

From PLI's Course Handbook  
*40<sup>th</sup> Annual Estate Planning Institute*  
#18923

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ESTATE PLANNING FOR  
DOMESTIC PARTNERS AND  
NON-TRADITIONAL FAMILIES

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## ESTATE PLANNING FOR DOMESTIC PARTNERS AND NON-TRADITIONAL FAMILIES

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Practicing Law 40<sup>th</sup> Annual Estate Planning Institute

For domestic partners, same-sex spouses and their children, proper estate planning is crucial not only to ensure inheritance rights, but also to establish objective proof of the existence of a domestic partnership, as distinct from a more social relationship, and to overcome the many gaps in the legal recognition and status of their families of choice.

### I. CREATING DOMESTIC PARTNERSHIPS AND NON-TRADITIONAL FAMILIES

The key distinction between marriage and domestic partnership in New York and many other jurisdictions is that marriage is a *legal status*, which automatically confers mutual rights, obligations, and benefits upon the parties and which exists until it is legally terminated. Domestic Partnership is the product of a *course of conduct* by the parties themselves. The rights, obligations and benefits of domestic partnership exist only to the extent that the partners affirmatively create them. One of the most important ways couples can make their partnership “visible” to outside world and confer important rights and protections upon their partners is through proper estate planning, discussed in detail elsewhere in these materials, and acquiring a solid understanding of the current law affecting domestic partnerships. The more the couple themselves do to memorialize their mutual obligations and understandings, the more their partnership can be recognized and protected.

#### A. Domestic Partnership in New York - A Creation of the Parties Themselves

1. The *Braschi* decision: The seminal case in which same-sex domestic partners were first held to have any cognizable legal rights as such is *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 543 N.E. 2d 49, 544 N.Y.S.2d 784 (1989), which interpreted the term “family” under New York City rent-control law to include long-term life partners whose relationship was characterized by emotional commitment and financial interdependence and listed criteria by which such a determination might be made.

2. Criteria for Domestic Partnership: From the *Braschi* decision and a long line of later cases, a list of criteria has been developed that is now widely used in virtually situations where a determination of the existence of a domestic partnership relationship is used to qualify various types of benefits and other programs. The list is fairly long, but essentially boils down to proof of *cohabitation, emotional commitment, financial interdependence* (such as, jointly held assets or joint debt obligations), conferring of estate or similar *benefits* (such as naming one another as beneficiaries of their partners’ respective Wills, life insurance, retirement accounts, employment benefits, and so forth), *co-parenting* responsibilities, and/or appointment of one another to *fiduciary positions*, such as powers of attorney, nominations as executor, health care proxies, guardian under NY Mental Health Law), any form of *public declaration or registration* of the parties as domestic partners (such as domestic partnership registration in New York City and in some other counties and

municipalities, obtaining benefits for a domestic partner through employers, commitment ceremonies, announcements of the union in newspapers, and so forth).

3. Domestic Partnership Registration in New York. Domestic Partnership registration (New York City and some other county and municipal jurisdictions) creates virtually no legal rights by itself, but is an excellent method of qualifying for employee benefits that are extended to domestic partners, and other entitlements that are based upon a showing of a “family like” or “spousal-like” relationship. It also allows for termination of the registration, making it easier to ascertain whether the parties are or are no longer domestic partners at any future time.

4. Statutory Definition of Domestic Partner: The *Braschi* criteria (as developed and expanded over subsequent years) have, for the first time, been incorporated into New York’s statutory law. New York Public Health Law, sec. 4201, which defines the priority of persons entitled to make funeral arrangements for a decedent, was amended, effective August 2, 2006, to include the decedent’s “domestic partner”, which is expressly defined in sec. 4201(c) as follows:

*"Domestic partner" means a person who, with respect to another person:*

*(i) is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or any state, local or foreign jurisdiction, or registered as the domestic partner of the person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction; or*

*(ii) is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or*

*(iii) is dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under subparagraph (i) or (ii) of this paragraph; or the length of the personal relationship of the persons.*

*Each party to a domestic partnership shall be considered to be the domestic partner of the other party. "Domestic partner" shall not include a person who is related to the other person by blood in a manner that would*

*bar marriage to the other person in New York state. "Domestic partner" shall also not include any person who is less than eighteen years of age or who is the adopted child of the other person or who is related by blood in a manner that would bar marriage in New York state to a person who is the lawful spouse of the other person.*  
New York Laws, 2006, Chapter 76, amending Public Health Law Section 4201

5. Domestic Partnership Agreements

- (a) Can create an enforceable contractual relationship between unmarried partners. May include any or all of the following provisions:
  - (i) Definition of the parties' financial obligations to one another (and/or to the partners' children), both during the partnership and upon dissolution.
  - (ii) Memorialize the partners' *respective contributions* toward the acquisition of major assets, such as real property, investments and so forth, and provide a mechanism for division of assets in the event of dissolution of the relationship.
  - (iii) Memorialize the contributions of each partner for purposes of estate taxes and determining the portion of the asset that receives stepped-up basis with respect to a deceased partner's interest.
  - (iv) Create a procedure for dissolving or terminating the relationship and dividing up assets, possibly including provisions for valuing assets, mediation or arbitration of disputes, and so forth.
  - (v) **Caveat:** The parties must have separate representation to maximize enforceability of the agreement in the event of a later dispute.
- (b) Consideration - such agreements are generally enforceable so long as they are supported by appropriate consideration. Consideration must not be based upon "sexual services" or other illegal form of consideration. To the extent (if any) that the consideration is not simply cash contributions (*e.g.*, "sweat equity" labor to renovate a jointly owned home) care must be taken to reflect those elements of the agreement in a way that makes it possible to determine whether such forms of contribution were in fact made and if so how to determine the value.

- (c) Benefits of Domestic Partnership Agreements
  - (i) Strong evidence of the existence of the relationship as a domestic partnership, as opposed to merely a friendship, business venture, roommate relationship, and so forth.
  - (ii) Provides objective criteria for determining obligations of parties, the continuing existence and/or termination of the domestic partnership and procedure for termination and division of property.

**B. Legally Sanctioned Same-sex Unions: Same-sex Marriage, Civil Union, Statutory Domestic Partnerships and Reciprocal Beneficiary Registration**

Currently, there seems to be an explosion of significant legal developments affecting domestic partners generally, and same-sex couples and their families in particular. New York law does not provide for any form of statewide domestic partnership or civil union, but has made significant strides toward recognizing same-sex marriages validly performed in other jurisdictions. One of the areas most significantly affected, by these developments, at least at the state level, is estate planning.

1. Benefits of Legally Sanctioned Same-Sex Unions:
  - (a) Where available, marriage for same-sex partners (Massachusetts, Connecticut, Iowa, and Vermont, and the countries of Canada, Spain, Belgium, the Netherlands, Norway and South Africa), Civil Partnership (England), Civil Union (Vermont, New Hampshire, and New Jersey), Domestic Partnership (California, Washington, Oregon, Maine, and District of Columbia), Reciprocal Beneficiary Designations (Hawaii), and other legally sanctioned forms of “spousal equivalency” can confer significant rights equivalent to those enjoyed by legally recognized spouses (such as, intestate succession rights, estate and gift tax exemption at the *state* level, ownership of real property as tenants-by-the-entirety, recognition of the partners as legal “next-of-kin,” and so forth.) The list of which jurisdictions confer which types of legal recognition upon same sex couples changes constantly, so you *must* check for new developments before rendering specific advice. The website of the Lambda Legal Defense and Education Fund ([www.lambdalegal.org](http://www.lambdalegal.org)) provides up-to-date information for every state of the union.
  - (b) Same-sex unions created under the laws of one state or sovereign nation may receive full or partial recognition in other jurisdictions (but see list of “pitfalls” below).

- (c) Even if a particular out-of-state same-sex union is not recognized in another jurisdiction, it can still be used as proof of a “spousal” or “family like” relationship between the parties in order to meet the *Braschi* criteria to qualify for certain benefits (e.g., employer health insurance, succession to apartment leasehold).

## 2. Pitfalls of Legally Sanctioned Same-sex Unions

- (a) Limitations Imposed by the Federal Defense of Marriage Act: The Defense of Marriage Act (“DOMA”) provides that under federal law, only marriages between one man and one woman will be recognized. *See* 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996). Accordingly, any form of marriage between same-sex couples and the various statutory “spousal equivalent” relationships have *no* effect on matters of federal law, such as federal estate and gift taxation, federal income tax filings, succession to social security benefits or ERISA pension benefits, immigration preferences, and so forth. Therefore, any benefits and protections arising from legally sanctioned marriages and equivalent unions between same-sex partners pertain *only* to matters of *state* law and are generally applicable *only* to *residents* of those states.
- (b) Over-reliance by Couples: The availability of civil unions or domestic partnership registration, and even marriage for same-sex couples, as well as the wide acceptance of commitment ceremonies for domestic partners, sometimes creates problems for couples who erroneously believe that these “marriage substitutes” effectively create a legally recognized spousal relationship, with *all* of the rights and benefits of marriage. If this lulls couples into a false sense of security so that they neglect to take affirmative steps to name each other in Wills, Trusts, Health Care Proxies, Powers of Attorney, and so forth, or to seek legal recognition of their relationship as co-parents of their children, the results can be tragic.
- (c) Rights in Divorce or Break-Up Uncertain: As will be more fully discussed later in today’s program, most legally sanctioned same-sex unions and marriages are much easier to enter into than they are to terminate. For example, marriage in Canada requires no prior residency, but divorce requires two full years of residency by at least one of the spouses. Similarly, Vermont civil unions are readily granted to out of state residents but dissolution requires at least one year of residency by one spouse. Divorce or other termination of a spousal equivalent status outside the jurisdiction where it was conferred may be limited to a few jurisdictions that extend full faith and credit to these relationships, or may not be available at all. Only clients who are willing to become test case litigants

in the event they decide to end their marriage, civil union or domestic partnership should consider entering into any of these spousal equivalents outside the state where they reside.

(d) Legal Effect of Out-of-State Marriages, Civil Unions and Domestic Partnerships Is Inconsistent: It is quite common for couples to change their residency from one state to another; but if they are counting on their legally-sanctioned same-sex union being given full faith and credit in their new home state, they may be in for an unpleasant surprise.

(i) Many states have enacted their own forms of DOMAs (often called mini-DOMAs”) and will not recognize any form of legally sanctioned same-sex union.

(ii) Surprisingly, even states that have enacted some form of legal same-sex union differ widely in their treatment of legal unions and marriages created in other states. *For example:* Rhode Island and New Mexico extend full faith and credit to same-sex marriages performed in Massachusetts. New Jersey treats them as Civil Unions. Until recently, Connecticut and Vermont did not recognize Massachusetts same-sex marriages at all, but *did* recognize civil unions created in other states.

### C. Current New York Law Regarding Same-Sex Unions.

1. Civil Unions from other Jurisdictions Do Not Confer Spousal Rights: A surviving partner in a Civil Union lacks standing as a “surviving spouse” to seek damages for his deceased partner’s wrongful death, *Langan v. St. Vincent’s Hospital of New York*, 802 N.Y.S.2d 476 (App. Div. 2d Dept. 2005), appeal dismissed, 6 N.Y.3d 890, 850 N.E.2d 672, 817 N.Y.S.2d 625 (2006), or to seek Worker’s Compensation survivor benefits. *Langan v. State Farm*, 48 A.D.2d 76, 879 N.Y.S.2d 105 (3d Dept. 2007). However, a Civil Union performed in another jurisdiction would almost certainly meet *Braschi*-type requirements for proving a domestic partnership.

2. New York Law Limits Marriage to Opposite Sex Couples: The New York Court of Appeals decision in *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770, 2006 Slip Op. 5239 (2006), which held that the limitation of marriage under existing Domestic Relations Laws to a female “bride” and a male “groom” does not violate constitutional requirements of due process and equal protection. Accordingly, extending marriage, extending marriage rights to same-sex couples in New York will require an act of the legislature.

3. Valid Out-of-State Same Sex Unions Are Recognized by New York State – But for Which Purposes?

- (a) Public Employees – The first major “battleground” for the recognition under New York law of out-of-state same sex marriages was in the sphere of public employee benefit claims. See, *Funderburke v. New York State Department of Civil Service*, 251 A.D.2d 622 (N.Y. App. Div. 2d Dep’t 2008); *Martinez v. County of Monroe*, 850 N.Y.S. 2d 740 (N.Y. App. Div. 2d Dep’t 2008)
- (b) Divorce: Ironically, one of the key testing grounds for recognition of out-of-state same sex unions is divorce law. In February, 2008, the New York County Supreme Court ruled that a Canadian marriage between two women was valid under New York law and could give rise to an action for divorce under New York Domestic Relations Laws. *Beth R v. Donna M.* 853 N.Y.S.2d 501 (N.Y. Sup. Ct. New York County 2008). *Caveat*: New York Domestic Relations Law has not caught up with the recognition of valid same-sex marriages with respect to taxation and pension laws. It is advisable for couples to enter into a pre-nuptial agreement that expressly exempts pension and retirement funds from equitable distribution to avoid potentially disastrous income tax consequences.
- (c) Probate Proceedings: On January 26, 2009, the New York County Surrogate’s Court held that J. Craig Leiby, the surviving same-sex spouse of the late H. Kenneth Ranftle, must be deemed the decedent’s sole distributee (*i.e.*, sole legal heir), which meant that the decedent’s surviving brothers did not have standing in the probate proceeding and did not have to be served with citations or give waivers and consents to the probate. *Matter of the Estate of H. Kenneth Ranftle*, NYLJ 2/3/2009, p. 27, col. 1. This means that even if the brothers had wanted to file objections to the Will (which was not the case here), they would not have had the opportunity because they were not recognized as the decedent’s legal heirs for any purpose. While the result might seem obvious and inevitable, this was not the case when the same issue was presented to the Queens County Surrogate’s Court in *Will of Alan Zwirling*, NYLJ, Sept. 9, 2008. In that case, Surrogate ruled that the deceased spouse’s parents must be treated as distributees, and served with a citation, because the court was unsure whether, under *Martinez*, the recognition of the surviving partner as the spouse would extend to probate proceedings. For this reason, Surrogate Glen’s decision in *Estate of Ranftle*, and the clearly stated analysis and rationale for that decision, represented an important step forward that received considerable attention in the press.



**D. Co-Parenting.**

1. Second Parent Adoption – In a growing number of states, the partner of a biological or adoptive parent can become the legally recognized co-parent of the child(ren) through a proceeding commonly called a “second-parent adoption”. In some jurisdictions, including New Jersey, co-adoption is available to both partners in a single proceeding. Others, such as New York, require a two-step process. Once the adoption or co-adoption is completed, the child is a recognized distributee (legal heir) of both parents. The availability of second-parent adoption represents a significant advance in the recognition of non-traditional family relationships. However, because the process requires a showing that the “parent-like” relationship has already been established between the child and the legal parent’s partner, the co-parent’s relationship to the child may lack any legally recognized status for the first several years of the child’s life. For this reason, in Wills, Trusts and other instruments, it may be necessary to expand the definition of the Testator’s or Grantor’s “children” or “issue” to cover children for whom the person is acting as a co-parent even before legal status as such has been acquired.

2. Co-Parents Prior to Birth – In certain circumstances, California will allow a non-biological co-parent to be legally recognized as such from the time of conception. *However*, it is by no means clear that other jurisdictions will recognize California co-parents, and couples who reside in other states must consult an attorney in their home state to determine if additional legal proceedings are required.

3. Prohibited in Some States – Several states prohibit co-parenting and second parent adoption by same-sex couples, including Florida, Virginia, Alabama and Wisconsin.

4. Caveat – A growing number of couples are having their children through surrogate birth mothers. Surrogacy contracts are entirely legal and well accepted in many states, most notably California. However, in New York, such contracts are deemed to be against public policy and are unenforceable. Furthermore, under New York law, it is a *felony* for an attorney to assist in the formation of a contract for surrogacy. If a client approaches you for assistance in making or entering into a surrogacy agreement, the most you can do is refer the client to organizations or websites which provide information about the procedures available in those jurisdictions where such arrangements are legally sanctioned.

**II. PROBATE, ADMINISTRATION AND INTESTATE SUCCESSION.**

**A. Intestate Succession in New York**

1. Domestic Partners – No matter how long a couple has been together, or how evident they have made it to the world at large that they are committed domestic partners, if one of them dies without a Will, the State of New York will provide one by default, under the

law of intestate succession, and there is NO recognition of a domestic partner in that scheme. New York Estates, Powers and Trust Law, Section 4-1.1. Accordingly, if the deceased partner has children, whether from that relationship or a prior one, all of the deceased partner's assets will pass to the children. If the decedent has no children, the priority for inheritance is as follows: first, the decedent's surviving parent or parents, then siblings (and the issue of predeceased siblings), then nieces and nephews, then the siblings of both parents (*i.e.*, the decedent's aunts and uncles on both maternal and paternal sides), then the issue of the parents' siblings (*i.e.*, the decedent's cousins on both sides), and so forth.

2. Spouses – A legally recognized surviving spouse has the right to at least one half the estate of a deceased spouse (if the decedent has surviving children or more remote issue), and if there are no issue, the surviving spouse takes one hundred percent of the estate. New York Estates, Powers and Trust Law, Section 4-1.1(a) (1) and (2). As of this writing, there is no reported case of a surviving same-sex spouse inheriting pursuant to the laws of intestate succession in New York. However, using the analysis outlined in the *Ranffile* case, a validly married same-sex spouse *should* be able to assert rights as either a sole distributee if there are no issue, or a fifty percent distributee if there are, in the event his or her spouse dies without a valid Will. This would mean that the decedent's other family members would not even have standing to argue over the division of the estate. **Caveat:** Since *Ranffile* is only a single, lower court decision, it *cannot* be relied upon as establishing precedent with respect to a surviving same-sex spouse's rights in intestacy.

## **B. Rights to Serve as Executor or Administrator of a Decedent's Estate.**

1. Priorities for Appointment as Administrator – Absent a Will that validly designates an Executor, the Surrogates Court will appoint an Administrator to handle a decedent's estate. As with intestate succession, the law lays out the order of priority for appointment of an Administrator of an estate: First, the surviving spouse. Then, the children of the deceased have co-equal rights to serve, then the decedent's parents, and so on. Under the analysis laid out in *Ranffile*, a surviving same-sex spouse *should* be accorded the same right to serve as Administrator as any other spouse. **Caveat:** It would be a serious mistake for couples to rely on this prospect instead of preparing Wills and otherwise taking full control of their own estate planning. Although the analysis applied in *Ranffile* may seem compelling, this is only a lower court decision that has binding effect only in New York County, so the result could be different elsewhere. Furthermore, one of the many benefits of a Will is, in most instances, the waiver of the requirement that the Executor obtain a surety bond. Administrators generally are required to obtain such a bond, especially if there are other beneficiaries or substantial creditors who could be harmed by any defalcation by the personal representative of the estate. So there are other important reasons to avoid relying on the laws of intestacy.

### III. ESTATE PLANNING FOR DOMESTIC PARTNERS AND THEIR FAMILIES

#### A. Basic Elements of a Will

1. Dispositions of tangible personal property (*i.e.* the physical objects one owns, including everything from an ashtray to a yacht, but not currency, accounts, securities, real property, leaseholds, life insurance or anything defined in terms of intangible rights rather than physical possession).
2. Specific Bequests – Bequests of specified amounts of cash or of particular assets.
3. Residuary bequests (typically expressed as fractions or percentages rather than specific amounts).
4. Appointment of Fiduciaries - Primary and Successor Executors, Trustees and Guardians, as appropriate.
5. Tax Allocation Clause
  - (a) In the absence of specific direction in the Will, estate taxes will be usually apportioned among beneficiaries in proportion to the percentage of the total taxable estate they have received. (*Example:* Estate consists of \$5 million, including \$3 million in assets passing to the surviving partner under the Will, plus an IRA of \$1,000,000 that passes to the decedent's brother by beneficiary designation, and life insurance of \$1,000,000 divided among decedent's six nieces and nephews. The Executor must collect the proportionate share of the estate tax from the decedent's brother and nieces and nephews.)
  - (b) Many Wills provide that all estate taxes are to be paid out of the residuary estate. (*Example:* Same facts as above, but here the Executor would pay all estate taxes out of the \$3 million testamentary estate, and the others would receive their inheritances free of estate tax.) This is often the easiest way to handle the payment of taxes and is often (but not always) consistent with the testator's wishes.
  - (c) It is also possible to allocate estate taxes to a particular portion of the residuary estate, for example, to avoid allocating any part of the estate taxes to any part of the estate that is to be distributed to a charity.
  - (d) ***Caveat:*** Always think through the impact of a tax allocation clause based on the total assets in each person's estate. While allocating the tax to the residuary is often a good plan, it can create an unfair burden if there are

significant non-testamentary assets or specific bequests passing to other beneficiaries. (In the above Example, the testator might *not* want to burden the partner's share of the estate with the tax on the property going to family members.) Each case must be considered individually.

6. Disinheriting Other Family Members

- (a) Only those persons who would have inherited under the laws of intestacy in the absence of a Will (called "distributees" in New York law) and, possibly, the beneficiaries named in a prior Will whose interests are reduced or eliminated in the later Will, have standing to contest a Will.
- (b) Negative Bequest – To reduce the possibility of a challenge by a "natural heir" who receives nothing under a Will, it is sometimes wise to make it explicit that this was done knowingly and deliberately, but best not to give a specific reason.
- (c) *In Terrorem* Clause – Provides that anyone who contests the Will is deemed to have died before the Testator and receives nothing. Typically useful only if the Will provides a bequest to the potential challenger that is significant enough that he or she would be unwilling to risk losing that bequest by challenging the Will.

7. Funeral Arrangements

- (a) In Will – Including funeral instructions in a Will is *generally* a discouraged practice. However, a major exception to this general rule is when the testator wishes to have funeral arrangements made by a domestic partner or other "non-relative." Funeral homes have traditionally been fearful of taking instructions from a "non-relative" for fear of lawsuits by family members who later object to the arrangements as made. A copy of the Will in which the surviving partner is both the named executor and is expressly appointed in the Will to make funeral arrangements is usually persuasive. (Be sure to be explicit if cremation and/or anatomical donation is desired.) But it is unwise – and unnecessary – to rely on such provisions in a Will alone. A separate written designation of the person authorized to make arrangements for the disposition of remains is strongly recommended.
- (b) Decedent's Domestic Partner — As noted above, New York Public Health Law, Sec. 4201 has been amended, effective August 2, 2006, to include a decedent's surviving domestic partner as a person having highest priority over other relatives "to control the disposition of the remains of such

decedent”. Under this amendment, even in those situations where a decedent did not execute a written designation of the person to make such arrangements, a domestic partner (as expressly defined Sec. 4201(c)) would be permitted to do so, *but* presumably would first have to show sufficient proof to meet the *Braschi*-type criteria listed in the statute.

- (c) By written designation of agent — The amendment to Public Health Law expressly recognizes – and provides a form for – appointing one or more persons to make funeral and related arrangements. Clearly, it is far preferable to execute a written designation authorizing the partner as the person to make such arrangements, obviating the need for gathering documentary proof of the existence of the domestic partner relationship.

## **B. Contingency Plans**

Every Will should provide for at least two sets of circumstances. “Plan A: - if the deceased is survived by the partner; and “Plan B” - if the deceased is not survived by the partner.

1. "Mirror Image" Wills for Couples – Typically each partner will wish to leave all or most of his or her estate to the surviving partner ("Plan A"). But what if both members of the couple are deceased? In the absence of a surviving partner, each member of the couple may wish to leave assets to his or her own family members, friends or favorite charities. Since the second-to-die partner will presumably be the owner of the combined assets of both members of the couple (having previously inherited from the first-to-die), "Plan B" should provide that the surviving partner's estate is divided between the first-to-die partner's secondary beneficiaries and the second-to-die partner's secondary beneficiaries. The division may be 50-50 or may reflect each partner's relative contribution to the couple's total combined assets.

*Example:*

*If my domestic partner, Mary Doe, does not survive me, I direct that my residuary estate be divided into two equal parts, called “Share I” and “Share II,” and distributed as follows:*

- 1) *I direct that Share I be divided in equal shares among my siblings who survive me and the issue of any of my siblings who predecease me in equal sub-shares per stirpes.*
- 2) *I direct that Share II be distributed as follows:*

- (a) *I give Fifty Percent thereof to Jane Doe, the mother of my domestic partner, Mary Doe, if she survives me, or if she does not, to her issue who survive me in equal shares per stirpes.*
- (b) *I give Fifty Percent thereof to Terrific Women's College, in memory of my domestic partner, Mary Doe.*
- (c) *Any portion of the assets to be distributed pursuant to this sub-article (b) that is not effectively so distributed shall be added to that portion that is effectively so distributed under this sub-article.*

- 2. Trust for Surviving Partner - To ensure that the surviving partner cannot change the plan of distribution after the first partner's death, it may be preferable to leave assets in trust for the surviving partner's lifetime, with the secondary beneficiaries as remaindermen. However, this will require the appointment of one or more Trustees for the lifetime of the surviving partner and may be seen as unduly controlling or paternalistic.
- 3. Contract to Make a Will - Another method of preventing the surviving partner from changing the agreed-upon plan of ultimate distribution is by entering into a contract to make a Will. Under New York EPTL § 13-2.1 it is clear that persons can bind themselves to make a specific testamentary (or trust) disposition so long as the "agreement, promise or undertaking .... is in writing and subscribed by the party to be charged therewith, or by his lawful agent". The requirement for making such a contract or a joint Will is strictly interpreted by the courts to require not only language stating an intention to make jointly determined dispositions, but also an express contract not to revoke or change any such disposition. See, *In re Estate of Lubins*, 673 N.Y.S.2d 204 (2d Dep't 1998) (absent clear and unambiguous statement of contractual intent to relinquish right to revoke a testamentary disposition, testator is free to change will after death of spouse). As a practical matter, binding contracts to make a will or particular disposition are rarely used if only because a lawsuit seeking to enforce such a contract would be expensive and time-consuming. Nevertheless, for some clients, it might be worth considering.

## C. Clients with Children

- 1. Trust for Children – If children are minors or very young adults, it is best to leave assets in trust for them with distributions of principal postponed until whatever age seems appropriate to client.
- 2. Appointment of Guardians – If co-parent is not recognized as legal parent, such as through second-parent adoption, it is absolutely crucial to name the surviving partner as the Guardian of the child or children during their minority. A successor Guardian should also be named. (It is often wise to leave some amount of cash

directly to non-co-parent Guardian to help offset the financial burden of adding another member to the household.)

3. Appointment of Trustees – Separate from the appointment of the Guardian is the appointment of the Trustee(s) of the trust(s) for the child(ren). If the surviving co-parent is the Guardian, it is probably not necessary to name anyone else as Trustee. But if a non-co-parent is the Guardian, it is sometimes wise to name someone from the other side of the family to serve as co-trustee with the Guardian. In cases where the surviving partner is on good terms with the deceased partner's family, this arrangement can help keep both sides of the family involved in the child(ren)'s life.
4. Defining "Children" or "Issue" — It may be wise to define the terms "my children" and "my issue" to include "any child with respect to whom I have commenced a legal proceeding to establish rights as a co-parent which proceeding has not been terminated or withdrawn by me at the time of my death." This could provide an inheritance for a child with whom the testator has established a parental bond even if the second-parent adoption process has not been completed at the time of the testator's death.

#### **D. Planning for Special Circumstances**

1. Severely disabled or ill surviving partner – If the surviving partner is likely to be unable to handle his or her own finances because of illness or severe disability, it may be wise to leave assets in trust for the surviving partner's lifetime with a close friend or family member as Trustee (possibly with an institutional co-trustee to handle the tax filings and investments.) Remember that the trust must provide for the disposition of any assets remaining after the death of the lifetime beneficiary.
2. Hostile relationship with partner's family – A trust for the partner is the surest way to avoid having any of the first-to-die partner's assets become subject to claims by (or bequests to) the surviving partner's family.
3. Works of art, music, literature and so forth by testator – Will can provide for a separate executor to handle a decedent's artistic creations (*e.g.*, a literary executor). Copyrights should be specifically bequeathed in the will. **Caveat:** Determine where copyrights or other rights are held (U.S.A. or foreign?) and the applicable laws concerning inheritance of such rights.

#### **E. Same-Sex Spouses**

1. For New York couples who are validly married elsewhere, it is good practice to specifically state that in a provision along with the following lines:

*JANE DOE, my domestic partner of many years, and I were legally married in the Commonwealth of Massachusetts on January 1, 2009. Accordingly, throughout this Will, all references to JANE DOE shall be construed as references to my "spouse" to the fullest extent of applicable law, and to the extent that applicable law fails to recognize our relationship as legally wedded spouses, such references shall be deemed to refer to her as my "domestic partner".*

2. As noted above, it is highly likely that a surviving spouse will be recognized as the decedent's next of kin for probate purposes. Whether this recognition will extend to the unlimited spousal deduction under New York State estate laws remains to be seen.

#### **F. Avoiding (or Defeating) Will Contests**

1. Observe formalities of execution – Careful attention to the proper execution of the Will is crucial.
2. Separate representation – Consider whether it is best to avoid interviewing the partners together or at least having them execute their wills separately. (This is a matter of balancing the desire to treat the couple as much like a "married" couple as possible against the need for extra caution against the possibility of a challenge on grounds of undue influence, collusion and so forth.) If there is a strong possibility of a challenge to the Will, be scrupulous about seeing the clients separately, having them execute their wills separately and even referring one partner to a different attorney. Also recommend that the clients execute more than one Will with substantially similar terms six months to a year apart to create a further disincentive to a challenge.
3. Non-testamentary dispositions – Maximize use of non-testamentary methods for passing assets to surviving partner, which are less vulnerable to challenge, such as:
  - Beneficiary designations (life insurance, IRA's etc.)
  - Joint Tenancy with Rights of Survivorship for real property (see below.)
  - Joint or "In Trust for" accounts
  - Ownership of life insurance on each other's lives – Requires an "insurable interest," but this is readily available where there is joint ownership of real property or a business and there is increasing recognition of domestic partners as



having an “insurable interest” equivalent to spouses) – or a life insurance trust.

- Inter vivos trusts (see below)

- Lifetime gifts to shift assets over to partner and/or child(ren).

- Transfer on Death securities registrations – Prior to January 1, 2006, New York law *did not* recognize “Transfer on Death” designations for securities or non-retirement securities accounts. However, under New York Estates, Powers and Trusts Law Sec. 13-4.0, entitled “Transfer-on-Death Security Registration”, “Transfer on Death” designations are now recognized in New York with respect to securities and investment accounts, but this is only effective for *designations made on or after 1/1/06*. **Caveat:** Make sure that client verifies that any previously made “TOD” designations are dated on or after 1/1/2006. Older ones *must* be redone or they will *not* be effective.

#### IV. INTER VIVOS TRUSTS

##### A. Possible Benefits

1. Less Contestable than Wills – Can be more difficult to challenge than a Will because it is established well before death. The Grantor typically operates the trust him/or herself for a substantial period. Without the need for probate, there is also no requirement for notice to “natural heirs”, and hence no implicit invitation to challenge the plan of distributions.
2. Avoids Probate – Often an overrated benefit in New York and other jurisdictions in the Northeast (except where the deceased has missing heirs who must be served with notice of the probate proceeding), but widely used in other jurisdictions, especially Florida and California. **Caveat:** Use of a Pourover Will to pass assets to an inter-vivos trust after death defeats any intention of avoiding probate and will require that legal heirs (“distributees”) be served with a Citation or else sign a Waiver and Consent to the probate and that a Notice of Probate be sent to the remaindermen of the trust.
3. Grantor retains lifetime control – After assets are successfully transferred to the Trust, the Grantor continues to have sole control of his or her financial affairs. No need for a new tax identification number if Grantor is the sole lifetime beneficiary. No need for separate fiduciary returns to be filed for the Trust. All income reported on Grantor’s personal returns.
4. Successor Trustees – Can provide for a smooth transition to a successor trustee to take over upon incapacity or death of Grantor and manage the trust for the benefit of the Grantor during his or her remaining lifetime and perhaps for the benefit of

the Grantor's partner or child(ren) after the Grantor's death.

5. Privacy – May allow greater privacy because filing in Probate or Surrogate's Court is not required. But, again, if a Pourover Will is submitted to probate, the Trust Agreement must be filed in Surrogate's Court, and the privacy element is lost.
6. Sophisticated trusts – Can provide for tax savings and charitable giving while also benefitting a loved one.
7. Estate Tax planning – Avoid taxation of trust assets in estate of second-to-die partner by using a by-pass trust structure.
8. Avoids Statutory Accounting Requirements – Trusts created under a Will are subject to strict rules of Accounting by the Trustees, which are generally not waivable by the Testator. Inter-vivos trusts are not subject to those requirements, so the Grantor has flexibility as to the rules for Accountings. (This may not *always* be a good thing, however.)

## **B. Possible Pitfalls of Revocable Lifetime Trusts**

1. Must transfer assets into title of the trust in order to gain the benefit.
  - (a) Requires the client to follow through.
  - (b) Transfers *can* be done later on (*e.g.*, if Grantor becomes ill or incapacitated) by an attorney-in-fact, but only if the power of attorney specifically grants such authority.
  - (c) Some assets (notably partnership interests and many New York co-op apartments) are difficult to transfer to a trust.
2. Will is still needed – A trust does not completely avoid the need for a Will. At minimum, a "Pourover" Will is still needed to ensure that any assets not effectively transferred to the trust during the Grantor's lifetime are added to the trust after Grantor's death. As noted above, if the Pourover Will is probated, some of the supposed benefits of using a revocable living trust will be lost.
3. Cost – Costs more than a simple Will.
4. No automatic estate tax savings – Contrary to widespread popular belief, the mere fact of passing assets through a revocable trust does not generally reduce or avoid estate taxes. (Tax-planning trusts, such as a charitable remainder or lead trust, a common law GRIT, a GRAT, a qualified personal residence trust or a life

insurance trust, are always irrevocable.)

5. Amendments – Amending a lengthy Trust Agreement may be more cumbersome than simply executing a new Will. Attorney must decide whether to create separate Amendments to the Trust Agreement or to incorporate changes into an Amended and Restated Trust Agreement.

### C. Defining the Beneficiaries of Irrevocable Trusts

1. In an irrevocable trust, such as a Life Insurance Trust or other tax-reducing form of trust (such as GRITs, GRATs and split interest charitable trusts), careful thought must be given to designating the intended beneficiaries. Simply naming the Grantor’s current domestic partner as a remainderman of an irrevocable trust could be disastrous in the event of a subsequent breakup of the relationship. Yet, lacking the benefits of a marriage certificate or divorce decree to create or terminate legal status as a domestic partnership, the trust agreement itself should set forth the standards for determining whether the Grantor’s domestic partner at the time of the execution of the trust agreement is still an intended beneficiary at the time of the Grantor’s death, while at the same time preserving the irrevocable nature of the trust which is a prerequisite to any tax benefit.

*Example: “Upon termination of the trust, the Trustee shall distribute the remaining trust corpus to John Doe, if he is then my Domestic Partner or legal spouse, or if he is not, then to the person (if any) who is then my legal spouse or who, in the judgment of my Trustees, is my Domestic Partner at the time of my death....”*

2. The term “Domestic Partner” should be expressly defined in the trust document:

*Example: “The term “Domestic Partner” shall mean a person with whom I am residing in a committed domestic partner relationship, including but not limited to a person whom I have expressly identified as my Domestic Partner in any public registration of domestic partnerships or the equivalent, which has not been terminated at the time of my death.. However, it shall be left to the discretion of my Trustees to determine whether a person I have named as my Domestic Partner qualifies as such for purposes of being made a beneficiary of this Trust.”*

**Or**, consider tracking the language used to define “domestic partner” in the New York Public Health Law, Sec. 4201(c).

3. Some practitioners suggest leaving the determination of whether a person qualifies as a deceased Grantor’s domestic partner entirely to the Trustee(s). The whole issue of determining whether a particular person shall be deemed the Grantor’s

Domestic Partner can, of course, create conflicts of interest in some cases and may leave the surviving partner at the mercy of a third party's subjective judgment. And there is a clear risk of litigation between a putative domestic partner or same-sex spouse and a Trustee who determines that the partner/spouse does not qualify as such for purposes of the Trust. Nevertheless, in the case of a life insurance trust, it is extremely important to preserve the effectiveness of the Trust by avoiding giving the Grantor any "indicia of ownership" such as the implied right to designate the beneficiary of the life insurance.

## V. JOINT ACQUISITIONS OF PROPERTY

Very often, the first time a couple gives serious thought to their mutual financial understandings and their overall estate plan is when they decide to purchase a home together. Since even a married same-sex couple will not have the benefit of unlimited tax free gifting, they must think through all aspects of how they will acquire and pay for any real property together.

### A. Joint Tenants with Rights of Survivorship ("JTWROS").

1. Both owners *together* own 100% of the property and upon the death of one owner, the other becomes sole owner by operation of law.
2. Avoids probate for that particular property, which may be important to protect a surviving partner's interests in the property.
3. Possible Pitfall: Property owned as JTWROS is presumed to belong entirely to the decedent. Absent proof of contribution by the surviving co-owner, 100% of the value as of the date of death is deemed part of the decedent's taxable estate. Therefore, documentation will be needed to establish the value of the deceased partner's interest so that tax is imposed only on that portion of the total value.
4. Documentation of each party's contribution is needed in the event of the couple's separation to determine a fair buy-out or distribution of the net proceeds of a sale of the property.
5. Unequal contribution gives rise to a gift by the partner contributing more than 50% and may require filing a gift tax return and using some or all of the Applicable Exclusion Amount, or even incurring gift tax, which is paid by the donor.

### B. Tenants-in-Common

1. Each owner is deemed to be the owner of an undivided one-half interest in the property unless the deed specifies a different allocation of ownership.

2. Each partner's share is deemed to be part of his or her testamentary estate. Therefore, to ensure the surviving partner ends up owning the property, each partner must make an appropriate provision in his or her Will. Since domestic partners are not recognized under the laws of intestacy, failure to make such a testamentary provision will cause the deceased partner's interest in the property to pass to his or her heirs at law ("distributees".) **Note:** The Will need not provide a specific devise of the property if the partner is the beneficiary of 100% of the residuary estate. However, many practitioners do include such devises to enhance the protection of the surviving partner's interest.

### **C. Tenants-by-the-Entirety**

1. This form of joint ownership is limited to spouses. It provides not only mutual rights of survivorship but also protection against a deceased spouse's creditors.
2. States that allow marriage by same-sex partners, or that allow "marriage equivalents," such as civil unions or statutory domestic partnership, typically allow those couples to own property *in those states* as tenants-by-the-entirety.
3. In New York State, it is not yet settled whether this form of ownership will be recognized for same-sex couples validly married in other jurisdictions. However, deeds reflecting title as "tenants-by-the-entirety or, if not, as joint tenants with rights of survivorship" have been successfully recorded and insured by title companies in New York. This at least allows married same-sex couples to record title in that manner right away and be correctly positioned when the legal precedent has been more clearly established allowing the spousal form of ownership. **Caveat:** Title companies may try to dissuade you from using this form of title description, claiming that it has not been legally recognized and that "joint tenancy with rights of survivorship" is really the "same thing" as tenants-by-the-entirety. Do not give in. The enhanced protection from creditors is only available under the spousal form of ownership.

### **D. Acquisition of Property**

1. Contributions of the Parties – Whenever couples purchase real property in both names, it is very important to memorialize the parties' respective contributions toward the purchase price and toward any capital repairs and improvements. Some possible scenarios:

*"Even Steven"* - Both contribute equally to the down payment, carrying costs and capital repairs and improvements. In that case, clearly each partner owns half the equity in the property.

*"The Investment Banker and the Starving Artist"* - One partner pays for 100%

purchase price, carrying costs and capital repairs and improvements. Clearly a gift of half the value has been made to the non-contributing partner.

*“The Investment Banker and the Carpenter”*- The parties have unequal wealth and the wealthier partner contributes all the cash for the purchase and carrying costs. There are immediate potential gift tax consequences, *but* the parties might enter into an agreement that provides a way for the less wealthy partner to acquire equity in the property through “sweat equity”, such as constructing capital improvements on the property.

*“The Investment Banker and the Heiress”*- One party has high income, the other has a large amount of available cash (*e.g.*, an inheritance) but low income. The “Heiress” puts up all of the down payment, while the “Investment Banker” makes all mortgage payments and covers all carrying costs. Their respective contributions and equity will be grossly unequal at the outset, but will change over time as the Investment Bank pays down the mortgage etc. This type of arrangement clearly calls for the most careful ongoing documentation because the respective equities will be different at different points in time, which would be crucial in the event of a sale, break-up of the relationship or the death of one of the partners.

2. Memorializing Contributions – A formal agreement, such as a domestic partnership agreement, is by far the best way to memorialize not only the parties’ respective contributions to the purchase price, but also their mutual understandings regarding ongoing financial obligations, the types of contributions that will be recognized as adding to equity. Such an agreement should also provide a procedure for terminating the joint ownership, including dividing the property in the event of a break-up. This may include a method of calculating the price at which each party could buy out the other’s interest, or calculating the distribution of the proceeds of a sale to a third party. To ensure validity of the agreement, the parties must have separate representation.

3. Adding Partner as Co-Owner of Property – Where one partner wishes to add the other to the title of a previously acquired property, it is crucial to ascertain whether the intention is:

- (a) To make an outright gift of a half interest?
- (b) To allow the other partner to purchase an interest for fair value, and if so, how?
- (c) To treat the transfer purely as a testamentary substitute for as long as the couple is together, with full ownership to revert to the original owner in the event of a breakup? Surprisingly, this is actually the most common

subjective intention when one partner adds the other to the deed on already owned property, but is typically unstated and not well documented. Ask the clients how the original owner would get the property back if the parties break up. Pay for improvements made by the donee? Share the benefit of any increase in value during the period of co-ownership? Buy back the conveyed interest for full value? Some other formula?

## VI. LIFE INSURANCE

Because of the lack of a marital deduction, life insurance often plays an especially important role in estate planning for domestic partners who have substantial assets, as well as for partners who are undertaken joint debt (*e.g.* home mortgage that could not be supported by one partner alone). Ideally, the life insurance can be excluded from the decedent's estate by using a life insurance trust or having each partner own a policy on the life of the other. Life insurance trusts in particular are an important way of replacing assets otherwise lost to taxes and/or to the charitable beneficiaries of split-interest charitable gifts that may be a part of the client's overall estate plan.

## VII. RETIREMENT BENEFITS

### A. Rollover and Minimum Distribution Rules

Since non-spouses do not have the opportunity to fully roll over their partners' IRAs and similar tax-deferred retirement assets into their own retirement accounts, the client must be made aware of the rules for income in respect of a decedent and the options that may be available to elect a payout over time to spread out the income tax obligation. For unmarried clients who wish to leave a portion of their estates to charity, designation of a charity as the direct beneficiary of a tax-deferred retirement account is often preferable to making a bequest in the will that will be funded with post-tax dollars.

**Federal Pension Protection Act.** On August 17, 2006, the Pension Protection Act, H.R. 2830/S. 1783, was signed into law. This represented a sweeping reform in many aspects of federal pension law, and included two new provisions of direct benefit to domestic partners:

1. Section 829 – Non-spousal “Rollovers” of Retirement Plans
  - (a) Previously, most defined contribution plans, such as 401(k) and 403(b) plans, and even some IRAs, had to be paid out in a single lump sum to any beneficiary who was not a legally recognized spouse. (Spouses could, and still can, roll over the proceeds of a deceased spouse's retirement plan to their own IRA, preserving the tax deferral until the surviving spouse reaches the requisite age for “minimum required distributions.”)
  - (b) Under Section 829, a non-spouse beneficiary, including a domestic

partner, can elect *either* a pay-out over five years *or* a conversion to a “beneficiary IRA,” sometimes called a “stretch IRA,” which will pay out the proceeds over the *beneficiary’s* life expectancy, spreading the taxable income over a number of years. Under the old scheme, the best advice to clients with large 401(k) and similar employer-based contributory retirement plans, was to shift as much as the plan would allow over to an individual IRA that *would* allow conversion to a “stretch IRA” for the beneficiary.

- (c) Note that the “non-spouse rollover” provision is *not* the same as the even *more* beneficial “spousal rollover” provision. The non-spouse beneficiary will be required to start receiving taxable distributions no more than a year after the account holder’s death, regardless of the beneficiary’s age. However, this is still an enormous improvement over the old law, which often resulted in a substantial loss of the decedent’s retirement savings to income taxes on large lump sum distributions. This is no longer necessary.
- (d) Note also that Section 829 applies only to “defined *contribution* plans,” such as 401(k), 403(b) and IRA’s, and has no effect on “defined *benefit*” pension plans that fall under the ERISA laws. As to those, surviving spouses remain the only possible beneficiaries of a deceased pensioner’s benefits, depending on whether the pensioner made the appropriate election.

## 2. Section 826 – “Hardship” Withdrawals Extended to Plan Beneficiaries

- (a) Previously, “hardship withdrawals” were permitted to be taken from tax-deferred retirement plans, without the early withdrawal penalty, upon proof that the funds were needed to meet certain medical or other urgent expenses of the account holder or the account holder’s legally recognized spouse and/or dependents.
- (b) Under Section 826, such “hardship withdrawals” may also be taken to meet the needs of a named beneficiary of the plan, including a domestic partner.
- (c) ***Caveat:*** These more expansive “hardship withdrawal” rights extend only to a beneficiary who is specifically designated on the retirement account or plan. It is therefore extremely important for clients to designate the intended beneficiary and to double check that the designation has been



duly processed by the planholder. (Surprisingly, press reports indicate that as many as *half* of all 401(k) and similar accounts do *not* have an effectively designated beneficiary.)

## **B. Beneficiary Designations**

Always insist that the client verify who the named beneficiaries are for each non-testamentary asset, especially retirement accounts, which can be substantial. Lesbian or gay clients, fearful of being too “out” at their jobs, will often name someone other than their partners as beneficiaries on employee benefits such as life insurance or retirement plans. Also, because there is no formal divorce proceeding when a non-marital relationship terminates, it is extremely common for clients simply to forget that a previous partner is still named on an IRA or life insurance policy.

## **C. Certain Retirement Benefits Limited to Federally Recognized Spouses**

1. Social Security benefits – While a surviving spouse may elect to benefit from a deceased spouse’s (and sometimes even a former spouse’s) Social Security entitlement, domestic partners cannot.
2. Qualified Pension Plans – Most fully employer-funded pension plans (qualified defined *benefit* plans), which are governed by federal ERISA rules, do not permit a continuation of pension benefit after the death of the pensioner *except for* a surviving spouse, as defined under federal law. Thus, neither a domestic partner nor the couple’s children will ordinarily receive any continuation of the deceased partner’s defined benefit pension.
3. Rollover of Retirement Accounts and Plans – Even under the new rules of the Pension Protection Act, neither Individual Retirement accounts nor 401(k) (or equivalent) plans can be completely rolled over to a surviving partner’s own retirement account, as they can for a surviving spouse. However, this inequity has been greatly reduced by the new rules allowing a payout over the beneficiary partner’s lifetime.
4. General Note – The potential impact of losing a deceased partner’s Social Security and defined benefit pension income, and the possible premature distribution and taxation of retirement accounts, must be carefully factored in when planning for domestic partners, especially as they approach or exceed retirement age. Clients must be encouraged as much as possible to establish and fund their own retirement accounts and to purchase as much permanent life insurance as they reasonably can afford to offset the potential loss of the first-to-die partner’s social security, pension and possibly other income, and the loss of tax deferred assets to income taxes as well as potential estate taxes.

## VII. THINGS TO WATCH OUT FOR

### A. “Hidden” Relationships from Client's Past

1. “Dormant” Marriages – Many clients convince themselves that by simply ignoring past legal ties, they can somehow cut off the rights of estranged “heirs at law.” Always ask whether your client has ever been married and, if so, was the marriage ever legally terminated (Obtain a copy of any divorce decree.) Similarly, find out if there are unacknowledged or estranged children from a prior relationship.
2. Contractual Obligations – Be sure to find out if the client is under any legal obligation to any past partner (*e.g.*, under a divorce settlement or a break- up agreement) or owns any assets jointly with anyone besides current partner. Such arrangements can have a significant impact on the client's estate plan.
3. Outdated Beneficiary Designations - As noted above, failure to review the beneficiary designations in effect with respect to employment benefits, life insurance, retirement accounts can result in an unintended benefit to a former partner or other person who is no longer the intended beneficiary. Furthermore, even if a change of beneficiary form has been submitted, it is all too common for clerical error to prevent the change from being properly effectuated. Urge clients always to verify that changes have been not only submitted but also incorporated into the plan. Under the new Pension Protection Act rules, this is more important than ever.

### B. Heightened Scrutiny of Estate Tax Returns

1. Lack of Marital Deduction – Because non-marital partners do not enjoy the benefits of the unlimited marital deduction for gift and estate tax purposes, the tax authorities are far more likely to audit an estate tax return where the primary beneficiary is the decedent’s domestic partner. It is therefore prudent to prepare the return with the expectation that it will be audited in detail and to compile the maximum available documentation at the earliest stages of the estate administration.
2. Scrutiny of Lifetime Gifts and Contributions – A particular focus of most audits of the estate tax return of a non-marital partner is lifetime transfers between the partners for which gift tax returns should have been filed. Clients must be educated about the possible gift tax implications of any transfers between themselves or into jointly held accounts or properties.

- (a) Even payments by one partner for expensive travel or luxuries shared in by the other can be considered potential taxable gifts.
  - (b) IRS audits of Estate Tax Returns routinely require proof of contribution by the surviving partner/spouse to property jointly owned with a deceased partner/spouse.
  - (c) Gifts made by an attorney-in-fact during the final illness of the principal are especially scrutinized. If the power of attorney does not expressly confer the power to make gifts, even gifts of less than the annual exclusion amount can be brought back into the estate. See discussion below of new Power of Attorney rules with respect to gift giving powers.
3. No Split Gifting - Unmarried partners do not have the option to treat gifts to third parties (such as children) made by one partner as “split gifts” by the couple, as married partners can. To make a gift of more than the annual exclusion amount, the couple must each make a separate gift of up to \$13,000.00 or they must make the gift using joint assets to which both have made well documented contributions.

## VII. OTHER IMPORTANT INSTRUMENTS

### A. Planning for Possible Disability or Illness

- 1. General Durable Power of Attorney
  - (a) Whenever possible, use a standard pre-printed form (or the HotDocs version) because there is less likelihood of a need for interpretation or construction. However, those forms typically have to be amended to include additional powers in order to cover all contingencies, such as transfers for Medicaid planning, access to safe deposit boxes, transfers to an irrevocable trust established by the principal, etc. **Note:** New statutory forms for Powers of Attorney go into effect in September, 2009. These will require separate, detailed grants of authority for gifts other than annual exclusion gifts to immediate family. See New York General Obligations Laws, Sec. 5-1501.
  - (b) Banks often seek to require that their own power of attorney forms be used. Be aware, however, that, if it is no longer practical to have the client execute the bank's form, under New York General Obligations Law, banks are required to honor any form of properly executed general durable power of attorney. You may have to insist on speaking to someone in the legal

department if the bank employees are resistant to accepting a general power of attorney. *However*, the same does not apply to brokerage houses, so it is advisable for clients who have brokerage accounts to execute the brokerage house's specific power of attorney form at the same time as they execute the general form. The new amendment *requires* that a duly executed Power of Attorney be honored by all third parties. NY G.O.L. Sec.5-1503.

- (c) Since enactment of the Patriot Act, banks and brokerage firms are more resistant than ever to recognizing power of attorney designations and regularly insist upon "medallion guaranteed" signatures of both principal and agents. As much as possible, try to have Power of Attorney designations effected while the client is able to meet these new requirements. However, the new forms should overcome most of these problems.
- (d) Can provide authority to make gratuitous transfers of Principal's assets and/or to make transfers to an inter vivos trust, or even to make transfers for purposes of Medicaid qualification planning, but these powers *must* be expressly stated. *Note*: The new form requires a separate Statutory Major Gifts Rider ("SMGR"). NY G.O.L. Sec. 5-1514, 9(b).
- (e) "Springing" Power of Attorney – becomes effective only upon a specified contingency (*e.g.*, Two physicians provide written opinions that the Principal is no longer competent to handle his or her own affairs.) Some clients prefer this, but it is much more cumbersome to use than a general power, and it limits the usefulness of the power to specific circumstances, which may or may not ever arise.

## 2. Health Care Proxy

- (a) Names partner (or anyone of client's choosing) as the principal's agent to make all health care decisions if the principal is unable to do so for him or herself. Ideally, it also names successor health care agent(s).
- (b) Absolutely crucial for unmarried partners to have for each other.
- (c) Should specify that, regardless of the principal's ability to make his or her own health care decisions, the named Health Care Agent has the right to be treated as "immediate family" for purposes of restricted visitation facilities (*e.g.*, intensive care unit) and it should include an explicit waiver of the medical confidentiality rules enacted under HIPAA (Health Insurance Portability and Accountability Act) and the Privacy Rule, 45

CFR, Pt. 160 and 164(A) and (B), with respect to the named Agent.

3. Living Will/Health Care Decisions Declaration/Advance Medical Directives/"MOLST" Forms

- (a) Sets limits on medical treatment or intervention that, in a clearly terminal situation, would only prolong the process of dying.
- (b) Any direction to refuse or withdraw artificial nutrition and/or hydration must be expressly set forth or it will be presumed that these are *not* to be withdrawn under any circumstances. Same for consent to a "Do Not Resuscitate Order" (commonly called a "DNR").
- (c) Two schools of thought:
  - List specific treatments and medications that are to be withdrawn or refused (*e.g.*, antibiotics, respirator, feeding tube, resuscitation, etc.)
  - or
  - Provide general categories of treatment to be withheld or withdrawn and leave specifics to be decided by Health Care Agent. N.B.: Be sure to discuss with the client his or her specific views regarding withdrawal of nutrition or hydration. A directive to forego or withdraw artificial nutrition and/or hydration must be explicit.
- (d) Medical Orders for Life Sustaining Treatment ("MOLST") Forms - An alternative to the standard Do Not Resuscitate Order ("DNR") which enables patients to provide more detailed end-of-life preferences than a simple DNR. **Note:** The MOLST form gives direct instructions to medical providers rather than relying on a Health Care Agent, acting under a Health Care Proxy, to give or withhold consents on patient's behalf can enhance strength of end-of-life wishes but be careful not to supersede Health Care Agent's vital role in making judgment calls on patient's behalf. For more information, see the New York State Department of Health website at:  
<http://www.health.state.ny.us/professionals/patients/patient-rights/molst>.

4. Nomination of Guardian

- (a) Nominates partner (and, if desired, one or more successors) to be

appointed the client's legal guardian in the event of a judicial proceeding to appoint a guardian under Article 81 of the New York Mental Hygiene Law.

- (b) Rarely used, and usually unnecessary if partner has power of attorney and Health Care Proxy. *But* in an extreme situation, where one partner becomes incapacitated to the point that appointment of a guardian is necessary, a Nomination of Guardian might overcome a court's typical predisposition toward appointing blood relatives even where the incapacitated person has a committed domestic partner of many years.

5. Authorization to Make Anatomical Donations, Funeral Arrangements and Cremation.

- (a) Appoints the client's partner as the person to make arrangements for funeral and for the disposition of the client's remains. If cremation is desired, it is especially important to have written authorization to that effect. Can help overcome the concern of most funeral providers with respect to taking directions from a non-relative, especially if there is a concern over possible religious or other objections by the family to cremation or any other desired disposition of the client's remains.
- (b) Should be reinforced by a provision in the Will that the surviving partner or nominated executor is to make such arrangements.
- (c) Although, New York Public Health Law sec. 4201 has been amended to confer upon a surviving domestic partner the authority to control the disposition of the remains of a deceased partner, it is still preferable to rely on a properly executed "Appointment of Agent to Control Disposition of Remains", substantially conforming to the model form incorporated into Public Health Law sec. 4201(3).

**B. Planning for Care and Custody of Children**

1. Nomination of Standby Guardian for Child

Helps put surviving co-parent immediately in place as the child(ren)'s guardian in the event of the incapacity or extended absence of the biological or adoptive parent.

2. Medical Authorization for Child

Similarly, gives co-parent (and perhaps a successor appointee) authority to give or withhold consent for medical treatment of child in case of incapacity or absence of "legal" parent.

3. Travel Authorization for Child

Authorizes someone not otherwise legally recognized as a child's parent to accompany the child while traveling. For air travel, lengthy trips and/or international travel, a separate authorization should be executed specifying the dates and places where the child will be traveling.