*, note 1) have enacted civil union statutes. Although Quebec's need for one was superseded by the *Hendricks* case, (*supra*, note 6, first paragraph) and the July 2005 Canadian sanctioning of nationwide same-sex marriage (*supra*, note 6, fifth and sixth paragraphs) opposite sex parties may still enter into a Quebec civil union.

[59] *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 595 (Mich. 1973).

[60] *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

[61] S*ee*, e.g., *In re Estate of Thornton*, 81 Wash. 2d 72, 499 P.2d 864 (1972) and *Mitchell v. Fish*, 134 S.W. 940 (Ark. 1911).

[62] For example, where a man defrauded a woman with promises of marriage, property they had tried to acquire in tenancy by the entirety was partitioned and the woman given half. *Beaton v. Laford*, 261 N.W.2d 327 (Mich. 1978). Similarly, the unclean hands doctrine was brushed aside with each party held entitled to their separate property (including their earnings during marriage) while property acquired mutually was considered held in tenancy in common. *West v. Knowles*, 311 P.2d 689 (Wash. 1957). A constructive trust theory was used in *Spafford v. Coats*, 455 N.E.2d 241 (Ill. App. 1983).

4. Proof problems with oral agreements and implied contracts

a. **Oral agreements present proof problems; they are like implied contracts and probably unenforceable** in many jurisdictions, despite inequitable results.[63] However, oral contracts based on mutual consideration have been enforced.[64] Implied contracts may be found to exist by some courts, [65] as living together arrangements begin to appear more like traditional marriages.

b. **Factors to be considered as indications of an implied contract are**: the existence or absence of marital intent; how the status is represented to others; how title to property acquired during the relationship is taken; other financial arrangements, such as using joint bank accounts, sharing expenses and acquiring property jointly are some indication of an intent to pool earnings or share property. Maintaining separate bank accounts, splitting expenses, acquiring property in separate names and keeping records of separate property indicate the parties do not intend to pool resources. Additional factors include the foregoing of financial and other opportunities by one party, as well as whether they expect to have mutual children.

B. Common-law Marriage has been used to grant relief

1. Parties claim to be married

Common law marriages were recognized in a number of English colonies in America before independence and in many states thereafter. They arise by operation of law, based on the parties holding themselves out as being married. They are non-ceremonial relationships requiring "a positive mutual agreement . . . to enter into a marriage relationship, cohabitation [openly living together as spouses] sufficient to warrant fulfillment of

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[63] *Hewitt v. Hewitt*, 77 Ill.2d 49, 394 N.E.2d 1204 (1979), involved defendant's oral promise to "share his life, his future, his earnings and his property." Plaintiff argued successfully that as a result an implied contract existed. However, an oral prenuptial agreement was held enforceable at divorce, because the parties fully performed in accord with the provisions of the oral agreement during their marriage. *Marriage of Dewberry*, 115 Wn.App. 351, 62 P.3d 525, *rev. denied* 150 Wn.2d 1006 (2003).

[64] *See, e.g., Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975).

[65] Note, *Property Rights on Termination of Nonmarital Cohabitation*, 90 Harv. L. Rev. 1708 (1977); and Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 U.C.L.A. L. Rev. 1240 (1980).

necessary relationship of man and wife, and an assumption of marital duties and obligations." [66]

2. <u>Current status</u>

a. <u>Only 18 states and the District of Columbia still recognize common-law marriages contracted therein</u>

They are Alabama, Colorado, Georgia (if entered into before 1997, abolished after 1996) Idaho (if entered into before 1996, abolished after 1995), Indiana (if entered into before 1958), Iowa, Kansas (although a misdemeanor), Kentucky (only for purposes of worker's compensation), Maine (existence questionable), Montana, New Hampshire (a variant where three years of pre-death cohabitation creates spousal rights in the survivor),[67] Ohio (if entered into before 10 October 1991), Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas (where it is called an "informal marriage") and Utah.[68]

b. <u>All other states have abolished common-law marriages, most of them by statute</u>[69]

c. <u>New York will consider a common-law marriage valid if good where contracted, unless contrary to natural law or statute</u>.

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[66] *Black's Law Dictionary* 277 (6th ed. 1990). *See also Daniels v. Mohon*, 350 P.2d 932 (Okla. 1960).

[67] N.H. REV. STAT. § 457:39 (2003).

[68] *See Campbells' Adm'r. v. Gullat*, 43 Ala. 57 (1869)*; and Piel v. Brown*, 361 So. 2d 90, 93 (Ala. 1978); COLO. REV. STAT. ANN. § 14-2-104 (2003); *Klipfel's Estate v. Klipfel*, 92 P.2d 76 (Colo. 1907) and *Deter v. Deter*, 484 P.2d 805, 806 (Colo. Ct. App. 1971); *Hoage v. Murch Bros. Const. Co.*, 50 F.2d 983 (App. D.C. 1931), and *Johnson v. Young*, 372 A.2d 992, 994 (D.C. 1977); GA. CODE ANN. § 19-3-1.1 (2003); IDAHO CODE § 32-201 (2003); IOWA CODE ANN. § 595.11 (West 1981); and *McFarland v. McFarland*, 2 N.W. 269 (Ia. 1879); KAN. STAT. ANN. § 23-101 (2003); *Smith v. Smith*, 161 Kan. 1, 3, 165 P.2d 593, 594 (1946); MON. CODE ANN.§ 26-1-602, 40-1-403 (2003); OKLA STAT. ANN. tit 43, § 1 (West 1979); 23 PA. CONS. STAT. ANN. § 1103 (2003); *Sardonis v. Sardonis*, 106 R.I. 469 at 472, 261 A.2d 22 at 23 (1970); *Holgate v. United Electric*, 133A. 243 (R.I. 1926); S.C. CODE ANN. § 20-1-360 (2003); *Johnson v. Johnson*, 235 S.C. 542, 550, 112 S.E.2d 647; TEX. FAM. CODE ANN. § 2.401 (2003), *Ex parte Threet*, 160 Tex. 482, 333 S.W.2d 361 (1960); and UTAH CODE ANN. § 30-1-4.5 (2003).

[69] *See, e.g.*, *Furth v. Furth*, 133 S.W. 1037, 1038-39 (Ark. 1911); CAL. CIV. CODE § 4100 and CAL. FAM. CODE § 300 (West 1983); *Owens v. Bentley* 14 A.2d 391, 393 (Del. Super. 1940); FLA. STAT. ANN. § 741.211 (2003); 750; ILL. COMP. STAT. ANN. 5/214 (2003); IND. CODE ANN. § 31-11-8-5 (2003); OHIO REV. CODE ANN. § 3105.12 (Wet 2003); N.Y. DOM. REL. LAW § 11 (McKinney 1988 & Supp. 1992). *See also*, Ira M. Elliman, et al. *Family Law; Cases, Text and Problems* 21 (1986). A number of Indian tribes recognize them between two tribal members living on their reservation. *See* text preceding footnotes 57 and 58 of March 24, 2004 draft by Barbara Hauser, *Marriage, Marital Property and Death: Which Law Will or Should Apply to Spousal Inheritance Rights?*

But a claim of a common law spouse under the dissolution of marriage or intestate succession statutes, while not actionable, will be honored if the spouse can establish legally viable contractual and/or equitable grounds.[70] Other states have no authority recognizing out of state common law marriages.

d. A valid common law marriage entitles the spouses to all rights received in a ceremonial marriage

If validly entered into in a state still allowing its celebration, it should, but not necessarily will, be recognized elsewhere under the United States Constitution's full faith and credit clause.[71]

C. Putative marriage

1. Recognized in certain states if couple believes themselves validly married

Where both parties in good faith believe they are validly married, but their marriage technically defective, the civil law concept of putative marriage[72] recognizes them as married in California, Colorado, Florida, Illinois, Louisiana, Minnesota, Montana, Texas and possibly Alaska.[73] These states treat parties to a marriage contracted in good faith, but in ignorance of impediments rendering it unlawful, as if they were validly married. California and Texas also hold that one party can be a putative spouse although the other party is not. Otherwise persons merely in a living together relationship have none of the rights of putative spouses. [74]

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[70] *Shea v. Shea*, 294 N.Y. 909, 63 N.E.2d 113 (1945); *see also Mott v. Duncan Petroleum Trans.*, et al; slip opinion #564 (November 18, 1980) N.Y. Court of App.) and *Glasgo v. Glasgo*, 410 N.E. 2d 1325 (Ind. 1980). But the validity of a common law marriage is always open to suspicion, especially "when one of the partners is dead." *Boyd v. Boyd*, 226 App. Div. 358 (1st Dept.), 252 N.Y. 422 at 428 (1929).

[71] U.S. CONSTITUTION, Art. IV, Sec. 1 .

[72] Putative marriage is defined in Black's Law Dictionary 1113 (Rev. 6th Ed. 1990), p. 1237, and discussed in 52 Am. Jur. 2d Marriage §§ 90-92 (2000).

[73] CAL. FAM CODE. § 2251 (2003); COLO. REV. STAT. ANN. § 14-2-111 (2003). (*Adopted from UNIF. MARRIAGE AND DIVORCE ACT* § 209); FLA. STAT. § 741.211 (2003); ILL. STAT. ANN. § 5/305 (2003); MINN. STAT. ANN. § 518.055 (2003); MON. CODE ANN. § 40-1-404 (2003); TEX. FAMILY CODE § 8.060 (2003) and LA. CIV. CODE ANN. Art. 96 (2003). In the event of divorce, a putative spouse is also entitled to alimony in Louisiana. *Galbraith v. Galbraith* 396 So.2d 1364 (La.App. 1981). This footnote (55) is from Hauser, *supra*, note 33.

[74] *Kunakoff v. Woods*, 166 Cal. App. 2d 59, 332 P.2d 773 (2d Dist. 1958) and *Osuna v. Quintana*, 993 S.W. 2d 201 (Tex. App. Corpus Christie 1999).

2. Children of putative spouses are considered legitimate and the couple has support obligations to each other and to their children

While children born of a couple merely living together are illegitimate, those born from a couple in a putative marriage are considered legitimate. Obligations of support between the spouses and to their children are the same as they are in a regular marriage. Although illegitimate children have a right to receive support from both of their parents, there are no obligations of support between the parties themselves in a meretricious relationship.[75]

3. Property rights

Putative spouses are not entitled to each other's separate property, since a putative spouse is not really a spouse. Joint property of putative spouses is treated as community property accumulated during a valid marriage, at least in California.[76] Furthermore, upon termination of a putative marriage, both spouses are entitled to an equitable division of property that would normally be considered community or possibly even quasi-community property. [77] A putative wife was awarded 8% of her putative husband's homestead where they both believed their Mexican marriage to be valid.[78] A surviving putative spouse has spousal rights in his[79] deceased putative spouse's estate, including rights to any separate property,[80] and a right to sue for his wrongful death, as well as a right to receive public retirement benefits as though she were a spouse.[81]

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[75] *Estate of Hafner*, 184 Cal. App. 3d 1371, 229 Cal. Rptr. 676 (1986). In Indiana, children of a marriage void on account of consanguinity, affinity or because of a prior marriage of one of the parties are to be treated as if they were children of a valid marriage, provided the parties reasonably believed that the disability did not exist. IND. CODE ANN. § 31-14-7-1 (Burns 1997).

[76] *Estate of Goldberg*, 203 Cal. App.2d 402, 21 Cal. Rptr. 626 (1962).

[77] *See* 32 Cal. Jur. 2d 355 for an explanation of California's community property rule.

[78] *Hager v. Hager*, 553 P.2d 919 (Alaska 1976).

[79] Author's note re use of gender terms: wherever the words "he", "his", "him", "man", "men" or comparable words or parts of words appear in this outline, they have been used solely for literary purposes in the interest of having a smooth reading text. They are meant to include all persons--whether male or female. No discrimination is intended nor should any be inferred. Furthermore, the masculine pronoun is used for the first cohabitant to die and the feminine for the survivor, since that is the usual order of deaths.

[80] *Estate of Leslie*, 37 Cal. 3d 186; 207 Cal. Rptr. 561; 689 P.2d 133 (1984).

[81] For tax status of putative marriages *see infra*, Part three, II.B.2. income tax returns, *infra*, Part three II.B.1. and Part Three VIII.G about the marital deduction.

D. Rights of Spouses in Conventional, Common Law And Possibly Even Putative Marriages Under Federal And State Law

Spouses have as many as 1,049 federal rights, benefits and responsibilities, as well as state property rights, such as dower and curtesy, intestate succession preference, rights of election against the probate or augmented estate, community and quasi-community property and preference in intestate succession; priority in obtaining appointment as an administrator of an intestate spouse's estate and of an incapacitated spouse's guardian; availability of court supervision of property rights on termination of their marital relationship; availability of an unlimited estate and gift tax marital deduction for transfers between spouses under federal[82] and some state tax laws, as well as use of the non-donor spouse's federal gift tax exclusions and exemption for gifts to third parties; a choice between filing a joint income tax return or separate ones; availability of an employer's fringe benefits, including health insurance and a survivor's pension;[83] social security survivor benefits; ability of a step-parent to adopt his or her spouse's child; parental rights and support obligations; decision-making authority for an incapacitated spouse; availability of the privilege protecting communications between spouses; and the right to sue for loss of consortium, emotional distress and wrongful death for injuries to the other spouse, among other torts.[84]

E. Rights of Persons Living Together to Enforce Contractual and Equitable Claims to Property

1. Recently, there has been worldwide recognition that unmarried people living together have certain rights traditionally recognized only for married couples

Initially, each person could only enforce claims for support against the other, usually after breaking up, but subsequent legal developments have given more rights to unmarried couples living together, including the right to inherit from each other.

2. Post separation rights of unmarried cohabitants

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[82] But *see infra*, Part three VIII.G.2., about a possible argument to make to try to get a marital deduction for same-sex spouses.

[83] Some states, municipalities and corporations make these available to unmarried same-sex and opposite sex couples and domestic partners.

[84] Materials in this paragraph are paraphrased from an outline by Missia H. Vaselaney, *Planning for the Remarried, the Unmarried and Other Non-Traditional Families*, 2003 Annual Notre Dame Estate and Tax Planning Institute, Vol. II, 28-1 and 2 (2003); and Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, 90 A.B.A. J. 47 (July 2004.

Two different attitudes exist in dealing with unmarried cohabitants after separation. Under one, there is no recovery without an express contract.[85] Under the more liberal view (originating in community property jurisdictions), recovery is allowed.[86]

a. <u>The landmark *Marvin v. Marvin* case</u> [87]

The California Supreme Court enforced contracts to share equally in property acquired by unwed couples during cohabitation.

b. <u>A summary of the *Marvin* results</u>

Express contracts between unmarried cohabitants will be enforced unless explicitly based on sexual consideration. Where there is no express contract, an implied contract may be found, based on the parties' conduct or the existence of a partnership or joint venture agreement. Equitable remedies or quantum meruit may be used in appropriate instances. *Marvin* did not require unmarried cohabitants to share equally, did not make one liable for "palimony" after breaking up nor did it consider the doctrine of comparative fault to be a determining factor as to property rights nor hold that the relationship would be treated as equivalent to a marriage.

c. <u>Many cases have followed and expanded on *Marvin*</u>[88]

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[85] *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E. 2d 1154 (1980), overruling *McCullon v. McCullon*, 96 Misc. 2d 962, 410 N.Y.S.2d 226 (1978), which granted relief because an implied contract was found to exist between the parties regarding support. *See, also, McCall v. Frampton*, 99 Misc. 2d 159, 415 N.Y.S. 2d 752 (Sup. Ct. West. Co. 1979), reversed in part and affirmed in part 81 A.D.2d 607, 438 N.Y.S.2d 11 (3rd Dept. 1981). In Minnesota, agreements between unmarried cohabitants must be written to be enforceable. MINN. STAT. ANN. § 513.075.

[86] *Latham v. Hennessy*, 554 P.2d 1057 (Wash. 1976), which stated in *dicta* that community property laws could be applied by analogy to fix property rights of unmarried cohabitants. *See Coats v. Coats*, 160 Cal. 671 (1911); *Feig v. Bank of America*, 5 Cal.2d 266 (1936); and *Estate of Krone*, 83, Cal. App.2d 766 (1948), involving putative spouse. However, subsequent cases in this area have not tried to apply community property rules to unmarried people. *Dawley v. Dawley*, 131 Cal. Rptr. 3, 541 P.2d 323 (1976) stated that what engaged couples could do with antenuptial agreements and married couples could accomplish with property settlements, unmarried cohabitants should be able to do before or after setting up a household.

[87] *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), rehabilitative award reversed, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (2d Dist. 1981).

[88] Among them are: *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Hill v. Ames*, 606 P.2d 388 (Alaska. 1980); *Boland v. Catalano*, 202 Conn. 333, 521A.2d 142 (1987); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977); *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981); *Warren v. Warren*, 94 Nev. 309, 579 P.2d 772 (1978); *SUE S. v. John S.*, 427 A.2d 498 (N.H. 1981); *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979); *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976); *Lawrence v. Ladd*, 280 Or. 181, 570 P.2d 638 (1977); *Beal v. Beal*, 282 Or. 115, 577 P.2d 507 (1978); *In re Marriage of Bauder*, 44 Or. App. 443, 605 P.2d 1374 (1980); *Mullen v. Suchko*,

The most expansive cases are quite recent and involve same-sex partners. Beginning slowly, property rights of same-sex cohabitants have been gradually analogized to those of unmarried partners of the opposite sex and lately, the law of gay relationships has been developing at an increasingly fast pace.

IV. CASES INVOLVING SAME-SEX RELATIONSHIPS ARE INCREASING

A. Same-Sex Domestic Partners Have Brought Several Suits Seeking To Receive The Same Benefits And Rights As Married Couples.

To date most have been unsuccessful.[89] While debate continues over common law marriage, Massachusetts is the only state whose highest court has recognized same-sex partners as married.[90] Although Oregon and Washington lower court cases recognized same-sex marriage, they were reversed on appeal.[91 & 92]

Following Michigan's constitutional amendment banning gay marriage, "on March 16, [2005], Michigan's attorney general, Mike Cox, . . . [ruled] that gay and lesbian state workers should be ineligible for health benefits for their partners

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421 A.2d 310 (Pa. Super. 1980); *Estate of Steffes*, 95 Wisc.2d 490, 290 N.W.2d 697 (1980); and *Kinnison v. Kinnison*, 627 P.2d 594 (Wyoming 1981). For an extensive collection of cases, etc., in this area, see Annotation, *Property rights arising from relationship of couple cohabiting without marriage*, 3 A.L.R. 4th 13 (Supp. 1998).

[89] *Rovira v. AT &T*, 760 F. Supp 376 (S.D.N.Y. 1991) (surviving partner of lesbian relationship sought death benefits as spouse); *Doe v. Prudential Ins. Co.*, 744 F. Supp. 40 (D.R.I. 1990) (dispute between parents and surviving partner over life insurance policy); *Elden v. Sheldon*, 758 P.2d 581 (Cal. 1988) (plaintiff denied recovery for loss of consortium on cohabitant's death).

[90] *Goodridge v. Dept. of Public Health, supra*, note 18.

In *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972), (the Minnesota Supreme Court held the 14th Amendment to the U.S. Constitution did not require states to permit same-sex marriages, upholding the constitutionality of a Minnesota statute which did not authorize, and thus was read as prohibiting, same-sex marriages. The U.S. Supreme Court dismissed the appeal for lack of a substantial federal question); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973) (the definition of marriage, rather than the text of the state statute was held to preclude same-sex marriages); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), aff'd 673 F.2d 1036 (9th Cir. 1981), *cert den*. 458 U.S. 1111 (1982), (a California immigration case construing Colorado law); *DeSanto v. Barnsley*, 328 Pa. Super. Ct. 181, 476 A.2d 952 (1984) (same-sex couples cannot contract a common law marriage); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (Wash. Ct. App.) *review denied*, 84 Wash.2d 1008 (1974), (court refused to find that denial of a marriage license to a same-sex couple violated either the state or federal constitution).

Other than its first sentence, this footnote, 90, and its predecessor, 89, are footnotes 98 and 99 in Horwood and Zaluda, 813 T.M. *Estate Planning for the Unmarried Adult*, (1997), p. A-8. That portfolio has been revised and was superseded by a 2003 edition, 813-2d T.M. (with the same title and co-authors).

[91 & 92] *Supra*, note 28 (Washington case) and *Li v. State*, 2004 WL 1258167 (Or. Cir., April 20, 2004); *reversed*, 338 Or. 376, 110 P.3d 91 (April 14, 2005).

in future contracts . . . . [In] a lawsuit, 21 same-sex couples are asking the state courts to clarify whether the amendment's passage means the loss of their benefits.

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"In Indiana and Virginia, amendments passed [in 2005] must pass again [in 2006] before going to voters. In Tennessee, an amendment will go to voters in November 2006.

"Similar legislative efforts are under way in South Carolina, Minnesota and other states.

"Not all states, however, are moving to restrict recognition of same-sex relationships. Efforts to ban same-sex unions failed this year in Maryland and Idaho.

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"In Montana, one of the states that passed an amendment [in 2004], the state university system's Board of Regents recently voted to extend benefits to same-sex partners of university employees, arguing that such benefits do not constitute recognition of the couples as married."[93]

B. For The Present, Contract Law Will Probably Be Applied To Gay Relationships Between Unmarried Cohabitants in Most Jurisdictions, Whether of the Same or Opposite Sex

Same-sex unmarried cohabitants may find that the contractual and other principles being used to enforce rights between people of the opposite sex living together can be applied to them, too. While express contracts will probably be enforceable between gay couples, it may be difficult to persuade the courts that the intentions and expectations of such a couple were not merely those of roommates.[94]

C. Decriminalization of Gay Sex

1. Authority for military ban on homosexuality

A 17-year old case upholding Georgia's since repealed sodomy law, which banned both consensual homosexual and heterosexual conduct in a

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[93] N.Y. TIMES, April 4, 2005, p. A 16.

[94] *See* Gutierrez, *Estate Planning for the Unmarried Cohabitant,* 12 MIAMI INST. ON EST. PLAN. 1979, ¶ 1607.3 & Ftnt 112.

home, was overruled, in a five to four vote.[95] It had held that the Georgia law did not violate the right to privacy endorsed by the court in previous cases involving contraception and abortion. Lower federal courts have previously cited this now overruled case in upholding the military ban on open homosexuality in the ranks.

A major gay rights breakthrough occurred in the Supreme Court's decision in *Lawrence v. Texas*,[96] holding a Texas statute criminalizing sex between gay partners to be unconstitutional. This also invalidated similar statutes in other states. Thus, besides Texas, consensual homosexual conduct had been banned in Kansas, Oklahoma and Missouri.[97]

2. Minnesota's anti-sodomy law is invalid

In the opinion of unnamed legal experts,[98] *Lawrence*[99] ends any lingering questions about whether a Hennepin County, Minnesota, court's 2001 decision invalidating Minnesota's anti-sodomy law applies throughout that State.[100] The Minnesota law prohibited oral and anal sex between adults, including married couples. It was invalidated as applied to non-commercial sexual activity between consenting adults. However, an Arizona appeals court held the *Lawrence*[101] decision in the Texas Court of Appeals did not prevent same-sex marriage.[102]

3. Implication that state bans on gay sex is unconstitutional

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[95] *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). While *Lawrence, infra*, note 79, was a six to three decision, Justice O'Connor's concurrence in it did not overrule *Bowers* v. *Hardwick*. She preferred to invalidate the Texas statute on equal protection grounds.

[96] *Lawrence v. Texas*, 537 U.S. 1102, 123 S.Ct. 953, 154 L.Ed. 770 (2003), reversing 41 S.W.3d 349 (Tex. Ct. of App.).

Judge Janice Law, of Harris County, Texas, Criminal Court No. 5, a former journalist, became interested in the *Lawrence* case, which had passed through her court shortly before she took office as a judge. Based on her investigation, she believes that the participants invited arrest in a prearranged setup to test the constitutionality of the Texas sodomy statute. The defendants and their attorneys have consistently denied that their arrests were manufactured for the purpose of litigation. She points out that if rumors that the arrest was invited are true, there was no violation of a right to privacy and the U.S. Supreme Court may never have heard the case or may have decided it differently. *See* her book, *Sex Appealed Was the U.S. Supreme Court Fooled?* (Eakin Press, 2005).

[97] N.Y. TIMES, January 31, 2004.

[98] St. Paul Pioneer Press, 27 June 2003, p. 12A.

[99] *Supra*, note 96.

[100] *Doe et al.* v. *Ventura et al*, File No. MC 01-489 (15 May 2001).

[101] *Supra*, note 96.

[102] *Standhardt* v. *Superior Court*, 77 P.3d 451 (Ariz. App. 2003).

The implication of *Lawrence* is that nine seldom-enforced State laws banning both homosexual and heterosexual sodomy are also unconstitutional.[103] Challenges to the military's ban on open homosexuality, as well as a broader assertion of equal rights for homosexuals in such areas a child custody and employment may occur.

4. Scalia's dissent that *Lawrence* ends all morals legislation

Justice Scalia, in his dissent in *Lawrence*, said that the ruling "effectively decrees the end of all morals legislation"[104] and would pave the way for "the judicial imposition of homosexual marriage, as has recently occurred

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[103] Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah and Virginia all have anti-sodomy laws.

The Kansas Supreme Court overruled that state's anti-sodomy statute, as violating the Fourteenth Amendment's equal protection clause, because of its starkly different penalties limiting "the punishment that can be imposed on older teenagers who have sex with younger ones, but only if they are of the opposite sex [stating that this statute] must also apply to teenagers who engage in homosexual sex [overturning Matthew R. Limon's conviction for criminal sodomy, with a 17-year sentence, while the maximum sentence for heterosexual sex in this age group would have been 15 months, ruling] that the *Lawrence* case [*supra*, note 96] required reversal of the lower court's decision in Kansas [stating that the] moral disapproval of a group cannot be a legitimate state interest . . . [rejecting] the argument that homosexual sex is more likely to transmit diseases." The Kansas Attorney General's brief cited a parade of horribles would occur in a favorable ruling for the defendant by beginning "a toppling of dominoes which is likely to end in the Kansas marriage law on the scrape heap.

"Sexual desires rather than communal and historical sensitivities would then define the marital relationship, allowing such combinations as three-party marriages, incestuous marriages, child brides and other less than 'desirable couplings.'"

The defendant's lawyer said the state's "premise seems to be that gay people have to stay in prison, be made invisible and not have any degree of rights or else gay people will be able to get married. [The Kansas Attorney General will] probably not appeal to the United States Supreme Court." N.Y. TIMES, October 22, 2005.

A 20-year-old gay man challenged Hong Kong's law imposing a two year prison sentence for gay sex, when one or both participants were under 21. But both heterosexual and lesbian couples over 15 could legally have such relations.

Hong Kong's highest court held the laws "discriminate on the basis of sexual orientation [and] are demeaning of gay men who are, through the legislation, stereotyped as deviant . . . [the laws are a] grave and arbitrary interference with the right of gay men to self-autonomy in the most intimate aspects of their private lives." *Leung TC William Roy v. Secretary for Justice*, HCAL, No. 160 of 2004 (August 24, 2005).

Hong Kong can appeal the ruling, but it has lost its legal authority to enforce the law, although the latter is still on the books. Some Christian groups condemned the decision, saying it would encourage more young people to try sodomy.

Asia has different practices with respect to homosexuals. The Philippines and Thailand tend to be more tolerant, while ethnic Chinese cultures like Hong Kong are less open. N.Y. TIMES, August 25, 2005, p. A9.

[104] S*upra*, note 96.

in Canada". His dissenting opinion was joined by the late Chief Justice Rehnquist and Justice Thomas.

5. O'Connor's concurrence that Texas law violated equal treatment

Justice O'Connor's concurring opinion explained that she objected to the Texas law because it violated the Constitutional guarantee of equal treatment under the law. She said the state may not punish oral and anal sex between homosexuals while permitting the same conduct between heterosexuals.

D. Current Attitudes Toward Gays in the United States

One of Vice President Cheney's daughters is openly gay; so is a daughter of former Speaker of the House and 2004 candidate for the Democratic presidential nomination, Representative Richard A. Gephardt.

1. Public opinion may be swinging against same-sex rights

On many Sundays, The *New York Times* contains articles, with photos, of gay and lesbian couples who have local ties and were recently married in Toronto.[105] However, although this suggests increasing public acceptance of the recognition of gay and lesbian rights, statistical information suggests that there has been a swing in public opinion against same-sex rights. A Gallup poll released after the *Lawrence* case in July 2003 found that 57 per cent opposed gay civil unions. Only a few months earlier, in May 2003, a similar Gallup poll found that only 49 percent were opposed.[106]

2. Same-sex marriage has become the "hot button" issue

What caused the change in opinion? It has been attributed largely to the introduction into the debate of the "culturally explosive word" marriage, after Justice Scalia's dissent in *Lawrence*.[107] Social conservatives were alarmed that traditional marriage as Americans knew it was gravely endangered. President Bush was pressured by his conservative supporters to oppose gay marriage publicly, which put him in agreement with 70 percent of Republican voters. It is not only the 2004 Republican voters that opposed the notion of same-sex marriage. Most of the 2004

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105 See, for example, N.Y.TIMES, August 24, 2003, page ST 10.

106 V. Lawton, *Ottawa Accused of Same-Sex Delay*, *Toronto Star* website, January 29, 2004.

107 *Supra*, note 96. Elizabeth Bumiller, *Why America Has Gay Marriage Jitters*, N.Y. TIMES website, 10 August 2003 and Clifford Krauss, *Canada's Push to Legalize Gay Marriage Draws Bishop's Ire*, N.Y. TIMES website 10 August, 2003.

Democratic presidential candidates opposed it as well as did 50 percent of Democratic voters.[108]

3. The word "marriage" causes a deep emotional response

All the 2004 presidential candidates supported extending legal rights to same sex partners, and some explicitly supported same-sex unions. But it is the word, "marriage", that causes the problems in the public arena, often triggering a deeply emotional (and negative) response. Marriage is regarded by most Americans as a religious institution -- and, as such, it is about an institution for a man and a woman. This is reflected in part in the fact that 86 per cent of Americans were married in a religious ceremony.[109] As most religious denominations in the United States do not approve of same-sex unions, the notion of 'gay marriage' is particularly confronting.

4. Civil union may be the compromise solution

Given this attitude, gay and lesbian rights leaders have focused their attention on gaining public support for same-sex civil unions. They are also emphasizing the contractual aspect of marriage -- that it is a legal matter between two people and the State, and that civil unions are a way to confer rights on the domestic partners of same-sex couples.

V. DOMESTIC PARTNERSHIPS, CIVIL UNIONS AND SAME-SEX MARRIAGES

A. Domestic partnership and civil union laws

Domestic partnership laws have been enacted in California,[110] District of Columbia,[111] Hawaii,[112] Maine[113] and New Jersey[114] and introduced but not yet enacted in a number of other states. Domestic partnerships give same (and in

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[108] *Ibid.*

[109] According to a July 2003 poll by Peter D. Hart Research Associates cited by Bumiller, *ibid*.

[110] CAL. CIV. CODE § 1714.01, CAL. FAM. CODE §§ 297, 298 and 299 & CAL. PROB. CODE §§ 37.1813.1, 4716 and 6122.1, AB 25-Ch. 893, Stat. of 2001, effective 1 January 2002. Unmarried heterosexual couples, if one or both are over 62 may register. This provides an alternative to a second or subsequent marriage that could cause loss or reduction of pension, social security and other benefits .

[111] D.C. CODE § 32-701, effective in 1993, but no federal money authorized to implement it until December, 2001.

[112] HAW. L. 1997, Ch 383. Subsequently, Hawaii created a new legal status of "reciprocal beneficiaries," providing a number of benefits to state employees and citizens, although its effect on private employers is limited. HAW. REV. STAT. § 572C-7 (2001).

California both same and over 65 year old opposite) sex unmarried couples some of the rights accorded married ones. Civil union laws have been enacted by Vermont and Connecticut.[115]

1. California's Domestic Partner Rights and Responsibilities Act of 2003[116]

This expanded the rights and responsibilities associated with its existing domestic partnership registration law.[117] Among other provisions, starting in 2005, it extended the rights and duties of marriage to persons registered as domestic partners, giving the California Superior Courts jurisdiction over all proceedings governing dissolution, nullity and legal separation. It recognizes legal unions formed elsewhere as domestic partnerships and permits registered domestic partners to file joint or separate state tax returns, possess community property and have a right to consent for autopsies and the disposition of remains.[118]

2. The Legal and tax consequences of Vermont's Civil Union Law

Vermont, after holding same-sex couples should be treated the same as heterosexual married ones, enacted its new concept of civil union.[119] Vermont statutes excluding same-sex couples from the benefits and protections provided heterosexual married couples were invalidated[120] because they violated the Vermont Constitution's Common Benefits Clause.[121] The Federal Constitution's 14th Amendment's Equal Protection Clause was held to supplement, not supplant the former.

a. Legal consequences

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[113] 2001 MAINE PUB. L. ch. 347.

[114] N.J. Domestic Partnership Act, P.L. 2003, Ch 246 (2004), codified at N.J. STAT. ANN. § 26:8a-1 et seq., making New Jersey the fifth state to recognize some form of domestic partnership, according to the N.Y. TIMES, January 9, 2004.

[115] *Supra*, note 1.

[116] 2003 CAL. STAT. 421, California A.B. 205, codified as sections of the California Family Code.

[117] CALIFORNIA FAMILY CODE § 297. *See also* CALIFORNIA PROBATE CODE § 37.

[118] The California Domestic Partner Rights and Responsibilities Act of 2003, CALIFORNIA FAMILY CODE §297.5.

[119] 15 VT. STAT. ANN., Ch. 23, was added to the Vermont statutes and many other sections were amended.

[120] *Baker v. State,* 170 Vt. 194, 744 A.2d 864 (1999).

[121] VT. CONST., Ch. I, Art. 7.

Vermont's civil union law, effective 1 July 2000, affirmed that marriage is a union between a man and a woman. While a civil union does not have the status of a marriage, it satisfied the Vermont Constitution's Common Benefits Clause.[122] Besides providing eligible same-sex couples many of the benefits and protections afforded heterosexual married couples, the statute also provides eligible blood relatives and persons related by adoption the opportunity to establish a reciprocal beneficiary relationship to receive certain benefits and protections and be subject to certain responsibilities granted spouses.

(i) Among rights and responsibilities available to married couples, now granted couples in a Vermont civil union, are the right to inherit a partner's estate without paying extra state taxes, to file joint state income tax returns and make medical decisions for a partner.

(ii) Parties to a civil union are responsible for each other's support. But they may modify the terms of their civil union, as heterosexual couples may, in an enforceable agreement similar to an antenuptial one. The law of domestic relations, including annulment, separation, divorce, child custody and support, property division and maintenance applies to these parties, as do 24 other benefits, protections and responsibilities available to married couples.

(iii) Certification of civil unions is equivalent to a marriage ceremony and same-sex couples in a civil union are called spouses. Numerous officials may certify one. A marriage contracted by a person with a living spouse or party to civil union is void.[123] Dissolution of a civil union is like a divorce. Trial courts in Iowa and West Virginia have dissolved Vermont civil unions, thus recognizing them to that extent.[124] But appellate courts in Connecticut and Georgia have refused recognition.[125] A member of a lesbian couple who was among the first joined in a civil

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[122] *Id.*

[123] 15 VT. STAT. ANN. § 4.

[124] *In re Kimberly Brown and Jennifer Perez* (Iowa Dist. Ct., Woodbury Co. Nov. 14, 2003); *In re the Marriage of Misty Gorman and Sherry Gump*, No. 02-d-292 (W. Va. Fam. Ct., Marion Co. Jan. 3, 2003).

[125] *Rosengarten v. Downes,* 71 Conn. App. 372, 802 A.2d 170 (App. Ct. 2002); *Burns v. Burns*, 253 Ga. App. 600 560 S.E.2d 47 (Ct. App. 2002).

union on the July 1, 2000 effective date of that law asked a court to end her relationship in October 2005 and obtained a restraining order on December 14, 2005 against her partner, alleging violent behavior.[126]

(iv) A lesbian couple who had lived together for several years in Virginia entered into a Vermont civil union in 2000. A daughter was born to one of them by artificial insemination from an anonymous donor whom the other helped select. The latter was present in the delivery room.

(v) When the daughter was four months old, the family moved to Vermont for about a year (presumably to obtain the required jurisdiction to end their civil union) before separating. Thereafter, the biological mother and the daughter moved back to Virginia. The former now considered that she no longer was a lesbian, denied visitation rights to her ex-partner and after dissolution of their civil union, filed for full custody. A Virginia court denied parental rights, but the Vermont Supreme Court ruled that the biological mother's former lesbian partner had parental rights. Thus, in effect, it ruled that their now four-year old child had two mothers.

(vi) A Virginia judge had granted sole custody to the natural mother, relying on Virginia's Marriage Affirmation Act, making same-sex unions from other states "void in all respects in Virginia." But, a Virginia Appellate Court deferred decision on an appeal until the Vermont Supreme Court had a chance to rule. It unanimously held that it was apparent that plaintiff was a mother, because she and the natural mother "were in a valid legal union at the time of the child's birth."

(vii) Even in the pleadings for dissolution of the civil union, the biological mother identified her partner as a parent. The Vermont Supreme Court stated that nine other state courts "have recognized parental rights in a same-gender partner of a person who adopts a child or conceives through artificial insemination."[127]

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[126] HARTFORD COURANT, p. A 5, December 16, 2005.

[127] *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, . . . A.2d . . . (August 4, 2006). *See, also* N.Y.TIMES, August 5, 2006, p. A11.

b. Tax consequences

Vermont's civil union law applies to the parties as if federal income tax law recognized a civil union in the same manner as Vermont law.[128] The intent is expressed to conform the Vermont estate tax laws with federal estate and gift tax provisions (but nothing is said about the generation skipping transfer tax), to simplify return filings and reduce accounting burdens.[129]

(i) Since federal estate and gift tax laws do not recognize a civil union in the same manner as Vermont and reduction in Vermont estate tax liability for parties to a civil union, based upon the federal marital deduction, would not reduce their total estate tax liability, estates of parties to a civil union are subject to tax based on their actual federal estate tax liability and the federal credit for state death taxes.[130]

(ii) Until a possible future legalization of same-sex marriage in the United States, Vermont's and Connecticut's civil union laws and California's domestic partnership statutes in effect since 2004, may be the opening wedge for similar legislation elsewhere. Civil union laws already been considered by several other states. Thus it may be just a matter of time before more such statutes will be enacted.[131]

(iii) Since federal tax law does not recognize same-sex marriages so its provisions permitting a "husband and wife" to file a joint income tax return, do not apply to couples in a domestic partnership or civil union.[132] However, other countries' laws have evolved further, giving increased rights, including tax breaks, to same or opposite sex unmarried couples.

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[128] 32 VT. STAT. ANN. § 5812.

[129] 32 VT. STAT. ANN. § 7401(a).

[130] 32 VT. STAT. ANN. § 7401(a). *See infra*, Income, Gift and Estate Tax Consequences of Transfers between Unmarried People, Part Three Sections VII. F and G for details of federal gift and estate tax consequences.

[131] Civil union bills have been introduced in Hawaii, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Washington.

[132] Section 6013(a) of the federal Internal Revenue Code of 1986, hereafter the IRC. All subsequent references to section and chapter numbers alone are to the latter.

3. Connecticut's Civil Union Law,[133] unlike Vermont's,[134] was enacted without the legislature being under court compulsion to act

a. Summary of provisions

(i) To be eligible to enter into a Connecticut civil union, a person cannot be a party to another civil union or a marriage, must be of the same sex as the other party and at least 18 years old.[135] Civil unions between one's lineal ascendants and descendants, siblings, nieces, nephews, aunts and uncles are prohibited[136] and void.[137]

(ii) All judges (very broadly defined), including other states' judges with power to join persons in a marriage or civil union and all ordained or licensed clergy, whether belonging to Connecticut or any other state, may join couples in civil unions.[138]

(iii) Someone authorized to join persons in a civil union who fails or refuses to do so shall not be subject to any fine or other penalty.[139] Issuance of a license for a civil union must be done by the registrar of vital statistics either for the town in which the civil union is to be celebrated or either person to be joined resides and both persons must appear before the registrar, applying for the license in the same

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[133] CONN. GEN. STAT. §§ 46b-38aa through 46b-38pp; P.A. 05-10, Substitute Senate Bill No. 963, signed by Governor Jodi Rell on April 22, 2005, effective October 1, 2005 (Section 1).

[134] *Supra*, note 1. Vermont's civil union statute was passed as a result of the Vermont Supreme Court's decision in *Baker v. State*, *supra*, note 120, which required that either gay marriage or the equivalent be enacted. Following enactment of Connecticut's civil union law, about three thousand opponents rallied at the state capitol in Hartford on April 24, 2005, calling for its repeal "and defeat of the politicians who supported it . . . .

"They outnumbered 80 or so supporters of same-sex marriage." HARTFORD COURANT, page 1, April 25, 2005.

For a comparison of Connecticut's and Vermont's civil union law, *see* "Office of Legislative Research Report: Questions About Civil Union Legislation," at www.cga.ct.gov/2005/rpt/2005-R-0354.htm. This sentence is from Murphy, *Connecticut's Civil Union Law: A Look Forward*, 16 Connecticut Lawyer, No. 2, 18 at 21, note 1.

[135] Ch. 815f, CONN. GEN. STAT. §§ 40b-38aa through 46b-38pp; P.A. 05-10, §§ 2 (1), (2) and (3).

[136] *Id.* § 46b-39bb.

[137] *Id.* § 46b-38cc.

[138] *Id.* § 46b-38dd.

[139] *Id.* § 46b-38ff.

way as if applying for a marriage license, but this need not be done at the same time.[140] They must show proper identification, give their Social Security numbers and pay a nominal fee to the town clerk or registrar of vital statistics in either the town in which one of the parties resides or the town in which the parties intend to have the ceremony take place, even if not in Connecticut. The couple has 65 days to enter into a civil union from the date of the earlier application, if application is not done at the same time.[141]

(iv) No civil union license may be issued to anyone under conservatorship without the signed and acknowledged written consent of the conservator,[142] nor to any applicant under 18.[143]

(v) Civil unions celebrated in another state, such as Vermont or in a foreign country, where one or both parties are Connecticut residents are valid, provided each had legal capacity to contract a civil union in Connecticut and the civil union is celebrated in conformity with the other country's law or in the presence of a United States ambassador or minister to that country or a United States consular official accredited to that country or by any ordained or licensed member of the clergy engaged in the ministry in any state or foreign country.[144] While the license evidently need not be obtained in Connecticut,[145] it might be difficult or impossible to obtain one in states prohibiting civil unions.

(vi) Parties to a civil union are to have "all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil

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140 *Id.* § 46b-38gg and 46b-38hh.

141 *Id.* § 46b-38gg.

142 *Id.* § 46b-38ii.

143 *Id.* § 46b-38jj.

144 *Id.* § 46b-38mm.

145 *Supra*, text preceding note 141.

law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman."[146]

(vii) Wherever statutes containing the terms "spouse", "family", "immediate family", "next of kin" or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition, and, with certain technical exceptions, wherever the term "marriage" is used or defined, civil union shall be included is such use or definition.[147]

b. <u>Legal Consequences; namely what Connecticut's Civil Union Act does and does not do</u>[148]

(i) A Connecticut civil union is a legal status, somewhat parallel to civil marriage at the state law level, but does not give any federal tax benefits[149] nor any of the 1,138 federal protections given heterosexual couples.

(ii) However, "[t]he impact of the Connecticut civil union law is broad and sweeping. The Connecticut Office of Legislative Research has determined that there are 588

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[146] CONN. GEN. STAT. § 46b-38nn. Governor Rell insisted that this definition of marriage be included or she would not sign the Act. It is somewhat redundant, in view of CONN. GEN. STAT § 45a-727a(4), *supra*, note 9.

Associate Professor Mary Ferrari, of Quinnipiac University School of Law, has pointed out (in an outline used in a New Haven Bar Association program on September 9, 2005) that "[t]here is some difference of opinion as to whether DOMA applies to parties to state-law civil unions in view of the fact that a civil union is a "marriage-like" but expressly stated *not* to be a marriage under state law. *See* Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 Cap. U.L. Rev. 387, 389 (2001) for her citation of the conflicting views of Greg Johnson, *Vermont Civil Unions: The New Language of Marriage,* 25 Vt. L. Rev. 15, 55 (2000), who suggests that if construed narrowly, DOMA would not apply to civil unions, and William N. Eskridge, Jr. *Equality Practice: Liberal reflections on the Jurisprudence of Civil Unions*, 64 Alb. L. Rev. 853, 861 (2001), who contents that federal agencies could construe DOMA to deny marital benefits to parties to civil unions. Although partners in a civil union would still be treated as unmarried for purposes of federal tax law whether or not DOMA applies to civil unions, a question exists whether family status issues such as the presumption of parenthood and status as stepparent, and property issues such as support obligations should be determined under state law, as has traditionally been the case, or whether DOMA supercedes these state law determinations as well."

[147] CONN. GEN. STAT. § 46b-38*oo*. The exceptions are in CONN. GEN. STATS. §§ 7-45, 17b-137 and 46b-150d (both as amended by the Civil Union Act), 45a-727a (4), 46b-20 to 46b-134, inclusive, and § 14 of the Civil Union Act, CONN. GEN. STAT.§ 46bb-38*oo*.

[148] Portions of the material in this Part one, V.A.3.b. is an updated, enriched (with additions) and rewritten summary of GLAD (Gay & Lesbian Advocates & Defenders: *Some Questions and Answers About the New Connecticut Civil Unions Law*, 1st ed. (April 27, 2005).

[149] *Infra,* Part one, V.A.3.b. xxii and Part three, II.A.1. and c.

Connecticut statutes in which marital status is a factor.[150] Virtually every area of the law encompasses some reference, right, responsibility, or benefit ascribed to marital status. Most of those statutory references create rights afforded married couples that cannot be replicated by contract and, therefore, have not been available to same-sex couples because they cannot marry.[151] Ostensibly, the thousands of Connecticut same-sex couples[152] will now be able to enter into a civil ceremony to establish themselves as 'spouses' and 'next of kin' under Connecticut law."[153]

(iii) In the absence of any statutory provision, there appears to be no residency requirement for marriage in Connecticut. This implies there is no residency requirement for a Connecticut civil union. Thus, as in Vermont, non-residents should be able to enter into a civil union in Connecticut, if otherwise eligible, with the civil unions celebrated in the town where the civil union license is issued.

(iv) Since October 1, 2005, a Vermont civil union should probably be treated in Connecticut in the same way that Connecticut treats its civil unions. In the opinion of Connecticut's Attorney General Richard Blumenthal,

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[150] *See*, Connecticut Office of Legislative Research 2002 report at: www.cgs.ct.gov/2001/rpt/olr/htm/2001-r-0606.htm.

[151] OLR estimates that over two-thirds of the 588 statutory rights, responsibilities, and benefits cannot be created by contract, explaining that "contracting is not an option where a legislative scheme uses marital status to define executive or judicial branch powers or eligibility for government programs." www.cga.ct.gov/2002/rpt/2002-R-0144.htm.

[152] The 2000 United States Census provided that 7,386 households in Connecticut identified themselves as same-sex partners, a 5,298 increase over the 1990 census. *See*, the National Gay and Lesbian Task Force at http://ngltf.org/issues/census2000.htm. *See also*, Connecticut Office of Legislative Research report at: www.cga.ct.gov/olr/2002/2002Backgrounders/Same_sex_0834.htm.

[153] CONN. GEN. STAT, § 46b-38*oo*, provides that "[w]herever in the general statutes the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition and wherever in the general statutes, except section 7-45 and 17b-137a of the general statutes, as amended by this act, subdivision (4) of section 45a-727a, sections 46b-20 to 46b-34, inclusive, section 46b-150d of the general statutes, as amended by this act, and section 14 of this act, the term 'marriage' is used or defined, a civil union shall be included in such use or definition."

Paragraphs (b)(ii) and footnotes 150-153 are from Murphy, *supra*, note 134, last paragraph.

"[C]ivil unions performed under the laws of other States are valid in Connecticut under the Full Faith and Credit Clause of the United States Constitution.

"At present, our courts will conclude that Connecticut law and the Full Faith and Credit Clause of the United States Constitution require Connecticut to recognize Vermont civil unions and California same-sex domestic partnerships. Other out-of-state, legally authorized same-sex domestic partnerships may be recognized as civil unions in Connecticut depending on how specific provisions of other States' laws compare to ours.

"Same-sex couples whose civil unions and domestic partnerships are performed in other States and recognized in Connecticut already have a valid civil union in Connecticut that need not and cannot be repeated in Connecticut.

"The Connecticut General Assembly has specifically determined that same-sex marriages are contrary to Connecticut law. Because the legislature has determined that marriages in Connecticut may only be between a man and a woman, same-sex marriages performed under laws of any other State violate Connecticut's expressly articulated public policy and are not required by the Full Faith and Credit Clause of the United States Constitution to be recognized here.

"Because same-sex marriages performed under the laws of another State are not valid marriages or civil unions in Connecticut, same-sex couples married under the laws of another State are allowed by Connecticut law to obtain a Connecticut civil union."

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"Our conclusion [is] that Connecticut courts will recognize a California same-sex domestic partnership and a Vermont civil union, but will not recognize a Massachusetts same-sex marriage . . .

"An individual who is a party to either. . . [of the first two relationships] cannot enter into a civil union in Connecticut because he or she is already 'a party to another civil union,' recognized as valid in this state. P.A. 05-10, §

2. An individual who is a party to an out-of-state same-sex marriage may obtain a Connecticut civil union because Connecticut courts will not recognize a same-sex marriage as either a civil union or a marriage.

"In summary, civil unions performed in other States are entitled to full faith and credit in Connecticut, and cannot be repeated here. Out-of-state same-sex marriages have no legal force and effect here, and such couples can enter into a civil union in Connecticut."[154]

Connecticut's civil union statute appears to overrule *Rosengarten v. Downes*,[155] *sub silento*, since the jurisdictional statute in force at the time of that case should now be read to include civil unions.

(v) The case involved a Connecticut resident who sought to dissolve his Vermont civil union with a New York resident. The superior court, acting on its own authority, dismissed the case, concluding that it lacked subject matter

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[154] Connecticut Attorney General's Opinion in a September 20, 2005, letter responding to a request "for a legal opinion as to whether Connecticut courts will recognize out-of-state civil unions, same-sex marriages and same-sex domestic partnerships after Connecticut's Act Concerning Civil Unions . . . [took] effect on October 1, 2005." The full text is in Appendix C of this outline.

[155] *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (Conn. App. 2002), *appeal dismissed (*2003), *cert. granted* and dismissed, 261 Conn. 936, 806 A.2d 1066 (2002) held C.G.S. § 46b-1(17) to be a catchall provision "concerning children or family relations" and that Superior Court rules do not "define foreign civil unions as a family matter." Furthermore, the Appellate Court said at 71 Conn. App. 383-384: "General Statutes §§ 45a-727b and 46a-81r . . . expressly state that Connecticut does not endorse or authorize, respectively, civil unions or any other relationship between unmarried persons" and the "legislative intent in the adoption of [§ 46b-1(17)] . . . was not to make Connecticut courts a forum for same-sex, foreign civil unions."

Two gay men who had been domestic partners for thirteen years, establishing a paternal relationship with a child under California law, subsequently moved to Connecticut and ended their relationship with each other. In *Davis v. Cania, Robert W. Davis* v. *David J. Cania*, 48 Conn. Supp. 141, 2003 W.L. 22387135, 35 Conn. L. Rptr. 372 (Conn. Super. Aug. 29, 2003) subject matter jurisdiction was found to exist, since both parties and the minor child resided in Connecticut. Both were parties to the California action. The latter declared the defendant both the genetic and legal parent of the child and the plaintiff the legal parent.

Since the California judgment neither contravened Connecticut policy nor violated its law, the plaintiff was allowed to enforce his legal rights in Connecticut. The court found he was prejudiced because he believed he was the legal parent of the minor child, provided emotional and financial support and did not seek to adopt the minor child after his birth, as the California judgment precluded the need to do so.

The defendant's assertion that the plaintiff was not the legal parent and the California judgment of paternity was invalid in Connecticut, denying the plaintiff a relationship with the child, was found to be prejudicial to the plaintiff. Since the California judgment of paternity does not contravene Connecticut public policy and the benefits sought by the parties in obtaining the paternity judgment in California did not constitute forum shopping, since the parties had contact with that state, the Connecticut court found it had subject matter jurisdiction.

jurisdiction because the action did not fall with the statutory definition of a "family relations" matter. The Appellate Court affirmed and the Connecticut Supreme Court agreed to review the case. However, after the plaintiff died a few weeks later, the case was dismissed as moot.

(vi) Vermont civil unions should be respected in Connecticut in the same way as an out-of-state heterosexual marriage. But while Connecticut's civil union statute has a provision relating to certain foreign country civil unions, which is similar to the Connecticut law applicable to certain foreign country marriages, Connecticut will evidently not recognize same-sex marriages,[156] since its Attorney General is of the opinion that Connecticut will not respect valid Massachusetts, Canadian or other jurisdictions' same-sex marriages.[157]

(vii) *Lane v. Albanese*[158] held Connecticut had no subject matter jurisdiction to entertain a Connecticut couples' request for annulment of their Massachusetts marriage. However, the opinion indicated that legislation enacted that "reflect a public policy that recognizes civil unions or marriages between same-sex couples" might give it subject-matter jurisdiction.

(viii) A Connecticut same-sex couple, married in a jurisdiction permitting same-sex marriages, will have the benefits, protections and obligations of marriage provided under Connecticut law, since Connecticut will not respect same-

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[156] See portion of text of Attorney General's opinion, preceding note 154 and CONN. GEN. STAT. §46b-38nn.

[157] *Id.*

[158] *Lane v. Albanese*, Doc. No. FA04-4002128S Conn. Super Lexis 759 (March 18, 2005). This case held there was no "subject-matter jurisdiction to annual a [Massachusetts] same-sex 'civil marriage'. . . by a couple who are residents of Connecticut. The parties claimed that they did not know that Massachusetts law required that they be Massachusetts residents at the time of the ceremony. The court observed that Massachusetts' marriage law applies only to residents of Massachusetts, and it excludes nonresidents. Therefore, the civil marriage was not valid from its inception, and Connecticut has nothing to dissolve or annul. In addition, Connecticut courts lack jurisdiction pursuant to C.G.S. § 46b-1, the court stated, because 'civil marriage' is not a matter concerning family relations, as defined in that statute. Connecticut is not required to provide full faith and credit to a judgment that contravenes its public policy and is nullity at inception. The public policy exception to the Full Faith and Credit Clause says that states do not have to recognize the acts of other states, if this would be inconsistent with the public policy of their own state. The court concluded it had no choice other than to dismiss for lack of subject-matter jurisdiction . . . ."

sex marriages. However, the civil union benefits are almost the same.

(ix) A Connecticut (or Vermont) person is ineligible to enter into a civil union in either state if they are a party to another civil union.[159] Since, to obtain a Connecticut civil union or marriage license, the applicants must disclose whether they are "single, widowed or divorced."[160] The applicants are presumably required to indicate they are currently married to each other or in a civil union with each other sanctioned by another jurisdiction or single and free to marry in Connecticut. Based on the Attorney General's opinion,[161] unless they are in a civil union, an unrecognized same-sex marriage will not preclude a same-sex couple from obtaining a Connecticut civil union license.[162]

(x) Being a "party to another civil union or a marriage," could mean simply whether one is in such a status, regardless of with whom. Alternatively, "another civil union or a marriage" may actually be a somewhat technical way of simply requiring that one not have "another spouse" other than the person to be joined in a civil union.

(xi) The latter interpretation appears to be better and the Attorney General has so construed the law. This is consistent both with Vermont practice and the law's general requirement of having only one spouse at a time. Clearly a Connecticut civil union cannot be entered into by someone married to a person of the opposite sex, without dissolving that prior marriage. It is possible that the civil union could take place in Connecticut with one of the parties to a same-sex marriage, because Connecticut does not recognize the latter.

(xii) A Vermont civil union will be respected in Connecticut, making it unnecessary to enter into a Connecticut civil union. The latter cannot be entered into under these circumstances. However, one could enter into a Connecticut civil union with the same person to whom he

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159 CONN. GEN. STAT. § 46b-39bb(1) and 15 VT. STAT. ANN. § 1202 (1).

160 CONN. GEN. STAT. § 36b-38hh.

161 *Supra*, last quoted paragraph of text preceding footnote 154.

162 *Id.*

or she is currently married in a jurisdiction, such as Massachusetts, which permits same-sex marriage.[163]

(xiii) Since Vermont's civil union law is similar to Connecticut's, Vermont should recognize a Connecticut civil union. Probably California, New Jersey, Maine and Hawaii, under their domestic partnerships statutes, and Hawaii, under its reciprocal beneficiary statute, should also recognize a Connecticut civil union.

(xiv) The same prohibition against entering a Connecticut civil union by a person in a Vermont civil union with someone else will require that the prior existing civil union be dissolved. It now appears that Connecticut residents in a Vermont civil union will be able to dissolve the latter in a Connecticut court.

(xv) A registered California domestic partnership[164] is essentially equivalent to a Vermont or Connecticut civil union. However, there are substantive differences, since entering a Connecticut or Vermont civil union is the same process as entering a marriage, while California has a simplified registration process for entering a domestic partnership; wholly unlike a marriage. Furthermore, Connecticut and Vermont do not allow heterosexual civil unions, while California permits heterosexual domestic partnerships if one of the respective partners is over 62 years old and eligible for Social Security.[165] In any case, it should be possible to enter a Connecticut civil union with the same person with whom one is currently in a California domestic partnership, but not if the partnership is with a different person, until the latter is dissolved.

(xvi) It appears that any government sanctioned domestic partnership status should not pose a problem to entering a Connecticut civil union, unless it is with someone other than a person with whom a state (other than California) or municipal domestic partnership exists.

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163 *Id.*

164 CAL. FAM. CODE § 297 (2005).

165 He must meet the eligibility criteria defined in 42 U.S.C. § 402(a) or 42 U.S.C. § 1381 CAL. FAM. CODE § 297(b)(5)(B)(2005). Guidance from Connecticut will be needed to determine how a preexisting California domestic partnership will be treated in Connecticut. An indication of this may be *Davis v. Cania*, *supra*, note 155, second paragraph.

(xvii) Since the Armed Forces consider an attempted same-sex marriage to be grounds for discharge under its "don't ask, don't tell" policy, they could consider a Connecticut civil union (or for that matter a Vermont one or a California domestic partnership between same-sex parties) to be the equivalent of marriage and thus grounds for discharge.

(xviii) Apart from the total absence of any federal benefits for people in a civil union, certain state government programs may not be available to parties to the latter, because the income and assets of one person may be included with the other, in determining eligibility.

(xix) An employer-sponsored domestic partnership plan may require that a person be "single" to qualify. If the plan only requires that employee to be "unmarried," an employee in a civil union could readily take that position. The responsibilities of married persons for each other's debts and support appear to apply to persons in a civil union. It would also seem that in the absence of a will or of provisions equivalent to a prenuptial or postnuptial agreement (such as in a partnership or living together agreement) to the contrary, a party to a civil union would be entitled to an intestate share of the other party's estate.

(xx) Inasmuch as Connecticut's civil union law parallels its marriage law, including termination of a legal relationship, Connecticut's dissolution and annulment laws should apply to Connecticut civil unions. While there is no residency requirement to enter into a civil union or to get married, residency requirements exist for dissolution.

(xxi) To dissolve a civil union one party must have been a Connecticut resident for the twelve months preceding either the filing of the complaint or the issuance of the dissolution decree or have been a Connecticut resident at the time of the civil union and now return to Connecticut with an intention, before filing the complaint, of permanently remaining there or the cause for dissolution must have arisen after either party moved into Connecticut.[166]

(xxii) While the residency requirement for dissolution of a civil union can be satisfied in one of several ways, whether another state will recognize a Connecticut civil union for

[166] CONN. GEN. STAT. § 46b-44(c).

purposes of dissolution is not clear. Vermont has its own residency requirements (previously mentioned) for dissolving a Vermont civil union, but no cases have been found involving Vermont civil unions of Vermonters who have relocated or traveled outside Vermont and require access to a non-Vermont court. However, the Vermont residency requirement for dissolution of its civil unions is one year (as previously mentioned). Connecticut seems to have the same.

(xxiii) The consequences of dividing assets and dealing with support claims when a civil union is dissolved will be quite different from dissolution of a marriage, because of the federal nonrecognition of civil unions. The payor of the equivalent of alimony will not receive any tax benefit, ERISA governed retirement accounts may not be divided at the time of a civil union's dissolution and while property transfers at the time of dissolution should not have any Connecticut tax implications, they may have them under federal law.[167]

(xxiv) An employer-sponsored domestic partnership plan may require that a person be "single" to qualify. If the plan only requires that employee to be "unmarried," an employee in a civil union could readily take the position that he is unmarried.

(xxv) It is likely that a party in a civil union should be able to subsequently marry the same person with whom he has been joined in a civil union if and when marriage becomes available to same-sex couples in Connecticut. Furthermore, there appears to be no impediment to Connecticut couples in their civil union subsequently marrying each other in Massachusetts, since the latter currently permits couples in a Vermont civil union to marry in Massachusetts if otherwise qualified; namely, being Massachusetts residents.

(xxvi) The following categories of Connecticut laws will apply to couples in a civil union:[168]

1. family law, including marriage, divorce, and support;

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[167] Part Three V, C and D, VII B, C. and D, *infra*.

[168] Connecticut's Office of Legislative Research, Bill Analysis, pp. 2-3.

2. title, tenure, descent and distribution, intestate succession, wills, survivorships, or other incidents of the acquisition, ownership or transfer (during life or at death) of real or personal property;

3. state and municipal taxation;

4. probate courts and procedure;

5. group insurance for government (but not private-sector) employees;

6. family leave benefits;

7. financial disclosure and conflict-of-interest rules;

8. protection against discrimination based on marital status;

9. emergency and non-emergency medical care and treatment, hospital visitation and notification, and authority to act in matters affecting family members;

10. state public assistance benefits;

11. workers' compensation;

12. crime victims' rights;

13. marital privileges in court proceedings;

14. vital records and absentee voting procedures; and

15. tax.

(xxvii) Assuming an unmarried heterosexual couple wished to have a Connecticut or Vermont civil union instead of a conventional marriage, but cannot because the parties must be of the same sex, could they raise a 14th amendment equal protection issue? Or would they be precluded, because the same benefits would be available to them in a traditional marriage?

(xxvii) The Federal DOMA precludes the federal government from recognizing Connecticut, as well as Vermont civil unions and California domestic partnerships between same-sex couples. Thus, the previously mentioned more than 1,138 federal benefits, protections and responsibilities applicable to spouses in a heterosexual marriage, including federal tax treatment, Social Security, any immigration, Veteran's benefits, bankruptcy filing and many others, will not apply to parties in a Connecticut civil union.

c. <u>Connecticut tax consequences to couples in a civil union</u>

(i) While the extension of health insurance coverage to partners of same-sex employees is tax free to the employee, the federal DOMA precludes deductibility of the premium him. The latter is treated as income to the employee, whose civil union partner's provided with these benefits, but should not be treated as such for Connecticut state income tax purposes.

(ii) A joint federal income tax return may not be filed by a same-sex couple, whether married or in a civil union. While Connecticut's civil union law indicates that a couple so joined should be treated as a Connecticut married couple and can file a joint state tax return, Connecticut law also provides that a Connecticut resident's filing status for state income taxes (with certain irrelevant exceptions) is the same as his federal income tax filing status. Since federal law requires partners to in a civil union to file as single people, Connecticut's tax law initially required filing in a similar manner, conflicting with the spirit of its civil union law.

(iii) Fortunately, the problem was quickly (but only partially) solved in the legislature's June 2005 Special Session. A section of an omnibus bill provides that "chapters 217 [the estate tax], 228c [the gift tax] and 229 [the income tax] of the general statutes shall apply to parties to a civil union recognized under the laws of this state as if federal income tax law and federal estate and gift tax law recognized such a civil union in the same manner as Connecticut law."[169]

[169] P.A. 05-3, § 58 of the June 2005 Special Session. Chapter 217 is Connecticut's estate tax, chapter 228c its gift tax and chapter 229 its income tax. Connecticut's estate and gift taxes were radically amended in the regular session of the 2005 General Assembly, retroactive to deaths occurring and gifts made after 2004. P.A. 05-251. *See note* 172, *infra.* Ferrari, *supra*, note 146, at p. 2 of her outline, points out that said Public Act 05-3 makes

(iv) However, although the amendment was apparently intended to better coordinate Connecticut's civil union law with its tax laws, it did not do this for the last quarter of 2005 because it states that it is *"[e]ffective from passage and applicable to taxable years commencing, gifts made, and estates of decedent's dying on or after January 1, 2006."*[170] Since Connecticut's civil union statute became effective October 1, 2005, there is an inconsistency between it and the corrective tax provision for the last three months of 2005. While the language requires that Connecticut estate, gift and income tax treatment of couples in a Connecticut civil union will be treated as if they were married, it does not seem to apply during these last three months to couples in civil unions.

(v) Thus, Connecticut civil union partners will be required to file state income tax returns as if they were single for the last quarter of 2005, even though that they were joined in a civil union after September 30, 2005. Any gifts made by them during those three months will be subject to Connecticut gift tax, as if they had remained single. Also, should one or both of them die during that period, Connecticut estate tax will treat the decedent as if he remained single. This is not what the legislature could have intended and should be corrected early in the 2006 session, before any estate, gift or income tax returns are due.[171]

(vi) Thus, unlike Vermont, couples joined in Connecticut civil unions will not be able to file joint state income tax returns for 2005, because Connecticut ties tax filing status to federal law and Connecticut's amendment did not correct the problem for the last quarter of 2005. Since this issue cannot be resolved administratively, a legislative correction should be made. Until then, some areas of interaction between federal and Connecticut tax law will create

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clear that parties to a civil union will be treated as married for Connecticut state tax purposes, even though the federal law treats them as unmarried.

[170] Section 58 of the statute italicized and placed in parentheses the above quoted provision.

[171] The extensive restructuring changes made to Connecticut's gift and estate taxes, effective for gifts made and deaths after 2004, are beyond the scope of this outline, but must be considered in connection with any estate planning. However, note 172, *infra*, contains a brief summary description.

problems and inequities for couples who entered into civil unions during the last quarter of 2005.

(vii) The Department of Revenue Services has ruled that:

"An employee who is a party to a civil union recognized under Connecticut law should complete a new **Form CT-W4** (effective 1/1/06). By choosing the filing statue of *civil union filing jointly or civil union filing separately*, the employee will have the correct amount of Connecticut income tax withheld from his or her wages. The wages subject to Connecticut income tax withholding are the same as wages subject to federal income tax withholding, determined as if the employee were married. For example:

"1. An employer provides health insurance coverage for employees and their families. For federal income tax withholding purposes, the coverage for an employee's spouse is a nontaxable fringe benefit, but the cost of coverage for an employee's civil union partner is taxable income to the employee. For Connecticut income tax withholding purposes, the benefit for the civil union partner is treated in the same manner as a benefit for a spouse; therefore the coverage for the civil union partner is not taxable.

"2. An employer provides a 'cafeteria plan' package which allows employees to use pre-tax income for health insurance payments. For federal income tax withholding purposes, the premiums for an employee's spouse are a pre-tax salary reduction, but the premiums for a civil union partner are not a pre-tax salary reduction. However, for Connecticut income tax withholding purposes, the premiums for a civil union partner are a pre-tax salary reduction.

Out-of-state same-sex marriages (as opposed to civil unions) have no legal significance and are not recognized for any purpose in Connecticut, including Connecticut income tax purposes."

(viii) "Civil unions would pump almost $1 million worth of new tax revenue into Connecticut's economy as same-sex couples shell out significant sums on everything from flowers to food to celebrate their new status, according to a

study commissioned by the gay rights lobbying group, *Love Makes a Family*.

"The study, released [March 15, 2005] also predicted that if gay marriage were legalized in Connecticut, that would have an even bigger benefit, netting almost $2 million in sales and lodging tax revenue.

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"[T]he . . .Office of Fiscal Analysis . . . estimates that Connecticut would lose about $1 million a year in state inheritance tax revenue if civil unions were permitted. [This was before enactment of the unified estate and gift tax law with a $2 million exemption.][172]

"The Love Makes a Family study[173] projected a far smaller loss of inheritance tax revenue – about $100,000 a year [based on the prior law].

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"Although civil unions would not draw significant numbers of out-of-state tourists to Connecticut, because both Vermont and California offer a similar status, the study found that Connecticut residents celebrating their civil union status would still boost the state's economy by $900,000.

"If gay marriage were legal, that would draw 46,414 same-sex couples to Connecticut from throughout the Northeast,

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[172] P.A. 05-251 repealed the succession and gift taxes retroactively to January 1, 2005, but an amount of aggregate lifetime gifts of $2 million (on or after January 1, 2005) remain taxable and cumulative taxable gifts made on or after January 1, 2005 are to be brought back into the estate with a credit for gift taxes paid on gifts made on or after January 1, 2005. The Connecticut estate tax is de-coupled from the federal estate tax and has a $2 million exemption.

The rate table is designed to replace the revenue lost under the former state death tax credit. However, the table causes a cliff in the rates. Thus, tax on an estate of $2 million is 0, while tax on an estate of $2,000,001 is $101,600.10. Lifetime gifts of $2 million will result in a tax liability of over $100,000 if so much as $1 is left in the taxable estate.

An independent QTIP election is provided, but this will not be necessary until 2009, when the federal estate tax exemption exceeds Connecticut's. All estates (regardless of whether or not they are taxable) will be required to file returns nine months after death. This new estate tax is effective from passage and should not require retroactive filings in non-taxable estates. CONN. GEN. STAT. §§ 12-391 through 12-398.

[173] Conducted by researchers at the Institute for Gay and Lesbian Strategic Studies at the University of Massachusetts in Amherst, and the Williams Project of the University of California Los Angeles Law School.

and would double the revenue, the study found. The authors based that projection on the experience in San Francisco and Portland, Ore., two cities that briefly performed gay nuptials last year."[174]

d. <u>Events that occurred when civil unions became legal on October 1, 2005</u>

"About 20 towns opened for the ceremonies despite normally being closed on [a] Saturday, and couples lined up in town halls waiting for their licenses.

"The beginning of civil unions inspired small rallies on both sides of the issue, neither of which drew more than a few dozen people. Both groups seemed more concerned with preparing for the political and legal fight over same-sex marriage than with heralding the new law.

"Opponents gathered on one side of the State Capitol in Hartford on Saturday [October 1, 2005] to warn legislators not to push for marriage. At the rally, Brian Brown, the director of the Family Institute of Connecticut, urged the attendees to support political candidates who would reject same-sex marriage.

" 'Do not be fooled,' he said. 'This civil union legislation is merely a steppingstone for the same-sex marriage movement.'

"On the other side of the Capitol, a gay rights group gave muted approval to civil unions, but spoke forcefully for full marriage rights. A group reportedly connected to white supremacists showed up at the rally, carrying signs with anti-gay slurs and taunting the gay rights advocates, but the police stepped between the groups. . .

"[I]n some cities and town, the ceremonies drew numerous couples seeking to gain official recognition for their relationships.

"In Hartford, the Bureau of Vital Records issued 26 licenses for civil unions. . .

"The state did not release guidelines on how to conduct the ceremonies until about a week before they began, justices of the peace said, creating some nervousness. Justices of the peace were

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[174] HARTFORD COURANT, March 16, 2005, p. B. 7.

advised to use words like 'companions' and 'partners in life' or 'partners for life'."[175]

e. Recognition by other states

(i) Other states should respect Vermont and Connecticut civil unions in the same way as marriages enjoy a strong presumption of respect. Since civil unions are not marriages, the results have been mixed for Vermont civil unions.

(ii) California's domestic partnership law gives same-sex couples many of the benefits of marriage.[176] New Jersey's domestic partnership law also affords same-sex couples most of the benefits of marriage, although less than those offered in California. The New Jersey law specifically recognizes civil unions from other states. Therefore, parties to a civil union probably can either travel or move to California, New Jersey, or Vermont and expect some recognition of their status as spouses or next of kin. Massachusetts, the only state that has granted full marriage status to same-sex couples,[177] has not recognized civil unions from Vermont.[178]

(iii) Some states have enacted statutes or constitutional provisions forbidding recognition of any civil unions.[179]

(iv) A pending Connecticut Superior Court case challenges the constitutionality (under Connecticut's constitution) of the exclusion of same-sex couples from marriage.[180]

4. Children in a civil union

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175 N.Y. TIMES, October 9, 2005.

176 *See*, the California Department of Secretary of States, www.ss.ca.gov/dpregistry/. *See also*, http://writ.news.findlaw.com/gross-man/200050809.html. Most recently, the California Supreme Court ruled that country clubs must include domestic partners in their definition of spouses. *Koebke v. Bernardo Heights*, S124179.

177 *See, Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), *supra*, note 18.

178 *Salucco v. Alldredge*, 17 Mass. L. Rep. 498 (Mass. Super. Ct. 2004). Paragraph (e)(ii) and its footnotes are from Murphy, *supra*, note 113.

179 *Supra*, Part one, II.A. 1.& 2.

180 *Kerrigan & Mock v. Conn. Dept. of Public Health, et al*, *supra*, note 40.

If one party to a civil union has a child before or during the union, the other party will likely be considered a step-parent, unless he or she adopts the child. But if parties to a Connecticut civil union subsequently have a child, both of them may be legally presumed to be the parents of a child born to either. Since this is only a presumption, a second parent adoption would be the best way to insure that the child is considered the child of both parents.

5. Surrogacy

"[Surrogacy][181] is a method favored by gay male couples who would like . . . at least one of the fathers to have a biological tie to the child." It can be done by inseminating a surrogate mother with one of the prospective father's sperm. This is also the traditional method of the two types of surrogacy arrangements which same-sex couples might use to have children. The sperm can be that of the intended biological father or anonymous sperm donor. In the alternative gestational method, "a surrogate mother has transferred into her uterus an embryo formed from sperm donated by the intended biological father or anonymous sperm donor and an egg donated by the intended biological mother or an anonymous egg donor; this makes the surrogate a gestational mother with no genetic tie to the resulting child."[182]

Connecticut has no statute either permitting or prohibiting parties from entering into surrogacy agreements. Though it appears that the latter are permitted, although there are no published Connecticut cases on this subject. The validity and enforceability of surrogacy agreements vary from state to state.[183]

The author (Jennings-Lax) concludes that although there is no specific statute or case law in Connecticut, their "validity and enforceability . . . can be assumed from the few cases decided that have involved such agreements that they are not prohibited."[184]

The author also points out that individuals in "a civil union should not be subjected to any higher or different hurdles in establishing parentage than those incurred by heterosexual married couples using the same assisted reproductive technology.[185]

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181 *Surrogacy—The Law in Connecticut,* by Jennings-Lax in 79 C.B.J. 59 (2003) .

182 *Id.*

183 *Id.* Discussed in the second full paragraph.

184 *Supra*, note 40.

185 *Supra*, note 40 at 66.

6. Employee benefits

Self-insured employers (most large ones) should amend their fringe benefit plans to include persons in civil unions. Spouses are automatically covered under self-insured plans that defer to a state-law definition of who is married.

a. A person in a civil union with a Connecticut state or municipal employee should be entitled to the same health insurance rights as are available to spouses of married employees. However, the federal DOMA precludes health plans offered through the Federal Employees Health Benefits Program from covering same-sex spouses of federal employees. Thus, spousal health insurance coverage in all likelihood will not be provided for the partner of a federal employee in a civil union.

b. "City governments [in Michigan] cannot provide benefits for same-sex partners of employees in future labor contracts because . . . [of Michigan's] constitutional amendment banning same-sex unions, the state's attorney general said. Attorney General Mike Cox wrote in an opinion that Kalamazoo's policy of offering health and retirement benefits to same-sex partners violated [the amendment. The latter] said a union between one man and one woman 'shall be the only agreement recognized as a marriage or similar union for any purpose.' Michigan law already defined marriage as a union between one man and one woman."[186]

c. On April 7, 2005, New York City joined the other New York State cities of Buffalo, Rochester, Brighton, Ithaca and Nyack by announcing that it will fully respect the marriages and civil unions of same-sex couples performed in jurisdictions such as Massachusetts, Vermont, Canada and other countries.

d. In September 2005, the mayor of Salt Lake City signed an executive order granting domestic partner benefits to city workers, a decision that is likely to be challenged.[187]

e. A self-employed person should be able to purchase coverage for his or her civil union partner on the same terms as a self-employed married individual. But a private sector employer may not be

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[186] N.Y. TIMES, March 17, 2005, p. A. 22.

[187] N.Y. TIMES, September 22, 2005.

required to offer health insurance, spousal or family coverage to a person in a civil union with an employee.

f. It would appear under ERISA that an insured plan, which can be regulated by state insurance laws, should not be able to refuse coverage to a partner in a civil union with an employee, if coverage is extended to spouses of married employees.

g. However, self-insured plans may not be quite as liberally interpreted. Similarly, COBRA benefits may be denied to same-sex partners of employees. A similar problem may apply to health insurance eligibility under HIPAA.

h. The status of a civil union outside of Connecticut is not the same as it would be for a marriage.

i. Short of a civil union, a Connecticut couple could enter into an agreement to share earnings, etc. An unmarried heterosexual couple was so permitted, on the grounds that they had an express contract enforceable, under the ordinary rules of contract upon their separation.[188] It would appear that the same result should apply to a same-sex couple's contract even if it is an oral one, but the latter is not nearly as desirable as one in writing.[189]

j. A bias complaint was filed with the Connecticut Commission on Human Rights and Opportunities after St. Mary's Hospital in Waterbury denied a doctor's request for health coverage for his civil union partner. While the law stipulates that state-regulated health insurance plans provide the same benefits to gay couples as they do to spouses, St. Mary's Self-Funded Health Insurance Plan operates under federal guidelines and is not required to adhere to state mandates. This raises the question as to whether a Catholic entity is allowed to avoid the sexual orientation of the civil union law.[190]

7. <u>Designating a non-legally related adult to have certain rights and responsibilities</u>

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188 *Boland v. Catalano*, 202 Conn. 333, 341-41, 521 A.2d 142, 146 (1987).

189 Caveat the Statute of Frauds.

190 N.Y. TIMES, Section 14, February 26, 2006, p. 2.

An adult, known as the designator, may name another adult, known as the designee, to make certain decisions on his or her behalf, or give the designee certain rights and responsibilities.[191]

a. To make the designation, the designator must sign, date and acknowledge a document before a notary public and two witnesses. This is revocable at any time by destruction or execution of a new document.[192] The designation document must be honored in the workplace,[193] court and administrative proceedings involving crime victims,[194] in healthcare settings,[195] psychiatric hospitals[196] and nursing homes.[197]

b. Other documents, such as powers of attorney, designation of health care agents, appointment of conservators, wills, transfers of car ownership to a surviving partner and similar estate planning documents, allow same-sex partners to have the same financial, medical and end of life decisions made by a partner. The rights and responsibilities to which a designee is entitled under the civil union act overlap and are not entirely clear.

B. Potential Conflict Between the IRC and the DOMA

Questions about interpretation of the tax laws, including whether the estate and gift tax marital deductions[198] are available, will only be reached by a court recognizing same-sex marriages. Then it will have to resolve a potential conflict between the federal DOMA's definition of marriage, as a relationship between a man and a woman, and an interpretation of section 2056(a) that might permit the marital deduction. This section refers to an interest passing "to his surviving spouse" (with the word "his" obviously generic) while section 2523 refers to a gift to "the donor's spouse."[199]

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191 CT. P.A. 02-105.

192 *Id.* § 3.

193 Conn. Gen. Stat. § 31-51jj.

194 Conn. Gen. Stat. § 54-201.

195 Conn. Gen. Stat. §§ 19a-578(b) and 19a-278(c)(a).

196 Conn. Gen. Stat. § 17a-543(b).

197 Conn. Gen. Stat. § 19a-550.

198 §§ 2056(a), 2513(a) and 2523(a).

199 *See* Part three, VIII.G.2 and 3, *infra.*

C. Reaction to Civil Unions

1. While Nebraska and Texas are the only states prohibiting recognition of same-sex civil unions, broad prohibitions in Alaska,[200] Florida,[201] and West Virginia[202] statutes might be interpreted as applying to civil unions, domestic partnerships or other arrangements granting to couples rights usually only available to married people. A Georgia case has refused to recognize a Vermont civil union as a marriage.[203]

2. Suits by parties to civil unions to obtain recognition by other states of their status, under the Full Faith and Credit and equal protection provisions of the U.S. Constitution, are beginning. As previously mentioned, the limited exception to this clause, preventing a violation of another state's strongly held public policy, will probably apply in those states and the plaintiffs will lose. But under principles of full faith and credit or comity, while a New York lower court recognized a party to a Vermont civil union as a spouse under New York's wrongful death statute, this was reversed on appeal.[204]

3. The requirement of a year's residency in Vermont and Connecticut for dissolution of their respective civil unions and the absence of recognition of civil unions in other states creates problems for non-residents of these states who, after entering into civil unions, wish to dissolve them, without residing in the state for a year. (Contrast this with the recognition that all states give to each other's divorce laws.) Mississippi and Texas have rejected petitions to end Vermont civil unions, but in December 2003 an

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[200] The relevant portion of Alaska's statute provides that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of a marriage." ALASKA STAT. § 255.05 011 (2001). This was enacted, as was the constitutional amendment prohibiting same-sex marriages, ALASKA CONST. Art. I, § 23 (2001) as the result of a decision favoring same-sex marriage in *Brause v. Alaska*, 21 P.3d 357 (Alaska 2001).

[201] Florida's statute states that: "Marriages between persons of the same sex entered into in any jurisdiction . . . or relationship between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state. The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state . . . respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship." FLA. STAT. ANN. § 741.212.

[202] West Virginia's law states that "[a] public act, record or judicial proceeding of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state . . . or a right or claim arising from such relationship, shall not be given effect in this state" W. VA. CODE § 48-2-603.

[203] *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

[204] *Langan v. St. Vincent's Hospital*, 196 Misc. 2d 440, 765 N.Y.S. 2d 441 (Sup. Ct., Nassau Co. 2003), rvs'd, N.Y. Slip. Op. No. 07495, 2005 W.L. 2542658, App. Div. 2d Dept. (October 11, 2005).

Iowa judge granted a divorce to two women in a Vermont civil union. Opponents of same-sex unions are expected to challenge this decision.

D. Reaction to Same-Sex Marriage and Other Gay Rights

1. Most if not all states refuse to recognize same-sex marriages

Since the federal and at least 40 state DOMAs deny recognition to legal marriages of same-sex couples,[205] as do the constitutions of twelve states,[206] it seems likely that most states will refuse to recognize a Dutch, Belgian, Spanish or Canadian marriage, thus possibly violating international agreements.[207] The U.S. Constitution's Full Faith and Credit provision, requiring one state to give full faith and credit to the public acts of another state, does not apply to foreign laws. The principle of comity merely allows their recognition. However, the Hague Convention permits non-recognition of a marriage if recognition is manifestly incompatible with the country's public policy.

2. Reactions of various Protestant Denominations and of the Catholic Church

a. On 2 November 2003, V. Gene Robinson was consecrated as Bishop of the Episcopal Diocese of New Hampshire. He is an gay man, living openly with his same-sex partner. Thus, his consecration has become extremely controversial and, coupled with the elevation of other gay clergy, may lead to a schism in the Anglican Communion.

b. Church leaders have pleaded with communicants not to split, but rather to work from within and not to break away from the 2.3 million member Episcopal Church in the United States. Theoretically a split would have dire consequences for those who choose to leave. They would lose all rights to church property.[208] This general principle is reinforced by the "Dennis Cannon", which is, as Alan Cooperman described it, "a church law that places ultimate ownership of every parish's land, buildings and

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205 *Supra*, Part one, II.A.2.

206 *Supra*, Part one, II.A.

207 Provisions of the Hague Convention on Celebration and Recognition of the Validity of Marriages has not yet been ratified by the United States.

208 Alan Cooperman, WASHINGTON POST, January, 2004, republished in the HARTFORD COURANT. The article notes that this has not yet been tested because an entire diocese has not attempted to leave and that it would be likely to be a fierce battle.

real property -- from the steeple to the hymnals -- in the hands of its diocese and the national church."[209] The consequences therefore are that: "[a] congregation that walks away, in other words, leave with nothing . . . ."[210]

c. While some are opposed to same-sex unions, other Episcopal communities support it. For example, the Episcopal Diocese of Vermont has already approved the blessing of gay and lesbian civil unions.

d. In Connecticut however, Bishop Andrew Smith's support of Bishop Robinson has resulted in six Connecticut Episcopal priests asking to be supervised by a different bishop because they disagreed with Smith's support for Robinson.

e. Bishop Smith threatened to inhibit all six priests (prevent them from leading any Connecticut congregation for up to six months) in April 2005. In early July, he did inhibit one of them, the Reverend Mark Hansen, appointing another priest to lead St. John's Church in Bristol. If the situation is not resolved in six months, Bishop Smith can remove the Reverend Hansen from the priesthood.

f. Nine out-of-state conservative Episcopal bishops plan to take Bishop Smith to religious court over the Reverend Hansen's suspension and his threat to five others.

g. Diocese officials said Hansen was suspended because he took an unauthorized sabbatical, St. John's has stopped payments on a loan for its building, but the Reverend Hansen maintained he notified Bishop Smith about his plans.

h. The nine bishops, mostly from the South and Midwest have written Bishop Smith, saying that they are determined to intervene in this case, as well as if five other priests are inhibited. They are preparing a "presentment" (a formal charge) filed in ecclesiastical court, charging Smith with 'conduct unbecoming' a bishop. They also plan to raise money for any civil suits the six may file or face, provide care to St. John's and other parishes and license Hansen for functions in their dioceses.[211]

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209 Alan Cooperman, WASHINGTON POST, January 2004, republished in the HARTFORD COURANT.

210 *Ibid.*

211 HARTFORD COURANT, p. B. 6, July 29, 2005.

i. "Six Episcopal churches involved in a protracted clash with Connecticut Bishop Andrew D. Smith over his support of a gay clergyman filed a federal lawsuit [on September 27, 2005], alleging that Smith and other diocese officials violated the civil and property rights of the churches' priests, members and officials.

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"The lawsuit says that the priests were wrongly charged with being 'out of communication' with the bishop, putting their positions in jeopardy, and that they were denied due process.

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"Some of the allegations in the 67-page lawsuit stem from the state Episcopal diocese's recent takeover of a Bristol parish. In July [2005], Smith stripped the Rev. Mark Hansen of St. John's Episcopal Church of this duties as rector, and appointed the Rev. Susan J. McCone to lead the church; she was named as a defendant in the suit.

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"Frank T. Griswold, III, presiding bishop of the U.S. Episcopal Church, also is named as a defendant in the lawsuit, which says he refused to intervene over the charges against the priests and the seizure of St. John's—essentially condoning Smith's actions.

"The lawsuit also names Connecticut Attorney General Richard Blumenthal, alleging that the state has entangled itself in the dispute because of a law that requires Episcopal parishes to operate under the rules of the Connecticut diocese.

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"But Blumenthal said the state is not involved.

" 'We have no idea what factual or legal basis there could be for naming the attorney general of the state,' Blumenthal said. 'Neither I nor my office has played any role whatsoever in this ongoing controversy, which seems to be an internal religious dispute."[212]

[212] HARTFORD COURANT, pp. A1 and A12, September 28, 2005.

"Members of the Episcopal Diocese of Connecticut passed a resolution [on October 22, 2005] urging Bishop Andrew Smith to allow priests in Connecticut to preside at civil union ceremonies.

"The resolution passed overwhelmingly the annual meeting of the diocese, church officials said. . . .

"But Smith reminded clergy in a recent memo that they are not authorized to officiate at blessings of same-sex unions. He said that will not change, at least not until the House of Bishops meets in 2006.

"The resolution, while not binding, gives the diocese 'a sense of this convention at this time,' Smith said. There will be other occasions to discuss whether priests should preside over civil unions or not, he said."[213]

j. "Conservative leaders of the Episcopal Church U.S.A. and their Anglican counterparts from overseas intensified their warnings [on November 11, 2005] about the possibility of a schism in the Anglican Communion if the Episcopal Church did not renounce the consecration of gay bishops and the blessing of same-sex unions.

"About 2,400 Episcopal Church and Anglican bishops, clergy members and lay leaders from around the world gathered [in New York City on November 10, 2005] for a three-day show of solidarity in preparation for a general convention of the Episcopal Church [in] June [2006] in Columbus, Ohio.

"While Episcopal and Anglican conservatives have warned before of the possibility of a split in the 77 million-member Anglican Communion over these issues, powerful primates of national and regional Anglican churches from Africa, Asia and the Caribbean said [on November 10, 2005] that a break was all but imminent if the Episcopal Church did not vote to change course at the Columbus meeting.

" 'The primates will decide' if they consider the response of the Episcopal Church 'adequate,' said Archbishop Drexel Wellington Gomez, primate of the West Indies. He said, however, that he expected no change in the stance of the Episcopal Church, the American arm of the Anglican Communion, when it comes to gays.

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[213] HARTFORD COURANT, October 23, 2005, p. B2.

"If that is the case, 'given our present mood, the convention will most certainly be followed by some action,' Archbishop Gomez said. 'We have worked too hard, too long, to leave it like that.'

"The Episcopalians and the Anglicans were joined by well-known American evangelical Christians, most notably the Rev. Rick Warren, pastor of Saddleback Church in Lake Forest, Calif., and author of *The Purpose-Driven Life*. Mr. Warren gave encouragement to conservative church dissidents who are trying to break with the Episcopal Church but who have often been stymied by disputes with their dioceses over ownership of church property.

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"Tensions between the Episcopal Church and Anglican churches in the developing world, and within the American church itself, have simmered for years over issues like the ordination of women and the interpretation of Scripture. But for many conservatives, the last straw came when the Episcopal Church consecrated the Rev. V. Gene Robinson, an openly gay may, as bishop of New Hampshire in 2003.

"To avoid a split in the global communion, an Anglican commission issued a report in October 2004 urging the Episcopal Church in apologize for creating division by its consecration of Mr. Robinson. But the church did not renounce its actions, and impatience with it is boiling over, conservatives said."[214]

k. The leader of the Presbyterian Church in the U.S. for the period 2004-2006, The Rev. Rick Ufford-Chase, supports the inclusion of gays in the ministry. One of the issues he will need to confront is a provision in that Church's Constitution which prohibits noncelibate homosexuals from being ordained as members of the clergy.[215]

l. "[T]he national assembly of the Evangelical Lutheran Church in America rejected a proposal . . . to allow gay men and lesbians in committed relationships to be ordained as members of the clergy . . . [T]he vote on gay clergy . . . divided most evenly, with 49 percent in favor to 51 percent opposed. To pass, the measure required a two-thirds majority.

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[214] N.Y. TIMES, November 12, 2005, p. A10.

[215] N.Y. TIMES, June 28, 2004, p. A14.

m. "The 1,018 delegates in Orlando also voted against an amendment that would have given pastors explicit permission to bless same-sex unions. But the assembly approved a more ambiguous measure that both upholds the current ban on same-sex blessing ceremonies, and says at the same time that the church will 'trust' pastors and congregations 'to discern ways to provide faithful pastoral care' to everyone.

n. "Many advocates of gay inclusion in the church regarded the vote as leaving the door open for same-sex blessings maintained that is was a rebuke.

o. "Above all, the Lutherans avoided taking any radical new steps that could precipitate defections. A resolution to remain unified despite deep differences over homosexuality was approved by a vote of 851 to 127.

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p. "The United Methodist Church and the Presbyterian Church have upheld bans on ordaining noncelibate gay men and lesbians. As mentioned above, the Episcopal Church U.S.A. approved the ordination of an openly noncelibate gay bishop in 2003. In the fallout, some congregations have left, and the Episcopal Church has been condemned by many of its affiliates in the worldwide Anglican communion.

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q. "The [Lutheran] church currently allows the ordination of gay men and women as long as they are celibate and chaste. The defeated resolution [described in (j) above on page 42] would have permitted noncelibate gay men and lesbians to be ordained if they met several criteria, including being in committed relationships."

r. Protestant theologian, the Reverend Doctor Norman J. Kansfield, officiated at his daughter's marriage to another woman, evidently in New Jersey (a state with pending litigation designed to legalize gay marriage). His contract as President of New Brunswick (N.J.) Theological Seminary was not renewed and he now faces a church trial for violating church law. If found guilty, he could be defrocked as a theology professor and minister and excommunicated by the Reformed Church in America.[216]

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[216] N.Y. TIMES, June 17, 2005.

s. This is only one of several cases involving homosexuality that have roiled Protestant dominations recently. In March 2004, the United Methodist Church's Supreme Court acquitted the Rev. Karen Dammann of violating church law by openly declaring that she was in a lesbian relationship. While the church's highest court upheld the acquittal, her future remains unclear because the church reaffirmed the ban against gay ministers.[217]

t. "In a pair of decisions that bolstered conservatives, the highest court of the United Methodist Church defrocked an openly lesbian minister yesterday and reinstated a pastor who had been suspended for refusing to allow a gay man to become a member of his congregation.

"The nine-member court, the Judicial Council, also ruled in two other cases that church law superseded local resolutions that were more inclusive toward gay men and lesbians.

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"The church has declared in the past that there are no bars to the participation of gay men and women as lay people, but it also gives pastors discretion over their congregations."[218]

u. "Homosexuals, even those who are celibate, will be barred from becoming Roman Catholic priests, . . . under stricter rules soon to be released on one of the most sensitive issues facing the church.

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"The . . . ban would pertain only to candidates for the priesthood, not to those already ordained. [This does] not represent any theological shift for the church, whose catechism considers homosexuality 'objectively disordered.'"

While some Catholics content this is necessary to restore the church's credibility when noting the church teaching bars homosexuals, active or not from the priesthood, while others say although the test should be celibacy, not innate sexuality, they predict resignations from the priesthood that will worsen the church's deep shortage of clergy.

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217 *Id.*

218 N.Y. TIMES, November 1, 2005, p. A.14.

The ban and planned visits to each of the 229 seminaries in the United States taken together seem aimed at opposing a stricter standard on both seminary atmosphere and candidates to be accepted for the priesthood.[219]

v. The above rules "that could bar most gay men joining the priesthood has set off a waive of anger and sadness among some gay priests and seminarians who say they may soon have to decide whether to stay or leave, to remain silent or to speak out. The ban would pertain only to candidates and not to already ordained priests.[220]

E. Cases Involving Same-Sex Relationships Are Increasing

Notwithstanding a written agreement, the claim of one gay person against the estate of another was denied because the consideration was illicit sexual services.[221] Same-sex domestic partners have brought several suits seeking to receive the same benefits and rights as married couples; however, to date most have been unsuccessful.[222] The most intense debate is over common law marriage. No United States court has recognized same-sex partners as married,[223] although the Massachusetts Supreme Judicial Court has held that same-sex couples should be allowed to marry.[224]

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219 N.Y. TIMES, September 22, 2005, pgs. A.1 and A.12.

220 N.Y. TIMES, September 23, 2005, p. A.10.

221 *Jones v. Daly*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981).

222 *Rovira v. AT&T*, 817 F. Supp 1062 (S.D.N.Y. 1993) (surviving partner of lesbian relationship sought death benefits as spouse); Doe v. Prudential Ins. Co., 744 F. Supp. 40 (D.R.I. 1990) (dispute between parents and surviving partner over life insurance policy); *Elden v. Sheldon*, 758 P.2d 581 (Cal. 1988) (plaintiff denied recovery for loss of consortium on cohabitant's death).

223 In *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972), (the Minnesota Supreme Court held the 14th Amendment to the U.S. Constitution did not require states to permit same-sex marriages, upholding the constitutionality of a Minnesota statute which did not authorize, and thus was read as prohibiting, same-sex marriages. The U.S. Supreme Court dismissed the appeal for lack of a substantial federal question); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973) (the definition of marriage, rather than the text of the state statute was held to preclude same-sex marriages); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), aff'd 673 F.2d 1036 (9th Cir. 1981), *cert den*. 458 U.S. 1111 (1982), (a California immigration case construing Colorado law); *DeSanto v. Barnsley*, 328 Pa. Super. Ct. 181, 476 A.2d 952 (1984) (same-sex couples cannot contract a common law marriage); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (Wash. Ct. App.) *review denied*, 84 Wash.2d 1008 (1974), (court refused to find that denial of a marriage license to a same-sex couple violated either the state or federal constitution).

A portion of the text preceeding footnotes 222 and 223 and both footnotes themselves are from Horwood and Zaluda, 813 T.M. *Estate Planning for the Unmarried Adult*.

224 *Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003), reversing 14 Mass. L.Rptr. 591 (Suffolk Co. Superior Court (May 7, 2002).

VI. MASSACHUSETTS, A STATE WITH ONE OF THE HIGHEST CONCENTRATIONS OF GAY HOUSEHOLDS IN THE COUNTRY, HAS UPHELD SAME-SEX CIVIL MARRIAGE

A. Legalization of Same-Sex Marriage in Massachusetts

On November 18, 2003, in *Goodridge v. Dept. of Public Health*[225] the Massachusetts Supreme Judicial Court (in a four to three decision) held that the state "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples. . . . [But the court stayed] entry of judgment . . . for 180 days to permit the Legislature to take such action as it may deem appropriate in light of [its] opinion."

G*oodridge* pointed out that Ontario's *Halpern* case[226] changed the common law definition of marriage to include same sex couples and led to the issuance of marriage licenses. Thus, seven gay and lesbian couples made Massachusetts the first state to sanction same-sex marriage by its residents.

The vague wording of *Goodridge* left lawmakers and advocates on both sides of the issue uncertain if Vermont-style civil unions would satisfy the Court's decision. Accordingly, the Massachusetts Senate took up a bill granting gay couples all "the protection, benefits and obligations of civil marriage," but called it civil union, asking the Massachusetts Supreme Judicial Court for more guidance, as to whether Vermont-style civil unions (which convey the state benefits of marriage but not the title) would meet Massachusetts constitutional muster.

The Court's advisory opinion[227] stated that the bill "creates a new legal status, 'civil union,' purportedly equal to 'marriage,' yet separate from it. The constitutional difficulty of the proposed civil union bill is evident in its stated purpose to 'preserve the traditional, historic nature and meaning of the institution of civil marriage.'"[228]

Thus, only full, equal marriage rights for gay couples, rather than civil unions, would be constitutional. This ruling permitted the nation's first same-sex marriages to occur in the state beginning on 17 May 2004.

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225 *Id*.

226 *Halpern v. Toronto* (City), 172 O.A.C. 276 (2003).

227 *Opinions of the Justices to the Senate,*, 440 Mass. 1201 (2004).

228 N.Y. TIMES, March 30, 2004, p. A1, A16.

"Gov. Mitt Romney, . . . who opposes both gay marriage and same-sex civil unions, said he would ask the state's highest court to issue a stay of its rulings . . . requiring the state to grant marriage licenses to gays [thus barring] same-sex couples from marrying until after the proposed constitutional amendment banning gay marriage could go before the voters.[229]

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Massachusetts Attorney General Thomas F. Reilly, a Democrat, refused Republican Governor Romney's request to delay the ruling in the *Goodridge*[230] case pending final action in November, 2006, of the proposed constitutional amendment.

"[He] had evaluated the merits of asking the court for a stay after it issued two rulings legalizing gay marriage . . . [concluding] that the court would probably decide that there was greater harm in denying same-sex couples marriage for more than two years then there was in compelling them to change their status should the amendment pass, . . . [asserting] that the court would consider an amendment's chance of passage 'highly speculative,' . . . ."

B. Reaction to Massachusetts' Gay Marriage Case

1. The *Goodridge*[231] four to three decision set off a firestorm of protest across the country among politicians, religious leaders and others opposed to gay marriage. State constitutional amendments banning it have been enacted in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Ohio and Utah[232] and are under consideration in Alabama, Arizona, Idaho, Indiana, Minnesota and Wisconsin.

2. Massachusetts' Governor Romney made it quite clear that "[s]ame-sex couples who live outside Massachusetts would not be able to marry in Massachusetts . . . ." A 1913 law prevents Massachusetts from issuing marriage licenses to couples not eligible to be married in their home state.[233] In effect, this limited marriages to Massachusetts' residents.

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229 *Supra*, Part one II A.3.

230 *Supra*, note 18.

231 *Id*.

232 *Supra*, Part one, II.A.

233 207 MASS. G.L. § 11 says: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." This was part of the Uniform Marriage Evasion Act, withdrawn by the Commissioners on Uniform State Laws in 1943. The three states that maintain this uniform law, in addition to Massachusetts, include Illinois,

Thus, marriage license forms were rewritten so that only Massachusetts' residents or those intending to reside in Massachusetts would be able to be married and if couples do not actually intend to move to Massachusetts, their marriage "shall be null and void."[234]

3. An effort to repeal the 1913 statute was vetoed by the Governor.[235] [However, both New York and Rhode Island indicated they would respect Massachusetts marriages involving their state's same-sex couples, even if the latter could not marry at home.[236]

4. Therefore, in March 2006, the Massachusetts Supreme Court, while upholding the 1913 law barring gay-couples from states explicitly prohibiting gay marriage from marrying in Massachusetts returned the portion of the case involving New York and Rhode Island couples to the Massachusetts Superior Court, because it was unclear whether gay marriage was prohibited in New York and Rhode Island.

   a. Arguments were held in the Rhode Island Superior Court, by a resident lesbian couple who were denied a Massachusetts marriage license because they were nonresidents of the latter. They argued that the Massachusetts 1913 law prohibiting nonresidents from marrying there does not apply to Rhode Island residents, because the latter's laws do not "expressly prohibit" same-sex marriage.

   b. No date has been set for a hearing in New York.[237]

Wisconsin, and Vermont. 750 Ill. Comp. Stat. 5/217; Wis. Stat. Ann. § 765.04; Vt. Stat. Ann. Tit. 15, § 6. Louisiana repealed its law in the wake of *Loving v. Virginia*, 388 U.S. 1 (1967). 1972 La. Acts 171. In 1979, New Hampshire enacted a reverse evasion statute of its own. N.H. Rev. Stat. § 457:44.

234 N.Y. TIMES, April 25, 2004, pgs. 1 & 22.

235 HARTFORD COURANT, May 20, 2004, p. A.20. There is a pending suit to overturn this law, *Cote-Whitacre, el al v. Department of Public Health, et al*, Massachusetts Supreme Judicial Court No. SJC-09436, as a violation of the Privileges and Immunities clause of the United States Constitution (Art. IV, § 2). Briefs were submitted by Gay and Lesbian Advocates and Defenders [GLAD], and oral arguments heard in the fall of 2005, with a decision expected by mid-2006.

236 May 13, 2004 letter from New York's Solicitor General to Massachusetts Governor Romney and May 17, 2004 Statement of Rhode Island Attorney General Patrick Lynch. Connecticut and Vermont have left the question of how their states would recognize a Massachusetts marriage of their own residents unresolved. By statute, New Hampshire and Maine will not presently accord respect. N.H. REV. STAT. ANN. § 457:1-3; 19-A ME. REV. STAT. ANN., tit. 19-A, §§ 650, 701. Yet, even these adverse statutes do not definitively resolve the question of whether these states will accord respect to the marriage in whole or in part. (This footnote and certain related materials are from Plaintiffs'-Appellants' March 11, 2005 Brief in the pending *Cote-Whitacre* case, *supra*, note 183.)

237 HARTFORD COURANT, June 23, 2006, p. A2.

5. An analysis and its author's opinion of legal developments affecting gay marriage since the *Goodridge* [238] decision by the Massachusetts' Supreme Judicial Court stated that the latter "seemed to spark a torrent of voter hostility [, thus] 44 states have laws restricting marriage to a man and a woman and voters have written gay marriage bans into the constitutions of 19 states—16 since 2003."[239]

   a. The article pointed out the widespread feeling against gay marriage and the refusal in July 2006 of Washington's and New York's highest courts to recognize a right to same-sex marriage, calling it an issue for their legislatures, and the Eighth Circuit's upholding of Nebraska's ban on gay marriage, civil unions and domestic partnerships, as well as the Massachusetts Supreme Judicial Court declining to stop a voter initiative to outlaw gay marriage in 2008, together with the appearance of six constitutional amendments to restrict marriage to a man and a woman on the 2006 election ballot in various states, including Wisconsin and Virginia. The article's view is that most are expected to pass. Furthermore, it pointed out that six cases, most seeking a state constitutional right to gay marriage are now pending, many in states where courts are still thought to be sympathetic to gay rights, such as New Jersey and Maryland.

   b. The article concluded with the opinion of Jon Davidson, legal director of Lambda Legal Defense Fund (in New York) that losses in these cases will probably result in it being "a couple of decades" before there is a wide-spread right to gay marriage. However, attempts to enact constitutional amendments banning gay marriage failed in at least five states, including Florida. The article mentions California's marriage equality law was vetoed in 2005 and a a Pew Research Center poll released in early August 2006 shows that a majority of Americans support some same-sex legal rights, as do Connecticut, California, Massachusetts, Maryland, New Jersey and Vermont, as well as growing number of businesses and cities.

   c. The poll shows that since 1996, Americans' opposition to gay marriage has dropped from 65% to 56%, although it has grown in the last few months. Opponents hope that any court rulings favoring gay marriage will galvanize support for state or nationwide constitutional bans.[240]

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238 *Supra*, note 18.

239 U.S. News & World Reports, August 14-21, 2006, p. 32 et seq.

240 U.S. NEWS &WORLD REPORT, August 14-21, 2006.

d. Neither resolution by a federal constitutional amendment nor a U.S. Supreme Court decision seems likely in the near future. Thus, the current patchwork will continue, with few states allowing gay marriage or its near equivalent

C. Legalization of Same-Sex Marriage in the Netherlands, Belgium, Spain, Canada and Massachusetts led to The Breaking of the Dam that Held Back Gay Rights

What appears to be happening is similar to what occurs when a dam is breaking. First water pressure causes minor crumbling, then a few little chips of the masonry begin to fall, followed by huge concrete chunks. This allows high-pressure water to pour through the gaps. Finally the entire dam collapses.

D. Legalization of Same-Sex Marriages

1. In Europe, Canada and Massachusetts

First in The Netherlands, then in Belgium, most Canadian provinces, Massachusetts, Spain and then in all of Canada, legalization of same-sex marriage has spread.[241]

Same-sex marriages contracted in these countries or even Massachusetts and elsewhere will probably be recognized by few if any states. The federal DOMA[242] and comparable state DOMAs probably preclude most states from recognizing gay marriages.

A pending "law . . . would add 'sexual orientation' to the Canadian hate propaganda law, . . . , thus making public criticism of homosexuality a crime . . . [except] for religious opposition. . . .

"Since Canada has no First Amendment, anti-bias laws generally trump free speech and freedom of religion.

"In Sweden, sermons are explicitly covered by an anti-hate-speech law passed to protect homosexuals."[243]

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[241] *Supra*, notes 3, 4, 5 and 6. In *M.M. v .J.M. and Attorney General of Canada*, Court File No.: 04-FP-297613F1S (Nov. 11, 2004), two lesbians married in June 2003, shortly after the legalization of same-sex marriages by the Ontario Court of Appeals, separated five days later and sued for divorce. The Ontario Superior Court approved what is evidently the first same-sex divorce, ruling as unconstitutional the section of the Ontario divorce act that said that only spouses (defined as a man and a woman) can divorce.

[242] *Supra*, note 8.

[243] Excerpts from an article, "*Stomping on free speech*" in John Leo's column, *On Society*, U.S. NEWS & WORLD REPORT, April 19, 2004, p. 14. Mr. Leo expresses the opinion that "in the interest of fighting bias,

2. San Francisco

Between February 12 and March 11, 2004, San Francisco's Mayor, Gavin Newsom, permitted 4,037 marriage licenses to be issued, asserting that the state constitution prohibited discrimination in such matters. The California Supreme Court then enjoined further marriages or licenses, but 3,955 marriages had already taken place.

a. "Gays and lesbians from 46 states and eight countries were among the 4,037 same-sex couples married in San Francisco [starting 12 February 2004], but most of the newlyweds were Californian living outside the city, officials . . . reported on . . . [16 March 2004].

b. "A preliminary analysis of same-sex marriage applications in the month that licenses were issued to gay and lesbian couples shows that more than 91 percent of the weddings involved California residents. The California Supreme Court put an end to the marriages on March 11 pending a review in May or June of two lawsuits against the city.

c. "Though San Francisco contributed the most couples, [namely] 1,278, the number accounted for fewer than a third of the same-sex marriages. Taken together, cities in the San Francisco Bay Area accounted for about half of the marriages, with nearly 9 percent of the couples coming from nearby Oakland.

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d. "[M]ost of the newlyweds were highly educated, with nearly 69 percent possessing at least one college degree. More than three-quarters were 50 years old or younger, with the largest number 35 to 50. A majority of the couples, 57 percent, were lesbians. Newlyweds came from every state except Maine, Mississippi, West Virginia and Wyoming."

3. Invalidity of same-sex marriages elsewhere

a. California

(i) In *Lockyer v. City and County of San Francisco* and in *Barbara Lewis, et al v. Nancy Alfaro as County Clerk,*

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liberal groups reliably promote laws that limit First Amendment principles. The best defenders of free speech and freedom of religion are no longer on the left. They are found on the right."

etc.[244] the California Supreme Court unanimously ruled that all the marriages were "void and of no legal effect from their inception," because the Mayor had exceeded his authority and the marriages appeared to be in conflict with both the California and federal DOMAs. However, only five of the seven Justices agreed that the licenses already issued should be rendered void. A warning as to the uncertain legal effects of these licenses had appeared on them but many couples relied on them to obtain insurance and make other commitments as married couples. Thus, many questions will arise as to the legality of their actions.

(ii) Pending cases (which presumably will be consolidated) will ultimately give the California Supreme Court the chance to rule on the constitutionality of same-sex marriage. If found constitutional, it will mean that California's DOMA will then be void. In the meantime, the liberalization of California' Domestic Partnership law became effective January 1, 2005.[245]

(iii) A three-judge panel of the Ninth Circuit Court of Appeals ruled that two gay California men who were denied a marriage license should await the outcome of California litigation challenging that state's law banning gay marriages, which had already been declared invalid by a lower court judge in San Francisco. The latter decision was stayed for review by a California appeals court. Thus, the Ninth Circuit avoided whether denial of gays and lesbians having a right to marry was unconstitutional, leaving it to the state courts.[246]

(iv) California now limits revaluation of real property on the transfer between registered domestic partners for purposes of ad valorem taxation.[247]

b. <u>New York</u>

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[244] *Lockyer v. City and County of San Francisco*, Cal. Sup. Ct. ¶ 122923 and ¶ 122865 (Aug. 12, 2004).

[245] *Supra*, Part one, V.A.1. The California Legislature approved legalizing same-sex marriage; the first legislative body to so act, but Governor Schwarzenegger vetoed the bill. HARTFORD COURANT, September 2, 2005, p. A.8.

[246] OMAHA WORLD HERALD, May 6, 2006, p. 4A.

[247] 2005 CAL. STAT. 415.

New Paltz, New York's Mayor solemnized 25 same-sex marriages (on 27 February 2004), although no licenses had been issued. Criminal charges brought against him for so acting were reinstated by a County Court judge "who said public officials could not choose which laws to obey."[248]

"[T]he office of Gov. George E. Pataki reacted to the two dozen marriages [in New Paltz]. . . by asking the [New York] attorney general to seek a court order to halt the proceedings . . .

"But Attorney General Eliot Spitzer, a Democrat who is [a] . . . candidate for governor in 2006, rejected the efforts of the governor, a Republican.

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"Whether the couples . . . would be considered legally wed under state law—and entitled to the same benefits of opposite-sex married couples—is likely to be decided by the courts.

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"[Seventy-two] gay and lesbian couples . . . [tried to obtain marriage licenses, but] received letters saying that [New York] state laws dating from 1896 prohibited same-sex marriage.

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"The applicants were given instructions on how to apply for domestic partnership status.

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"[New York City's Mayor Bloomberg] has a record of supporting civil rights for gays; he has signed a law that recognizes gay marriages and civil unions sanctioned in jurisdictions outside New York, and has also gone on record as opposing the constitutional amendment President Bush has proposed. But he has refused to reveal his own opinion on gay marriage, saying only that he will uphold the laws."[249]

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[248] N.Y. TIMES, February 3, 2005, p. 27.

[249] N.Y. TIMES, March 5, 2004, p. B.1 and 5.

A February 4, 2005, ruling applicable only to New York City held a state law "that effectively denied gay couples the right to marry violated the due process and equal protection clauses of the state constitution.[250] As previously mentioned, the N.Y. Court of Appeals has ruled against gay marriage.[251] Governor Pataki believes any changes to state marriage "laws should be made through the legislative process, not by a judge or local officials."[252]

At least nine cities or towns in New York offer domestic partnership registries.[253] New York City and the municipalities of Brighton, Buffalo, East Hampton, Ithaca, Nyack and Rochester will recognize for all municipal purposes only validly created same-sex marriage.[254] But they may not file New York income tax returns as married because their filing status must be the same as on their federal returns. [255]

c. <u>Oregon</u>

About 3,000 marriage licenses were issued to gay couples on March 3 and March 4, 2004 in Portland, Oregon. "Democratic Gov. Ted Kulongoski said the marriages may not be legal and requested a legal opinion from Oregon's attorney general.[256]

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[250] N.Y. TIMES, February 3, 2005, p. 1 and B.4. The Appellate Division reversed saying "that the state had a legitimate and rational interest in promoting heterosexual marriage.

"Mayor Michael Bloomberg reiterated yesterday that he was personally in favor of permitting same-sex marriage, and that the city had appealed the lower court decision only as a way of clarifying the law." N.Y. TIMES, December 9, 2005, p. B.3.

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Mayor Michael Bloomberg reiterated yesterday that he was personally in favor of permitting same-sex marriage, and that the city had appealed the lower court decision only as a way of clarifying the law.

[251] *Supra*, note 33.

[252] N.Y. TIMES, February 3, 2005, p. B.4.

[253] The Cities of Albany, Brighton, New York and Rochester; the Towns of Eastchester and Greenburgh; and the Counties of Albany, Tompkins and Westchester. *See* New York State Bar Association, *Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples*, Oct. 2004, at 238.

[254] Dorn, *Same-Sex Marriage Under New York Law*, 78 N.Y. State B.J. 40, 43 (January 2006).

[255] *See* Andy Humm, *Gays Denied Married Tax Status; Attorney Gen. Eliot Spitzer Won't Intervene in State Finance Decision*, Gay City News, Jan. 31, 2005. Two petitions pending before the New York State Department of Taxation and Finance seek official guidance.

[256] HARTFORD COURANT, March 5, 2004, p. A.2.

Although an Oregon court ordered that no more marriage licenses be issued to same-sex couples, it has ordered "Oregon to recognize the [3,022] licenses already granted . . . . [This is] the first time in . . . [this country] that a judge has recognized previously solemnized gay marriages.[257]

"The county [in which Portland is located is] . . . the only county in the nation to sanction gay marriage [prior to] May 17, 2004. . . ."[258] *Li v. State*,[259] held that marriage in Oregon is limited to opposite-sex couples; marriage licenses issued to same-sex ones were done without authority and thus void at the time they were issued. *Belgarde v. Linn*[260] held in light of the *Li*[261] case, there is no authority to issue marriage licenses to same-sex couples.

d. <u>The overall situation</u>

(i) "[O]fficials in California, New Mexico, New York and Oregon have allowed same-sex marriages [but since then these states' courts have ruled against it], Massachusetts has signaled its approval, President Bush has called for a constitutional amendment to ban gay marriage and law makers, and conservative and gay-rights groups have joined a debate that has roiled the nation.[262]

(ii) A U.S.A. Today/CNN/Gallup Poll found that "[a] majority of Americans favor legalizing civil unions for gay couples as an alternative to same-sex marriage. . . .

"About six in 10 of Americans oppose recognizing same-sex marriages. That level has changed little since 1999.

"Half favor a constitutional amendment banning gay marriage. That level of support is down slightly from 53% shortly before

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257 HARTFORD COURANT, April 21, 2004, p. A.3.

258 N.Y. TIMES, April 18, 2004 p. 18.

259 *Li v. State*, 338 Or. 376, 110 P.3d 91 (April 14, 2005).

260 *Belgarde v. Linn*, 205 Or. App. 433 (May 3, 2006).

261 *Supra*, note 259.

262 N.Y. TIMES, March 5, 2004, p. B.1 and 5.

Bush endorsed an amendment on February 24 [2004.[263] In his February 2, 2005 State of the Union speech, President Bush again called for such an amendment.]

(iii) Some officials in California, New Mexico, New York and Oregon have allowed same-sex marriages. President Bush has called for a constitutional amendment to ban them. Lawmakers, conservative and gay-rights groups have joined a debate that has roiled the nation.[264] Thus, at least for the present, same-sex marriages contracted in these jurisdictions will be recognized by few if any other states. The federal and comparable state DOMAs[265] probably preclude most states from recognizing gay marriages.

(iv) A U.S.A. Today/CNN/Gallup Poll found that "[a] majority of Americans favor legalizing civil unions for gay couples as an alternative to same-sex marriage. . . . but about six in 10. . . Americans oppose recognizing same-sex marriages. That level has changed little since 1999.

"Half [the country] favor a constitutional amendment banning gay marriage. That level of support is down slightly from 53% shortly before Bush endorsed an amendment on February 24 [,2004.[266] In his February 2, 2005 State of the Union speech, President Bush again called for such an amendment.]

(v) A Pew Research Center survey conducted from July 6 to July 19, 2006 generalized that Americans "are conservative in opposing gay marriage and gay adoption, liberal in favoring embryonic stem cell research, and a little of both on abortion."

(vi) The survey found that 56% of Americans oppose same-sex marriage and 35% favor it; hardly much of a change over recent years, with religion appearing to be the big factor. Seventy-eight percent of white Evangelical Protestants, 74% of black Protestants oppose same-sex marriage, as do 58% of white, non-Hispanic Catholics. Mainline Protestants are almost split evenly, while only

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263 U.S.A. TODAY, April 2004.

264 N.Y. TIMES, March 5, 2004, P. B1 and 5. Governor Arnold Schwarzenegger vetoed the bill saying it "contravened Proposition 22, approved by voters in 2000 and made valid a marriage only between a man and a woman." N.Y. TIMES, September 30, 2005.

265 *Supra,* IV.A. and B. as well as text between notes 8 and 9.

266 U.S.A. TODAY, April 2004.

those identified by the researcher as "secular" favor same-sex marriage by 63% to 27%.

(vii) Fifty-four to 42% of the Americans now support civil unions that would provide gay and lesbian couples many of the same rights as married ones. Furthermore, Americans are less likely to think that sexual orientation can be changed than they were a few years ago and adults under 30 are much more supportive of same-sex marriage than are their elders. The support is from mainline Protestants, Catholics and non-religious people, with white Evangelicals constituting the persistent opposition.

(viii) The Pew survey found that people were almost evenly split on whether same-sex marriage should be resolved at the national rather than the state level. Over 40% of same-sex marriage opponents said that amending the constitution was a bad way to do it, while a similar percentage of the supporters questioned the wisdom of pushing hard for its legalization, given the risk of an anti-gay backlash.

(ix) The survey showed that conservatives were almost overwhelmingly opposed to same-sex marriage, while liberal and moderate Republicans were similarly opposed, but not so strongly.

(x) Two-thirds of liberal Democrats favored same-sex marriage, while 59% of conservative and moderate Democrats opposed it.[267]

(xi) Any predictions of future developments must consider the increasing political strength of the gay and lesbian community. Major legal controversies have already arisen over the Massachusetts' Supreme Judicial Court's and the San Francisco and New Paltz, New York, Mayors' decisions and others in New Mexico, Oregon, and New Jersey and New York City that permit gay marriage.

(xii) Nevertheless, sooner or later, at least to some extent, political pressures will probably overcome obstacles in the existing legal structure and opposition of the still very influential religious fundamentalists and other social conservatives. But recognition and general acceptance of same-sex marriage in the United States, if it occurs at all, will take many years. Instead, gay couples may eventually be accorded most of the property rights and tax benefits of marriage, without expanding the latter's definition to include same-sex unions.

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[267] N.Y. TIMES, August 5, 2006, article on Religion by Peter Steinfels, p. A11.

(xiii) The less controversial concepts of domestic partnerships and civil unions may be the way gay relationships will evolve. But eventually, gay marriages will probably become legal in Connecticut and a few other states. Meanwhile, an increasing number of rights are being given domestic partners. The legal theories underlying civil unions in Vermont and Connecticut, by going beyond the domestic partnership concept, broke new legal ground for same-sex relationships. The special legal status of civil unions, with nearly all the rights of marriage, except its federal tax advantages, went beyond existing law in extending "spousal" support to same-sex couples living together.

(xiv) Meanwhile, many same-sex couples will need estate planning.

VII. CONCLUSION TO LEGAL STATUS

A. Recognition of Contract Rights of Unmarried Cohabitants

Since the mid-1970s there has been a trend towards recognizing implied (as well as express) contract rights of unmarried cohabitants, although some states, such as New York, still only recognize an express written agreement in such a relationship. Both opposite and same-sex couples considering a long-term living together arrangement should make an express contract, as should couples entering into domestic partnerships and civil unions.

B. Domestic Partnerships, Civil Unions and Gay Marriage

The controversial concepts of domestic partnerships, civil unions and possibly gay marriages may be the way gay relationships will evolve. An increasing number of rights are being given domestic partners, but the legal theories underlying civil unions in Vermont, by going beyond the domestic partnership concept, broke new legal ground for same-sex relationships. Their special legal status, with nearly all the rights of marriage, except its federal tax advantages, for same-sex couples living together went beyond existing law in extending "spousal" support to persons previously in gay relationships.

C. DOMA is only Violated by Same-Sex Marriage

Vermont's and Connecticut's civil union laws do not violate the federal DOMA, but same-sex marriages celebrated elsewhere in the United States violate both it and other states' DOMA laws. Vermont's law, like the federal DOMA, also defines marriage as between one woman and one man. Since the federal DOMA allows states to ignore same-sex marriages, there will be suits by couples joined in Vermont civil unions to enforce their rights in other states under the full faith and credit clause of the federal constitution. The same type of litigation will surely be

brought by same-sex couples married in Massachusetts after 16 May 2004 and those married elsewhere in the United States since late February 2004.

D. Suits by Couples in Foreign Same-Sex Marriages

Suits will arise by couples married under foreign same-sex marriage laws may also occur, with these couples arguing for recognition of their marriage under principles of comity. Thus, a major controversy over same-sex marriage has begun and any predictions of future developments in the United States and elsewhere must consider the increasing political strength of the gay and lesbian community.

PART TWO

ESTATE PLANNING CONSIDERATIONS FOR UNMARRIED SAME OR OPPOSITE SEX COHABITANTS*

I. ESTATE PLANNING FOR COHABITATING UNMARRIED COUPLES SHOULD INCLUDE A WRITTEN PARTNERSHIP CONTRACT (A COHABITATION AGREEMENT) EXPRESSING THE PARTIES' INTENTIONS, SOMEWHAT SIMILAR TO BUT BROADER THAN AN ANTENUPTIAL OR POSTNUPTIAL AGREEMENT

A. In a Number of Ways, Estate Planning For Cohabiting Unmarried Heterosexual or Same-Sex Couples Is Quite Similar To Planning For Married Ones.

1. No state or federal benefits for unmarried couples.

However, except for parties in a Vermont or Connecticut civil union, unmarried heterosexual or same-sex couples do not have the state law priority rights and state and federal tax benefits available to spouses. Even parties in civil unions do not have the federal benefits of married couples. Furthermore, unmarried couples, particularly if of the same sex, "need to document the . . . existence of their relationships. Nothing can be taken for granted [since . . . the law provides little protection for persons involved in non-traditional relationships."[268]

2. No uniformity in the law

While only a few states recognize some form of domestic partnership, gay marriage or civil union "those measures are creating a patchwork of laws and court decisions with little uniformity. The issue is so fluid that no one can predict whether any consensus will be reached among the states or how state actions will be affected by a proposed amendment to the U.S. Constitution banning any form of same-sex marriage.[269] Such an amendment banning same-sex marriage was defeated in the United States Senate in 2004 on a procedural vote. A House vote of 227 to 186 in favor

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* This part of the outline is an updated and revised version of an article originally published in The Practical Tax Lawyer, 18 THE PRACTICAL TAX LAWYER 55 (Winter 2004) and subsequently updated through October 2, 2006. See asterisked footnote at bottom of the cover page to this outline.

[268] Joan M. Burda, *Estate Planning for Same-Sex Couples*, p. 2, American Bar Association's General Practice, Solo and Small Firm Section (July 2004). The book has extensive material and 22 forms on this subject. Portions of some of the suggestions that have been used in a few of the later parts of this article.

[269] Jill Schachner Chanen, *The Changing Face of Gay Legal Issues,"* 90 ABA JOURNAL 47, 48, July 2004.

of the amendment fell far short of the 290 votes (2/3 of the House) required to adopt it."[270] President Bush's January 20, 2005 State of the Union address again advocated it.

3. Planning similarities

Nonetheless, planning for unmarried couples may resemble that for spouses where both parties are parents of all their children. It may also be similar to planning for remarried couples, one or both of whom have children from prior marriages.[271] Proper planning for cohabitating unmarried couples buying or owning real estate may give them some of the benefits available to their married counterparts acquiring or holding title to land.

B. Uncertain Direction of the Law

"The growing uncertainty about the direction of the law on this issue is making it increasingly difficult for lawyers to advise clients in same-sex domestic partnerships [civil unions or marriage] on just what their rights are and what steps they should take to protect them."[272]

C. Married Couples' Advantages that are not Available to the Unmarried

1. Joint federal tax return filing and most likely the marital deduction[273]

Neither of these advantages are available, but there is a remote possibility of obtaining the marital deduction.

2. Pensions

The advantages married couples have in dealing with IRAs and qualified retirement plans are not available for unmarried cohabitants. At the death of the first cohabitant, the full value of his plan is included in his estate. If the surviving cohabitant is the beneficiary, she may either request regular distributions for her life or withdraw the entire proceeds within five years after the decedent's death. The distributions are taxable to her when received, while a surviving spouse may roll over the plan proceeds, deferring distribution until she is 70, so its amount will continue to receive tax sheltered growth.

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270 N.Y. TIMES, October 1, 2004.

271 This paragraph is paraphrased from Vaselaney, *supra*, note 53.

272 *Supra.*, note 268.

273 *Infra*, Part three, II.A-C and VIII G.

3. Divorces

Alimony can be suspended, reduced or terminated if a divorcee cohabits with another person. Couples who have entered into a civil union or who are just planning to cohabit following a divorce of one or both of them should be warned that under C.G.S.A. 46b-86b, the payor of alimony may reduce, suspend or terminate it to a payee who is living with another person. This may result in reduction or even elimination of alimony, unless a provision to the contrary appears in a separation agreement incorporated in the prior divorce decree.[274]

D. Estate Planning for Both Cohabitants and Dealing with their Potential Conflicts of Interest

Estate planning for married or unmarried couples, if limited to disposition of assets upon death or possible future incapacity, is unlikely to lead to any conflicts of interest. But these may arise when issues of current ownership and transfers are being considered.

1. Types of Representation

a. Joint representation of the couple by the same attorney

The parties can decide whether to have joint representation, in which the same attorney may prepare an estate plan for both cohabitants (whether or not they are married), warning them that any disclosure made by one of them will be told to the other.

b. Separate representation of each party by the same attorney

A far less frequently used type of representation is where the attorney represents both parties separately, agreeing to keep each of their confidences from the other (as well as from everyone else, the usual practice). The problem with this "Chinese wall" type of representation in the mind of the attorney doing separate representation is that he may learn something from one of the parties that affects the work he is doing for the other. Furthermore, the risk of breaching one or both of the clients' confidentiality in

[274] *See Marriage of Bower*, 117 Cal. Rptr. 2d 520 (Ct. App. 2002); *Marriage of Thornton*, 115 Cal. Rptr. 2d 380 (Ct. App. 2002); *Marriage of Parsons*, 30 P.3d 868 (Colo. Ct. App. 2001); *Panitz v. Panitz*, 799 A.2d 452 (Md. Ct. Spec. App. 2002) and 2002 WL 206511 (Ohio Ct. App. Jan. 30, 2002). These cases are from p. 6 of an outline on *Recent Developments* by Max Gutierrez, Jr., one of the professional program papers presented at the September 24, 2003 Santiago, Chile, meeting of The International Academy of Estate and Trust Law.

this type of representation may hinder the attorney from representing either of them effectively.

c. Separate representation where each party has a different attorney

Separate representation of a couple where each one of them has a different attorney in a different firm can seriously limit both attorneys' abilities to plan for the couple; neither has all the information needed from both parties. However, if the latter are unwilling to share their confidences with each other, then separate representation of each is probably the best, but may be the costliest solution.

2. Representation of both parties by the same attorney (joint representation)

The most common form of representing a married couple or unmarried cohabitants is joint representation. It is usually fairly clear that the common objectives of the parties take precedence over any conflicting interests. But, both clients must agree to share information between them and the attorney, thus substantially eliminating any risk that the attorney will violate the duty of confidentiality.

3. The engagement letter and questionnaire

Following the initial meeting, during which the various types of representation are discussed or perhaps only the joint representation is explained in any detail, the type of representation should be set forth in the engagement letter. Ideally, this should be countersigned by both clients, even though in many cases involving married couples, only the husband comes in to see the attorney initially.

The couple should fill out a questionnaire containing all the usual questions about their wishes, assets and liabilities, including how they hold title to real estate. Furthermore, the legal consequences of the latter should be explained to them. (See ¶ 5, below.)

4. Where separate counsel is needed

Since a living together agreement is a general partnership between same or opposite sex couples, like any partnership agreement, the same attorney may represent both parties.

a. Waivers of conflicts of interest and need to obtain consents to financial disclosure

However, if the same attorney represents both parties, he should obtain written waivers of conflicts of interest and, in the case of unmarried couples, he should obtain consents for financial disclosure from each party, because financial information is confidential as between unmarried people.

b. Desirability of separate counsel if feasible

Nonetheless, it would be better to have separate counsel for each party, although this may not be feasible, any more than it is in the preparation of wills, trusts, etc., for married or unmarried couples.

c. Acting as counsel for more than one party to any partnership agreement could lead to the representation of conflicting interests.

It may create potential ethical problems, possibly resulting in unenforceability of the agreement and a malpractice claim.

d. If the agreement is a pre-marital, post marital or a separation one, representing both parties will almost always result in its being attacked in later litigation.

Therefore, separate counsel for each party should negotiate the terms of any ante-nuptial, postnuptial or separation agreements. This may avoid possible later claims of fraud, duress and invalidity of this type of agreement.

5. Holding title to real estate

a. Sole ownership

Sole ownership of property is where title is in the name of only one person. This gives a certain amount of protection to the owner against future claims of a spouse or an unmarried cohabitant.

b. Tenancy in common

A tenancy in common is similar to a partnership in which each owner has a right to possess the entire property, while owning either a specified share or a fractional interest; one-half, if there are only two owners. If the deed does not specify otherwise, each one owns an equal share. This is the usual case.

(i) At the death of one co-owner of a tenancy in common, his share passes through his probate estate. Thus, unless the survivor is a beneficiary of the latter (either by will or intestacy), a new co-tenant will become a tenant in common with the survivor. Each co-tenant may freely dispose of his interest by sale, mortgage, devise or otherwise, without anyone else's consent.

(ii) Tenancy in common is presumed if the owners are unmarried. Thus, unmarried people acquiring real property or a co-op apartment are assumed to be taking title to it as tenants in common, unless the deed specifies that they are taking it as joint tenants with right of survivorship.

c. Joint tenancy with right of survivorship[275]

Although a joint tenancy is somewhat similar to a tenancy in common, there is a presumption that where both names appear on the title to property held by a married couple, a right of survivorship exists between them. This presumption does not apply to unmarried persons. For them to hold as joint tenants, the words "with a right of survivorship" must be used in their title.

(i) In both a joint tenancy with right of survivorship and a tenancy in common there may be more than two owners, although more than two owners of the former is rare and can create problems in transferring or mortgaging the property. In a joint tenancy (but not in a tenancy in common) when one joint tenant dies, his interest passes directly to the surviving joint tenant or tenants.

(ii) A creditor obtaining a judgment against the co-owner of a joint tenancy can obtain a court order of partition and then force the sale of the debtor's interest. Then, the remaining co-tenant will be in a tenancy in common with the creditor.

(iii) One joint tenant can convert the joint tenancy to a tenancy in common by conveying his interest, even by deeding it to himself, without the consent of the other joint tenant (or tenants) being necessary.

(iv) A tenancy in common may be advantageous for unmarried partners who both want to own their home.

[275] Joint tenancy with right of survivorship is a form of ownership disfavored by this author.

d. Tenancies by the entirety

A tenancy by the entireties,[276] is not available in Connecticut, although it exists in New York and Massachusetts, among other states. Only persons legally married to each other at the time of acquisition of the property may take title this way. In most jurisdictions it applies only to real estate, but in some (such as New York) a co-op apartment may be held in that manner.

(i) In a tenancy by the entirety, each spouse owns 100% of the property and has the right to possess it, subject to the similar right of the other spouse. As in the case of a joint tenancy with right of survivorship, at the death of one party, the survivor automatically becomes the sole owner. Theoretically, this is based on the doctrine that the survivor always had a 100% ownership interest and is not taking by right of survivorship, as would the survivor of a joint tenancy.

(ii) Under the laws of most jurisdictions that permit married couples to hold property in tenancies by the entirety, there is an assumption that title is being taken that way, unless the deed expressly provides to the contrary. Unlike a joint tenant with right of survivorship, each spouse in a tenancy by the entirety simultaneously owns an entire interest in the property; thus it is next to impossible for a creditor to obtain an order of partition.

e. Specify how title is held in the deed

It is wise to specify how title is to be held, even in a deed to a married couple. Otherwise, such deeds are automatically assumed, under the laws of some states, to be conveyances into joint tenancies with right of survivorship. In other states, they may be assumed to be a conveyance into a tenancy in common or even a tenancy by the entireties.

6. Federal tax consequences

a. Gift tax problems *may* arise on transfers into or out of joint tenancies or tenancies by the entirety.

b. Under the estate tax, at the death of an unmarried joint tenant, there is a presumption that all contributions to acquire the joint property

[276] Tenancy by the entireties is also a form of ownership disfavored by the author.

were made by the deceased joint tenant.[277] Thus, for federal estate tax purposes, there will be inclusion of the entire value of the joint property in the first decedent's estate, unless the survivor can prove contribution to rebut the presumption.

7. Cohabitation agreements for any two people living together

As previously mentioned, both same and even opposite sex couples living together should have a written contract (a cohabitation agreement) like a partnership agreement, expressing their intentions. (*See* Appendix A for a sample)

a. People in civil unions, domestic partnerships and others in a loving relationship, should have an agreement similar in nature but broader than an antenuptial or postnuptial contract.

While it would obviously be desirable to have the agreement prepared and executed before entering into such a relationship, ordinarily it will almost always be prepared and executed some time after inception of the relationship, especially if it is merely a living together agreement between roommates.

b. Important for roommates and housesharers

Such an agreement is not only important for same or opposite sex unmarried persons in a loving relationship with each other, but should also be executed by two or more housesharers, whether as co-owners, landlord and tenant or co-tenants to deal with the shared use of common areas and activities.

c. It could have terms somewhat similar to contracts governing owners of cooperative apartments or condominium units, but considerably broader.

These include dealing with parking, storage, payment of utility bills, a right of first refusal for each party (where they both are part owners), dividing costs, sharing meals, specifying who will shop, cook and clean up, etc., as well as rules banning, restricting or governing smoking, visitors, and parties, privacy, security, phone usage, laundry, furniture and pets. Provisions dealing with dispute

[277] § 2040(a).

resolution should include the possibility of mediation or arbitration.[278]

d. **The terms should deal with support, property, inheritance and parental rights**.

These should be in a form whose validity will be recognized by the state in which the couple resides.

e. **The parties and their current residence or residences should be identified.**

They should be described in the agreement as "partners," domestic partners," or "cohabitants." Prudence dictates that the parties not call themselves "lovers."

f. **The consideration for the contract should be stated and may be based on business or even homemaking services.**

In some states,[279] such consideration is valid. However, no statement should be made that they are living together as husband and wife, to avoid the doctrine that the consideration for their contract is meretricious sexual services.

g. **But, merely holding themselves out as spouses does not necessarily imply sexual services**.

In most states consideration based on sexual services between an unmarried couple will invalidate at least part, if not all of any such agreement.[280] Thus, a severability provision should be in the agreement so that if one or more provisions are invalidated (such

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[278] The above material is based on Margaret Graham Tebo's article, *Home Bound*, 90 ABA J. 24 (August 2004). The agreement described in this article was a 45-page one drafted by Clackamas, Oregon Attorney Veronica Schnidrig for two women, each of whom own half a house (presumably as tenants in common), thus sharing the house, but not their personal lives. The living together agreement "cobbled together parts of real estate contracts, leases, joint ventures and security agreements, in addition to [containing]. . . whole sections on other matters."

[279] *See Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986) and *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), *rehabilitative award reversed*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (2d Dist. 1981).

[280] Case law in a few states, including Illinois and Ohio, invalidates contracts for which the consideration is a person's sexual services. In *Jones v. Estate of Daly*, 122 Cal. App. 3d 500 (1981), a written agreement explicitly referring to sex in exchange for assets was held to be an unenforceable agreement for prostitution.

as a reference to sexual services), the rest of the contract will be enforced.[281]

h. **<u>If the couple does not expect to marry</u>** or have a common-law marriage in a state still recognizing one,[282] their living together agreement should disclaim any intent that a legally recognized marriage arises from their cohabitation.[283] Otherwise, their agreement may be unenforceable because it violates public policy.

i. **<u>Financial provisions should include disclosure of all income and assets of both parties, including both joint and separate ones; asset schedules should be annexed.</u>**

The agreement should also deal with their interests in each other's earnings and other income, as well as their property acquired by purchase, gift or inheritance before or during their relationship, their debts owed both before and incurred during their relationship, the understanding they have of how to share their living expenses and household responsibilities, as well as bill paying and tax consequences. This should preclude any court from later discerning some assumed intent or implied agreements. Separate schedules of each party's property and any joint property should be annexed.

j. **<u>The parties' responsibilities and obligations to each other and any specific duties to be assumed by either party should be stated</u>**.

If they live in a jurisdiction where no support obligation exists between unmarried cohabitants, any such obligation should either be specified or waived, both during and after the relationship, while any intentions for post-separation support should be stated. Until recently, absent an enforceable contract for post-separation support, no entitlement to that existed.[284]

k. **<u>Property ownership</u>**

Unless all property is kept separate, with provisions made for any interest in the appreciation of one cohabitant's property resulting

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281 This occurred in *Whorton v. Dillingham*, 202 Cal. App. 3d 447 (1988).

282 *See* Part one III.B.2.

283 *See* Cantwell, *Estate Planning for Playmates, Grandmothers and Other Sinners*, the transcript of a talk delivered at the Denver Estate Planning Council on January 25, 1979.

284 *See*, for example, *Davis v. Misiano*, 373 Mass. 261, 366 N.E.2d 752 (1977).

from the other's services or by acquisitions from third parties, there should be a stipulation in the agreement about commingled property and a statement as to the meaning of any change in ownership or purchase of joint property during the relationship.

l. <u>Division of property on death or other termination of the relationship</u>

Intentions about division of property if the relationship terminates or one of the partners dies (while the cohabitants are still living together) should be expressed, both in the contract and in the couples' wills. This should include valuation procedure. California, Washington, Michigan and New Hampshire will enforce such express contracts at death, even between people in a meretricious relationship.[285]

m. <u>Other matters to be included in the partnership agreement</u>

These should be confidentiality and privacy terms, grant of signature authority by each party to the other, provisions about recordkeeping, investment strategy, insurance, handling household expenses, dispute resolution (whether mediation, nonbinding or binding arbitration or any combination of them is to apply), whether counseling is to be obtained before termination of the relationship, remedies for defaults, authorization giving power over one another's health care decisions and the responsibility for domestic services.

n. "<u>Collaborative law is another vehicle available to the parties.</u>

"This concept [involves a stipulation] . . . that the attorneys representing the individual parties agree to work on resolving . . . [a dissolution of their relationship] outside of court. The parties [must] agree not to file legal action against each other. If an agreement is not possible, the attorneys withdraw and the parties must retain new counsel and start over again. Collaborative law is not a widely used method of resolution, but it is a growing area of practice in family law."[286]

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[285] *Cline v. Festerson*, 128 Cal. App. 2d 380, 275 P.2d 149 (1954); *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974); *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 595 (1973) and N.H. Rev. Stat. Ann. § 457:39, which provides that unmarried cohabitation for three years before death gives the survivor rights as a spouse.

[286] From Burda, *supra*, note 268, page 24. Burda's note 6 (on her book's page 25) refers to Pauline Tesler, *Collaborative Law: Achieving Effective Resolution In Divorce Without Ligitation* (ABA, 2001) for an explanation of the benefits of collaborative law and how it can benefit attorneys and their clients.

8. Wills, trusts and powers of attorney, etc.

Besides a living together agreement, as in any estate planning, wills, possibly trusts and durable powers of attorney, both for financial and health care purposes, should be prepared for and executed by the couple. Provisions for disposition of remains and anatomical gifts should also be put into appropriate documents. All of these items should be referred to in the agreement.

a. Unmarried couples should consider making each other the beneficiaries of their wills and trusts.

This should be done unless they have other beneficiaries in mind or are willing to have applicable intestacy laws apply. In the latter case, their estates will pass to their parents, siblings or other blood relatives. The court will appoint an administrator, probably requiring him to post a bond.

b. Provisions of each party's will in favor of his partner should probably be contingent on continuation of the couple's relationship.

Thus, for a partner to be a beneficiary, he must remain as such. Therefore, the term "partner" should be defined as "the person living with me at my death."[287] Consider whether the definition should state that a separation may not disqualify the bequest, unless due to domestic disharmony. A temporary relocation of one partner's job or the confinement of one partner to a hospital or extended care facility should not constitute a separation. If a fiduciary other than the surviving partner is named, that person or institution could determine if the surviving partner qualified at the first partner's death.

c. Broadly and carefully define the class of beneficiaries.

The class of beneficiaries described as the partners' "children", "descendants" or "issue" should be carefully defined. It should be broad enough to include all children whom the partners intend to benefit, even if not their own biological ones. Using the children's names is wise. The class of "children" could also include "someone born to or adopted by my partner during the period that we have been partners" and the class of descendants should be

[287] Portions of the above material are a partial revision of an article by Gail E. Cohen, *Estate Planning for the Unique Needs of Unmarried Partners*, 30 *Estate Planning*, No. 4, 188-191 (April 2003).

defined to include "children and more remote descendants of my children."

E. Children and Pets

1. If the parties contemplate having children, this should be mentioned in both the cohabitation agreement and a separate agreement.[288]

Even if children are not contemplated, provisions concerning their custody, visitation rights and the rearing of any possibly unplanned children should be included in the agreement. There should be similar applicable provisions for any pets.

2. A child living with an unmarried couple may be a child of both of them, one of them or possibly resulting from an adoption by one or both.

a. A child's rights are limited to receiving benefits only from his legal parent.

Except for children born to or adopted by both cohabitants, only one is the legal parent. A child has no right to inherit from the nonlegal parent nor to receive social security, health or other insurance benefits from a non-legal parent's account or employer, nor can the nonlegal parent consent to needed emergency medical treatment or even visit the child in the hospital. However, when questions of this nature are before a court, it will try to decide on the basis of the child's best interest. Other such rights include being a fiduciary of the legal parent's estate, suing for his wrongful death, but not maintaining a relationship with the nonlegal parent, nor receiving financial support from her during the child's minority.

b. Second parent adoptions and standby guardianship

To avoid unfortunate events, such as having the child placed in a foster home or with unfamiliar relatives at the death of the legal parent, a second parent adoption, where available under state law, could be considered, as well as appointment by the legal parent of a standby guardian. A standby guardianship can be a bridge until the decedent's will is probated. New York and Illinois permit such appointment and will grant immediate custody of the child to that person. Such an appointment should be in a separate document, in

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[288] *See* Gutierrez, *Estate Planning for the Unmarried Cohabitant*, 13 MIAMI INST. ON EST. PLAN. 1979, ¶ 1603.1.

addition to the appointment of a guardian in the will of the legal parent.[289]

c. <u>California's Supreme Court has expanded same-sex parental rights</u>

The California Supreme Court ruled that "both members of a lesbian couple who planned for and raise a child born to either of them should be considered the child's mothers even after their relationship ends.[290]

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"The [3] cases involved a request for child support, a petition to establish parental rights and an attack on a lower court ruling issued before a child's birth that the child should have two women listed as parents on her birth certificate.

"[The California Supreme Court held it could] perceive no reason why both parents of a child cannot be women."

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"Courts in about half the states have allowed members of same-sex couples to adopt their partners' children. [California's] decisions considered the separate question of whether the law could require former members of such couples to assume parental rights and obligations.

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"The decisions broke new ground, advocates on both sides agreed. [Thus the court recognized] that in the absence of an adoption, and even in the absence in some instances of a domestic partnership agreement, . . . two men or two women could be the full legal parents of a child born through assisted reproduction."

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"The decisions may . . . have implications for same-sex marriage in California. The question of whether the state Constitution requires

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[289] An extensive description of the above and other issues raised by children of an unmarried couple, especially if the couple are either gay or lesbian, is covered in Burda, Chapter 6, pages 63-72, *supra*, note 268.

[290] In *Elisa B. v. Emily B.* (August 22, 2005, S126912, __ Cal. 4th __); *K.M. v. E.G.*, (August 22, 2005, S125643, __ Cal. 4th __) and *Kristine H. v. Lisa R.*, (August 22, 2005, S126945, __Cal. 4th __).

the recognition of such marriages is before a state appeals court. [It appears that the Supreme Court may recognize gay marriage when these cases reach it.]

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". . . [O]ne of the three decisions . . . seemed to leave open the possibility of an appeal to the United States Supreme Court . . . . [A] woman . . . who provided an egg to her lesbian partner [who then] gave birth to twin girls . . . had signed a form giving up her claims to any child at the time of the donation but, after the couple broke up, filed a lawsuit to establish her parental rights. [A 14th Amendment equal protection issue may exist here, because a California] law . . . says a man who donates his semen to impregnate a woman who is not his wife is not a legal father.

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"The other two decisions . . . did not involve donated eggs. [One involved payment of] child support to [a] former partner, who gave birth to twins while the women were a couple.

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"In the third decision, the court ruled that a woman . . . did not have the right to challenge an earlier decision that granted her former lesbian partner parental rights, including putting her name on the birth certificate [of her child] in the space provided for 'father.' The court based its decision on [plaintiff's] participation in the earlier proceeding.

"Lawyers on the losing sides of the decisions said that the rulings would give rise to confusion between competing state laws, with someone said to be parent in California, for instance, not considered one if she moved to Texas."[291]

3. <u>Shared-parenting agreements</u>

While a shared-parenting agreement cannot prevent an acrimonious split, it will make the parties think about the children's' best interests during a time when the relationship is going well. It should include:

"a. Appointment of the biological parent's partner as the child's guardian. This is especially important since most courts will adhere to the mother's wishes.

[291] N.Y. TIMES, August 23, 2005, page A.10.

"b. A clause granting power to the nonbiological parent to approve medical treatment for the child. This avoids delays in an emergency when the child requires care and medical personnel balk because 'you're not the mother.' This clause serves the child's health and welfare.

"c. Co-parenting clauses that provide for the care of the child; and

"d. A provision that reflects the parties' decision concerning custody, visitation, and support.

"In some cases, the identity of the other biological parent is known and that person intends to be involved in the child's life. It is important to discuss this scenario with [the parties]. Include the provisions for such involvement in a written document that will be signed by all affected parties.

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"The enforcement of such an agreement is not assured. Many jurisdictions will not allow a custodial parent to waive future child support. Also, the donor may return, at a later date, to demand parenting time with the child. This is all the more reason to ensure that . . . all parties [have separate counsel].

"In states that permit second-parent adoptions, like New York and Vermont, shared-parenting agreements are losing favor. Where second-parent adoptions are possible, the parties receive greater legal protection for the family they are creating. They should be encouraged to take advantage of the opportunity." Most states addressing the issue have approved adoption by a same-sex partner.[292]

"Shared-parenting agreements can be executed prior to or after the conception or birth of a child. The agreement can contain provisions concerning insemination and adoption costs and maternity costs as well as the daily financial issues. Child care must also be explored. Some agreements include an arbitration or mediation clause. Since the general rule is 'best interests of the child,' the clients must understand that such a clause may not be enforceable.

"The agreement must also address tax issues including who claims the child as a dependent. In some cases, this includes the designation of 'head of household.' The child's health insurance will usually be the

[292] *See* e.g., *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003), Harris, *Same-Sex Unions Around the World Marriage, Civil Unions, Registered Partnerships—What Are the Differences and Why Do They Matter?*, 19 Probate & Property No. 5, 31, 32 (September/October 2005).

responsibility of the biological parent. This can change if a company that grants domestic partner benefits employs the nonbiological parent. However, there may be additional tax consequences to the nonbiological parent since the health benefits may be taxed as income."[293]

F. Adoption

1. Adoption of a child or children of one unmarried partner by the other may be done to establish a legal relationship.

Several state courts, including those in California, Illinois, New York and Vermont permit such adoptions by same-sex partners, while Florida and New Hampshire have statutes barring them.[294] Co-parent adoptions by the non-biological parent of any children should be considered.

2. Adoption of one partner by the other could be considered.

This would make the adoptee an heir at law. While he could still be disinherited by a will, which he could contest, the adoption itself is irrevocable. Adult adoption is not available in all states[295] and some have restricted adoption to close relatives.[296] Where permitted,[297] such an adoption would convert the absence of any legal status into a parent-child relationship between the parties, giving the surviving partner certain inheritance and other rights. These rights may eliminate those of other family members in the deceased partner's estate. For example, adoption could preclude the right of the decedent's parents to object, at least in New York, to the probate of the decedent's will. Where the adopting partner is the beneficiary of a will or trust passing property to his or her "descendants" at his or her death, adoption would bring the adopted partner within the definition of that class.

3. The effect of adoption is to eliminate the adopted partner's rights in his or her biological family's estate.

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293 Quoted material is from Burda, *supra,* note 268, pages 26-27. For a discussion of tax issues, *see infra,* Part three, VI. and VIII.

294 *Eg.: In re Adoption of Evan*, 583 N.Y.S. 2d 997 (Surr. Ct. 1992).

295 Among several other states, New York disallows adult adoption. *Matter of the Adoption of Robert Paul P*., 63 N.Y. 2d 233, 471 N.E. 2d 424, 481 N.Y.S. 2d 652 (1984).

296 *See, e.g.*, NEV. REV. STAT. § 127.190.

297 *See, e.g.*, GA. CODE ANN. 19-8-21.

A better alternative, as indicated above, would be naming the other partner as beneficiary under a will or revocable trust. While a spouse cannot be entirely disinherited because of the existence of dower, curtsey or elective share statutes in common law states and community property laws (in community property jurisdictions), an adoptee may be disinherited entirely. But, the adoptive relationship itself is ordinarily irrevocable.[298]

4. Parental rights

Parental rights of a same-sex partner/spouse who is neither biologically related to nor an adopted parent of a child being raised by the couple is examined in an article which explores whether parental rights granted to a non-biological parent, civil union or domestic partner can and will survive a move to another state that does not explicitedly recognize such same-sex relationships.

a. The article argues that based on statutory common law precedence even in jurisdictions with a mini DOMA, parental rights likely can survive invalidation of the relationship.

b. Legitimacy of children and general choice of law principles all provide potent arguments for advocates seeking to preserve same-sex rights of a partner.[299]

G. Financial and Health Care Powers of Attorney, Advance Directives and Conservator Nominations

1. Financial powers

A financial durable power of attorney for unmarried couples living together is generally the same as one for spouses. It can authorize the attorney-in-fact to fund an unfunded revocable living trust, operate a business, deal with the tax authorities, etc., and either take effect immediately or be a springing power.

2. Health Care Documents

a. A health care power of attorney can name the other cohabitant as the person to make all medical treatment decisions if the principal is incapacitated.

[298] However, CAL. CIV. CODE § 227(p)(6) permits the filing of a petition terminating an adoptive relationship by an adopted adult, after written notification to the adoptive parent.

[299] Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions and Domestic Partnerships,* XLVI, #1 (December 2004).

This is probably the most important document instructing health care personnel and institutions that the attorney-in-fact (the patient's cohabitant) is the only person who may make health care decisions (instead of a blood relative) and is entitled to visit the principal in the hospital or nursing home. It can either include language authorizing the latter or this can be in a separate document. [300]

b. Living Wills

A living will or advance directive should, among other matters, also name that individual and it can include naming of a conservator of the person. Separate forms naming a conservator of the estate (or a guardian) should also be executed if not included in the advance directive. As in married couples' documents, do not resuscitate instructions and other provisions about medical care and anatomical gifts may also be included.

c. Use blue ink for all original copies,

Multiple originals should be executed in blue ink, to avoid any questions of a document's authenticity (as one of several multiple originals).

d. Forms

If the state in which the couple is domiciled or the local hospital has a form, it would be desirable to use it, adding supplementary instructions to personalize it. Thus, the hospital or health care provider will at least be familiar with part of the form.

e. Coping with HIPPA

To avoid problems caused by the Health Insurance Portability And Accountability Act of 1996 (hereafter HIPPA), language should be included in all health care documents authorizing the provider to release all medical information to the agent.[301]

H. Suppose One or Both Cohabitants are Estranged from their Blood Relatives?

1. Where estrangement has taken place

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[300] *See* Estate Planning Form 12, "Priority of visitation language," *Burda*, page 146, *supra*, note 268.

[301] For an example of a HIPPA authorization, *see* Estate Planning Form 22, pp. 175-176 of *Burda*, *supra*, note 268.

Sometimes the relatives of a gay or lesbian person refuse to accept that person's sexual orientation and are unwilling to have anything to do with his or her other cohabitant. To avoid intervention by these relatives in an estranged cohabitant's health crisis or funeral arrangements, consider notifying the appropriate family members by certified mail of decisions made and the documents implementing them executed by the cohabitant. Thus, the relatives will be unable to claim ignorance of their existence.

2. Narrative of family contacts

Have an estranged cohabitant prepare a narrative about his contacts with his family for attachment to estate planning documents, particularly those dealing with health care, anatomical gifts and funeral arrangements.

3. Video taping is not recommended

While some attorneys advocate video taping the execution of wills, trusts and other documents, this author does not recommend it, especially if there is a possibility that the video tape may be used in court during a will contest or other proceeding. Since most clients have had little experience as actors or even public speakers, the video tape may not turn out well. If it is redone, this may raise other questions.

4. If no estrangement

Where no estrangement exists between one or both cohabitants and their parents, siblings or other blood relatives, nonetheless consider advising the cohabitants to discuss or at least inform their relatives about their estate plans and related arrangements to avoid a future conflict in the event of a health crisis or a death.

5. Funeral arrangements

a. Will provisions

Since funerals almost always occur well before probate of a will, it is usually futile to include funeral and burial or cremation instructions in one. However, will provisions could (i) restrict payment of funeral expenses only for those items specified by the decedent before death and (ii) specify that any other charges associated with the funeral that were not in accordance with the decedent's wishes should not to be paid by the executor.

b. Separate document should be given funeral home

These instructions should also be in a separate document, including specification of the limitation on the executor's authorization to pay, turned over to the funeral home, along with any pre-payment or, if there is not going to be a pre-payment, the funeral home should be aware of the instructions as soon as possible after the death.

II. CONCLUSION TO ESTATE PLANNING MATERIAL

There are many similarities in estate planning for married and unmarried couples, starting with the type of representation and including the need for wills, trusts, financial powers of attorney and health care documents.

PART THREE

TAX CONSEQUENCES OF UNMARRIED COHABITATION, DOMESTIC PARTNERSHIPS, CIVIL UNIONS AND SAME-SEX MARRIAGE*

I. INTRODUCTION

As mentioned earlier, *Goodridge v. Department of Public Health*,[302] required Massachusetts to license same sex marriage after May 16, 2004. This has followed legalization of same sex marriage in the Netherlands, Belgium, Spain and Canada.

For most same-sex couples, however, marriage is not a possibility. They, as well as unmarried heterosexual couples, have to deal with the tax consequences of unmarried cohabitation. This part of the outline examines those consequences. It should be borne in mind that there are no specific provisions in the Internal Revenue Code ("Code") dealing with unmarried couples living together.

II. INCOME TAX FILING STATUS

A. Unmarried Couples Living Together Must File As Single People; Only couples deemed married under applicable law can file joint federal income tax returns[303]

Unmarried couples living together must file their federal and most state income tax returns as single people. Same-sex couples in Massachusetts' marriages, Vermont civil unions and California registered domestic partnerships may file joint state tax returns. (Connecticut's law requires separate returns for 2005, during the last four months of which civil unions became legal, but starting in 2006, joint returns are permitted.)[304]

Joint filing privileges have been denied when the parties were not married.[305] However, a common law spouse in a state that recognizes such marriages will be

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* This part of the outline is an updated and revised version of an article originally published in 18 THE PRACTICAL TAX LAWYER 55 (Winter 2004) and subsequently updated through October 2, 2006. See asterisked footnote at bottom of the cover page to this outline.

302 Part one, VI A, *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 2003 Mass. LEXIS 814 (2003), reversing 14 Mass. L. Rptr. 591 (Suffolk Co. Superior Court, May 7, 2002).

303 *See* § 6013(a).

304 CT. P.A. 05-3, June Special Session, § 58, *supra*, note 149 and text preceding note 150.

305 *See Sullivan v. Commissioner*, 256 F.2d 664 (4th Cir. 1959), and *Untermann v. Commissioner*, 38 T.C. 93 (1962).

considered the taxpayer's spouse.[306] Thus, if applicable state law recognizes a marital relationship, the I.R.S. should as well,[307] but may be overridden by the DOMA.

B. Only a Married Couple and Putative Spouses May File Joint Income Tax Returns

1. There is no distinction between same-sex and opposite-sex marriages in the Code.

But, section 6013(a) permits only a "husband and wife" to file joint income tax returns. It would be a very strained construction for a court to call the parties to a same-sex marriage "husband and wife" (although they could probably be called "spouses") even if such a marriage were recognized under the Code. For that to happen, an apparent conflict between the Code and the federal DOMA[308] would have to be resolved, with the DOMA probably prevailing.

2. Putative spouses are a couple with a good faith belief that they are validly married, but with a technically defective marriage.

This is a civil law concept recognized in California, Colorado, Florida, Illinois, Louisiana, Minnesota, Montana, Texas (and possibly Alaska). Thus, putative spouses could probably file joint federal and state income tax returns. Neither they, the IRS, nor their state's tax authorities may realize that their marriage is technically deficient. (For more information about putative marriage, *see* Part One, III.C, *supra.)*

C. A same-sex marriage might receive tax recognition in the unlikely event that the tax law is deemed to take precedence over the DOMA, but joint return filing would itself violate the Code.

1. Foreign and Massachusetts same-sex marriages

A same-sex marriage contracted in the Netherlands, Belgium, Massachusetts, Spain, Canada, South Africa or elsewhere, after the respective effective dates of these jurisdictions' validation of such

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306 Rev. Rul. 58-66, 1958-1 CB 60; *see J. M. Ross*, 31 T.C.M. 488 (1972).

307 Rev. Rul. 58-66, 1958-1 C.B. 60 and Pvt. Letter Ruls. 943107 and 9231062. (Can this 46-year old Revenue Ruling and ten- to thirteen-year-old private letter rulings be relied on by a same-sex couple married in Massachusetts since 16 May 2004, as requiring the IRS to recognize their marriage? Same-sex marriage was not the subject of these rulings and the DOMA probably overrides them. Furthermore, private letter rulings can only be relied on by the taxpayer to whom they are issued.)

308 The Defense of Marriage Act, 28 U.S.C.A. 1738C, et seq, which defines marriage as "only a legal union between one man and one woman." *Supra*, note 8.

marriages, *might* be recognized for United States tax purposes. But this would depend on a resolution of the apparent conflict between the IRC and the DOMA. Even so, joint return filing does not seem permissible without an amendment to the Internal Revenue Code, even if the DOMA does not prevail over it.

2. Same-sex marriages legally solemnized in the United States

Same-sex marriages solemnized in Massachusetts since 16 May 2004 and possibly in other United States jurisdictions legalizing them in the future, may create an even worse potential conflict than foreign same-sex ones. The requirements of the U.S. Constitution's full faith and credit clause, [309] go further that the doctrine of comity,[310] which arguably would give recognition to those solemnized abroad. Comity does not require recognition of foreign same-sex marriages, while the full faith and credit doctrine may require recognition of marriages legally solemnized in the United States, if they do not violate a state's strongly held public policy.

3. Same-sex marriages that are of doubtful legality

Marriages celebrated in San Francisco in February and March 2004 not only appear to be in conflict with both the federal and California DOMAs,[311] but have been unanimously voided by the California Supreme Court, on the grounds that the Mayor had exceeded his authority. The marriage licenses themselves were declared void in the same cases in a 5 to 2 decision.[312] However, pending litigation will eventually test the constitutionality of California's DOMA in the California Supreme Court. Same-sex marriages in other states are also apparently invalid, at least until validated by a state supreme court.

4. Civil unions and California domestic partnerships

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309 However, this provision (U.S. CONSTITUTION, Art. IV., Sec. 1) has been construed as having a limited exception so that a state need not give full faith and credit to another state's acts if the latter's violate the former state's strongly held public policy. *See,* for example, *Magnolia Petroleum v. Hunt*, 320 U.S. 430 (1943).

310 *Supra,* Part one, II.B.1.b.

311 California's DOMA's definition of marriage is similar to the federal DOMA.

312 *Lockyer, as Attorney General, etc. v. City and County of San Francisco, et al and Barbara Lewis, et al v. Nancy Alfaro, as County Clerk, etc.* Cal. Sup. Ct. § 122923 and § 122865 (12 Aug. 2004).

Since domestic partners and parties to a Vermont or Connecticut civil union "are not husband and wife, they are not eligible to file joint federal income tax returns.[313] Along with same-sex married couples in jurisdictions permitting certain domestic partnerships and same-sex marriage, they are considered unmarried for federal but married in the relevant state jurisdictions. (Vermont and Connecticut are the only states permitting civil unions. California has a somewhat comparable very broad domestic partnership law.)[314]

5. Same-sex married couples' problems with Form 1040's questions about filing status

a. The questions

A same-sex married couple may have difficulty answering the filing status questions (1 through 3) on the front of Form 1040. Question 1 asks if a filer is single. Question 2 asks if he or she is married filing jointly. Question 3 asks if he or she is married filing separately. Since the DOMA precludes federal recognition of same-sex marriages, it seems that a same-sex married couple should check box 1 and each file a separate return as a single person. But if they married in Massachusetts or any country permitting same-sex marriage, a claim that they are single is incorrect.

b. Massachusetts requirement

Furthermore, a same-sex married couple in Massachusetts must still prepare a dummy joint federal return to calculate how much state tax each one owes, since Massachusetts computes its income taxes based on the amount reported to the I.R.S. This also appears to be the case for same-sex couples in Vermont or (after 2005) Connecticut civil unions. After they prepare separate federal returns, they must prepare a dummy joint one.

c. Existence of same-sex marriage should not appear on a tax return

If a same-sex married couple state on their Form 1040 that although they are filing separately, they are legally married in Massachusetts (or some other jurisdiction permitting same-sex marriages), there is a very remote possibility that this might result

313 § 6013(a).

314 *Supra*, note 1 and CAL. A.B. 205.

in an audit authorized by someone in the I.R.S. who is offended by the concept of gay marriage. While the audit selection process almost completely precludes this from happening, nonetheless, it would be wise not to flaunt the existence of a gay marriage on a federal tax return.

d. Impermissible joint returns by same-sex married couples will be very hard to detect, as will returns by them claiming to be married filing separately

If a married same-sex couple files a joint return, due to limited audit resources it is doubtful that the I.R.S. will realize that they are committing an impermissible act. The same is true if they claim to be married filing separately. But, if each of them has taxable income over $59,975 in 2005, they will be in a 28% marginal bracket, which they would not reach until $71,950, if they filed as single people.

e. No indication of gender exists on a tax return

Unless future returns require that a filer indicate their gender, same-sex married couples may very well get away with filing a joint return, since their first names or use of initials may not indicate their gender and neither their social security numbers nor anything else on a tax return indicates it.

D. The Marriage Penalty and Bonus

Because of peculiarities in the tax rate tables, while unmarried couples with approximately equal incomes may pay a lower tax than if they were married, for married couples with a major difference in income, there is a "marriage bonus", enabling them to pay less tax than if they could file as single taxpayers.

Both the marriage penalty and marriage bonus have been eased in recent federal tax laws.[315] Neither affect unmarried couples living together as domestic partners or in a civil union. But for married couples, both still exist, especially in determining the alternative minimum tax, the passive loss rules, the limitations on deductibility of investment interest, casualty and capital losses, the two percent of adjusted gross income floor on unreimbursed employee business expenses and most other miscellaneous deductions, the 7.5 percent adjusted gross income floor on medical expense deductions, and the three percent reduction of most deductions in excess of adjusted gross income of $150,500 for 2006.[316]

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[315] Including the tax cut extension enacted October 1, 2004.

[316] 2006 CCH U.S. Master Tax Guide, ¶ 1014.

E. Income Tax Minimization for Unmarried Cohabitants

Some income tax minimization may be possible for unmarried cohabitants. However, only the taxpayer who pays for a deductible item or service is entitled to claim a deduction for it on his tax return. While mortgage interest and property taxes are only deductible by the mortgagor and the owner of the property being taxed, advance planning before paying other deductible expenses can have these paid by the cohabitant in the higher tax bracket, if the couple has unequal incomes.

Unlimited payments for certain educational and all medical expenses can be made by one cohabitant on behalf of the other, if the latter is his dependent, without having the payments classified as taxable gifts. Medical expenses in excess of 7 ½% of the payor's adjusted gross income will be deductible by him if the cohabitant receiving the medical treatment is his dependent.[317]

F. Possible Deficit Reduction if Same-Sex Marriage were to be Recognized Federally

Some deficit reduction might be achieved by federal recognition of same-sex marriages. "The Congressional Budget Office concluded that allowing same-sex marriage would slightly reduce the budget deficit every year for the next decade.

"[N]ew benefits [such as] Social Security payments to a widow or widower would be relatively low. In heterosexual marriages, a wife typically outlives her husband by six or seven years (both because women are generally younger than their husbands and because women outlive men), but gay partners are usually about the same age and have a similar life expectancy.

"The extra Social Security payments would be more than offset by the income taxes that gays would pay because of the so-called marriage penalty, the budget office estimates, and there would be other savings because fewer gays would qualify for Medicaid and federal benefits once spouses' incomes were factored in. The net annual gain to the government would be about $750 million by 2011."[318]

G. Head of Household Status for One of the Parties to a Civil Union

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317 Described in Part three, III.A., *infra.*

318 N.Y. TIMES, June 27, 2004, p. 18.

For head of household status to be available, there must be a legal relationship between the cohabitants.[319] Since a civil union entered into in Vermont or Connecticut or any other jurisdiction enacting a similar civil union law and possibly a California domestic partnership is such a relationship, one of the parties to it should be able to claim that status, even though neither of them are residents of that jurisdiction.

H. Exclusion of Gain on Sale of Principal Residence

Among other tax differences between married and unmarried couples is that unmarried people are only eligible for a $250,000 exclusion on the sale or exchange of a principal residence.[320] However, a married couple filing jointly is entitled to exclude $500,000 of gain, provided certain tests are met.[321]

I. Pension and Profit Sharing Plans

Effective January 1, 2007, the Pension Protection Act of 2006 will permit the survivor of an unmarried cohabitating couple to roll over the decedent's qualified pension or profit sharing plan. Until then, only a surviving spouse may do a tax free rollover of distributions to she received to another retirement plan from her deceased spouse's plan.[322] Thus, a new spousal IRA can be created. If the

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[319] *Whalen v. Commissioner*, 35 TCM 611 (1976).

[320] § 121(b).

[321] To obtain the exclusion, an individual must have owned and used the property as a principal residence for periods aggregating two years or more (a total of 730 days) during the five-year period ending on the date of the sale or exchange. Short temporary absences for vacations or seasonal absences are included in the periods of use, even if the property is rented out during such an absence. The ownership and use tests may be met during non-concurrent periods, provided that both are met during the five-year period ending on the date of sale. Treas. Reg. § 1.121-1(c)(1) and (2).

The home need not have had to been the principal residence at the time of purchase or sale so long as the taxpayer's use of it as a principal residence was two years or more within the five-year period ending on the date of sale. The residence used by the taxpayer a majority of the time during the year will be considered the taxpayer's principal residence and a non-exclusive list of factors are provided to aid in identifying a property as such. Treas. Reg. § 1.121-1(b)(2). There are special rules for residences transferred to a taxpayer incident to a divorce or where the property is that of a deceased spouse.

To get the $500,000 gain exclusion, as distinct from only a $250,000 exclusion, the taxpayer must file a joint return. As previously pointed out, joint returns can only be filed by a married couple and, section 6013(a) permits only a "husband and wife" to file joint income tax returns.

[322] Code § 403(b)(8)(B) as amended by § 829(a)(3) of said Act (H.R.4, signed August 17, 2006).

plan is already an IRA, she may treat it as his or her own, thus obtaining many income tax advantages not available to other beneficiaries.[323]

1. The new provision permits any beneficiary to rollover inherited Section 401(k) accounts into IRAs without paying taxes on the income immediately; thus there is a possibility of stretching out the account for many years.

2. Nor will the age of a non-spouse beneficiary's tax payment schedule be tied to the age of the account's former owner.

3. But non-spouse beneficiaries will not be treated the same as spouses in all matters related to retirement accounts. They will have to draw down the accounts on a schedule determined by the age of the account's deceased former owner rather than their own age and retirement status.

4. On the other hand, spouses make such withdrawals based on their own age or as they move into retirement.[324]

III. DEPENDENCY EXEMPTIONS AND HEALTH INSURANCE

Generally, no dependency exemption deduction is allowed a taxpayer for his cohabitant, nor will there be any exclusion from the latter's income if the cohabitant's employer pays for the other cohabitant's health insurance. The federal government does not give health benefits to same-sex spouses nor to couples in a civil union.[325]

A. Requirements for a dependency exemption

Section 152(a) defines the term "dependent" as "(1) a qualifying child, or (2) a qualifying relative." A qualifying child is defined in section 152(c)(1) as "an individual—

(A) who bears a relationship to the taxpayer described in paragraph (2),
(B) who has the same principal place of abode as the taxpayer for more than one-half of such taxable year,

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[323] §§ 401(a)(9), 402 and 408 permit a surviving spouse to elect to treat distributions from an IRA, a 401(k) or other qualified plan inherited from his or her deceased spouse as his of her own, without being immediately subject to the minimum distribution rules.

[324] HARTFORD COURANT, September 17, 2006, p. D3.

[325] The F.B.I. rescinded health benefits to an agent's same-sex spouse that had been mistakenly paid for several months after their Massachusetts marriage in May 2004. N.Y. TIMES, July 28, 2004, p. A13.

(C) who meets the age requirements of paragraph (3), and
(D) who has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins.

(2) RELATIONSHIP.—For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if such individual is—
(A) a child of the taxpayer or a descendant of such a child, or
(B) a brother, sister, stepbrother, or stepsister of the taxpayer or a descendent of any such relative.

(3) AGE REQUIREMENTS.—
(A) IN GENERAL.—For purposes of paragraph (1)(C), an individual meets the requirements of this paragraph if such individual—
(i) has not attained the age of 19 as of the close of the calendar year in which the taxable year of the taxpayer begins, or
(ii) is a student who has not attained the age of 24 as of the close of such calendar year.
(B) SPECIAL RULE FOR DISABLED.-- In the case of an individual who is permanently and totally disabled (as defined in section 22(e)(3)) at any time during such calendar year, the requirements of subparagraph (A) shall be treated as met with respect to such individual."

Section 152(f)(3) precludes an individual from being "a member of the taxpayer's household if at any time during the taxable year f the taxpayer the relationship between such individual and the taxpayer is in violation of local law.[326]

Therefore, for a taxpayer to be entitled to a dependency exemption for a cohabitant, the latter must (a) receive over half of his support from the taxpayer, (b) be considered a member of the taxpayer's household and (c) the relationship cannot violate local law.[327]

Since both the exemption and the health insurance exclusion hinge on the legal status of the cohabitants in their state of residence and at least 41 states have enacted DOMAs and twelve (including some of the 41) have amended their constitutions to prohibit recognition of gay marriage and civil unions,[328] both unmarried cohabitants and same sex married couples appear ineligible to be

[326] *See also D. Buckley Est*., 37 T.C. 664 (1962), in New York; *A. Davis*, 23 T.C.M. 1099 (1964), in Arizona; *G. R. Turgeon*, 82-2 U.S.T.C. ¶ 9433 (D. C. Minn. 1982), in Minnesota; *L.J. Eichbauer*, 30 T.C.M. 581 (1971), in Washington; and *S.J. Martin*, 32 T.C.M. 656 (1973), in Alabama. Section 152 was amended by § 201 of P.L. 108-311, The Working Families Tax Relief Act of 2004, effective for tax years beginning after 12/31/2004.

[327] § 152(f)(3).

[328] *Supra*, text following footnote 9.

claimed as dependents, even if the fifty percent support test is met. But one person in a civil union could probably qualify for the exemption.

For example, in a case of first impression decided before former section 152(b)(5) (now section 152(f)(3) was added to the Code, an exemption was not allowed for someone "in an illicit relationship in conscious violation of the [Alabama] criminal law. . . ."[329]

Ensminger v. Commissioner[330] held that in North Carolina unmarried cohabitation was a misdemeanor; thus it violated local law and no exemption was allowed. *Peacock v. Commissioner*[331] allowed a dependency exemption to an unmarried woman for a single man who resided in her home during a year in which neither was married. He otherwise qualified as her dependent and the relationship did not violate state law. They did not hold themselves out as common law spouses and Missouri law did not recognize a common-law marriage.[332]

A claim for exemption for a taxpayer's wife in the year in which they were divorced was disallowed because the section 152(a)(9) definition of a dependent as an individual whose principal place of abode is the home of the taxpayer and who is a member of the taxpayer's household excludes an individual who at anytime during the taxable year was the taxpayer's spouse. Thus, although the taxpayer continued to live with his ex-wife and their children during the year of their divorce and the next one, so that she had her principal place of abode at the taxpayer's home and was a member of his household, her status as a dependent did not exist in the year they were divorced. Taxpayer was nonetheless allowed to file as a single head of household and to claim an exemption for his two children.[333]

B. An Exemption is Probably Available for One of the Parties in a Vermont or Connecticut Civil Union

One party either to a Massachusetts same-sex marriage or a civil union of a couple living in Vermont or Connecticut who furnishes half or more of the support of the other party, besides being entitled to head-of-household status, should also claim an exemption for the other party and exclude employer-paid health insurance from his income. Their respective marriage or civil union does not violate local law and the person for whom the exemption is being claimed is

329 *Leon v. Turnipseed*, 27 T.C. 758 1957, interpreting section 152(a)(9).

330 610 F.2d 189 (4th Cir. 1979).

331 37 TCM 177 (1978).

332 *M.M. Shakelford*, 80 U.S.T.C. ¶ 9276 (D.C. Mo. 1980).

333 *Kenneth Royce Boykin*, 48 T.C.M. 267 (1984).

not the taxpayer's spouse. But if the parties lived elsewhere, the question of the validity of a Massachusetts same-sex marriage or a Vermont or Connecticut contracted civil union would have to be determined under the law of the state of their domicile.

C. A Domestic Partner May Obtain Favorable Tax Treatment for Employer Paid Health Benefits

A same-sex domestic partner or a person in a civil union, although not considered a spouse, may obtain favorable tax treatment for employer paid health benefits.[334] This also appears to apply to a same-sex Massachusetts or foreign marriage.

IV. SPECIAL SUPPORT TEST INVOLVING UNMARRIED COUPLES

A. An Unmarried Partner May Claim a Dependency Exemption for a Child

The section 152(e)(1) special support test, giving a child's exemption as a dependent to its custodial parent, applies even if its parents are not married to each other. Section 152(e)(2) treats a child receiving over half of his support during the calendar year from his parents as having received it from the noncustodial parent if the custodial parent has released his claim to the exemption deduction for the year, even though the parents have never married each other.[335]

B. The Parents May Be Living Apart

In "an issue that has not been squarely addressed by the [Tax] Court," the latter pointed out that section 152(e)(1)'s special support "test applies not only to divorced and certain separated parents, but to parents who live apart at all times during the last 6 months of the calendar year."

There is no requirement in the statute that parents have married each other before the special support test can apply. [Thus] Section 152(e)(1) applies to any parents, regardless of marital status, as long as they lived apart at all times for at least the last 6 months of the calendar year."

Therefore, under section 152(e)(1), cases hold that although the custodial parent provided over half of the child's support, since that parent had released her claim to exemption for the child in favor of the noncustodial parent, the latter was entitled to the dependency exemption deduction.[336]

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334 PLR 9850011.

335 *Jeffrey R. King and Sabrina M. Lopez v. Commissioner*, 121 T.C. No. 12 (Sept. 26, 2003).

336 *See also, Hughes v. Commissioner*, T.C. Memo 2000-143, and *Brignac v. Commissioner*, T.C. Memo. 1999-387, where the Tax Court applied, without discussion of this point, section 152(e)(1) to parents who had never married each other, but apparently the Commissioner did not argue for inapplicability of the statute in

V. GIFTS AND INCOME

Gifts of income producing assets from the cohabitant with the higher income to the one with less income may lead to a lower total tax for both of them. It could also help equalize their estates if the death of one or both of them would attract a federal or state death tax. However, gifts in excess of the annual exclusion will reduce the applicable estate tax exemption equivalent.[337]

A. Necessaries are not support

Necessaries provided by parties living together, but not in a civil union or a same-sex marriage will be considered gifts or payments for services and thus not support. Payments made from feelings of "detached and disinterested generosity, . . . out of affection, respect, admiration . . . or like impulses," are gifts, not taxable income.[338]

B. Treatment of "Alimony" when a Civil Union is Dissolved

"Payments that meet the definition of 'alimony or separate maintenance' under Code section 71(b) receive special treatment for federal income tax purposes. The payments are an adjustment to the gross income of the payor under Code section 215, and includible in the gross income of the payee under Code section 71. The federal tax treatment of alimony will not apply to two divorcing civil union partners, but it should for purposes of Connecticut tax. For federal purposes the payor of alimony would be denied a deduction from gross income on his federal return, but the payment might be excludible from the gross income of the recipient partner.[339] This result, however, is far from clear. The Service might take the position that DOMA requires that the former marriage-like relationship be ignored, so that the payment is neither deductible by the payor nor excludible by the payee.

C. Property Transfers

"Code section 1041 currently exempts transfers of property between spouses or former spouses, if incident to a divorce, from any federal income tax consequences to both transferor

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either case.

[337] The annual gift tax exclusion in 2006 is $12,000 and the lifetime exemption is $1,000,000. The applicable exclusion for estate tax is $2,000,000.

[338] *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960), interpreting §102(a).

[339] Under *Gould v. Gould*, 245 U.S. 151 (1917), which predates the current treatment of alimony as deductible/includible.

and transferee. . . . Under section 1041(b) the transferee takes the transferor's basis in the property, thus preserving any potential gain or loss in the hands of the transferee. Section 1041, obviously, will be unavailable to parties to a civil union for federal income tax purposes. Thus, during the course of a civil union, transfers of property between the partners might be treated as taxable realization events to the transferor and, possibly, as taxable receipts to the transferee as well. Again, this is far from clear. Transfers during the course of a civil union might also be characterized as gifts if made with the requisite "detached and disinterested generosity" required under *Duberstein*.[340] For Connecticut purposes of the Connecticut income tax, section 1041 should apply to shield transfers from gain and loss.

"Transfers of property incident to a 'divorce' of civil union partners will also not be eligible for section 1041 non-recognition of gain for federal income tax purposes, although it will be available for Connecticut income tax purposes. Thus, the former *Davis* rule[341] is likely to apply to require gain recognition by the transferors of property. It is not clear whether the transferee will be treated as having received a tax-free transfer as under pre-section 1041 law. Some commentators suggest that, at least in the case of 'approximately equal divisions of property at divorce,' the division should be viewed as a non-taxable, nonrealization event, similar to the division of jointly held property. . . . This is how the Service treated such divisions of property between divorcing spouses post *Davis*.[342] Whether the Service will apply this *pre-Davis* law to divorcing civil union partners is not clear.

D. Absent an Obligation, Support Items are Gifts

Thus, absent the legal obligation of support, items of support provided by one of the parties in a living-together arrangement would be considered gifts, taxable as such to the extent they exceed the $12,000 annual exclusion, unless they are provided in exchange for domestic services.[343] But, then the latter are probably taxable compensation.[344]

Since parties to a civil union or a same-sex marriage have an obligation of support to each other, any support provided would be neither a gift nor taxable compensation. However, since payment for sexual services is income, such

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340 *Supra*, note 297.

341 *United States v. Davis*, 370 U.S. 65C (1962) held a transfer of appreciated stock from one divorcing spouse to the other in exchange for the release of marital obligation required the transferor to recognized gain.

342 Rev. Rul 81-292, 1981-2 C.B. 158.

343 § 2503(b).

344 § 61.

payments for services which are essentially sexual will be deemed income to the recipient.[345]

VI. PARTNERSHIP AGREEMENTS

A partnership agreement can deal with property arrangements between unmarried cohabitants. Although an agreement to pool earnings will probably not prevent their separate taxation, and may give rise to a gift by the cohabitant with higher earnings, the agreed-upon percentages of property arrangements between unmarried cohabitants in a partnership should receive federal tax recognition.[346] A subsequent property division should be tax neutral (analogous to the division of community property).[347] This could also apply in the estate tax area, since partnerships have been recognized between spouses.[348]

VII. INCOME, GIFT AND ESTATE TAX CONSEQUENCES OF TRANSFERS BETWEEN UNMARRIED PEOPLE

A. A Transfer of Real Estate to the Other Cohabitant or Even Into Joint Tenancy with Her is a Taxable Gift

At the death of the first joint tenant, the value of the entire property held jointly is includible in his estate, except to the extent that the survivor can prove the amount of any contribution she made to it.

B. Tax Consequences of an Equal Division of Joint Property is Unclear

It is unclear whether the rule that there are no tax consequences in an equal division of jointly held property upon dissolution of a marriage will apply to unmarried cohabitants. But it should apply upon dissolution of a civil union and, possibly, a domestic partnership (at least a California registered one created after 2004).

C. Future Support May Be Income to Recipient

Except for parties to a civil union, future support payments based on domestic services may be ordinary income to the recipient, and nondeductible personal expenses to the payor, since they are not alimony. Similarly, any rehabilitative

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345 *L. K. Jones v. Commissioner*, 36 T.C.M. 1323 (1977).

346 *Lucas v. Earl*, 218 U.S. 111 (1930); *Pascarelli v. Commissioner*, 55 T.C. 1082 (1971).

347 *See* Rev. Rul. 76-83, 1976-1 C.B. 213; *see also, Ryza v. Commissioner*, 36 T.C.M. (CCH) 269 (1977).

348 *United States v. Neel*, 235 F.2d 395 (10th Cir. 1966).

payments, such as those awarded in *Marvin v. Marvin* [349] will not be excluded from the gross income of an unmarried cohabitant recipient.

D. Gain Recognition on Transfer of Appreciated Property

Recognition of gain on the transfer of appreciated property to an unmarried cohabitant (who had no prior ownership rights to the property) will occur on termination of the relationship or at any other time such a transfer is made.[350] Losses will also be recognized.[351] Ordinary income may be realized if property is transferred for services.[352] The above rules will probably apply to parties in a civil union and domestic partners.

E. Consequences of Carryover Basis

1. **In 2010,** a modified carryover basis regime will apply to property received from a decedent, in lieu of the present step-up or step-down to date of death or alternate valuation date value. However, this will be mollified to some extent by an aggregate basis increase of $1.3 million for estates of U.S. citizens and resident aliens.[353] But, the survivor of an unmarried couple will not be entitled to the $3 million basis increase for qualified spousal property.[354] What about the surviving spouse of a same-sex marriage?

2. **However, in 2011**, unless there are amendments to the Code provisions phasing out the estate tax completely in 2010 and bringing in carryover basis, the tax law will be restored to its June 6, 2001, provisions (before enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001.[355]

F. Gift Tax Consequences

1. The gift tax applies to all gratuitous transfers

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[349] 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), *rehabilitative award reversed*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (2d Dist. 1981).

[350] This was the case in transfers arising from a divorce and probably in antenuptial transfers as well before the 1984 Tax Reform Act.

[351] § 1001(c).

[352] *E.g.; Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

[353] § 1022(b)(2)(B).

[354] § 1022(c).

[355] For a detailed discussion of carryover basis, *see* Berall, Harrison, Blattmachr and Detzel, *Planning for Carryover Basis That Can Be/Should Be/Must Be Done Now*, 29 Estate Planning 99 (No. 3, March 2002).

Gift tax will apply to all gratuitous transfers in excess of the $12,000 per donee exclusion between unmarried people, including those occurring upon termination of the relationship of unmarried cohabitants.

Furthermore, if one cohabitant deeds real estate to the other, regardless of whether in any form of co-ownership or as a sole owner, unless full and adequate consideration is paid the grantor, the latter will have made a taxable gift. The amount of this and any other gifts will be reduced by the donor's annual exclusion[356] and applicable credit equivalent, as well as an exclusion for certain tuition and medical expenses.[357]

2. Transfers made when a civil union or domestic partnership ends

Gift tax probably applies to gratuitous transfers by parties dissolving a civil union or domestic partnership. The exemption for transfers made under a written separation agreement,[358] if there is a final divorce within three years thereafter, does not seem to apply since civil unions and domestic partnerships are not marriages. The Internal Revenue Service will probably not consider dissolution of one to be equivalent to a divorce from a conventional marriage. But if there is adequate consideration or if the transfer is part of an agreement subject to court approval or ordered by the court, an exception might be found.[359]

3. **Gratuitous transfers and gift splitting**

Married couples (if the donee spouse is a U.S. citizen) can make unlimited tax-free transfers between themselves.[360] However, gratuitous transfers between unmarried people are taxable gifts. Splitting gifts made by one unmarried partner to a third party, even if the latter is their child is unavailable, since sections 2056, 2513, and 2523 only apply to spouses. Thus, there will be a federal estate tax on the entire taxable estate (gross estate less debts, funeral and administration expenses) in excess of the section 2010 applicable exclusion amount of $2 million for deaths in 2006.)

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356 $11,000 in 2004, 2005 and 2006, under § 2503(b).

357 § 2503(e).

358 § 2516.

359 *See Harris v. Commissioner*, 340 U.S. 106 (1950), and *Commissioner v. Converse*, 163 F.2d 131 (2d Cir. 1947).

360 § 2523.

G. The Marital Deduction

1. The estate and gift tax marital deduction

a. **The estate tax marital deduction** is available for property interests of a United States person passing "from the decedent to his surviving spouse."[361]

b. **Since the masculine pronoun used here, in referring to the decedent, is inter-changeable with the feminine pronoun** and the word spouse is gender neutral, it would appear that an argument could be made that both the gift and estate tax marital deductions would be available for a same-sex couple married in a jurisdiction permitting such marriages. It would also seem that gift-splitting would be permissible by same-sex married couples.[362]

c. **However, the federal DOMA** says that "[i]n determining the meaning of Any Act of Congress . . . or interpretation of the various . . . agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

d. **Therefore, a federal court in a state recognizing same-sex marriages** would then have to resolve an apparent conflict between the federal Internal Revenue Code and the federal DOMA. It would probably hold that the DOMA prevents a marital deduction for same-sex couples, notwithstanding the apparently permissive language of the Internal Revenue Code.

2. No definition of a surviving spouse

a. **The term "surviving spouse" is not defined either in the Code or the Regulations.** The 1948 Senate Finance Committee Report[363] accompanying enactment of the federal estate tax marital deduction "does not indicate that the term was to have a special meaning for purposes of the marital deduction," according to Revenue Ruling 76-155.[364] This presumed that "the usual

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361 § 2056(a).

362 §§ 2513(a) and 2523(a).

363 S.Rep. No. 1013, 80th Cong., 2d Sess., Part 2, 1948-1, C.B. 285.

364 Rev. Rul. 76-155, 1976-1 C.B. 286.

meaning of the term 'surviving spouse' was intended. In normal usage 'surviving spouse' denotes a legal status that arises from the termination of a lawful marital union by the death of the other mate." It held that a payment to a decedent's alleged common-law surviving spouse to settle her dower claim did not qualify for the marital deduction in the absence of evidence that she was the decedent's legal spouse.

b. **It appears from the ruling that whether someone is a surviving spouse is a matter of state law.** However, as mentioned before, the terms "husband and wife," as used in the income tax law would have to be greatly strained to apply to a same sex married couple; thus precluding joint returns by the latter.[365]

3. **The estate and gift tax marital deductions are not available for unmarried cohabitants, domestic partners nor parties to a civil union and are probably not available to a married same-sex couple.**

Nor is an unmarried couple eligible for the marital deduction for life or term interests in a charitable remainder trust and they cannot use the generation-skipping transfer tax exemption of the first decedent at the second one's death.[366] (This is available for the surviving spouse of a married couple in the form of a reverse QTIP (qualified terminable interest property) election under § 2652(a)(3).)

a. **Putative spouse**

But, the marital deduction would appear available for property passing to a putative spouse, if she otherwise qualifies for it. On the other hand, the I.R.S. might refuse to allow it, on the grounds that there never was a valid marriage.

b. **Includibility of only decedent's share of partnership or joint venture**

If the survivor can establish the existence of a partnership or joint venture relationship, only the decedent's share of the property should be includable in the latter's estate. Since, under the *Marvin*[367] doctrine, a property interest can be established as a

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365 *Supra*, Part three, II.B.

366 Thus, there will be a federal estate tax on the entire taxable estate (gross estate less debts, funeral and administration expenses) in excess of the § 2010 applicable exclusion amount of $2 million for deaths in 2006.

367 *Supra*, note 87.

result of contribution of services, there might be a deductible claim by the survivor against the estate of the deceased nonmarital cohabitant.[368]

c. Jointly held property

The entire value of joint and survivorship property will be included in the gross estate of the first decedent, except to the extent contribution toward its acquisition can be proved by the survivor.[369] However, in the case of married joint owners, only half the value of the survivorship property will be included in the first decedent's estate, regardless of who paid for its acquisition.[370] Whether or not the joint owners are married, there will be a basis adjustment to the property to the extent it is included in the first decedent's estate.[371]

4. Estate Tax Deduction for Insurance Payable to Cohabitant

An estate tax deduction was allowed for a claim against the estate for insurance payable to the woman with whom decedent was living at his death. *Carlson (Peterson Estate) v. United States* [372] held an agreement between the decedent and his insurance beneficiary to share their assets was supported by full and adequate consideration. It allowed a section 2053 deduction for the over $100,000 of insurance proceeds received by the beneficiary.

The IRS conceded that the value of all other property awarded to her was deductible, at the insured's death (which occurred 10 years after leaving his wife (but never divorcing her) and three children and establishing a new family relationship with another woman.) Decedent and the other woman lived in a marital type of relationship, first in her home and then in a new jointly built residence. They had a son and the other woman contributed substantially both in her work and her assets to their relationship and business.

Decedent's estate of about $1 million included the policy naming the other woman as beneficiary. As a result of a suit by her against his intestate estate for the value of her share of the joint property, she was awarded the

368 § 2053(c).

369 § 2053(c).

370 § 2040(b).

371 § 1014.

372 *Carlson (Peterson Estate) v. United States*, 84-1 U.S.T.C. ¶ 13,570 (D. Minn. 1983).

homestead, household goods, a car, and the insurance proceeds, totaling $169,000.

In *Estate of Lucille M. Horstmeier v. Commissioner*,[373] the entire value of decedent's home, held in her name and to which her live-in partner contributed nothing, was included in decedent's estate because the partner did not own any beneficial interest in it. The decedent's will did not mention the house, which passed to a residuary trust for her partner's benefit.

Although the probate court allowed the survivor to take a 50 percent tenancy in common interest in the home, the IRS rejected this treatment and included the full value of it in the estate. The Tax Court agreed, holding that either her interest arose by gift (as she claimed in the probate court) or by contribution of household services, but not by both. The court did not agree that the contribution of services was attributable to the purchase price and included the full value of the home in the decedent's estate.

H. Generation Skipping Tax Exemption

The generation skipping transfer tax exemption of the first decedent cannot be used at the second one's death if they were not married.[374]

VIII. TAX PLANNING TECHNIQUES

A. GRITS

A grantor retained interest trust (GRIT) can pass assets to a less wealthy unmarried partner at a reduced transfer cost, since the latter is not a family member within the definition of Chapter 14. That chapter eliminated the use of the GRIT technique for a remainder beneficiary who was a family member. Because it deals with transfers among traditional family members, other techniques formerly used before its enactment may still be used, since domestic partners, parties to a civil union and other unrelated parties are not in this category.

Thus, since an unmarried couple is unrelated, a GRIT could be used with the grantor retaining all income from the trust for a fixed term, at the end of which the

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[373] *Horstmeier Estate v. Commissioner*, 1999 T.C.M. 145 (1999).

[374] This is available for the surviving spouse of a married couple in the form of a reverse QTIP (qualified terminable interest property) election under § 2652(a)(3).

remainder would pass to the beneficiary. If the grantor died before the term's end, the corpus would be includible in his or her estate.[375] The creation of the trust would be a gift equal to the property's fair market value less the retained income interest.[376]

The tax advantage of a GRIT is that if the rate of accounting income is lower than the United States Treasury's assumed rate, there will be an overvaluation of the income interest and the remainder will be undervalued; thus, a very low discounted value for gift tax purposes will be obtained. Then, upon trust termination the corpus (including appreciation) will pass transfer tax-free to the other partner.

B. Unrelated Parties May Use Personal Residence Trusts and Need Not Limit Themselves to the Restrictions in a QPRT

While section 2702's prohibitions restrict family members in their use of personal residence trusts to specially restricted qualified ones (called QPRTs),[377] domestic partners, parties to a civil union and other unrelated parties are able to use personal residence trusts where sales may be made between the grantor and the trust holding his or her residence. Thus, the grantor may purchase the residence from the trust just prior to the end of the term and the remainder beneficiaries will receive the purchase price, without the grantor or the trust having to recognize gain or loss.[378] But, if after expiration of the term, the residence remains in the grantor trust, it can be rented from the trustee by the grantor without taxable rental income. Furthermore, if the grantor pays rent based on the fair market value of the residence, the latter will be excluded from his or her gross estate, since his or her economic enjoyment ceases upon the payment of rent.

C. Section 2704 Restrictions do not apply to Non-Family Arrangements

While domestic partners, parties to a civil union and others not related by blood or marriage may be considered natural objects of the transferor's bounty, and thus act like family members under section 2703, the restrictions of section 2704 should not apply to non-family arrangements, such as domestic partnerships. This will give an opportunity to obtain discounts by using partnerships, limited liability partnerships, limited liability corporations and other similar entities.

D. Life Insurance, Gifts, Payment Of Tuition And Medical Expenses

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[375] § 2036(a).

[376] § 7520's Treasury tables are used to compute the value.

[377] QPRT is an acronym for a Qualified Personal Residence Trust.

[378] Rev. Rul. 85-13, 1985-1 C.B. 184.

Use of life insurance, possibly by having it acquired by an irrevocable trust for the benefit of one of the partners, and the making of annual exclusion gifts of $11,000[379] in 2006, as well as gift tax-free payments of tuition and medical expenses[380] should also be considered, as well as use of the applicable federal estate tax exclusion of $2,000,000 in 2006.

E. Charitable Trusts

The use of charitable remainder and charitable lead trusts are possibilities too, but since unmarried partners are not related, if there is more than a 37 ½ year age difference between them, a generation-skipping transfer tax will be incurred[381] on a large transfer.[382]

IX. CONCLUSION TO TAX MATERIAL AND TO ALL THREE PARTS

A. Taxation of Unmarried Cohabitants

The Massachusetts *Goodridge* case[383] sanctioned same-sex marriages of Massachusetts residents since May 18, 2004. For most such couples, however, marriage is not a possibility. They, as well as unmarried heterosexual couples, have to deal with the tax consequences of unmarried cohabitation.

Unmarried couples living together probably must file as single people. They cannot file joint federal income tax returns, unless they are deemed married under applicable law. But one of the parties to a Vermont or Connecticut civil union can claim head-of-household status.

There is no distinction between same-sex and opposite-sex marriages in the Code. Thus, a same-sex marriage contracted in Belgium, Holland, Canada, Spain or in Massachusetts (after May 18, 2004) by American citizens domiciled in one of those jurisdictions, might be recognized for U.S. tax purposes, depending on the resolution of an apparent conflict between federal tax law and the federal DOMA.

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[379] § 2503(b).

[380] § 2503(e).

[381] § 2651(d).

[382] Portions of the above material on More Sophisticated Planning Techniques, has been condensed and paraphrased from Cohen, *supra*, note 282.

[383] *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E. 2d 941, 2003 Mass. LEXIS 814 (2003), reversing 14 Mass. L. Rptr. 591 (Suffolk Co. Superior Court, May 7, 2002).

Generally, no dependency exemption deduction is allowed a taxpayer for his cohabitant, nor will there be any exclusion from income if the cohabitant's employer paid for health insurance.

A same-sex domestic partner, although not considered a spouse for purposes of determining the tax treatment of health benefits, may qualify as a dependent.

Necessaries provided by parties living together will be considered gifts or payments for services and thus not support.

Thus, absent the legal obligation of support, items of support provided by one of the parties in a living-together arrangement would be considered gifts, taxable as such to the extent they exceed the $11,000 annual exclusion, unless they are provided in exchange for domestic services.[384] But, then the latter are probably taxable compensation.[385]

It is unclear whether the rule that there are no tax consequences in an equal division of jointly held property upon dissolution of a marriage will apply to unmarried cohabitants. But it should apply upon dissolution of a Vermont or Connecticut civil union and, possibly, a domestic partnership (at least a California one).

B. Contracts Between Unmarried Cohabitants and Gay Partners

Since the mid-1970's, there has been a trend towards recognizing implied (as well as express) contract rights of unmarried cohabitants, although some states, such as New York, still only recognize an express written agreement in such a relationship.

Both heterosexual and gay couples considering a long-term living together arrangement should make an express contract, as should couples entering into domestic partnerships and civil unions.

C. The Concepts of Domestic Partnerships, Civil Unions and perhaps even Gay Marriages May Be the Way Gay Relationships Will Evolve, but only after many years of Litigation

1. An increasing number of rights are being given domestic partners

The provisions that were effective January 1, 2005 of California's September 2003 Act are the most extensive.[386]

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384 § 2503(b).

385 § 61.

386 *Supra*, Part two, III. B.

2. The legal theories underlying civil unions in Vermont and Connecticut, by going beyond the domestic partnership concept, broke new legal ground for gay relationships

Their special legal status, with nearly all the rights of marriage, except its federal tax advantages, given gays living together went beyond existing law in extending "spousal" support to persons previously in gay relationships.

3. The Federal DOMA is not violated by Civil Unions

Neither Vermont's nor Connecticut's civil union statutes violate the federal DOMA, but same-sex marriages celebrated elsewhere in the United States violate both it and other states' DOMA laws. Vermont's and Connecticut's laws, like the federal DOMA, also define marriage as between one woman and one man. Since the federal DOMA allows states to ignore same-sex marriages, there may be suits by couples joined in Vermont or Connecticut civil unions to enforce their rights in other states under the full faith and credit clause of the federal constitution. The same type of litigation will surely be brought by same-sex couples married in Massachusetts after May 16, 2004, while those married in New Paltz, N.Y., Asbury Park, N.J., New Mexico and elsewhere in the United States since late February 2004 may have to overcome the allegation that the officials had no authority to marry same-sex couples, in light of *Lockyer v. San Francisco.*[387]

4. Suits will probably be brought by couples married under foreign same-sex marriage laws

Suits by couples married under the same-sex marriage laws of the Netherlands, Belgium, Spain and Canada[388] may also occur, with these couples arguing for recognition of their marriage under principles of comity.

5. The big controversy over same-sex marriage has begun

"[G]ay marriage, unlike civil unions or benefits for committed gays, will now produce an enormous and divisive national uproar."[389]

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[387] *Supra*, note 312.

[388] Same-sex couples who married in Canada have sued in California and Hawaii for their recognition.

[389] John Leo, On Society, U.S. NEWS &WORLD REPORT 34, December 1, 2003.

D. The Fast Evolving Law of Same-Sex Relationships Requires Constantly Updating Research

Lawyers with a problem in this area should update their research to obtain current knowledge of the applicable law. Even then, they should be alert to possible new developments impacting their clients, frequently reported in The New York Times, The Wall Street Journal and other newspapers.

The legalization of gay marriages in several foreign countries, in Massachusetts and attempts to do so elsewhere *may* make gay marriages the wave of the future in the United States. On the other hand, the strong opposition to them by a majority of Americans could lead to a compromise extending the property rights, tax and other federal benefits and penalties of marriage to domestic partners and couples joined in civil unions. But this will probably only occur after many years of litigation.

APPENDIX A

NONMARITAL PARTNERSHIP AGREEMENT (LIVING TOGETHER AGREEMENT) [390]

THIS AGREEMENT is made this 14th day of June, 2005 by and between SUE J. JONES (hereinafter called SUE) and EDWARD J. SMITH (hereinafter called ED), both of whom are now residing at , Connecticut.

W I T N E S S E T H:

I. This agreement is made with respect to the following facts:

1. SUE and ED began living together on or about , when SUE moved into ED's house at , , Connecticut, and have subsequently moved together to their present residence at , , Connecticut. SUE and ED contemplate continuing to live together in the future.

2. On , SUE and ED purchased the above property (hereafter referred to as the premises), for a total of $. This purchase price is being paid by (a) a $ mortgage loan, on which both parties are liable (but ED has agreed to indemnify SUE) from the seller, (b) a $ cash contribution by SUE (already made at the closing) and (c) the balance contributed in cash by ED (since ED signed a note, until ED obtains funds from the sale of ED's house; ED's cash contribution will be made later).

3. SUE and ED desire and intend to define and clarify their intentions and expectations with respect to their financial rights and responsibilities between each other, including rights dealing with property and support, so as to remove these considerations as potential detractions from their relationship. They intend that this agreement shall supersede any rights either of them may have under applicable common law or statutes, including cases establishing rights between persons living together without a licensed, solemnized or registered statutory, common law or other marriage.

4. Both SUE and ED presently own property standing in his or her respective names, the nature and extent of which has been fully disclosed by each to the other and said disclosures, in the form of a simple balance sheet of each party, are appended to this agreement as Exhibits A (SUE's) and B (ED's).

5. Both SUE and ED are unmarried persons and permanent residents of Connecticut.

6. ED is presently employed by at an annual salary of approximately $. SUE is presently employed by at an annual salary of approximately

[390] For other forms for Domestic Partnership Agreements and Additional Clauses, *see* Burda *supra*, note 268, Estate Planning Forms 15, 16 and 21 at 150-164 and 173-174. For Termination of Domestic Partnership, *see* Burda's Form 18 at 165-166.

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7. SUE and ED desire that all property owned by either of them at this time and all property coming to them from whatever source during the time they live together shall be their respective separate property, except as otherwise provided in this agreement.

8. Although both SUE and ED understand that the laws of the State of Connecticut may be developing towards granting support payment to a party to a non-marital relationship from the other party after the relationship terminates, both SUE and ED desire to waive any support from one another in the event of the termination of their relationship for whatever reason, except as otherwise provided in this agreement.

9. Except as otherwise provided in this agreement, SUE and ED intend to contribute mutually to the support of the household which they share, but without acquiring any interests in the property of one another by such contribution, even though the earnings of either may have been applied so as to enhance the value of the property of the other or even though the personal skills, services and efforts of either may have directly or indirectly enhanced and resulted in appreciation of the value of the property of the other.

II. NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and promises contained herein, other good and valuable consideration and with the intention of being legally bound hereby, SUE and ED agree as follows:

1. Effective dates and definition of separation.

This agreement shall be effective as of , 2005 and shall continue until the first to occur of: (a) the death of either party, (b) marriage to each other, or (c) their separation, as defined for purposes of this agreement as any one or more of the following events:

(a) The removal by SUE of all or a substantial part of her personal property from the premises, unless said removal occurs as a result of SUE and ED moving either temporarily or permanently to another residence or going on a trip together;

(b) SUE's failure to reside on the premises for a period of 30 consecutive days or more, unless such failure is caused by: (i) SUE and ED having temporarily or permanently moved elsewhere together or (ii) both SUE and ED or SUE alone have gone away on a trip or (iii) either SUE or ED has become ill or is injured and is either hospitalized or (whether or not following hospitalization) is in some form of a nursing home or extended care facility;

(c) SUE's Establishment of a principal residence without ED;

(d) ED's request that SUE and ED terminate their arrangements and that SUE move out of the premises.

2. *Present financial position.*

While neither SUE nor ED represent his or her respective attached balance sheet to be a precise delineation of his or her assets and liabilities, it constitutes a reasonable approximation of such assets and liabilities. Both SUE and ED represent to the other that he has fully disclosed to the other his or her financial situation by the representations contained in the balance sheets, subject only to the caveat that the balance sheets were prepared informally and without reference to documents.

3. *Assets and liabilities as separate property.*

Except as otherwise provided in this agreement, SUE and ED agree that the property described below in this paragraph (3) shall remain the separate and solely owned property of its title holder and that all of the liabilities of each of them at the effective date of this agreement shall remain their separate liabilities and not that of the other.

(a) All property, whether realty or personalty, owned by either party at the effective date of this agreement.

(b) All property acquired by the other party out of the proceeds or income from property owned at the effective date of this agreement, or attributable to appreciation in value of such property, whether the enhancement is due to market conditions or to the services, skills or efforts of its owner.

(c) All property subsequently acquired by either party by gift, devise, bequest or inheritance.

(d) All the earnings and accumulations resulting from SUE and ED' personal services, skill, efforts and work. Both SUE and ED understand that except for this agreement, the earnings and accumulations from the personal services, skills, effort and work of the other throughout their cohabitation might be subject to legal or equitable rights of the other party, and that by this agreement SUE and ED's earnings and income during their cohabitation are made the separate property of the person to whom the earnings and accumulations are attributable.

4. *Living expenses.*

Except as provided elsewhere in this agreement SUE and ED agree that ED shall pay % and SUE shall pay % of their living expenses while they are living together.

5. *Dispositions of a property to other party.*

Notwithstanding any of the provisions of this agreement, either party may, by appropriate written instrument or otherwise, transfer, give, convey, devise or bequeath any property to the other. Neither SUE nor ED intend by this agreement to limit or restrict in any was the right to receive any such transfer, gift, conveyance, devise or bequest from the other, except as herein stated in this agreement.

6. Transmutation.

Except as otherwise provided herein, all property or interest therein now owned or hereafter acquired by SUE and ED (which by the terms of this agreement is classified as the separate property of one of them), can become the separate property of the other or can become SUE and ED's joint or common property only by written instrument executed by SUE and ED, whose separate property is thereby reclassified.

7. Parties interested in house.

The deed recorded on the [TOWN OR CITY] land records shows that the parties took title to the premises as tenants-in-common and that ED's interest is % and SUE's is %. However, SUE agrees that ED shall have the sole and exclusive right, power and authority to sell, mortgage, and encumber the premises. Furthermore, SUE has executed a document, recorded on the land records and being Exhibit C to this agreement, confirming that ED has said power and has given ED a limited durable power of attorney to act accordingly. The latter is Exhibit D to this agreement.

8. Contribution for house expenses.

While both SUE and ED own the premises, SUE will contribute a certain amount, as agreed upon by both of them from time to time, towards the payment of real estate taxes as well as for any capital improvements to be made to the premises. ED has agreed to indemnify SUE for any liability SUE may have on the note and mortgage and all payments to be made on the mortgage will be made by ED. However, to assure that both parties will have the benefit of Section 1034 of the Internal Revenue Code of 1986 (dealing with the rollover of gain on a sale of a principal residence), SUE and ED agree that any necessary changes to this agreement shall be made in a subsequent contract to be executed by them within 30 days after being advised by counsel that the $ SUE has contributed to the purchase of the premises is insufficient for SUE to be able to obtain said tax benefits or other changes are needed so that both SUE and ED will qualify under said Section.

9. Payment to SUE upon termination.

If (i) SUE's and ED's arrangements are terminated (as described in the first sentence of paragraph (1)) or (ii) if they sell the premises, ED will pay SUE either: (a) the sum of $ plus or an amount equal to the total amount of SUE's contributions to the property prior to sale or separation, (b) such amount as is determined to be SUE's

percentage share of the fair market value of the property if it is in fact sold or (c) such amount as is determined to be SUE's percentage share of the fair market value of the property according to an appraisal. SUE will have the sole right to elect whether to take (a) $ plus an amount equal to the total amount of SUE's contributions to the property prior to sale or separation, (b) the amount determined as a result of a sale of the property (if that is in fact what occurs) or (c) the amount determined by an appraisal (if there is no sale). If SUE elects to have the premises appraised, SUE and ED will share the cost of the appraisal equally. If they can agree upon one appraiser in advance of his or her making said appraisal, they will accept his or her appraised price as the fair market value of the premises. If they cannot agree upon a single appraiser, then each of them will obtain an appraiser of his or her own choosing. If the higher appraised value is 110% or less of the lower value, they will agree to split the difference in determining the fair market value. If the higher value is more than % of the lower value, they will then agree upon a third appraiser and will average the three appraisals in determining fair market value.

10. Additional payment to SUE if separation occurs.

The provisions in paragraph (9) with respect to the payment of SUE's share of the value of the house will apply whether SUE and ED's arrangements terminate because (a) the house is sold and they continue to live together elsewhere or (b) as a result of a separation. However, if their arrangements terminate as a result of a separation, then, in addition to the amount to be paid to SUE with respect to her share of the value of the house, as described in paragraph (9) above, including an amount equal to the total amount of SUE's contributions to the property prior to sale or separation, ED agrees to pay SUE the sum of $, adjusted for any changes in the price level based upon the increase in the Bureau of Labor Statistics' Consumer Price Index from the end of 2005 to the end of 2006 and to the end of each calendar year thereafter.

11. Disposition of real estate upon separation.

Upon separation, (as defined in paragraph (1), above), ED will become the sole owner of the premises, except that if ED decides to sell the premises within 30 days of a separation ED shall give SUE the right of first refusal to buy the premises at a mutually agreeable price. Such agreement will be in ED's sole discretion. Subject to ED paying SUE the amounts specified above in paragraph 9 and 10, SUE shall execute any and all agreements necessary to implement this agreement.

12. New wills.

SUE and ED have already executed a new will or a codicil providing that in the event that SUE and ED's arrangements end as the result of the death of one of them, each of their respective interests in the premises will be devised absolutely and outright in their entirety to the survivor of them and all of their personal effects are bequeathed to said survivor, except that if SUE is the survivor the personal effects are bequeathed by SUE to ED's children, outright. Thus, subject to a requirement of survivorship for

60 days, upon the death of either of SUE or ED prior to any separation, the survivor of them shall be the sole owner of the property.

13. Major medical insurance.

SUE and ED agree that they will discuss whether adequate major medical insurance exists on them and, if not, ED will obtain additional coverage.

14. Marriage to modify agreement.

This agreement shall continue in full force and effect in the event SUE and ED marry each other, with the exception of the provisions of paragraph II(15) (regarding liabilities), paragraph II(4) (regarding living expenses) and paragraph II(19) (concerning support), all of which shall be deleted from this agreement as of the date of SUE and ED's marriage.

15. Liabilities.

Neither SUE nor ED agree to become liable to the other of them nor to any third party by the acting of one of them beyond the express terms of this agreement, and particularly paragraph II(4), dealing with living expenses, unless he specifically incurs such liability in a written instrument, including a joint credit application or an instrument of guarantee.

16. Benefit and burden.

This agreement shall be binding upon and inure to the benefit of SUE and ED hereto and their respective heir, administrators, executors, personal representatives, successors and assigns.

17. Consideration for agreement.

The consideration of this agreement is the mutual promise of SUE and ED to act as companions and homemakers to each other, in addition to the other promises contained in this agreement.

18. Fiduciary duty.

Both SUE and ED promise to act in good faith towards the other in the management of their joint or common property, and in living under the terms of this agreement.

19. Separation of SUE and ED; support and other consideration.

Both SUE and ED waive all rights to be supported by the other or to claim or receive any lump sum, periodic payment, or other consideration of any kind after their

separation or after the death of either party, except as set forth by the express terms of this agreement.

20. Use of name and purported spousal designations.

While SUE and ED intend under most circumstances to hold themselves out as single people, nevertheless they agree that under certain circumstances SUE shall have the right to use the name MANN and hold herself out as ED's spouse. ED shall similarly have the right to hold himself out as SUE's spouse. However, this shall not affect the rights of SUE and ED as set forth in this agreement nor shall any applications for joint credit affect any financial arrangements set forth herein. No use of any name or holding out by either SUE or ED of a spousal status shall constitute any evidence in any court or legal proceeding of the existence of a common-law or solemnized marriage in this or any other jurisdiction. This agreement confirms a non-marital status between SUE and ED, neither this agreement nor actions under its provisions shall be used by or available to either party in any jurisdiction to establish a marital relationship, at common law or otherwise.

21. Compensation for services.

It is agreed between SUE and ED that any services which either party may provide to the other during the period of living together or at any time after a possible separation of SUE and ED or after the death of either of them will be fully compensated by the terms of this agreement.

22. Integration of all understandings in this instrument.

This instrument sets forth the complete and entire agreement between SUE and ED with regard to the subject matter hereof. Integrated in it is a revised version of the terms of the [date], letter agreement addressed to ED by SUE. All agreements, covenants, representations or warranties, express and implied, oral and written, of SUE and ED with respect to their financial relationship, past, present and future, commencing as of the date they began living together and terminating if and when they separate or when one of them dies, are contained herein with the exception of SUE's agreement of [date], not to sell, mortgage or encumber the , property and the irrevocable power of attorney coupled with an interest, signed by SUE on [date] , copies of which are appended hereto as Exhibits C and D, respectively. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made by SUE or ED to the other with respect to the subject matter of this agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements, representations, covenants and warranties with respect to the subject matter hereof are waived, merged into this agreement and superseded hereby. This is an integrated agreement, which also incorporates by reference the terms of the two documents referred to hereinabove, which are attached Exhibits C and D.

23. Severability.

If a court of competent jurisdiction deems any clauses or provisions of this agreement to be invalid or unenforceable, said clauses or provisions shall be deemed severable from the remainder of this agreement and shall not cause the invalidity or unenforceability of the remainder. If said provisions shall be deemed invalid due to scope or breadth, such provisions shall be deemed valid to the extent of their scope or breadth permitted by law. All remaining clauses and provisions shall continue in full force and effect and shall be enforceable by the parties.

24. Amendment.

This agreement can be amended only by a written agreement signed by both parties or by an executed oral agreement.

25. Governing law.

This agreement has been drafted and executed in the State of Connecticut and shall be governed by, continued and enforced in accordance with the laws of said state.

26. Signing of Agreement.

Prior to signing this agreement, each party consulted with an attorney of his or her choice. The terms and legal significance of this agreement and the effect which it has upon any interest which each party might accrue in the property of the other were fully explained. Each party acknowledges that he or she fully understands the agreement and its legal effect and that he or she is signing it freely and voluntarily and that neither party has any reason to believe the other did not understand fully the terms and effects of the agreement or that he or she did not freely and voluntarily execute said agreement.

27. Interpretation.

No provision in this agreement is to be interpreted for against any party because that party or that party's attorney or other legal representative drafted the provision.

28. Costs and expenses.

Each party to this agreement shall bear his or her respective costs and expenses incurred in connection with this agreement, including, but not limited to, the negotiation, preparation and consummation thereof.

29. Attorneys' fees.

Should any party hereto retain counsel for the purpose of enforcing or preventing the breach of any provision of this agreement, including, but not limited to the instituting

of any action or proceeding to enforce any provision hereof for damages by reason of any alleged breach of any provision of this agreement, for a declaration of such parties', rights or obligations hereunder or for any other judicial remedy relating hereto, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorneys' fees and costs for the services rendered to such prevailing party.

30. Hold Harmless and Indemnification

If either party defaults on or fails to abide by the terms of this agreement, that party shall indemnify the other and hold him or her harmless for all reasonable costs and expenses, including but not limited to attorney fees, incurred in enforcing this agreement. This indemnification includes any costs incurred by the nondefaulting party in asserting or defending any rights hereunder against the defaulting party or any third parties who may be cooperating with or encouraging the defaulting party.

31. Absence of Duress or Intimidation

The parties acknowledge that they enter into this agreement freely and without any intent to deceive. By their signatures they state that they are not entering into this agreement as the result of undue influence, fraud, or distress (economical, physical, or emotional) of any kind. They state that they are competent to enter into this agreement and do so willingly. They also state that no other person or persons have exerted any pressure or undue influence over them to sign this agreement.

32. Captions.

The italicized captions set forth at the beginning of paragraphs of this agreement are contained herein as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this agreement or any provision hereof.

33. Execution and counterparts.

This agreement may be executed in two counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

_____
SUE J. JONES

_____
EDWARD J. SMITH

In the State of Connecticut, County of , and City of , on this day of 2005, personally appeared SUE J. JONES, and EDWARD J. SMITH known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

_____
Notary Public
My commission expires:

APPROVED AS TO FORM:

_____
Attorney for EDWARD J. SMITH

_____
Attorney for SUE J. JONES

APPENDIX B

SUGGESTED SHORT FORM LIVING TOGETHER AGREEMENT[391]

(Prepared by the late William P. Cantwell, of Denver, Colorado)

We have decided to live together beginning on . We do not intend that any common law marriage should arise from this. We have not made any promises to each other about economic matters. We do not intend any economic rights to arise from our relationship. If in the future we decide that any promises of an economic nature should exist between us, we will put them in writing, and only such written promises made by us in a written memorandum signed by us in the future shall have any force between us.

Signed at _____ on _____, ___, 2005.

_____

_____

[391] For a short letter agreement where only one of the parties is gainfully employed, see Form 100.01 of Lindey and Parley, *supra*, note 57. For a general from where both parties are working, see Form 100.02, *supra*, note 57. For another form, see the Ante-Anti-Nuptial Agreement in the Appendix by Gutierrez, "Estate Planning for the Unmarried Cohabitant," 616 MIAMI EST. PLAN. INST. at pps. 16-28 through 16-32.

APPENDIX C

SUPPLEMENT TO PART ONE, V, D. 2

REACTIONS OF VARIOUS PROTESTANT DENOMINATIONS AND OF THE CATHOLIC CHURCH; DEVELOPMENTS SINCE NOVEMBER 11, 2005

This material, updating the text dealing with the reactions of various religious groups to gay marriage and the equivalent was not completed in time to appear in the regular text of this outline.

CONTINUATION OF PART ONE, V. D.

3. A general convention of the Episcopal Church opened on June 13, 2006 in Columbus, Ohio. On the one hand, the conservatives wanted an apology by the church and repentance of its actions in the 2003 election of an openly gay bishop, while the liberals considered this progress and did not want to step back.

   Thus, questions going to the heart of the relationship between the Episcopal Church in the United States and the wider Anglican communion were the issues.

   a. Connecticut "Episcopalians . . . [were] split over Connecticut Bishop Andrew Smith's vote in support of the 2003 consecration of Robinson, the first Episcopal bishop who is an openly gay man. Six priests rejected Smith's leadership because of the vote. The state diocese later took control of a dissenting priest's parish, St. John's in Bristol, citing financial irregularities . . .

      " 'St. John's in Exile,' [is] a group the formed when the Bristol congregation split following the takeover by the Connecticut diocese . . .

      "Conservative Episcopalians, a majority within the U.S. Church, have organized to become a significant force since the Robinson election. The Anglican Communion Network, led by Bishop Robert Duncan of Pittsburgh, includes more than 50 Episcopal bishops and a dozen dioceses.

      "Theodore 'Ted' Mollegan Jr., a Glastonbury resident . . . [attended] the convention as a delegate. While he regrets the pain the controversy has caused, Mollegan said, he sees acceptance of gays and lesbians in the Episcopal Church as a justice issue.

" 'It was the Episcopal Church that led the way on birth control, and allowing remarriage after divorce,' he said. 'And I think we are leading the way on this issue.'

"Mollegan said it may be possible to improve relations with some members of the Anglican [Communion] by backtracking on Robinson, "but that would be at the cost of violating the conscience of people who have already voted [in support of Robinson]. It was not a decision made lightly or that we though would be popular."

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b. "The Windsor Report, published in 2004, calls on the Episcopal Church to express regret for the controversy caused by Robinson's election, and for a moratorium on the ordination of gay priests and any consideration of blessings for same-sex civil unions.

" 'So it raises questions about the authority of the Episcopal Church and also our autonomy,' said Karin Hamilton, spokeswoman for the Connecticut Episcopal Diocese. For 500 years, we've had both.'" [392]

The liberals dominate the power centers (national offices and legislative arms) and the conservatives threatened to walk away, but most did not do so because they say the Church is rightfully, theologically, theirs.

c. The House of Deputies (made up of priests and lay people) not only did not comply with the demands in the Windsor Report, in which the Archbishop of Canterbury asked the Episcopal Church to put a moratorium on the election of gay bishops and to stop blessing same-sex couples, but it elected as its presiding bishop a woman, Katharine Jefferts Schori and, at her urging, passed a statement saying the church should "exercise restraint" in electing bishops "whose manner of life presents a challenge to the wider church and will lead to further strains on communion."

While this disappointed some advocates of gay inclusion, others considered it would buy time for the church to remain in the Anglican Communion and persuade other nations' bishops to accept the American position.

The Archbishop of York assured at least one of the liberal delegates that "the American statement would be sufficient to

[392] HARTFORD COURANT, June 14, 2006, p. A4.

prevent the Americans from being excluded from the next major meeting of the Anglican bishops Lambeth Conference of 2008."

On the other hand, conservative bishop, Robert Duncan of Pittsburgh, moderator of the Anglican Communion network suggested that "he had received assurances that the Anglican Communion would soon reprimand the Episcopal Church for disregarding orthodoxy."[393]

d. The Presbyterians at their General Assembly in Birmingham, Alabama, approved a compromise to keep the church from splitting, giving "congregations and regional districts known as presbyteries the leeway to ordain gay clergy members and elders, despite church standards banning the ordination of gay leaders, which the delegates voted to reconfirm at the convention."[394]

e. The Episcopal Diocese of Newark, New Jersey nominated a gay priest as one of four candidates to be bishop. This occurred the day after the Archbishop of Canterbury (a nominal leader of the world's 77,000,000 Anglicans) proposed a plan that could force the Episcopal Church either to renounce gay bishops and the blessings of same-sex unions or lose full membership in the Communion.[395]

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f. "So in other words, Martha Cook, a university professor and member of the vestry at St. Luke's asked her pastor at the gathering, 'the conservatives could literally take over our rightful spot in the Communion, and the majority of the American church would be on the outs?'

"The pastor, the Rev. David R. Anderson, answered that while it was far from settled, 'the scenario the traditionalists were seeking could actually come to pass.'

" 'The vast majority of the Episcopal Church would be considered the 'off brand,' Father Anderson said.

"Bewildered conversations like this took place in many Episcopal parishes last week.

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393 N.Y. TIMES, June 24, 2006, p. A10.

394 N.Y. TIMES, June 24, 2006, p. A10.

395 N.Y. TIMES, June 29, 2006, pp. B1 & B4.

"For parishes that identify with the right or the left pole on the issue of homosexuality, allegiances are clear. But the vast majority of parishes are somewhere in the middle, with members on each side of the debate who feel connected to the Episcopal Church and to Anglican tradition, said the Rev. William Sachs, a St. Luke's member who recently named director of the new Center for Reconciliation and Mission at St. Stephen's Church in Richmond, Va.

" 'What's really going on in the pews of Episcopal churches is they don't necessarily want to align with either side,' he said. 'They want to get on with life. They want this thing resolved.'

"The archbishop's statement raised the prospect of 'ordered and mutually respectful separation' between churches that could not come to agreement, suggesting to many Episcopalians that they would eventually have to choose sides."[396]

[396] N.Y. TIMES, July 2, 2006, p. 10.