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*POLYAMOROUS CLIENTS*

## **Bigger Love: Considerations for Polyamorous Clients**

*Traditional strategies involving use of the federal estate tax unlimited marital deduction and state intestacy rules do not anticipate decedents with multiple partners.*

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In recent years, there has been much debate about the changing legal landscape as it relates to marriage and the alleged erosion of traditional relationships. However, the term "traditional" means something different to everyone and reflects the values of the time in which those passing judgment have lived and the views of the particular community where they have resided. People have been living in "nontraditional" relationships for centuries. Estate planners often focus on the traditional husband-wife situation because that is the most tax-friendly and "common" situation, although non-heterosexual relationships now have the option of being equally tax advantaged through marriage in the U.S.

With "nontraditional" lifestyles becoming more accepted, estate planners are encountering more people openly living in what are generally considered alternative family relationships. Estate planning for nontraditional family arrangements is possible. Successful structuring of an estate plan for a client with multiple spouse-like partners, however, requires a focus on the particular challenges presented by the law in order to effectuate the intent of the client. **1**

## History of marriage

Marriage is often thought of as the traditional step couples take after dating and before having children (and, according to historical societal norms, in that order). Some commentators argue that marriage is only for two people and for the purpose of having children, and therefore should also be only between one man and one woman. However, a look at history shows that this concept of marriage is relatively new. Some civilizations encouraged a man to take multiple wives so that the wives would be able to help each other in doing housework and raising the minor children. **2** Some wives enjoyed this setup as the extra help was welcome-but many did not and they even schemed with their children against their co-wives. **3** Other civilizations supported same-sex relationships, as it was their belief that opposite sex partners could not provide the emotional support or friendship found in same-sex couples. **4** In still other civilizations, husbands would marry off their wives to political allies-polygamy was not an issue for them. **5**

Having a spouse enter into a second marriage for the purpose of political alliance is similar to marrying sons and daughters off in exchange for wealth and land. **6** Families could create concentrations of land by marrying off their children with their neighbor's children. Further, poorer families could advance their status by having an attractive child marry into a wealthy family.

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Eventually, religious groups began requiring that marriages be church-sanctioned in order to be considered legitimate. In 1563, marriage was deemed one of the seven sacraments in the Roman Catholic faith. **7** Until then, most people did not get married inside a church, likely because most people did not live close enough to a church. At that time, the church hierarchy required that a marriage occur inside a church for it to be valid. As Catholicism spread to other parts of the world, the one man, one woman, church-sanctioned couple began to be the norm for developed cultures. **8**

The 20<sup>th</sup> century was a constant seesaw with respect to generational views on marriage. The Victorian Era encouraged women to be chaste and asexual. **9** The 1920s saw women and men interact in social spaces without chaperones. The 1950s found the best family to be the nuclear family with a working father and a stay-at-home mom. **10** In the 1970s and the 1980s, more women were working outside the home and couples were getting married later.

It is only recently that married couples began receiving financial incentives for having a legally recognized union. Earlier in U.S. history, spouses in non-community property states did not receive any special treatment when the first spouse died-all assets passing to the surviving spouse were considered part of the first spouse's taxable estate. **11** Those in community property states fared slightly better. In community property states, only separate property passing to the surviving spouse was taxable. **12** Eventually, the laws changed and the bonus for community property residents was lessened. In 1942, the surviving spouse's interest in the community property was made includable in the decedent's gross

estate unless it could be shown "to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse." **13**

These hard times for surviving spouses were short-lived. In 1948, Congress created the marital deduction. The 1948 law restored the beneficial federal estate tax treatment to community state residents and it also gave spouses in common law states similarly equal treatment. **14** However, the maximum amount of the deduction was up to 50% of the "adjusted gross estate" of the deceased spouse. **15** Furthermore, in community property states, the community property amount was deducted from the adjusted gross estate, in effect nullifying the marital deduction for such community property. **16**

Over time, Congress increased the total dollar amount that could pass tax free between spouses until eventually, in 1981, the marital deduction was made unlimited for transfers between spouses. **17** In addition, the law allowed the marital deduction to fully apply to qualified terminable interest property. **18** Since this time, there has been little to no discussion of repealing the marital deduction; however, legislative and case law repeatedly have made clear that one must be legally married in order for a surviving spouse to receive such treatment.

In fact, the marital deduction played a major role in bringing about the recognition of same-sex marriages. *Windsor* **19** and its related cases had larger implications, but they highlighted the disparate tax treatment that couples received based on gender due to permitted marital status when one of the partners passed away. Since marriage was limited to heterosexual couples, only heterosexual married couples could receive the federal marital deduction during life and at death. The couple in *Windsor* successfully argued that denying the deduction to same-sex couples was unconstitutional. In our current environment, any two people who are legally married, regardless of gender, are entitled to all benefits due to spouses under the law.

Some commentators have argued that the allowance of same-sex marriage will lead the way to allowing multiple legally married partners. This chapter does not allow for a

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full discussion of the legal arguments on both sides of that debate, and for purposes of this discussion, the author assumes that legally recognized marriage will be allowed only between two individuals.

The rights of romantic companions, under the law and for tax and estate planning purposes, are often contingent upon marital status. For children of an individual, their rights of inheritance and, in some circumstances, their ability to obtain insurance, social welfare, or legal benefits, also hinge on the marital status of their parents. The status of an individual as a spouse has important consequences for tax planning, employee and governmental benefits, and general definitional assumptions under common law. As societal norms have changed, couples are choosing to live together and have a family without feeling that legal marriage is a necessity. In fact, even individuals who have married sometimes have an agreement with their spouse to remain married while each party pursues his or her own romantic

interests outside the marriage.

Situations that involve multiple amorous parties require special care in planning and also implicate ethics issues for attorneys and other advisors that necessitate careful consideration. The stereotypical polyamorous relationship, and one that has been addressed in-depth by the courts, is polygamous marriage. In the typical family structure of polygamy, there is one legal spouse with one or more additional "spiritual" spouses committing for life. Children in a polygamous family usually are raised together in a communal arrangement where all "spouses" parent together. Thanks to popular shows like "Big Love" or "Sister Wives," these types of relationships have been normalized somewhat on cable television. Actual polygamy is illegal in the U.S., and for most estate planners it would be rare to be asked to engage in planning for this type of family.

But polyamory is not limited to polygamy. Throughout the 20<sup>th</sup> and 21<sup>st</sup> centuries, the headlines are filled with stories of famous people who were married, but in long-term relationships with other people. For example, Spencer Tracy remained married to his wife for religious reasons, but was known to be in a long-term romantic relationship with Katharine Hepburn. Other people choose to remain married for social status or financial reasons, but agree that each spouse is able to engage in a new committed, monogamous, and often quite public relationship with a new partner. Planning for the second spouse is common. Planning for the second non-spouse while the spouse is still in the picture presents an entirely different challenge.

And, of course, there are the secret second-family scenarios, such as that of Charles Kuralt, who secretly maintained a second family for more than 20 years. Secret relationships, in particular, present a host of ethical and legal issues for estate planning professionals. Even if an attorney represented only the spouse with the secret second family and was required by the ethics rules to maintain the confidential information, the surviving spouse is likely to be angry and possibly litigious following the post-death revelation of the spouse's deception.

At present, the traditional definition of "relationship" rarely describes what truly exists. Planning for polyamorous relationships presents both typical and unique legal, tax, and psychological challenges that warrant special consideration.

## **Overview of parentage issues**

Marriage and romantic relationships are not the only family situations to see legal changes over time. A hundred years ago, the question of whether someone was a descendant of another person was a simpler question than it is today. While paternity may have been at issue, there were no issues with a biological child of a person being born more than nine months after his death. Use of genetic material of a decedent to create additional descendants after the person has died is a problem the courts are only beginning to tackle. It does not take much creativity to think of a scenario where the children of a first marriage sue to prevent their father's surviving spouse, who is approximately the same age as the

children from the first marriage, to prevent a surviving spouse from using the deceased father's sperm to create additional posthumous descendants that would water down their share of the estate.

In the past, illegitimate children were treated differently because their parents were unmarried. Illegitimates would not be deemed as legal

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heirs or the children of a father who would not recognize them. As societal norms have changed regarding pregnancy outside of marriage as well as the development of paternity tests to conclusively prove parentage, the law has come to treat illegitimate children the same as legitimate children for inheritance purposes. However, children born out of wedlock (or their mothers) may still have to prove paternity to determine certain legal rights. Some states allow certain statutes of limitations to run regarding challenging paternity to avoid descendants materializing generations down the line. Paternity and heirship determinations still vary across the states, as evidenced by the following cases.

In *Labine v. Vincent*, [20](#) the U.S. Supreme Court held that a law precluding an illegitimate child from inheriting as an intestate heir was valid. Ezra and Lou Bertha had a baby girl, Rita, while they were living together but unmarried. Rita was acknowledged by Ezra, but at the time acknowledgement did not automatically make them an heir; the parent had to take action to create a formal acknowledgement to legitimate the child. Under Louisiana law at the time, acknowledging an illegitimate child did not give her the same rights as a legitimate child, but did allow the child to claim support from such parent and allowed her to be a "limited beneficiary" under the parent's will. At the time, however, an illegitimate child would not be deemed an heir for intestacy purposes. [21](#)

Ezra died without a will. Ezra's relatives argued that they were the rightful recipients of Ezra's property under the law because Rita had not been formally acknowledged, whereas Rita's mother argued on Rita's behalf that she was his rightful and sole heir. Rita's mother argued that the law disinheriting Rita was a violation of the Equal Protection and Due Process clauses. The Court, however, held that it could not usurp the determination of the Louisiana legislature to treat illegitimate people differently.

The Court also focused on the argument that Ezra could have included Rita in a will (although she would have been allowed only to take up to one-third of his property), legitimated Rita by stating expressly that he wished to be an heir, or simply marrying Rita's mother to legitimate Rita. Therefore, the Court held in favor of the other relatives. While Louisiana law has come to treat legitimate children and illegitimate children the same for inheritance purposes, [22](#) *Labine v. Vincent* has never been overturned by the Supreme Court.

In *Clark v. Jeter*, [23](#) the Supreme Court struck down a six-year statute of limitations in Pennsylvania that forced a child or the child's mother to bring a lawsuit to establish paternity, as such time limit was a violation of the Equal Protection Clause. The law allowed a legitimate child to seek support from a parent at any time, but a child born out of wedlock only had six years to bring suit. The Court found that because illegitimate children are a protected class under the Equal Protection Clause, the law did not

pass the heightened scrutiny necessary.

In a Mississippi case, *Estate of McCullough v. Yates*, [24](#) Thelma died intestate without any surviving spouse, children, or parents. She was the only child born to James and Alice. James was later married to Rosetta, however, and they had five children, one of whom was Daniel. Daniel was the alleged father of numerous children and grandchildren who argued that they were the heirs of Thelma's estate. Under Mississippi law at the time, an illegitimate child could not claim an inheritance unless there was an action for paternity filed within a certain period after the death of the purported father. Daniel's alleged children failed to claim paternity within the time period following Daniel's death and therefore the court found that they were barred from alleging their status as heirs of Thelma's estate.

In another case, a court upheld a presumption that a child born during the marriage of a couple was the biological child of the couple. In *Matter of Estate of Nelson*, [25](#) the decedent's heirs were deemed to be the children of Mattie Della Shaw and John L. Nelson, the mother and father listed on the decedent's birth certificate. However, two other sets of individuals came forward to argue that in fact the decedent had a different biological father than what his birth certificate stated, and in fact his *real* father was the same father as such sets of individuals (each group had a different father and were arguing for their father to be deemed the father of the decedent). Each group requested that the court do DNA testing to determine who was the biological father of the decedent, and in the event the decedent's father listed on his birth certificate was determined not to be his father, that the

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court distribute the decedent's estate to the children of the newly discovered biological family.

Based on Minnesota law, the court found that "if a father-child relationship is established under the paternity presumption under the parentage act, only that father can be the child's genetic father. Thus, even if an heirship claim is not based on the paternity presumption, the paternity presumption still applies to that claim if a father-child relationship is established under the presumption and the claimant seeks to establish a genetic relationship between the claimant and decedent through decedent's father." The court did not allow the purported half-siblings to do the DNA test and moved forward with the decedent's heirs being the children of the parents listed on the decedent's birth certificate.

In still another case, *Regalado v. Estate of Regalado*, [26](#) Joseph received a large settlement and subsequently died without a will. Pursuant to the laws of intestacy, his heirs were deemed to be his surviving parents, brothers, sisters, and the issue of any deceased siblings. During Joseph's lifetime, his father married Paula's mother, 35 years after Paula was born. Shortly after Joseph's death, the marriage between his father and Paula's mother was annulled. After the annulment in 2005 (subsequent to Joseph's death), Joseph's father acknowledged Paula as his biological child, and Paula therefore claimed to be a surviving sibling of Joseph. Naturally, another surviving sibling of Joseph disagreed with Paula and challenged the decision by the lower court that Paula was deemed an heir of Joseph simply by Joseph's father acknowledging her as his daughter.

Paula's argument relied on Indiana Code section 29-1-2-7(b) which provided that "a child born out of wedlock shall be treated as if the child's father were married to the child's mother at the time of the child's birth if the putative father marries the mother of the child and acknowledges the child to be his own." While the court did not determine heirship ultimately, it did find that Paula needed to show that she was born out of wedlock before such statute applied and further that Joseph's father's acknowledgement of Paula did not bar Joseph's father or the other heirs from challenging Paula's paternity.

In *Mathews v. Lucas*, [27](#) the mother of two children applied for survivor benefit under Social Security for her children, who were born during her 18-year cohabitation with the decedent. Under the laws governing Social Security, dependent children of a decedent are entitled to seek survivorship benefits. However, illegitimate children have a further hurdle to prove. Under the law, "a child, unless adopted by some other individual, is entitled to a presumption of dependency if the decedent, before death, (a) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them which, but for a nonobvious legal defect, would have been valid, or (b) in writing had acknowledged the child to be his, or (c) had been decreed by a court to be the child's father, or (d) had been ordered by a court to support the child because the child was his."

Unfortunately for the children in *Mathews v. Lucas*, they did not fulfill any of the requirements under the law, and challenged such standards on the grounds that they violated the Due Process Clause because they treat illegitimate children differently than legitimate children. The Supreme Court, however, found that the classifications were permissible as they were reasonably related to the government's purpose of

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administrative efficiency in determining survivorship benefits. Presumably the Court reasoned that the line had to be drawn somewhere.

## Spousal rights

Many individuals see no reason to be legally married to their partner as a committed, cohabitating relationship is sufficient for them. However, legal marriage still offers numerous benefits of which those who are not married cannot take advantage. For example:

- (1) Unlimited gift and estate tax deductions for transfers between citizen spouses.
- (2) Filing of joint income taxes may lead to a reduction in income taxes.
- (3) A surviving spouse can roll over his or her deceased spouse's IRA. If the surviving spouse is younger, he or she can take the distributions out over the surviving spouse's lifetime, instead of the older spouse's life expectancy.
- (4) A non-employed spouse can use his or her working spouse's income to contribute to a spousal IRA.
- (5) A surviving spouse can receive survivor benefits from Social Security.
- (6) A spouse is the default agent to make medical decisions in many states.

(7) Surviving spouses have certain rights to a deceased spouse's estate that a non-married partner would not have, such as spousal forced share rights.

Spouses typically have easier access to medical records and making medical decisions on behalf of their spouse. Married spouses have preference in acting as the estate representative. If there is a legal spouse and a non-marital partner or a second family, the legal spouse in many cases could keep the non-marital partner from visiting the sick individual in the hospital, from obtaining information about how or why an individual died (protected medical records), and possibly even from knowing where the remains have been laid to rest.

Nonetheless, it is important to note that non-spouses have more rights than before. Previously, non-spouse beneficiaries could not roll over inherited retirement plan benefits to an IRA tax-free if the beneficiary was anyone other than a spouse. The Pension Protection Act of 2006, [28](#) in section 829, allows a non-spouse beneficiary to directly roll over qualified retirement plan benefits to an inherited individual retirement account. Further, the Worker, Retiree and Employer Recovery Act of 2008 (WRERA) [29](#) made rollover of a plan mandatory by the non-spouse recipient. After 1/1/2010, all qualifying plans were required to allow non-spouse beneficiaries to roll over inherited retirement benefits received as a lump sum to an inherited IRA on a tax-free basis. [30](#)

While there are still legal benefits to getting married, the focus of marriage has shifted more to simply finding a suitable life partner than producing multiple children and marrying to increase landholdings. Because of this societal shift and due to more acceptance of "nontraditional" relationships, fewer individuals are getting married and more are living in open relationships and living with multiple partners. The rise of multi-person relationships as opposed to the two-person legally married couple creates issues in planning that must be considered.

## Issues typical to marriages

Married individuals are more likely to encounter the estate planning issues discussed below.

**Spouses.** Determination of who is a spouse and who is a descendant typically is reserved to the state legislatures and judiciaries. While there are many consistent rules across the various jurisdictions, the typical differences seen in statutory and common law among the states can create an inconsistent landscape that can produce different answers for the same couple depending on who is asking the question, "Is this your spouse?" Several states offer couples the alternative of a domestic partnership, and a few states still have common law marriage. [31](#)

In *Yager v. Gregory Cattle Co.* the Supreme Court of Mississippi determined that the surviving life partner of a deceased worker was not entitled to his Worker's Compensation benefits because they were not legally married. [32](#) The couple had been married for 25 years and then divorced. After they divorced, the pair reconciled and resumed living together as husband and wife. The court found that "many of the indicia of a marriage were present," including filing of joint tax returns, cohabitation, and naming each

other as insurance beneficiaries. [33](#) A legal spouse

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requires an actual marriage, however, and the survivor here did not meet that definition.

Similarly, in *Crescione v. Louisiana State Police Retirement Board*, [34](#) the court analyzed the meaning of "surviving spouse." In this case, however, a legal marriage existed but the parties were legally separated. The decedent was a state trooper who died in the line of duty. He had children by a prior marriage, and so those children would be entitled to survivor benefits if there were no spouse. The court ultimately ruled that a spouse who is legally separated from the decedent at the time of death is still the surviving spouse and under statute, the sole beneficiary of the survivor benefits.

These cases demonstrate that even in a more traditional relationship with just two parties, it is important to consider and provide a definition in the estate plan that indicates when the status of "spouse" begins and ends. Depending on the type of planning and the family structure, a client may wish to define the term "spouse" so that it ceases to apply when divorce proceedings are initiated, rather than waiting until an order is entered dissolving the marriage. When a person ceases to be a "spouse" upon initiation of divorce proceedings, it is important to consider that such processes are sometimes started in the courts and then withdrawn.

Another common problem area in estate plans in traditional marriage situations occurs particularly when there are divorce and remarriage situations. Children of a prior marriage who are waiting for a stepparent's death to inherit will often hang on every action by the trustee to ensure that a stepparent does not receive a penny more (and preferably a penny less) than that to which he or she is entitled.

The traditional structure that specifies distribution of all income to a surviving spouse and possibly allows for invasion of principal in the trustee's discretion often affords fewer parameters than what is truly necessary to reduce the chance of arguments. Providing for a unitrust distribution or specifying how certain typically contentious items will be paid can help reduce the likelihood of litigation. Some of the more frequently litigated items among parents/children or stepparents/stepchildren include the following:

- (1) Real estate taxes on any residence owned in a trust.
- (2) Routine maintenance and repairs on the residence.
- (3) Major capital expenditures (such as a new roof) for the residence.
- (4) Medical expenses and health insurance.
- (5) Utility bills.
- (6) Insurance on a residence, artwork, or other valuables.
- (7) Income taxes on the distributions from the trust.
- (8) Vacation travel.
- (9) Caregiver expenses as the surviving spouse ages or becomes ill.
- (10) Automobiles and auto insurance.

While there are many reasons to grant discretion for the care of a spouse, careful consideration of an

appropriate budget in blended family situations can protect all involved. Being more specific does not necessarily reflect a lack of trust or less affection for the surviving spouse, but rather, it reflects a caring and thoughtful approach to protect the spouse from having every distribution challenged. In addition, solid boundaries can afford the remainder beneficiaries with the peace of mind that distributions are not being abused, and it clarifies the grantor's intent through specificity.

**Children.** The *Crescione* case, discussed above, also reflects the issue of biological animosity that can arise in traditional romantic relationships. Subsequent spouses versus children of a prior marriage is not an uncommon controversy in estate administration. Providing for a child born prior to or during the marriage out of wedlock often is not the first priority of a surviving spouse either. And, parents are even known to engage in lawsuits with their own children over insurance benefits, retirement benefits, and other assets distributable upon death.

An example of this is in *In re Martin B.* [35](#) out of the Surrogate's Court

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of New York. The Grantor created several trusts while his son was living, which trusts were for the benefit of the grantor's "issue" and "descendants." The son died of Hodgkin's Lymphoma shortly before the grantor. The deceased son's wife underwent in vitro fertilization using cryopreserved semen three years after her husband's death and gave birth to a boy. The wife underwent the same procedure again shortly thereafter, giving birth to a second son less than two years after the first birth. Looking to several treatises and the existing New York laws, the court found that absent an expression otherwise in the governing instruments, the posthumously conceived children were to be treated as "issue" and "descendants" for purposes of the trusts, mostly because the legislature could not even comprehend posthumous conception when it drafted the applicable law.

And even if the child is not biologically related, equitable adoption allows nonbiological children in some states to claim the status of an heir. Of the states that do recognize equitable adoption, some require the existence of an express or implied contract to adopt and some do not.

The concept is discussed at length in *DeHart v. DeHart*, [36](#) decided by the Illinois Supreme Court in 2013. In *DeHart*, James DeHart filed a complaint against the executor of Donald DeHart's estate. James alleged that he was eligible to inherit from Donald under the doctrine of equitable adoption, but the estate argued there was no valid claim because there was no contract to adopt. The court found that, in Illinois, the requirements and circumstances surrounding equitable adoption are unclear. The court adopted the holding in *In re Estate of Ford*, [37](#) a case heard by the California Supreme Court in 2004. The Illinois Supreme Court held that the alleged child must prove that the decedent intended to adopt him or her and consistently acted as if that were the ultimate intention. There must be evidence demonstrating that the decedent's intention was to maintain a "close and enduring familial relationship" with the child. [38](#)

*Williams ex rel. Z.D. v. Colvin* [39](#) involved an appeal to the U.S. District Court for the Northern District of

Texas after a denial of Social Security benefits. It found that Z.D. was not the equitably adopted child of Williams and, therefore, was ineligible to receive child's insurance benefits. The Social Security Administration rules provided that "an individual is entitled to child's insurance benefits on the earnings record of one who is entitled to disability benefits if the individual 1) is an insured person's child, 2) is dependent on the insured person, 3) applies for child's insurance benefits, 4) is unmarried, and 5) meets certain age requirements."

In order to meet the first requirement, the child must fall into one of the following categories: biological, legally adopted, stepchild, grandchild, stepgrandchild, or equitably adopted child. Texas law mandates that there must be a clear and convincing agreement to adopt for equitable adoption to apply. In this case, the evidence demonstrated that Z.D.'s natural mother was not willing to enter into an agreement to adopt with Williams and had sought to obtain custody. Because abandonment was not applicable and there was no agreement to adopt between the biological mother and Williams, the court found that Z.D. was not equitably adopted.

*In re Estate of Fairhurst* **40** involved a slightly different take on the use of equitable adoption. In this matter, the alleged parent sought to file a wrongful death action on behalf of the deceased minor's estate. The petitioner alleged that he had standing to bring the suit. The court found that the concept of equitable adoption was created to benefit the child, and that the concept allows the court to use its discretion only in awarding a child rights to inherit. Because equitable adoption (in New York) does not create a legal relationship between the two parties, the court held that the petitioner lacked standing in order to commence the action.

The fact that even in traditional relationships there are so many ways to create extra pools of "descendants" presents a compelling case that defining terms such as "child" and "descendant" in estate plan documents is an important step to close gaps in the law and reduce the likelihood of litigation. At a minimum, attorneys should consider including a paragraph that identifies by name

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the family members intended to benefit from the document.

Despite the changing definitions of marriage, it seems long-accepted that a child can have only two legal and biological parents. However, this "fact" is now changing as well. There are currently instances of a child having three legal parents in certain countries as well as a child having three biological parents.

Multiple states throughout the country are allowing three people to have parental rights to a child. These situations can be happy and agreed-upon relationships in which three people choose to raise a child together. **41** Courts also have recognized legal rights for certain individuals in contentious situations. In one case, Kitty was living with Darren and his boyfriend, Sam, on the East Coast. **42** Kitty and Darren decided to have a child together, and they gave their child Sam's last name. Eventually, Kitty decided to get married and move with the child to California. Darren and Sam objected.

A New Jersey court found that Sam was a "psychological parent" and ordered that Kitty could not take

the child. Kitty canceled her move, and the three maintain a co-parenting relationship. Equally complicated, science is now able to mix DNA from multiple parties, allowing the potential for more than two biological parents. [43](#) This technique has not been used in the U.S. yet, but has been used in other countries. Because U.S. courts have already recognized three legal parents, and with advances in DNA technology, it is likely that more and more three-parent situations will be seen as time goes on. Because courts are allowing more than two parents, it is not inconceivable that someone could have more than three parents.

No matter the number of parents, ideally all parties should coordinate the naming of a guardian in their estate plans to avoid conflicts. Considering parties that may not agree with the family arrangement and their potential objections in court in the event of the death of one or more of the parents may also help avoid controversy. Including language in a will or having a detailed letter of wishes in the safekeeping of the attorney or other trusted party may help ensure the wishes of the parents are known to and followed by the court.

## Issues typical to non-married persons

There are many ways that non-married individuals decide to live together. Simply, some do not wish to or choose not to marry another person. They live in a committed relationship for their entire life without being legally married. These non-marital committed relationships also can happen in situations where a person is already married to another but no longer resides with his or her legal spouse. Each married spouse may go on to create a long-term relationship with another person and live in a marriage-like relationship without the legal marriage. Still others wish to cohabitate with multiple individuals, all or some of whom are in romantic relationships. This last group can present particular challenges for estate planning to establish legal rights and avoid claims for support and other conflicts.

As previously discussed, married spouses have certain legal rights under the law upon the first spouse's death. In Illinois for example, if a spouse dies intestate, his or her surviving spouse receives the entire estate if there are no children and one-half of the estate if the decedent has descendants. [44](#) If an Illinois spouse dies testate, the surviving spouse has the right to elect against the will and take one-third of the probate estate even if there are descendants.

In Florida, the surviving spouse is entitled to the entire estate if there are no descendants or if all of the descendants of the decedent are descendants of the surviving spouse; otherwise the surviving spouse is entitled to one-half of the estate. [45](#) The rights of a surviving spouse differ throughout the 50 states. [46](#) The important point is that only a surviving spouse can take advantage of these legal rights.

In *Blumenthal v. Brewer*, [47](#) an Illinois nonmarried couple who had split up sued each other for certain "marriage-like" property rights upon the break-up. The court, however, held that public policy kept it from treating the relationship like a marriage. The court ruled that one partner was arguing to treat the relationship as a common law marriage, and that such argument was therefore barred by the Illinois

statute prohibiting common law marriage.

Advisors often see issues that arise between children of a prior marriage and the new spouse, and between

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half siblings or stepsiblings These issues may intensify when there are multi-partner relationships in which the half siblings or stepsiblings are living full or part-time with their parent's current partner while maintaining a relationship with the other biological parent. In unmarried adult relationships, there may be biological animosity among the children and their respective parents and non-parents. As discussed in greater detail below, creating parenting and visitation agreements to ensure that the right adults have access and involvement in each child's life may ease these tensions.

## **Issues particular to intersection of marriage and another relationship**

In a multi-person relationship where only two of the partners can be married at a time, only those individuals can take advantage of the marital deduction. The other partners may be reliant on the married couple to protect the wealth, but there must be an extreme amount of trust. For example, A, B, C, and D are in a relationship. A and B are married, and A has the majority of the wealth to support the quad. Assuming A dies first, B can receive all of A's assets estate tax free. If that is done, however, the quad must trust that B will continue to support C and D. Further if the remaining partners wish to ensure the assets continue to pass tax free, B may choose to marry one of C and D. The remaining partner is again reliant on the survivor for support.

The increase in the federal estate tax exemption effective 1/1/2018 affords more opportunity for the wealthy party to provide for a non-spouse, however, the looming sunset of that tax provision leaves reliance on the expanded exemption as an uncertain result. Tying planning for such a couple purely to the vagaries of legislatively determined exemption amounts, therefore, may not be the right structure for such polyamorous families.

Merriam-Webster online dictionary defines "polygamy" as a "marriage in which a spouse of either sex may have more than one mate at the same time." Polygamy in the U.S. has a long history and was popular in certain Mormon populations in the 1800s. *Reynolds v. U.S.* [48](#) addressed the constitutionality of the Morrill Anti-Bigamy Act, which was signed into law by President Abraham Lincoln in 1862. The court upheld the law against the constitutional challenge, finding that laws cannot regulate religious beliefs, but they may regulate religious practices or actions.

Plural marriage remains illegal in the U.S., although some scholars argue that the recent same-sex marriage cases have opened the door to polygamy by rolling back some of the prior restriction based on social norm. Regardless, polygamy and polyamory continue in the U.S. today; however, these

relationships do not always stand out as unusual in modern society.

For example, Bob and Sue are married and have three children. After the children are out of the house, Bob and Sue decide they are not satisfied in their relationship anymore. They are still friends and enjoy their mutual family, social status, and group of friends, so they do not wish to divorce. Instead, Bob and Sue agree that they will remain married but will agree to discreetly see other people. If Sue establishes a long-term romantic relationship with another person, she is in a polyamorous relationship.

In 1921, the Supreme Court of Fulton County, New York, was faced with a situation where a common law marriage existed and then James Procita married another woman. <sup>49</sup> The common law wife sued for spousal support and to have the subsequent marriage annulled. The court sided with the first wife and ordered \$200 in legal fees and \$7 per week.

Cases dealing with multiple marriage situations, however, are not a thing of the past. In 2008, the Missouri Court of Appeals dealt with the estate of George Davis and his two "wives." <sup>50</sup> George married Agnes in 1903 and had eight children. He never divorced Agnes, but began a relationship with Evelyn Rishovd no later than 1943, as their son, Thomas, was born in February 1944. George, Evelyn, and Thomas lived together as a family and lived in a home owned by George and Evelyn as tenants in common. George and Evelyn held themselves out as husband and wife, and took title to their home in 1955 as "George S. Davis and Evelyn Davis, his wife." Thomas died intestate in 2003, resulting in a dispute between the George/Agnes descendants and Evelyn's family about who would inherit. The court upheld the lower court's finding that the George/Agnes descendants established their relationship in accordance with the legal requirements.

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It does not take much imagination to think of scenarios where common law marriages, marriages that have not been properly dissolved, or marriages that are ignored by one party who subsequently enters into another marriage could create problems even in the estate of a testate decedent. As discussed below, the distinction between children born out of wedlock and those born during wedlock has been largely eliminated except as to statutes requiring that paternity be proved during the lifetime of the father, or similar requirements under state law that relate to a legitimate state purpose. Rather than leaving such determinations to chance and the variations in state law, drafters may wish to consider identifying the names of the spouse and children of the testator to help avoid arguments about who is intended to benefit under the estate plan documents.

Polyamory also presents a special set of problems for individuals residing in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, or Wisconsin, which are the community property states. Alaska residence, with its community property opt-in regime, may also raise issues if the spouse with one or more non-marital partners has opted into community property with the legal spouse.

Title is not determinative of ownership in a community property state, and therefore a surviving spouse may have rights to property, even if the decedent specifically bequeathed that property to a non-marital

partner. Although there is some variation under state law, the general rule in community property jurisdictions is that the surviving spouse owns an undivided one-half interest in each community asset at the first spouse's death. So, if a decedent owned a house that is occupied by the non-marital partner, and the house was acquired with the decedent's income during marriage, then upon the decedent's death, the surviving spouse and surviving non-marital partner likely are tenants-in-common for that residence. If the decedent purchased the residence with income earned during the marriage but placed the residence in the name of the non-marital partner, the result may be the same.

In general, the community can only be severed by agreement of both spouses. Therefore, unless the spouse consented, the surviving spouse has a one-half undivided interest in the residence occupied by non-marital partner. In either case, particularly if spouse did not know about the non-marital partner, this result is a recipe for estate litigation.

In community property states, the presumption generally is that property owned by either spouse is community property. The burden to prove that the property is not subject to the rules applicable to community is on the party seeking to demonstrate otherwise. An attorney advising a client in a community property state regarding planning (gifts or bequests) for a non-marital partner with a consenting spouse can help to avoid litigation by having the client and his or her consenting spouse execute an agreement severing community property rights from the assets intended to pass to the non-marital partner.

For legally married couples, premarital agreements generally become effective upon the date of the marriage and such agreements will have no effect if the marriage does not take place. However, cohabitation and parenting agreements typically will be effective upon execution and will terminate upon a party's death or the termination of the relationship, which timing may be harder to define than with a legal dissolution. For multi-partner relationships, defining termination of the relationship and rights upon termination can help avoid controversy by creating a set of rules where no statutory framework exists to otherwise assist the parties.

Without a written agreement, many courts do nothing to enforce one partner's claim against the other, despite the usual inequity resulting from the lack of legal protection for the parties trying to exit the relationship. In *Hewitt v. Hewitt*, [51](#) a woman brought suit against the man with whom she had lived, unmarried, for 15 years. The woman claimed that the man orally promised to "share his life, his future, his earnings and his property" with her and, therefore, that an implied contract entitled her to a share of the property accumulated during their "family relationship." The Illinois Supreme Court refused to enforce the parties' oral agreement because their living arrangements violated public policy. To hold otherwise, according to the court, would encourage the formation of "illicit" relationships.

Many courts, however, will infer and enforce an agreement based on either the conduct of the parties or principles of equity. [52](#) The leading case, *Marvin v. Marvin*, [53](#) was decided by the California Supreme Court in 1976. In *Marvin*, actor Lee Marvin and the plaintiff, an entertainer and singer, orally agreed that the plaintiff would "give up her lucrative career as an entertainer," to

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devote her time to the defendant as "companion, homemaker, housekeeper, and cook" in return for "financial support and needs for the rest of her life." At the dissolution of the relationship, Lee Marvin had title to most of the assets. The court held that the plaintiff's claim stated a valid cause of action for breach of an express contract. Moreover, the court agreed that recovery could be based on the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts.

The court further held that, in the absence of an express contract, the courts should "inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties." The court determined that a promise to perform homemaking services was a lawful and adequate consideration for a contract, and the agreement would be unenforceable only to the extent that consideration consisted of sexual services.

In order to avoid the public policy issue surrounding claims being considered as based on sexual services, claims in nonmarital "divorce" cases generally should be based on economic rights substantially independent of the nonmarital relationship and should not be based on rights arising from the cohabitation or the performance of domestic services. <sup>54</sup> For example, in *Spafford v. Coats*, <sup>55</sup> an unmarried woman, who lived with an unmarried man, sued to impose a constructive trust on cars acquired during the couple's cohabitating relationship, and for which the plaintiff had furnished most of the consideration. The court held that the woman's rights were "substantially independent" of the cohabitating relationship and were not based on rights arising from cohabitation. The court stated, "[W]here the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims."

*Spafford* was followed by *Ayala v. Fox*. <sup>56</sup> In *Ayala*, upon break-up of the cohabitation relationship, Ms. Ayala sued Mr. Fox for recovery of payments made with respect to the couple's home, which was titled in Mr. Fox's name despite his promise to place title in both names. In reliance on that promise, Ms. Ayala jointly took out the mortgage, paid the majority of mortgage payments, the majority of the taxes, and insurance (including all amounts during a four-year period while Mr. Fox was unemployed). Mr. Fox refused to transfer title or money upon the break-up. The court found for Mr. Fox, and distinguished *Spafford* on the grounds that Ms. Spafford "did not seek recovery based on rights closely resembling those arising from a conventional marriage or on rights founded on proof of cohabitation...." If co-owning a home looked too much like marriage for the court, a written partnership agreement may have granted an enforceable right to the plaintiff in *Ayala*.

Mississippi recently determined that when a claim is not based on relationship, the court can award a former unmarried cohabitant the amounts she contributed to a joint residence on the theory of unjust enrichment. In *Cates v. Swain*, <sup>57</sup> an unmarried couple cohabitated for six years, and during that time Swain contributed money toward expenses of the jointly occupied residence. After the break-up, Swain

asked the court to declare a constructive trust or a resulting trust and alleged that Cates had been unjustly enriched. The court distinguished the facts from *Davis v. Davis*, **58** where the claim was

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for equitable division of property on the basis of a relationship. In this case, Swain was not alleging equitable division of property, but rather argued for unjust enrichment based on her contributions to property legally owned by Cates.

The policy expressed in *Hewitt* was reiterated in a 2006 case before the Illinois appellate court in *Costa v. Oliven*. **59** This case involved a man suing a woman with whom he had lived for 24 years. While the couple never married, the man alleged that they had a "quasi-marital" relationship. The man argued that *Hewitt* should not "be applied as a blanket rule in every set of circumstances involving unmarried cohabitants." His action against his former cohabitant was for a constructive trust over her property and an accounting of all income and assets in her possession. The court ultimately ruled that Illinois public policy prevents granting enforceable property rights to unmarried cohabitants. **60**

When there are multiple parents to a child, legal or otherwise, the parties may consider discussing what arrangement would be in a child's best interests, both during the marriage and upon dissolution of a relationship. The parties can make an agreement addressing where the child should live, how often each party should have visitation, vacation and holiday schedules, and financial support for each child in the event the adults' relationship ends. While a court will always have the final say in making legally enforceable provisions regarding minor children, discussing these issues openly when all parties are still getting along may facilitate a reasonable and cooperative agreement regarding the children, thereby avoiding litigation.

These types of agreements can be especially beneficial when certain partners in the group may not have legal rights to a child. In such cases, multiple adults may be living in a household and a child may have an emotional and psychological relationship with all of the adults, not just the legal or biological parents. In the event the parents and other partners in the relationship decide to end their relationships, the parties may agree that it is in the child's best interests to maintain regular contact with all of the adults. Legal parents will have the most legal rights with respect to the child, and often will have the legal right to keep an ex non-parent from visiting with the child.

It is important to note that parenting agreements may be considered by some courts as void in violation of public policy. **61** Nonetheless, these agreements can be useful in establishing the terms of a parent-child relationship that has been formed if it is later called into question, and the court may still consider enforcing such agreement or certain terms within the agreement. **62** Accordingly, the involved parents may wish to document how they will handle issues such as custody, visitation, and education, belief systems, etc. of the children, understanding that the court's determination of the best interests of the children will ultimately prevail. **63**

The law varies from state to state when it comes to cohabitation agreements. For example, California

grants rights of cohabitants based on an implied or an express contract. **64** Florida allows unmarried cohabitants to enter into an enforceable contract that establishes rights and responsibilities provided that there is clear, valid, and lawful consideration without express or implied agreement regarding sexual relations. **65** In Texas, "nonmarital conjugal cohabitation agreements" must be in writing. **66**

Cohabitation agreements among multi-partner relationships should be entered into like premarital agreements, although general contract principles such as consideration or other required elements in the applicable jurisdiction must be addressed in order to make such contracts enforceable. Each party should disclose his or her assets and liabilities in order to avoid challenges based on lack of information or unconscionability. Parties may wish to determine property ownership, especially if certain members of the relationship are married to each other. For example, should a married couple own the main residence as tenants by the entirety? Should the parties each own the property as tenants in common or as joint tenants with rights of survivorship? Do community property rights need to be waived?

Often, the group will not have even thought of the issues that may come up if a party wishes to leave the group or if a party dies. Many polyamorous groups will say that honesty and communication are the best way to keep their relationship healthy and strong. **67** To assist the parties in having an open discussion, the advisor may want to provide the group with a list of issues to be discussed prior to the meeting in the lawyer's office. For example:

- (1) Wages/earnings.
- (2) Mortgage/rent payments.
- (3) Real estate ownership and division.
- (4) Personal property ownership and division.
- (5) Insurance/retirement plan beneficiaries/proceeds.
- (6) Shared bank account contribution.
- (7) Inheritances/gifts from family.

Such agreements can also discuss more specific and daily issues including:

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- (1) Filing of income tax returns.
- (2) Payment of household expenses.
- (3) Division of household duties.
- (4) Division of childcare duties.
- (5) Ownership, custody, and care of pets.
- (6) Duties and obligations of a partnership, joint venture, or other business arrangement with the cohabitant (especially if the business is operated out of the home).
- (7) Division of prior, current, and future debt obligations, including upon termination of the cohabitation.
- (8) Retirement, membership, medical, and other benefits each cohabitant has and the division of those benefits including upon termination of the agreement.

(9) Health, disability, property, life, and other insurance of each cohabitant. **68**

While some of these issues may seem trivial or complicated to discuss ahead of time, it is important, especially in a multi-person relationship, to lay out each person's expectations in an effort to avoid future surprise.

Courts have found that a cohabitant may have a claim for "palimony" against an individual (or against his or her estate if the individual does not survive the lawsuit) when providing homemaking services as consideration for a property-sharing agreement. **69** In a group relationship where multiple people may be dependent on one person to provide support, it is best for the parties to discuss their support expectations ahead of time in the event of a break-up. Without an agreement or a list of each party's property, upon the death of an individual, it may be difficult to prove whose property is whose and what property was not jointly acquired by all of the cohabitants.

Parties with interests in trusts or family businesses may wish to disclose such interests, especially if the parties plan to live off such interests. However, the wealthy partner's family may be more hesitant to disclose such information in a polyamorous relationship.

Legal divorce is difficult enough. In a polyamorous situation where there are multiple relationships, with or without a legal marriage, a separation can involve extra complications. If a triad or larger group is part of the dissolving relationship, the other partners may have legal claims or personal interest in the property division. For example, say A and B are married and live with C. B and C have a joint bank account. B has been contributing marital assets to the joint bank account. The bank account with C may be part of the divorce proceedings as it was funded with marital assets. However, C may have contributed to the account as well. The complications are endless considering different types of property-real estate, businesses, personal property, etc.

Furthermore, one partner may have been responsible for supporting the entire group. If the group is breaking up, there may be certain expectations by one or more of the parties that financial support will continue. Having a conversation ahead of time and agreeing to certain parameters in the event of a break-up can save the parties time, money, and emotional stress in the long run.

## **Ethical implications for advisors**

Bigamy is prohibited across the U.S. While state statutes differ in their wording, in general, bigamy is typically defined as intending to enter into or entering into marriage while already married or with knowledge that the other person is married. **70** However, some states' bigamy laws are stricter than others.

For example, Colorado law provides that any "married person who, while still married, marries, enters into a civil union, or cohabits in this state with another person commits bigamy." **71** Similarly Georgia law states that a "person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another person or carries on a bigamous cohabitation with another person." **72**

Arguably, anyone who stays legally married but lives with another person in a marriage-like relationship is committing bigamy under Colorado and Georgia law, presumably even if the spouse consents. Interestingly, Illinois law allows a second spouse, who unknowingly married a bigamist, the right to receive maintenance pursuant to divorce law so long as the allowance is not inconsistent with the rights of the first legal spouse. **73**

If a lawyer finds out, or is told through the course of representation, that a client or a group of clients have committed bigamy, the lawyer is protected from having to report such criminal conduct by the Rules of Professional Conduct. Specifically MRPC Rule 1.2(d) provides: "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct

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that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

The lawyer can counsel the individuals on the consequences of having committed bigamy, but generally should not be required (or permitted, depending on the state) to report them for having committed the crime. If a married client comes to a lawyer and asks if he or she can get married again, of course the lawyer cannot aid or counsel the client on how to commit such bigamy.

Consider the following: Jean has been Alice's estate planning advisor for ten years. Alice (who Jean knows is legally married to Barry) asks Alice to prepare or review a premarital agreement drafted by Chris's attorney as Alice and Chris are preparing to enter into a legal marriage.

Clearly, Jean cannot represent Alice in the premarital agreement. But what if Jean learns that Alice has hired another attorney to represent her in the premarital agreement? Is Jean required to report the other attorney to the state disciplinary bar if the other lawyer knows Alice is married already? Should-or may-Jean report such information to Alice's attorney or Chris's attorney if they do not know Alice is married already? Jean is likely barred from disclosing such information, but Jean may wish to counsel Alice that she is committing a crime.

Separate from the premarital agreement transaction, can Jean continue to represent Alice in her estate planning, knowing she may be lying to both of her "spouses" about their rights to her estate? If Alice never brings either spouse to Jean, Jean probably can continue the representation in most states without violating the legal ethics rules. If Alice ever wishes Jean to represent her jointly with either "spouse," Jean will have to decline.

Changing the facts a little, what if Alice and Barry ask Jean to draft a cohabitation agreement with Chris? If Jean is practicing in a state like Georgia or Colorado that defines bigamy as marriage-like cohabitation with someone other than the individual's spouse while legally married, Jean technically is helping Alice and Barry commit a crime. Knowing the law of bigamy in the state where one practices is important to avoid an unintended violation of the ethics rules.

## Conclusion

As the world becomes more accepting of "nontraditional" families, estate planners need to consider planning for such mixed and expanded families. It is important to create an environment where clients are able to discuss financial and familial expectations during and after the relationship openly with each other, as well as with their advisor. Understanding and advising these families about legal and tax consequences can help them to properly plan for the good times and difficult life events in a way that can reduce the need for and likelihood of litigation.

**1** The author addresses only those relationships that are entered into by consenting adults and does not comment on criminal law implications of such relationships or on any situations in which minors enter into, or are forced into, polygamous situations.

**2** Boboltz, "Here's Why the Idea of 'Traditional Marriage' Is Total Bullsh\*t," [www.huffingtonpost.com/2014/01/20/historical-marriage-definitions\\_n\\_4589763.html](http://www.huffingtonpost.com/2014/01/20/historical-marriage-definitions_n_4589763.html).

**3** *Id.*

**4** *Id.*

**5** *Id.*

**6** Everitt, "Ten Key Moments In the History of Marriage," BBC News Magazine (3/14/2012), available at [www.bbc.com/news/magazine-17351133](http://www.bbc.com/news/magazine-17351133).

**7** *Id.*

**8** "A Brief History of marriage," <https://yesterday.uktv.co.uk/article/brief-history-marriage/>.

**9** [www.huffingtonpost.com/2014/01/20/historical-marriage-definitions\\_n\\_4589763.html](http://www.huffingtonpost.com/2014/01/20/historical-marriage-definitions_n_4589763.html).

**10** *Id.*

**11** *Bogert, George Gleason, 1884-1977. The Law of Trusts and Trustees* (Thomson Reuters/West), § 275.

**12** *Id.*

**13** *Id.*

**14** *Id.*

**15** *Id.*

**16** *Id.*

**17** *Id.*

**18** *Id.*

**19** 570 U.S. 744 **111 AFTR2d 2013-2385** (2013).

**20** 401 U.S. 532 (1971).

**21** Louisiana Civil Code of 1870: Art. 206.

**22** La. Civ. Code Ann. art. 880.

**23** 108 S. Ct. 1910 .

**24** 32 So. 3d 403 (Miss. 2010).

**25** 901 N.W.2d 234 (Minn. Ct. App. 2017), *review denied* (11/28/17).

**26** 933 N.E.2d 512 (Ind. Ct. App. 2010).

**27** 427 U.S. 495 (1976).

**28** Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C.).

**29** Pub. L. No. 110-458, 122 Stat. 5092 (codified as amended in scattered sections of 26 U.S.C.).

**30** See [Notice 2008-30, 2008-1 CB 638](#) .

**31** One state will generally recognize a common law marriage that is valid in the state where the spouses reside. Common law marriage is recognized in only a limited number of jurisdictions as the basis for a legal marriage in that state. "Common Law Marriage by State," National Conference of State Legislatures (8/4/2014), [www.ncsl.org/issues-research/human-services/common-law-marriage.aspx](http://www.ncsl.org/issues-research/human-services/common-law-marriage.aspx).

**32** 638 So. 2d 1266 (Miss. 1994).

**33** The court noted that only if there is no surviving spouse, may the minor children of the deceased receive equal shares of the monthly pension. Because the statute is clean and unambiguous, the court found that it was bound to its holding, even though in reality it may not be the most equitable decision.

**34** 455 So. 2d 1362 (La. 1984).

**35** 841 N.Y.S.2d 207 (2007).

**36** 986 N.E.2d 85 (2013).

**37** 32 Cal. 4th 160 82 P.3d 747 (2004), *as modified* (2/4/2004).

**38** DeHart, *supra* note 36.

**39** No. 14-10014, 2014 WL 4357898 (CA-5, 9/4/2014).

**40** 988 N.Y.S.2d 522 (Sur. 2014).

**41** "Modern Family: More Courts Allowing Three Parents of One Child," [www.nbcnews.com/feature/nbc-out/modern-family-more-courts-allowing-three-parents-one-child-n774031](http://www.nbcnews.com/feature/nbc-out/modern-family-more-courts-allowing-three-parents-one-child-n774031).

**42** *Id.*

**43** Reardon, "Genetic Details of Controversial 'Three-Parent Baby' Revealed," *Nature* (4/3/2017), [www.nature.com/news/genetic-details-of-controversial-three-parent-baby-revealed-1.21761](http://www.nature.com/news/genetic-details-of-controversial-three-parent-baby-revealed-1.21761).

**44** 755 ILCS 5/2-1.

**45** 731.102, etc.

**46** Thomson Reuters, 50 State Statutory Surveys: Trusts and Estates: Descent and Distribution, Intestate Succession, 0160 Surveys 1 (October 2017).

**47** 2016 IL 118781 69 N.E.3d 834 (10/20/2016).

**48** 98 U.S. 145 (1878).

**49** Procita v. Procita et al., 190 N.Y.S. 21 (Sup. Ct., Fulton County, N.Y. 1921).

**50** In re Estate of Davis, 250 S.W.3d 768 (Mo. App. 2008).

**51** 394 N.E.2d 1204 (Ill. 1979).

**52** Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000) (holding that cohabiting couple may ask court for assistance in law or equity to enforce cohabitation agreement); Pinto v. Smalz, 955 P.2d 770 (Or. App. 1998) (female partner dissolving domestic partnership was awarded half of proceeds from sale of property accumulated while cohabiting on court's finding that parties intended to share their assets and liabilities); Pickens v. Pickens, 490 So. 2d 872 (Miss. 1986) (common law wife was awarded equitable share of the assets she and her common law husband acquired during the time of their cohabitation). These causes of action are not exhaustive. For example, a claim could be brought based on an oral contract. (See Green v. Richmond, 337 N.E.2d 691 (Mass. 1975)). However, a plaintiff may not wish to state each of these claims as a cause of action, because a court may invalidate the entire claim based on one invalid cause of action. The distinction between a contract claim and a claim based on principles of equity can determine the tax consequences, so the choice of theory should be carefully considered.

**53** 557 P.2d 106 (Cal. 1976).

**54** The court in Marvin, *supra* note 53, acknowledged that the claim was grounded in rights arising from the cohabitating relationship; however, the claim did not taint or destroy other claims. Other courts may not be as forgiving. See Green v. Richmond, *supra* note 52.

**55** 455 N.E.2d 241 (Ill. App. 1983).

**56** 564 N.E.2d 920 (Ill. App. 1990).

**57** 2013 WL 1831783 (Miss. 5/2/2013), *reh'g den.* (6/27/2013).

**58** 643 So.2d 931 (Miss. 1994).

**59** 849 N.E.2d 122 (2006).

**60** As the Hewitt court stated, "[T]hese questions are appropriately within the province of the legislature, and \* \* \* if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change." Hewitt, 77 Ill.2d at 66, 31 Ill.Dec. 827, 394 N.E.2d 1204, quoting *Mogged v. Mogged*, 55 Ill.2d 221 302 N.E.2d 293 (1973). *Costa*, 849 N.E.2d at 125.

**61** See, e.g., RCW 26.09.070(3) and Unif. Premarital Agreement Act §3(b) (1983), 9C U.L.A. 35, 43 (2001) ("The right of a child to support may not be adversely affected by a premarital agreement.").

**62** *Tenth Annual Review of Gender and Sexuality Law: Family Law Chapter: Child Custody, Visitation & Termination of Parental Rights*, 10 Geo. J. @DPT:INTERNATIONAL @AT:To Cooperate or Not Cooperate: The Dangers of Noncooperation for Foreign Banks Seeking U.S. Market Access @AU:IAN M. COMISKY Gender & L. 713, 740, Meredith Larson, ed. (2009).

**63** "The agreement may be considered by the court, in light of the circumstances and knowledge of the parties when the agreement was made, but it is not enforceable." *Marriage of Littlefield*, 133 Wn. 2d 39 940 P.2d 1362 (1997).

**64** In *Marvin v. Marvin*, *supra* note 53, the California Supreme Court held that California courts could enforce contracts between cohabiting couples where the required elements of a contract are found to exist, unless the contract was expressly founded on sexual services as the consideration.

**65** *Poe v. Levy's Estate*, 411 So.2d 253 (Fla. 4th DCA 1982).

**66** Tex. Bus. & Comm. Code § 26.01(b)(3).

**67** Grinberg, "Polyamory: When Three Isn't a Crowd," CNN (10/26/2013) [www.cnn.com/2013/10/26/living/relationships-polyamory/index.html](http://www.cnn.com/2013/10/26/living/relationships-polyamory/index.html).

**68** 95 Am. Jur. Proof of Facts 3d 1 (Originally published in 2007).

**69** Estate of Shapiro v. U.S., 634 F.3d 1055 (CA-9, 2011).

**70** Utah Code Ann. § 76-7-101 (West); LSA-R.S. 14:76; La. Stat. Ann. § 14:76; N.C. Gen. Stat. Ann. § 14-183; 720 Ill. Comp. Stat. Ann. 5/11-45; N.J. Stat. Ann. § 2C:24-1 (West).

**71** Colo. Rev. Stat. Ann. § 18-6-201 (West).

**72** Ga. Code Ann. § 16-6-20 (West).

**73** 750 Ill. Comp. Stat. Ann. 5/702.