ESTATE PLANNING

for

NON-TRADITIONAL COUPLES

Presented by

Howard S. Klein, Esq.

California Society of Certified Public Accountants
Orange County/Long Beach Chapter
Estate Planning Committee

September 28, 2005

INTRODUCTION

The speaker defines "non-traditional couples" to include the following:

(1) Unmarried cohabiting heterosexual couples;

(2) Cohabiting same sex couples who have not registered under the Domestic Partner Rights and Responsibilities Act of 2003 ["DPRRA"]; and

(3) Couples who have registered under DPRRA.

Because DPRRA is one of the most dramatic legislative enactments of the past several decades in California, and because it represents a sea change from California law of, say, only six years ago, the speaker begins by focusing on DPRRA. Just what is a registered domestic partnership, who qualifies for it, and how can the parties register? Just what was the intent of the legislature in passing DPRRA? What changes are wrought by DPRRA on existing California law, and what remains unchanged? How does a domestic partner terminate or modify the partnership? Why might domestic partners decide not to register under the new act? And what options are open to domestic partners?

The speaker then moves on to estate planning: first, that estate planning which is common to unmarried heterosexual cohabitants and to same sex cohabitants who have not registered as domestic partners; second, that estate planning which is intended expressly for registered domestic partners.

I.

REGISTERED DOMESTIC PARTNERSHIPS - AN OVERVIEW

Commencing in 2000, the California legislature enacted and then Governor Davis signed legislation involving same-sex partners living together in committed relationships. Essentially annually thereafter, that legislation has been expanded.

The signal legislation in this field, the California Domestic Partner Rights and Responsibilities Act ("DPRRA"), [AB 205, comprising Division 2.5, including Sections 297-299.6, of the Family Code], was signed into law in 2003 and became effective January 1, 2005, creating perhaps the broadest grant of a marriage-like status to same-sex couples among those 49 states which, unlike Massachusetts, do not recognize same-sex marriage. As a result, nonmarried eligible couples who have already properly registered as "domestic partners" or who so register in the future will have essentially all the rights and obligations of married persons under California law. DPRRA was amended in 2004 by a "cleanup bill" [AB 2580, being Family Code Section 297.5(m)(1)], which provided that a domestic partnership would be deemed to exist on the date of its registration with the state (thus giving retroactive effect to the provisions of DPRRA as to those registered domestic partnerships which predated the effective date of the statute).

Legislative Intent

The legislature stated that "[t]his act [DPRRA] shall be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties, and to the state, as the laws of California extend to and impose upon spouses." [Stats. 2003 ch. 421 (AB 205) sec. 15]

Requirements for Domestic Partnerships

Family Code Section 297 establishes the following requirements for domestic partnerships: (a) two adults who are in an intimate and committed relationship; and (b) both persons file a Declaration of Domestic Partnership with the Secretary of State and, at the time of filing, all the following requirements are met:

(1) Both persons have a common residence;

(2) Neither person is married to someone else or in a domestic partnership with someone else;

(3) The two persons are not related by blood in a way that would prevent them from being married to each other in California;

(4) Both persons are at least 18 years of age;

(5) Either both persons are members of the same sex, or at least one of them meets the eligibility requirements for Social Security Act old-age insurance benefits and at least one of them is over 62 years of age; and

(6) Both persons are capable of consenting to the domestic partnership.

Rights Granted To, and Responsibilities Assumed By, Registered Domestic Partners

Family Code Section 297.5(a) codifies the legislative intent, whether such rights, protections and benefits, and responsibilities, obligations and duties derive from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law. Thus, registered domestic partners have been accorded hundreds of rights and obligations of community property and community debt, support, fiduciary duties, duties with respect to children of the relationship that married persons have, hospital visitation, medical decision-making, financial and legal decision-making, recovery for wrongful death, access to records, sick leave, financial support, community property and related rights, "marital privileges" in legal proceedings, and fiduciary duties to one's domestic partner.

Probate Provisions

Registered domestic partners now have essentially the same right as married persons under the Probate Code. These include (a) the right to an intestate share of a deceased partner's estate [Probate Code Section 6401], (b) the same priority to the right to appoint an administrator of a deceased partner's estate [Probate Code Sections 8461, 8462], and (c) the same priority of right to serve as or nominate a conservator [Probate Code Section 1811].

Rights Not Conferred Upon Registered Domestic Partners

The Act does not affect the California Defense of Marriage Act [Family Code Section 308.5], which provides that the only lawful marriage in this state is one between a man and a woman. More importantly, the Act expressly does not amend or modify federal law [Family Code Section 297.5(k)].

This is highly significant from a tax standpoint in several ways: It denies to domestic partners the federal estate tax marital deduction and the ability to file joint federal income tax returns.

Further, Internal Revenue Code section 1041 does not apply to transfers made in connection with the dissolution or legal separation of registered domestic partners, because 1041 only applies to transfers involving spouses or former spouses. In addition, the spousal property transfer exemption of Internal Revenue Code Sections 2056 and 2523 probably does not apply, and such transfers would be treated as taxable gifts. On a related point, domestic partners are expressly prohibited from filing joint state income tax returns, and earned income will not be treated as community property for state income tax purposes [Family Code Section 297.5(e),(g)].

Finally, registered domestic partners are denied federal rights involving Social Security, Medicare, veterans' benefits, immigration, ERISA and family leave, among others.

Termination or Modification of Registered Domestic Partnership

Family Code section 299 sets forth two currently available procedures for terminating a registered domestic partnership. First, if the partnership is less than five years in duration, there are no children of the relationship, the asset and debt amounts are *de minimus*, there is no real property except for a short-term lease, the parties waive support and have executed a property settlement and related documents, then the parties may execute and submit to the Secretary of State a Notice of Termination of Domestic Partnership. This procedure is similar to the summary dissolution procedure of Family Code section 2400.

For all other registered domestic partnerships, the Family Court shall have exclusive jurisdiction over proceedings relating to the dissolution or nullity of the partnership and the legal separation of partners. The procedures are equivalent to those involving married persons. Thus, all rights and obligations that attach in marital status proceedings will apply to domestic partnership status proceedings, including equal division of community property, debt liability, spousal support, standard temporary restraining orders (the so-called "ATROs"], child custody and support determinations, and *pendente lite* orders. Note that the ATROs, which are set forth in Family Code Section 2040, are just as significant a factor in estate planning which occurs during the dissolution of a domestic partnership as they are in estate planning in the course of a marital dissolution.

Possible Downsides to Registered Domestic Partnerships

Clearly, one or both of the domestic partners may elect not to register under DPRRA, for one or more of the following reasons, among others:

1. The wealthier partner may not wish to commit to paying the support during the partnership or the alimony following a possible domestic partnership dissolution.

2. The higher earner may wish to retain his/her earnings as separate property rather than have them characterized as community property, as to which the lower earner would have a one-half entitlement.

3. The equal division of community property in the event of dissolution may be unattractive to the partner whose efforts produced most of that property, and that partner might just want to retain that property, or most of it, as his/her separate property.

4. If one of the partners is a spendthrift, the other partner might not want to be liable for the spendthrift's debts.

5. If one of the partners is a low-income individual who would otherwise qualify for state benefits, e.g. Medi-Cal, that qualification might be eliminated if the state considered the other partner's income, which would be the case with registered domestic partners.

6. The partnership can only be terminated judicially unless it is short term with no children and but little assets and the partners waive support.

Options Available to Domestic Partners

Domestic partners can elect to either register or not register under the Act. The decision should not be a strictly emotional one, but should involve considerations of the finances and health of each of the partners, the stability of the relationship, among other issues, and the pros and cons of a entering into a legal relationship which is entirely "marriage-like".

Under any circumstances, the domestic partners should seriously consider contracting as to the manner, rights and responsibilities of holding property, income, debt and support issues. And, of course, the parties should do estate planning. In this regard, while there is no estate tax marital deduction, the registered domestic partnership could involve the community property exclusion and the use of an equitable life estate on the death of the first partner to die.

II.

ESTATE PLANNING FOR UNMARRIED HETEROSEXUAL COUPLES AND FOR SAME SEX COUPLES WHO HAVE NOT REGISTERED UNDER THE DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT OF 2003

Ethical Issues

The attorney should explain to the partners that an attorney must represent the interests of each of his/her clients and may not keep any confidences from either one of them (as compared to keeping what he/she or either partner tells the other partner or him/her from third parties). The attorney must explain possible conflicts as to the ownership of assets (as belonging to one partner, the other partner, or both of them) and as to the distribution of assets. Also, that either or both of the partners has/have the right to seek independent counsel. And the attorney can represent both partners only if they sign a conflict of interest waiver/dual representation letter, and the partners have the right to seek counsel about that letter. Finally, if an actual conflict arises, and the attorney can not properly represent both clients, he/she will withdraw as counsel and advise the parties to obtain independent legal counsel.

Understanding the Marital Status and Family Relationships of the Partners

It is important that the attorney inquire as to exact marital status of each of the partners. Further, as to the names, ages and any minor children which each of the partners may have and of the other parent of such minor children. It is of critical importance that no spouse or minor child be in the position of being considered an omitted spouse or child of that partner and thereby acquire an intestate share in that partner's estate. In this regard, see Probate Code Sections 21623.

Inquiry into Existing and Future Assets and Obligations

The attorney should inquire closely into the nature, extent and ownership of all principal assets and obligations before proceeding further. Further, the attorney should not be satisfied by the clients' word as to the titling and beneficiary designations of significant assets; rather, the attorney must examine the deeds to all real property, the most recent statements of brokerage accounts, and the face sheets and beneficiary designations of life insurance policies and retirement benefits.

Are the parties in agreement as to the distribution of those assets? What is the partners' intent as to the distribution of those assets and of significant assets, for example a residence, to be acquired in the foreseeable future?

Does either or both of the partners have significant debts? Is it the intention of the partners, or either of them, to incur substantial debt in the foreseeable future - for example, in connection with the purchase of a residence? What is the position of each party as to those debts? If the debt is, or is to be, joint, will the partners be jointly and severally liable? If the debt is, or is to be, an individual debt, will the debtor partner hold the other partner harmless and agree to defend him/her therefrom?

Explanation of the Property Law as it Affects the Cohabitants

The parties must be given to understand the differences between separate property, joint tenancy, tenancy in common, and payable on death holdings as it affects their property. Are the parties in agreement as to what that holding should be as to each principal asset?

Cohabitation Agreement

Because the cohabitants will be holding many assets during the period of their life together, it is important that they execute a cohabitation agreement in addition to the usual estate planning documents.

In the cohabitation agreement, the partners will define the rights and responsibilities flowing from their relationship as to:

(1) The respective interests in real and personal property acquired by either or both of them;

(2) The interest of a partner, if any, in the income of the other partner;

(3) Whether a partners will commit to the ongoing financial support of the other partner;

(4) The right of a partner to be supported, and of the other partner to give that support, if the cohabitation terminates;

(5) Whether the parties agree to pool their income;

(6) Whether the parties agree to hold all property that is acquired during their relationship in accordance with the law governing community property;

(7) The agreement of the parties with respect to raising and supporting any children of the relationship, recognizing that the parties' agreement regarding children is not binding on the Court should the matter ever come before the Court for determination.

The California Court of Appeal in the famous case of *Marvin vs. Marvin*, 18 Cal.3d 660 (1976), held that the Court shall enforce such an agreement (except of course with respect to child

issues) so long as the agreement does not rest on the consideration of "meretricious sexual services". Cohabitation agreements are governed by the law of contract, which is contained in the Civil Code, and not by the Family Code, except regarding child issues.

Usual Estate Planning Documents

The parties will probably need to execute the usual documents of estate planning, including wills, a joint living trust or separate living trusts, advance health care directives, general and/or limited durable powers of attorney for financial management, nominations of conservator, funeral and burial/cremation instructions, trust transfer deeds, assignments of assets, and so forth.

The estate planner must remember that most of the favorable tax laws which are central to estate planning for married couples just do not work with non-married cohabitants (or to same sex domestic partners, whether registered or not). For example, there is no marital deduction for non-marrieds. There is no inter-spousal deeding without adverse tax consequences. Thus, the simple placement of one cohabitant's property into a joint trust may be a taxable gift in and of itself. So may the pooling of assets or the deeding of one cohabitant's property to the other in order to equalize the estates. In short, apparently innocuous transactions must be reviewed closely as to possible income tax, gift tax, and estate tax consequences when you are not dealing with married couples.

Naming Back-Up Fiduciaries

It is essential that the estate planner have the clients name alternate and second alternate executors and successor and second successor trustees, agents and conservators, so that if the partner of the testator, trustor, principal or conservatee does not survive or is incapacitated, the family of the testator, trustor or principal can not step in to drastically alter the administration of the will, trust, advance health directive, power of attorney, or conservatorship. This is because frequently the family is estranged, distant or hostile and would seek to thwart the intent of the client. Further, if the client feels strongly that he/she does not want the family to serve in a fiduciary capacity, then that should be expressly stated in the document.

No Contest Clauses

To help ensure that the estate plan of the cohabitants is not overturned by a contest of the principal dispositive instruments, it is frequently quite helpful to include no contest clauses in the trust(s) and will(s) directing that unsuccessful contestants receive nothing under the instrument. And, of course, the no contest clause should be coupled with a provision leaving some distribution of modest, but not inconsequential, value to those family members or others who might be expected to mount a challenge if they had nothing to lose by doing so.

III.

ESTATE PLANNING FOR SAME SEX COUPLES WHO HAVE REGISTERED UNDER THE DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT OF 2003

Ethical Issues

The issues presented here, with respect to potential conflict of interest, actual conflict of interest, dual representation versus independent counsel, and conflict waiver letters are the same as those set forth in Section II, above.

Understanding the Family Relationships of the Partners

By definition, neither partner can be married for there to be a valid registered domestic partnership. (See Section I, Requirements for Domestic Partnerships, above.) However, the discussion of family relationships, including the spousal support obligation to a former spouse, the child support obligation to the other parent of a minor child, and the need to name any such former spouse or minor child in the estate planning documents in order to avoid their treatment as omitted and entitled to an intestate share is equally applicable here.

Ensuring that the Domestic Partnership Has Been Registered

The attorney must not take the partners' word for the critical fact of registering with the Secretary of State under DPRRA. The attorney should request and examine a copy of the Declaration of Domestic Partnership that was filed in Sacramento.

Inquiry into Existing and Future Assets and Obligations

The discussion of this topic in Section II, above, is equally applicable here.

Further, the estate planner must be aware that the laws of community property and of joint liability for community debts are applicable in the case of registered domestic partnerships. Thus, assets acquired from and after the time of registering with the Secretary of State are presumed community property, and if they were purchased with the personal service earnings of either or both of the partners during that period are certainly community property unless the parties have contracted to the contrary. And if, during the same period, one of the partners has incurred a debt, that debt is also owed by the other partner, unless the parties have contracted to the contrary.

Explanation of the Property and Spousal Support Laws as They Affect Registered Domestic Partners

With respect to property, not only must the attorney explain to the registered domestic partners the differences between separate property, joint tenancy, tenancy in common, and payable on death holdings, but, most importantly, the attorney must explain how community property, both with regard to assets and debts, factor into the partners' relationship. In particular, how community property differs from separate property with respect to lifetime entitlement, the ability of the owner to transfer it by inter vivos or testamentary instrument, and perhaps most importantly the statutory requirement of an equal division of the community property in the event of a dissolution of the domestic partnership, which is exactly comparable to the situation in a marital dissolution.

The attorney must explain to the registered domestic partners that the duties to support the other partner during the partnership, and after the dissolution of the partnership through alimony awarded by the Court, are just as applicable as in the case of marriage. Further, the Family Court always has jurisdiction over the rights of minor children, whether such children are born of marriage or of domestic partnership (registered or not).

The registered domestic partners must be given to understand that their legal relationship is essentially that of a marriage except that essentially none of the benefits which federal law confers upon spouses applies to same sex couples. Those excluded federal benefits include, but are by no means limited to, those relating to immigration, Social Security, Medicare, treatment as a couple under federal tax law, veterans' benefits, and federal employment benefit laws such as ERISA.

Domestic Partnership Agreement

The domestic partnership agreement is the analog of the cohabitation agreement for heterosexual couples and non-registered same sex couples. It is recommended unless the partners absolutely go along with their relationship being governed by the same rules which govern marriage. That is because a domestic partnership agreement clearly defines the relationship of the partners with regard to several issues. For example, partnership personal service earnings (are they community, as provided in the general law, or will they be the separate property of the earning partner?). Another example: accretions to separate property (are they mixed, under *Pereira vs. Pereira*, 156 Cal.1 (1909), or *Van Camp vs. Van Camp,* 53 Cal.App. 17 (1921), or are they to remain entirely the separate property of the partner who brought them into the partnership?). And what if the domestic partnership is ultimately dissolved - a divorce (will the partners waive or limit the amount and duration of alimony?).

In sum, a domestic partnership agreement is analogous to a prenuptial agreement if it precedes the partners' registering with the Secretary of State. Conversely, it is analogous

to a postnuptial agreement if it is executed following such registration.

The requirements for the enforceability of prenups (or their analogs in the domestic partnership situation) are stringent. See the Uniform Premarital Agreement Act, Family Code Sections 1600-1617 ("UPAA"). As a practical matter, although not strictly required by UPAA, the parties should have independent counsel, the parties should exchange full information as to assets and obligations, and the agreement should be fair (whatever that means). The requirements for enforceability of postnups (or their analogs) are even more stringent, since the parties are subject to interspousal fiduciary duties under Family Code Sections 721 and 1100; with postnups, an adequate consideration is required. See *Messenger vs. Messenger*, 46 Cal.2d 619 (1956).

Usual Estate Planning Documents

The discussion of this topic in Section II, above, applies with a vengeance in the context of registered domestic partners. Here, however, the planning is very much like estate planning for married couples except, alas, that the marital deduction is non-existent, there are no interspousal tax-free transactions, and placing one domestic partner's property into a joint trust and comparably innocuous-appearing transactions may constitute taxable transactions. Thus, the estate planner must have his income, gift and estate tax thinking cap on at all times. And the frequency of the accountant's preparing gift tax returns will be significantly greater than when dealing with marrieds.

When drafting estate planning documents, from trusts to wills to financial powers of attorney and advance health care directives, it is imperative to set forth the existence of the domestic partnership and the date of the partners' registration, so that it is clear on their face that the documents are to be treated as analogous to those involving married couples.

For many reasons, the estate planner must handle transmutations of property with care. For one thing, the transmutation must strictly comply with the requirements of Family Code Sections 850 *et seq*., to wit: there must be a writing, it must constitute an express declaration of intent to change the character of particular property, for example, from separate to community; and it must be made, joined, consented to, or accepted by the partner who is adversely affected by it. For another thing, arguably the most glaring instance of the attorney's conflict of interest involves transmutations, since they almost always involve one party's gaining and the other party's losing as to the property involved.

By the same token, transmutations which occur after registration as domestic partners always are presumed the result of undue influence in a family law or family law-analogous setting, because in the context of an existing marriage or registered domestic partnership, any transaction which benefits one spouse or partner to the detriment of the other spouse or partner is presumed the result of undue influence and invalid. See, for

example, *Marriage of Haines*, 33 Cal.App.4th 277 (1995) and *Marriage of Lange*, 102 Cal.App.4th 360 (2002).

Naming Back-Up Fiduciaries

See the discussion of this topic in Section II, above.

No Contest Clauses

Similarly, see the discussion of this topic in Section II.

About the Speaker

Howard S. Klein is a partner and head of the Probate and Trust Department of Feinberg Mindel Brandt Klein & Kline, LLP, a Westside Los Angeles law firm. He has practiced law continuously in Los Angeles County for over 40 years as a probate and family lawyer. Mr. Klein is a Certified Specialist in Estate Planning, Trust and Probate Law (State Bar of California Board of Legal Specialization) and is Vice Chair of the State Bar Estate Planning, Trust and Probate Law Advisory Commission. His practice devotes particular emphasis to probate/family law crossover issues. He has lectured and written extensively on probate matters.

Mr. Klein's contact information:

Feinberg Mindel Brandt Klein & Kline, LLP
12400 Wilshire Blvd., Suite 900
Los Angeles, CA 90025

Telephone: (310) 447-8675
Fax: (310) 447-8678