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Planning for Polyamorous Clients — Not Just as Seen on TV

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While many still assume that a ''traditional'' family is one with a husband and wife who are legally married and have biological children of both parents, the definition of what is traditional has been evolving for many decades. Further, estate planning attorneys especially have been aware that ''families'' are not so easily defined. To provide the best plan for a client, we must be trusted with information that some may not feel comfortable sharing with the general public. However, more and more clients are comfortable living openly in situations that have historically been taboo. Polyamorous families typically involve three or more consenting adults living together. They may all be in a relationship together or they may have delineated relationships among only some members of the group. There may be multiple children with different parents the entire group is raising together as a family. As advisors, we should be comfortable with discussing these situations and familiar with their nuances. Further, with genetic testing and multi-parent situations, it is important to consider how to best address these situations to avoid conflict.

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CHANGING NORMS AND SOCIETAL VIEWS

While one man, one woman legal marriage is considered the norm, that this has only been the norm for a relatively short period of time. History has taught us that this concept of marriage is relatively new. Some societies encouraged (and still do) men to have multiple wives, not necessarily for the purpose of the man's enjoyment, but more so to allow the women to help each other raise children and do housework together.[1] While not all would agree to this arrangement, many wives enjoyed this arrangement as the additional help was beneficial to their daily lives. Of course, there are instances in which wives did not appreciate the competition.[2] Still other civilizations encouraged same-sex partners because they believed that opposite sex partners could not provide the emotional support.[3]

Even in recent history, we have seen regularly and rapidly changing views on marriage and its purpose. The Victorian Era encouraged women to be chaste and asexual.[4] During the 1920s, young singles began interacting in social spaces like dance halls (insert gasp here) without chaperones. Most ads from the 1950s will show that Americans celebrated the nuclear family with a working husband and a stay at home wife.[5] In the 1970s and the 1980s, more women began working outside the home and were getting married later or not at all since women no longer necessarily needed a husband's income to rely on. More couples were having fewer children and later in life as well. The 21st century has proven that families can be created in many different ways with the American legalization of same-sex marriage and assisted repro-

[1] Sara Boboltz, *Here's Why The Idea Of 'Traditional Marriage' Is Total Bullsh*t,* Huffington Post (Dec. 6, 2017), available at https://www.huffpost.com/entry/historical-marriage-definitions_n_4589763.

[2] See Note 1, above.

[3] See Note 1, above.

[4] See Note 1, above.

[5] See Note 1, above.

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ductive technology. It is always important to consider that what is considered normal is determined by the society and history around us and is everchanging. What may be considered normal to one society is different to another, and the passage of time obviously affects these societal norms.

The legal rights of romantic partners, including for tax and estate planning purposes, are typically contingent upon marital status. Similarly, a child's rights of inheritance and, in some circumstances, their ability to obtain insurance, social welfare, or legal benefits, may also depend on a parent's marital status. A spouse's status often has important consequences for tax planning, employee and governmental benefits, and defined assumptions under common law. However, with changing norms and priorities, individuals are choosing to live together and have a family but without wanting a legal marriage or feeling it necessary. Sometimes even married individuals have an agreement with their spouse to remain married while each party pursues his or her own romantic interests outside the marriage. These kinds of ''nontraditional'' relationships are not new, and estate planning attorneys should be prepared to discuss them openly and plan for these families.

Families that involve multiple partners require special care in planning. When most hear the term polyamory, they think of a polygamous family. In a 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. Popular shows like ''Big Love'' or ''Sister Wives'' have normalized these family arrangements to an extent. At a minimum, the shows have shed light on polygamous family relationships. Since actual polygamy is illegal in the United States, it would be unlikely for most estate planners to be asked to engage in planning for this type of family.

Polyamory is not limited to polygamy. Polyamory is the practice of having more than one open sexual and/or emotional relationships, typically with the consent of all parties involved. While polyamory may seem new to our lexicon, headlines throughout recent history have been filled with stories of people living in polyamorous relationships. Spencer Tracy stayed married throughout his life but was known to be in a long-term romantic relationship with Katharine Hepburn. Others choose to remain married for social or financial reasons, but maintain an agreement that each may engage in new committed and sometimes public relationships with a new partner.

And then there are the secret second family scenarios. Charles Kuralt maintained a second family without his first family's knowledge for more than 20 years.[6] With the widespread use of genetic testing kits, more families are finding out about half siblings they never knew about. Estate planning attorneys may or may not be aware of such scenarios and a plan may implicate such secret families.

In today's world, 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.

WHAT DOES IT MEAN TO BE A PARENT?

Until recently, determining who was a descendant of whom was fairly simple under the law and in estate planning documents. While paternity may have been an issue, there was no question about a biological child being born more than nine months after a person's death. The use of genetic material to create additional descendants after a person has died is an issue our court system is only beginning to tackle. We have already seen scenarios in which the children from the first marriage sue to prevent their father's surviving spouse from using the deceased father's sperm to create additional posthumous descendants that would dilute their share of their father's estate.

Previously, illegitimate children were treated differently simply because their parents were unmarried, and they would not have been legal heirs of a father who would not recognize them. As societal norms have shifted regarding pregnancy out of wedlock as well as the ability to conclusively prove parentage, the law has come to treat illegitimate children mostly the same as legitimate children for inheritance purposes. However, children born outside a legal marriage (or their mothers) may still have to prove paternity to determine certain legal rights. Further, some states have enacted statutes of limitations 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 a 1971 case, *Labine v. Vincent,* the U.S. Supreme Court held that a law precluding an illegitimate child from inheriting as an intestate heir was valid.[7] In *Labine,* Ezra died without a will. During his life, Ezra had a child, Rita, with Lou Bertha.[8] Ezra and Lou Bertha never married. While Ezra acknowledged Rita

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[6] Paige Williams, *A Double Life On The Road*, Wash. Post (June 1, 1998), available at https://www.washingtonpost.com/archive/lifestyle/1998/06/01/a-double-life-on-the-road/8d436694-3487-4f05-8d48-0ef76ff23f83/.

[7] *Labine v. Vincent*, 401 U.S. 532 (1971).

[8] *Labine*, 401 U.S. at 533.

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at his child, at that time acknowledgement did not automatically make Rita an heir in Louisiana. By law, Ezra had to take certain actions to formally acknowledge Rita thereby legitimizing her under the law.[9] After Ezra's death, his other relatives argued that they were the rightful recipients of Ezra's property because Rita had not been formally acknowledged as required in the statute. However, Lou Bertha argued on Rita's behalf that Rita was Ezra's rightful and sole heir as his sole surviving child.[10] Lou Bertha argued that the law disinheriting Rita was a violation of the Equal Protection and Due Process clauses in the Constitution. The Supreme Court, however, held that it could not override the Louisiana legislature's determination to treat illegitimate children differently. The Court also focused on the fact that Ezra could have legitimatized Rita by formally acknowledging her or by marrying Rita's mother to legitimize Rita, and the Court ruled in favor of the other relatives. While the Louisiana statutes have been amended to treat legitimate children and illegitimate children as equals for inheritance purposes,[11] the U.S. Supreme Court has never overturned *Labine.*

In another U.S. Supreme Court case, *Mathews v. Lucas*,[12] Belmira and Robert lived together for 18 years. During that time, they had two children together, but they never married. When Robert passed away, Belmira applied for survivor benefit under Social Security for the two children. Under the laws governing Social Security at the time, all dependent children (legitimate and illegitimate) of a decedent were entitled to seek survivorship benefits. However, illegitimate children had additional hurdles to overcome compared to legitimate children. 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.''[13] Unfortunately for Belmira's children, they did not meet any of the requirements under the law. Belmira, on her children's behalf, challenged such standards on the grounds that they violated the Due Process Clause because they treated illegitimate children differently. The Supreme Court, however, found that the requirements were permissible as they were reasonably related to the government's purpose of administrative efficiency in determining survivorship benefits. Presumably the Court reasoned that the line had to be drawn somewhere. While this is a 1976 case, and the Social Security Act has been subsequently amended, the case has never been overturned.

In a 2010 Supreme Court of Mississippi case, Thelma was the only child born to James and Alice. After James and Alice's deaths, Thelma died without a will and with no surviving spouse or children.[14] However, before his death, James was married to Rosetta, and they had five children, one of whom was Daniel.[15] Daniel was the alleged father of numerous children who argued that they would be the heirs of Thelma's estate.[16] Under Mississippi law at the time, an illegitimate child could not have claim an inheritance unless there was an action for paternity filed within a certain time period after the death of the purported father.[17] 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.[18] Presumably the court did not want to encourage distant relatives from using their alleged father's status to come out of the woodwork in a rich relative's estate.

In 2017, a Minnesota appellate court upheld a statutory presumption that a child born during the marriage of a couple was the biological child of the couple even if there was no biological proof. In *Matter of Estate of Nelson,* Wallace's heirs were deemed to be the children of Mattie and John, the mother and father listed on the Wallace's birth certificate.[19] However, two other sets of individuals came forward to argue that in fact Wallace's father was in fact not the father on his birth certificate, but the same father as such sets of individuals (there were two different sets of petitioners arguing for their respective father). The groups asked the court to order that DNA testing be done to determine who was Wallace's biological father. Therefore, in the event Wallace's father was determined to be someone else, the two side's requested that the court distribute Wallace's estate to heirs as determined by Wallace's newly discovered biological family. Interpreting and upholding the validity of Minnesota statutes, the court found that ''if a father-child relationship is established under the paternity presumption under the parentage act, only that father can be

[9] *Labine*, 401 U.S. at 533.
[10] *Labine*, 401 U.S. at 534.
[11] La. Civ. Code Ann. art. §880.
[12] 427 U.S. 495, 498-499 (1976).
[13] *Mathews*, 427 U.S. 495, 498-499 (1976).
[14] *Estate of McCullough v. Yates*, 32 So. 3d 403 (Miss. 2010).
[15] *Yates*, 32 So. 3d 403.
[16] *Yates,* 32 So. 3d 403.
[17] *Yates,* 32 So. 3d 403.
[18] *Yates*, 32 So. 3d 403.
[19] 901 N.W.2d 234, 241 (Minn. Ct. App. 2017).

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the child's genetic father.'' Therefore, court did not allow the purported half-siblings to do the DNA test and found that Wallace's heirs were the children of the parents listed on his birth certificate.

While some of these cases many seem antiquated and irrelevant, they show that the status of a child and his or her rights are not always clear cut in blended or non-married families. Further, such status and rights are constantly changing depending on the statutes and a family's specific scenario.

IS THIS YOUR SPOUSE?

The legal determination of who is a spouse and who is a descendant is typically reserved to the state legislatures and their judicial system. While these rules have come to be more uniform, there remain differences across the states. Such differences can create an inconsistent environment which produces unclear results depending on who is being asked the question, ''is this your spouse?'' For example, several states offer couples the alternative of a domestic partnership or civil union and a few states still have common law marriage.[20]

In *Yager v. Gregory Cattle Co.*,[21] a couple had been married for 25 years but subsequently divorced. Eventually, the two reconciled and resumed living together and holding themselves out as husband and wife. However, they never legally remarried. After the man's death, the surviving women applied for but was denied his worker's compensation benefits. The Supreme Court of Mississippi determined that the woman, as the surviving life partner, was not entitled to his Worker's Compensation benefits because they were not legally married. The court found that while ''many of the indicia of a marriage were present,'' including the filing of joint tax returns, cohabitation, and naming each other as insurance beneficiaries, to be a legal spouse for purposes of receiving the benefits, the parties needed an actual legal marriage.[22]

Similarly, in *Crescionne v. Louisiana State Police Retirement Board*,[23] the court analyzed the meaning of ''surviving spouse''. In this case Jean Claude and Sara were married but at the time of Jean Claude's death, they were legally separated.[24] Jean Claude was a State Trooper who died in the line of duty. He had children from a prior marriage to Sheila, and Sheila's children would have been entitled to Jean Claude's survivor benefits if it were determined that there was no surviving spouse. The court ruled that even though Sara was legally separated from Jean Claude at the time of his death, she was still the surviving spouse and under statute, the sole beneficiary of the survivor benefits.[25]

These cases demonstrate that even in a more traditional relationship with just two parties, everyone may have different opinions on the definition of what is a spouse. It may be prudent to discuss with your clients what they consider to be a legal spouse and provide a definition in the estate plan that indicates when the status of ''spouse'' begins and ends. Depending on a client's values and experience, they may wish to define the term ''spouse'' so that if divorce proceedings are initiated, the term spouse no longer applies rather than waiting until an order is entered dissolving the marriage.

In second (or third and so on) marriage scenarios, you may wish to discuss with your clients how to avoid contention between children or prior marriages and the surviving spouse. While an estate plan may provide for the distribution of all income to a surviving spouse with the possibility of principal in certain circumstances, such plan may encourage surviving children to question every expenditure for their stepparent's benefit. This may lead to uncomfortable arguments and sometimes litigation. Providing for a unitrust distribution to the spouse or more specific guidance on how and if certain items will be paid may reduce the likelihood of litigation. Some expenditures that may be helpful to reference are real estate taxes, routine maintenance, repairs and upkeep on any residence, major capital expenditures (such as a new roof) for the residence, medical expenses and health insurance for the surviving spouse, utility bills, vacation expenditures, insurance on a residence, artwork or other valuables, income taxes on the distributions from the trust, caregiver expenses as the surviving spouse ages or becomes ill, and automobiles and auto insurance. Further, you may wish to discuss setting aside a specific amount for the children at the first spouse's death so they are not waiting in the wings for stepparent's death.

Though plural marriage remains illegal in the United States, examples of polygamy and polyamory continue and may be expanding in the United States

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[20] One state will generally recognize a common law marriage that is valid in the state where the spouses reside. Common law marriage is only recognized in a limited number of jurisdictions as the basis for a legal marriage in that state. http://www.ncsl.org/issues-research/human-services/common-law-marriage.aspx.

[21] 638 So. 2d 1266 (Miss. 1994).

[22] *Yager,* 638 So. 2d at 1267. The court noted that unless there is no surviving spouse, only then 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.

[23] 455 So. 2d 1362 (La. 1984).

[24] *Crescionne*, 455 So. 2d 1362.

[25] *Crescionne*, 455 So. 2d at 1364.

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today. However, these relationships do not always stand out as unusual in modern society. Further, accidental or unintended polygamy/polyamory may occur as well.

In 1921, the Supreme Court of Fulton County, New York was faced with a situation in which James had lived with Anna for over seven years.[26] At some point James left Anna and married Flora. Anna brought suit alleging a common law marriage and requested support and maintenance and annulling James' marriage with Flora since he was already married. The common law wife sued for spousal support and to have the subsequent marriage annulled. The court sided with the first wife and ordered James to pay Anna's legal fees and a hefty seven dollars per week and the second spouse got nothing except an annulment of her marriage.

Cases dealing with multiple marriages, however, are not a thing of the past. In 2008, a Missouri court was overseeing the estate of George Davis and his two ''wives.''[27] George married Agnes together they had eight children. At some point he left Agnes and began a relationship with Evelyn and they had a son, Thomas, together. George, Evelyn and Thomas lived together in a home owned by George and Evelyn as ''George S. Davis and Evelyn Davis, his wife.'' It is unclear whether Evelyn was aware George was already married. 100 years after George married Agnes, Thomas died without a will. Naturally, Thomas' death led to a dispute between the George/Agnes descendants and Evelyn's family about who would inherit. Due to the legal marriage between George and Agnes, the court upheld the lower court's finding that the George/Agnes descendants established their relationship in accordance with the legal requirements and therefor they were the rightful heirs of Thomas.

ARE YOU MY MOTHER (OR FATHER)?

While previously, children could only be created in a way which I do not need to provide specific detail, modern science and situations are providing different ways in which a legal child may be brought into the world. While most parents wish to provide for their children, providing for a child born prior to or during the marriage out of wedlock may not be a priority of a surviving spouse. Even if someone is a biological child, there are situations in which parents engage in lawsuits with their own children over insurance benefits, retirement benefits, and other assets distributable upon a person's death.

An early case on the issue of assisted reproductive technology is *In re Adoption of Anonymous*.[28] In this case, a husband and wife were married but unable to have children together. With both parties' consent, the wife underwent ''artificial insemination'' using a donor's sperm. Her husband was listed as the father on the child's birth certificate. The parties later divorced, and the wife eventually remarried. Her second husband petitioned the court asking to adopt the child and argued that the first husband's consent was not necessary to the adoption action since the first husband was not the biological father of the child. The court found that while this type of reproductive technology was new, the first husband was the listed father on the birth certificate and was the legal father regardless of biology. The court referenced that this kind of technology would likely continue to cause litigation, and they were correct.

A later case that references the outcome of *In re Adoption of Anonymous* is *In re Martin B*.[29] out of the Surrogate's Court of New York. In this case, Martin created several trusts for the benefit of Martin's ''issue'' and ''descendants.'' Later, Martin's son, James, died of Hodgkin's Lymphoma shortly before Martin. Before James' passed away, he and his wife decided to cryopreserve James' semen in the event of his passing. After his death, James' surviving wife underwent in vitro fertilization using cryopreserved semen on two separate occasions in years after James' death and gave birth to two children. The trustee of the trusts petitioned the court to provide guidance and direction on whether such posthumously born children were descendants of Martin for purposes of being beneficiaries of the trusts. 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.

Further, courts have found that even if the child is not biologically related, non-biological children can use the theory of equitable adoption 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.[30]

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

[27] *In re Estate of Davis*, 250 S.W.3d 768 (Missouri App. 2008).

[28] *In re Adoption of Anonymous*, 74 Misc. 2d 99, 100, 345 N.Y.S.2d 430 (Sur. 1973)

[29] *In re Martin B.*, 841 N.Y.S.2d 207 (2007).

[30] Equitable adoption is often described as when an individual has the intent to adopt another and enters into a contract to do so but for some reason the contract is not fully competed by the adoptive parent, the would-be child may be able to enforce the adopted relationship in equity against the adoptive parent's estate

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Equitable adoption is discussed at length in *DeHart v. DeHart*[31] by the Illinois Supreme Court in 2013. In *DeHart,* James DeHart, the purportedly equitable adopted son, filed a complaint against the executor of Donald DeHart's estate. During Donald's life, he had held James out to be his biological son. Donald even had provided to James a birth certificate showing that he was James' father. Eventually James discovered that he was not the biological nor adopted son of Donald. Donald told James that due he actually adopted James during a relationship with James' mother. Donald made his funeral arrangements listing James as his son. Donald died with a surviving wife who held herself out as Donald's sole heir. However, James alleged that he was also an heir and eligible to inherit from Donald under the doctrine of equitable adoption. The surviving spouse and the estate argued there was no valid claim because there had been no legal adoption and no contract to adopt. The court found that, in Illinois, the requirements and circumstances that would create an equitable adoption are unclear. The court chose to adopt the holding of *Estate of Ford v. Ford*,[32] a case heard by the California Supreme Court in 2004, to hold that the alleged child must prove that the decedent intended to adopt him and consistently acted as if that were the intention. There must be evidence demonstrating that the decedent's intention was to maintain a ''close and enduring familial relationship'' with the child.[33] Because this existed in *DeHart*, James was found to be an heir of Donald.

Williams ex rel. Z.D. v. Colvin[34] involved an appeal to the U.S. district court after a denial of Social Security benefits to an allegedly equitably adopted child. The court found that Z.D. was not the equitably adopted child of Williams and therefore Z.D. 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.''[35] An equitable adopted child is deemed to be an insured person's child, thereby fulfilling the first requirement. To create an equitable adoption, Texas law mandated that there must be a clear and convincing agreement to adopt. In *Williams,* the evidence demonstrated that Z.D.'s mother was not willing to enter into an agreement to adopt with Williams and had sought to obtain custody and therefore there was no agreement to adopt. Therefore, the court found that Z.D. was not equitably adopted.

In re Estate of Fairhurst[36] involved the reverse use of equitable adoption. In *Fairhurst*, the alleged parent sought to file a wrongful death action on behalf of a deceased minor's estate thereby receiving a share of the deceased minor's estate. The petitioner alleged that he (as an equitably adoptive parent) 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 only allows the court to use its discretion in awarding a child rights to inherit. Because equitable adoption (in New York) does not create a legal relationship between the two parties that goes both ways, the court held that the petitioner lacked standing in order to commence the action.

These cases are examples of the many ways there are to create or finds extra ''descendants.'' As an advisor, you may want to discuss with your clients defining such terms as ''child'' and ''descendant'' in estate plan documents to close any gaps in the law and reduce the likelihood of litigation. Further, discussing these kinds of scenarios with clients may offer you an insight into what values and beliefs your client's have about the kinds of descendants they wish to support. Depending on their personal thoughts you may want to restrict or broaden what a descendant is for purposes of distributions.

Despite the above, it may seem well settled that a child can only ever have two legal and biological parents at a time (though as evidence above, a legal parent may be difficult to define). However, this ''fact'' may be changing as well. There are now multiple examples of a child having three legal parents in certain states and countries as well as scenarios in which a child has three biological parents.

Some states are allowing more than two individuals to have certain legal and parental rights to a child. These situations may be amicable relationships in which three people have chosen to raise a child together, either as a polyamorous, triad, or simply as friends.[37] There may be no need to court action while all parents are getting along harmoniously. However, in other cases, the courts have had to get involved to determine who has parental rights. In one recent case,

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for inheritance purposes. Some states do not require there to be a contract to adopt but, as described in *DeHart* below, a close family relationship will suffice for equitable adoption purposes.

[31] *DeHart v. DeHart*, 986 N.E.2d 85, 101 (2013).

[32] *In re Estate of Ford*, 32 Cal. 4th 160, 82 P.3d 747 (2004), *as modified* (Feb. 4, 2004).

[33] *DeHart*, 986 N.E. at 103.

[34] 581 Fed. Appx. 386 (5th Cir. 2014).

[35] *Williams*, at 387 (*citing* 20 C.F.R. §404.350(a) (2007)).

[36] 988 N.Y.S.2d 522 (Sur. 2014).

[37] *Modern Family: More Courts Allowing Three Parents of One Child*, NBC News, available at https://www.nbcnews.com/feature/nbc-out/modern-family-more-courts-allowing-three-parents-one-child-n774031.

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Kitty was living with Darren and Darren's boyfriend, Sam, on the east coast.[38] Kitty and Darren decided to have a child together as friends and that all three would raise the child together. In fact, Kitty and Darren agreed to give the child Sam's last name. Over time, the relationship soured, and Kitty met someone else. She and her new spouse got married and she decided to move to California and take the child with her. Darren and Sam objected and brought suit to enforce their parental rights. Clearly Darren would have enforceable parental rights, but Sam also wanted to be deemed a parent. A New Jersey court found that Sam was a ''psychological parent'' and ordered that Kitty could not take the child away.

Perhaps even more complicated, scientists have discovered a method to mix DNA from multiple parties.[39] Such child would have more than two biological parents depending on what metrics you are using to determine ''biological.'' While this technique has not been used in the United States yet, it has been used in other countries in in vitro fertilization. With U.S. courts already recognizing three legal parents, and with such advances in DNA technology, we will likely see more three or more parent scenarios.

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.

MARRIAGE? IT'S JUST A SOCIAL CONSTRUCT

For many living in committed relationships, they find no reason to enter into a legal marriage. Others have had a failed (or more than one failed) legal marriage and do not wish to ever go through the divorce process again. Nonetheless, legal marriage still overs benefits of which those who are not legally married cannot take advantage. For example:

1. The unlimited gift and estate tax deduction for transfers between spouses;

2. The filing of joint income tax returns may reduce one's income taxes;

3. A surviving spouse can rollover the deceased spouse's IRA and take such distributions out over the survivor's lifetime to stretch out the benefits;

4. A non-employed spouse can use the working spouse's income to contribute to a spousal IRA;

5. A surviving spouse's benefits from Social Security;

6. A legal spouse is the default agent to make medical decisions in many states; and

7. Spousal forced share rights to an estate.

Nonetheless, it is important to note that non-spouses are sometimes allowed certain rights typically limited to legal spouses. For a time, non-spouse beneficiaries were able to roll over inherited retirement plan benefits to an IRA on a tax-free basis even if the beneficiary was anyone other than a spouse. Section 829 of the Pension Protection Act of 2006[40] allowed a non-spouse beneficiary to directly rollover qualified retirement plan benefits to an inherited individual retirement account. Further, the Worker, Retiree and Employer Recovery Act of 2008 (WRERA)[41] made rollover of a plan mandatory by the non-spouse recipient. From January 1, 2010, until December 31, 2017, qualifying plans were required to allow non-spouse beneficiaries to roll over inherited retirement benefits received as lump sum to an inherited IRA on a tax-free basis.[42] However, this ability was revoked in the Tax Cuts and Jobs Act of 2017[43] such that only legal spouses can rollover an IRA. It is uncertain if non-spouses will receive this ability again.

In June of 2020, Somerville, Massachusetts adopted a city ordinance granting polyamorous groups certain rights held by spouses, such as the right to visit one in the hospital and the ability to confer health insurance benefits. Specifically, the ordinance specifies that domestic partnerships are an ''entity formed by people'' changed from an ''entity formed by two people.'' While it is unclear if other cities or states will follow, it is an acknowledgment of the existence of polyamorous relationships.

While there are still many legal benefits to being legally married, the focus of marriage has shifted more to simply finding a suitable life partner than being in the traditional legal marriage. Because of this societal shift and due to more acceptance of ''nontraditional'' relationships, fewer individuals are getting married. Further, more individuals are living in open relationships and living with multiple partners, some of whom or none of whom may be married. The rise of multi-person relationships as opposed to the two-person legally married couple creates issues in planning that must be considered.

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[38] See Note 37, above.

[39] See Note 37, above.

[40] Pub. L. No. 109-280.

[41] Pub. L. No. 110-458.

[42] *See* Notice 2008-30.

[43] Pub. L. No. 115-97.

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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, her surviving spouse shall receive the entire estate if there are no children.[44] In Florida, a surviving spouse is entitled to the entire estate if there are no descendants and if all of the descendants of the decedent are descendants of the surviving spouse.[45] The inheritance rights of a surviving spouse differ throughout the 50 states. The important point is that in all states, only a surviving legally married spouse can take advantage of these legal rights—non-married individuals would have no right to any portion of the estate.

In *Blumenthal v. Brewer*, a 2016 Illinois Supreme Court case, a nonmarried same-sex couple who had been together for decades had broken up. The parties in *Blumenthal* brought suit again each other alleging certain ''marriage-like'' property rights upon the break-up.[46] The Illinois Supreme Court, however, held that public policy kept the court from treating the relationship like a marriage. The court ruled that one of the partners 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. While the ruling is especially unfair considering that at all times during the relationship, both in Illinois and at the federal level, same-sex marriage was illegal, an important takeaway is the court's reluctance to give any property rights to unmarried partners.

SO HOW DO WE PLAN FOR ALL OF THIS?

As advisors, we are familiar with the contention that may arise between children of a prior marriage with the new spouse and between half siblings or step-siblings However, such issues may intensify when there are multi-partner relationships when you combine multi-partner households, and where there may be half siblings or step-siblings living full or part-time with their parent's current partner(s) while maintaining a relationship with their other biological parent. Such complicated scenarios may be best addressed by creating parenting and visitation agreements to ensure that the parents, biological or not, have the desired access and involvement in each child's life.

Polyamory also presents a special set of problems for individuals residing in community property states. Alaska residence, with its community property opt-in regime, may also cause issues if the spouse with one or more non-marital partners has opted into community property with the legal spouse.

In community property jurisdictions, title is not necessarily determinative of ownership, and therefore a surviving spouse may have rights to property, even if the decedent specifically bequeathed property to or designated as beneficiary a non-marital partner. In general, the surviving spouse owns an undivided one-half interest in each community asset at the first spouse's death. For example, if decedent owns a house that is occupied by the non-marital partner, and the house was purchased with decedent's income earned during marriage, then upon the decedent's death, the surviving spouse and the surviving non-marital partner likely are tenants-in-common for that residence. Even if the decedent titled the property in the name of the non-marital partner, if it was paid for using community property, the result is likely the same. Therefore, unless the spouse consented to such titling, the surviving spouse has a one-half undivided interest in the residence also half owned and occupied by non-marital partner. In either case, particularly if spouse did not know about non-marital partner, this result is a recipe for estate litigation.

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.

Without a written agreement, many courts refuse to enforce a partner's claim against another, even if it results in inequity. In *Hewitt v. Hewitt*,[47] 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 between them entitled her to a share of the property accumulated during their ''family relationship.''[48] The Illinois Supreme Court refused to enforce the parties' oral agreement because their living arrangements violated public policy.[49] To hold otherwise, according to the court, would encourage the formation of ''illicit'' relationships.[50]

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[44] 755 ILCS §5/2-1.

[45] Fla. Stat. §731.102, etc.

[46] *Blumenthal v. Brewer*, 2016 IL 118781, 69 N.E.3d 834 (Oct. 20, 2016).

[47] 394 N.E.2d 1204 (Ill. 1979).

[48] *Hewitt*, 394 N.E.2d at 1205.

[49] *Hewitt*, 394 N.E.2d at 1207.

[50] *Hewitt*, 394 N.E.2d at 1207.

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The policy expressed in *Hewitt* was reaffirmed in a 2006 case before the Illinois appellate court.[51] 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. 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 the court from granting enforceable property rights to unmarried cohabitants.[52]

Other jurisdictions, however, will infer and enforce an agreement based on either the conduct of the parties or principles of equity.[53] The leading case, *Marvin v. Marvin*,[54] was decided by the California Supreme Court in 1976. Actor Lee Marvin and the plaintiff had an oral agreement that that the plaintiff would ''give up her lucrative career as an entertainer,'' to 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.''[55] When the parties broke up, most assets were in Lee's name. The court held that the plaintiff's claim stated a valid cause of action for breach of an express contract. 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.''[56] The court determined that a promise to perform homemaking services was lawful and adequate consideration for a contract, and the agreement would be unenforceable only to the extent that consideration consisted of sexual services. This case is instructive for jurisdictions that require an express contract, whether oral or written, in determining property rights between parties.

To avoid any issues of public policy, claims in nonmarital ''divorce'' cases generally should be based on economic rights substantially independent of the relationship and should not be based on rights arising from the cohabitation or the performance of domestic services.[57] For example, in *Spafford v. Coats*,[58] 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 woman could prove that her funds provided the majority of the purchase price for such automobiles.[59] The court held that the woman's rights were independent of the relationship and were not based on rights arising from cohabitation.[60] 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.''[61]

Spafford was followed by *Ayala v. Fox*.[62] In *Ayala*, after the parties broke up and moved out, Ms. Ayala sued Mr. Fox for recovery of payments Ms. Ayala made with respect to the couple's home. The property was titled in Mr. Fox's sole name even though he had promised to put the title in both of their names. The court found that, in reliance on that promise, Ms. Ayala jointly signed the mortgage and paid a majority of the mortgage, taxes, and insurance. However, Mr. Fox refused to transfer title or money upon the breakup. 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. . . .''[63] If coowning the home appeared too similar to a marriage, a written agreement may have granted Ms. Ayala an enforceable property right.

Mississippi recently ruled that when a claim is not based on relationship, the court can award a former unmarried cohabitant the amount she contributed to a

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[51] *Costa v. Oliven*, 849 N.E.2d 122 (2006).

[52] 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, *quoting Mogged v. Mogged*, 55 Ill.2d 221, 225, 302 N.E.2d 293 (1973).'' *Costa*, 849 N.E.2d at 125.

[53] *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. 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.

[54] 557 P.2d 106 (Cal. 1976).

[55] *Marvin,* 557 P.2d at 110.

[56] *Marvin*, 557 P.2d at 110.

[57] The court in *Marvin*, above, acknowledged that the claim was grounded in rights arising from the cohabitating relationship; however, the claim did not taint or destroy other claims.

[58] 455 N.E.2d 241 (Ill. App. 1983).

[59] *Spafford*, 455 N.E.2d at 242-43.

[60] *Spafford*, 455 N.E.2d at 245.

[61] *Spafford*, 455 N.E.2d at 245.

[62] 564 N.E.2d 920 (Ill. App. 1990).

[63] *Ayala,* 564 N.E.2d at 922.

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joint residence on the theory of unjust enrichment.[64] In *Cates v. Swain*,[65] an unmarried couple lived together 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. Since 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 court found for Swain.

Instead of hoping for a court to find an implied agreement or rule in favor of certain property rights, it may be prudent to create express agreements between and among cohabiting parties so there are clear results upon a break-up.

PUT IT IN WRITING — EVEN IF YOU CAN'T

When there are multiple parents to a child, legal or otherwise (emotional, psychological, etc.), the parties may want to discuss what arrangement would be in a child's best interests. These kinds of discussions set expectations for all parties, both during the relationship and upon its dissolution. Such written document can provide the parties' thoughts as to where the child should live (both location and with whom), how often each party should be able to see the child, vacation and holiday schedules, and financial support expectations for each child in the event the adults' relationship ends. While these written agreements may not be enforceable by a court as they deal with minor children,[66] discussing these issues openly when the relationships are amicable may facilitate more cooperation and agreement upon the determination of the relationship and thereby avoiding or lessening the need for litigation. Even if the agreement is not necessarily enforceable, a court could still look to the terms of the agreement to determine best interests of the child and what the parties would have agreed to when cooler heads prevailed.[67]

Such agreements may be especially helpful when certain members of the group do not have legal rights to a child. This includes a situation in which multiple adults are living together and a child may have an emotional and loving relationships with all of the adults, not just his or her legal/biological parents. In the event the partners in the relationship decide to end their relationships, the legal parents will have the most legal rights with respect to the child, including the right to keep an ex non-parent from visiting the child. However, before a situation becomes acrimonious, the parties may agree that it is in the child's best interests to maintain regular contact with all of the adults in the event of a breakup. To make visitation easier on all, the parties may also agree to continue to live in the same area.

State law varies regarding cohabitation agreements. California grants rights of cohabitants based on an implied or an express contract.[68] 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.[69] In Texas, ''nonmarital conjugal cohabitation agreements'' must be in writing.[70]

Polyamorous groups should consider entering into cohabitation agreements just like premarital agreements. General contract principles such as consideration or other required jurisdictional elements n may need to be addressed in order to make such contracts enforceable. The parties should disclose their assets and liabilities to avoid any challenges to an agreement based on lack of information or unconscionability. Parties may wish to determine property ownership among them both during and after the relationship, 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? What happens to dependent parties upon a breakup e.g., how and where will they live?

Many polyamorous groups will say that honesty and communication are the best way to keep their relationship healthy and strong.[71] To assist the parties in having an open discussion regarding what would occur upon a party's death or if a party leaves the group,

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[64] *Cates v. Swain*, 215 So. 3d 492 (Miss. 2013), *reh'g denied* (June 27, 2013).

[65] *Cates*, 215 So. 3d 492.

[66] *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.'').

[67] *Tenth Annual Review of Gender and Sexuality Law: Family Law Chapter: Child Custody, Visitation & Termination of Parental Rights,* 10 Geo. J. Gender & L. 713, 740, Meredith Larson, ed. (2009).

[68] In *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 110 (1976), 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.

[69] *Poe v. Levy's Estate*, 411 So. 2d 253, 256 (Fla. 4th DCA 1982).

[70] Tex. Bus. & Comm. Code §26.01(b)(3).

[71] https://www.cnn.com/2013/10/26/living/relationships-polyamory/index.html.

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the advisor may want to provide the group with a list of issues that may need to be considered to have an open conversation and put together an agreement for the parties. 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. Filing of income tax returns; and

8. Inheritances/gifts from family.

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

1. Payment of household expenses;

2. Division of household duties;

3. Division of childcare duties;

4. Ownership, custody, and care of pets;

5. 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);

6. Division of prior, current, and future debt obligations, including upon termination of the cohabitation;

7. Retirement, membership, medical, and other benefits each cohabitant has and the division of those benefits including upon termination of the agreement; and

8. Health, disability, property, life, and other insurance of each cohabitant.[72]

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. In a group relationship where the parties may be dependent on one person to provide support, the parties may wish to discuss their support expectations ahead of time in the event of a break-up. Further, 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.

CONCLUSION

As our world becomes more aware of and tolerant of ''non-traditional'' families, an advisor may need to consider how to plan for such mixed and expanded families. Creating an environment where your clients are able to discuss financial and familial expectations during and after the relationship openly with each other and with you will allow you to understand the full picture of a family and help guide clients through the issues they should consider as a result of their family structure. Providing flexible and real-world solutions for these families by discussing expectations and establishing agreements shows clients that you respect their relationship and that you have experience in dealing with every kind of family. Understanding the many nuances when it comes to multi partner and multi parent scenarios helps your clients properly plan for both the good times and difficult life events in a way that can reduce the need for and potential of litigation.

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[72] 95 Am. Jur. Proof of Facts 3d 1 (originally published in 2007).

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