



Legal Protection for Cohabiting Couples: The Law and Living Together

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It is becoming increasingly more common for couples to combine their residence, finances, property and day-to-day lives without getting married. While homosexual couples cannot marry, many heterosexual couples are choosing to forego marriage altogether. Living together may provide couples with a reduction in expenses, but while life partners often consider one another to be family, the law typically does not. The unmar-

ried couple is not entitled to the same rights and financial safeguards enjoyed by their married counterparts.

Due to the lack of legal protections, unmarried partners need to be diligent in preparing in advance for events such as death, illness and separation. Cohabitation agreements are the starting point for these non-traditional families. They can be used to address a wide range of issues, including day-to-day finances, asset and debt allocation, and support. Estate planning, beyond the preparation of a last will and testament, are also important. Documents such as a health care surrogate designation and durable power of attorney are essential in planning for an individual's incapacity during life.

Cohabitation Agreements

A cohabitation agreement is a comprehensive tool for couples that intend to live together for an extended period of time. It is a contract between cohabitants that can establish rights and obligations for the parties that they are not afforded by law because

of their unmarried status. It is similar to a pre- or post-nuptial agreement because it creates a road map for how the couple is going to structure their finances and relationship.

Florida courts have consistently recognized and enforced agreements between unmarried couples.¹ The basic tenets of bilateral contract law – offer, acceptance and consideration – must be present. The consideration for such agreements cannot be based solely on sexual services or the agreement will fail due to its illegality. Courts will look beyond what is stated as consideration in the agreement itself, to the conduct of the parties.² The mere fact that the parties engage in a sexual relationship will not sabotage the agreement, provided valid and lawful consideration exists.³

Cohabitation agreements are different from pre- and post-nuptial agreements in several significant ways. To enforce such an agreement, a lawsuit must be filed in civil court as one would a typical breach of contract action. It will be governed and interpreted by general contract principles. In addition, for couples that are able to marry, a cohabitation agreement will not have the same validity and effect after marriage as a pre-nuptial agreement.

A well-drafted cohabitation agreement should contain many of the basic provisions of a pre- and post-nuptial agreement. The parties should be clearly identified. At a minimum, their addresses and birth dates should be included, but it may also be important to describe their current employment, financial position and health. The purpose of the agreement should be clearly stated along with the intention that the agreement be legally binding on the parties, their heirs and assigns. It should state the method by which it can be modified. Finally, each party should provide a schedule of their assets and liabilities.

The drafting attorney should also

include language to indicate that the agreement is intended to be the entire agreement of the parties and to declare any prior agreements or understandings between the parties invalid. An often-overlooked benefit of cohabitation agreements is that they protect against litigation regarding oral and implied contracts.

Substantively, the following provides an overview of the issues that should be considered by the attorney and discussed with the client in negotiating and drafting a cohabitation agreement:

- How long do the parties intend the agreement to last? Will the agreement sunset after a specific term or upon some triggering event? Can either party elect to unilaterally terminate the agreement?
- How should property purchased, inherited or received via gift during the relationship be handled? How will assets be titled? How will accrued savings, retirement assets, and annuities be handled? Will the parties agree to designate each other as beneficiary or co-owner? How will the financial contribution of each party to the acquisition of joint assets be dealt with? As a gift for tax purposes?
- How should debts incurred during the relationship be handled?
- How income will be shared or separated?
- How will household and living expenses be shared or allocated? How will vacations and other luxuries be paid for? Will there be off-sets for contributions by the parties during the relationship?
- Does either party agree to purchase or maintain life insurance for the benefit of the other? If so, who will own the policy and who will be designated as beneficiaries?
- How will property be divided upon the dissolution of the relationship?



Will set-offs or credits be given for any reason? How will they be calculated? If one partner can buy out the other, what are the terms?

- Will either party be obligated to financially support the other during the relationship or upon its dissolution? If so, for what length of time? Under what circumstances will the support terminate? How will the support be taxed – as a gift or as ordinary income for services rendered such as housekeeping?
- How will the parties handle separation? Who will move out and in what circumstances? How will the expenses for the household be shared if the household remains a joint asset?
- If rights of survivorship exist with respect to any real or personal property, will those rights survive the termination of the agreement or will a tenancy in common be created?
- Do the parties own pets? If the relationship terminates, who will

retain custody of the animals?

- Are there any circumstances, other than infidelity, under which either party should be entitled to liquidated damages or penalties from the other?
- Will the parties waive property rights in favor of natural heirs? How will future wills executed by either party after the execution of the cohabitation agreement be viewed?
- What law will govern? Will it be the law of the state in which the contract is formed? What venue will prevail? What if the parties relocate?

Health Care Surrogate Designation

Many hospitals only grant visitation rights to spouses and blood relatives when it comes to seeing a patient who is in critical condition. This rule generally excludes life partners and companions from visiting their loved ones in such situations. Having a

valid health care surrogate would enable the individual appointed as surrogate to visit the patient freely because the health care surrogate is one who is appointed to make health care decisions should the patient be unable to make the decision on their own. If the patient does not have the capacity to make decisions and the patient never appointed a health care surrogate, the hospital will look to the spouse and then blood relatives for decision-making authority. Therefore, not only does a health care surrogate designation eliminate the possibility of being shut out from visiting your partner in the hospital, but it may also alleviate any conflict that would arise between the patient's family and the partner. So long as the health care surrogate is properly drafted, it will be clear who the patient appointed.

Durable Power of Attorney

A durable power of attorney grants the attorney-in-fact the power to
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make financial decisions on behalf of another. Generally, durable powers of attorney are drafted so that they become effective only upon the incapacity of the individual. Therefore, if one partner becomes incapacitated, the attorney-in-fact would then have the authority to write checks, pay the mortgage, and continue making necessary insurance payments. Without a durable power of attorney, one's partner would have to go through the expensive and time-consuming process of guardianship. Guardianship proceedings may pit the life partner against the incapacitated party's family and may not result in the life partner being appointed guardian.

Post Mortem Planning

If an individual passes away without a will, state law pre-determines who the beneficiaries will be. Notwithstanding payable on death accounts and property held jointly, unmarried life partners will receive nothing from a partner who died without a will. For traditional families, state law ensures that the surviving spouse is not disinherited regardless of the existence of a will.

The Defense of Marriage Act ("DOMA") enacted in 1996, provides that non-traditional families are generally not afforded the same federal tax benefits as traditional families either. DOMA defines marriage as between a man and a woman, and thereby precludes homosexual couples from many of the tax advantages enjoyed by heterosexual married couples. One of the most important planning devices in any estate plan is the use of the marital deduction to reduce or eliminate the imposition of federal estate taxes. The marital deduction allows the unlimited transfer of assets tax-free to a spouse. Unfortunately, non-traditional families are not afforded this advantage and estate planners are forced to be more creative in their planning for non-traditional families. Although the federal estate tax is not in effect for the year 2010, it will likely re-appear at some point this year, and will definitely re-appear in 2011.

There are a variety of trusts available which will help reduce one's estate tax liability, and without the benefit of the marital deduction, it is essential that non-traditional families consult an estate planning attorney to discuss their options.

An often over-looked element of estate planning is the review of how assets are held between unmarried life partners. In Florida, married couples may hold title to many assets as joint tenancy by the entireties. Unmarried life partners, whether they cohabit within the property or otherwise, must choose among the following options in terms of title: (1) joint tenants with rights of survivorship ("JTROS"), (2) tenants in common ("TIC"), or (3) to hold assets solely in one's name. There are pros and cons to each and non-traditional families need to understand which form is best suited for their needs.

Holding an asset as JTROS will pass title to the remaining partner automatically upon the death of an owner, and thus avoiding the probate process. In a JTROS, each partner holds an equal share of the property. However, JTROS affords little creditor protection and may expose the property to the creditors of each individual partner. In addition, adding one partner to the title of an asset previously owned will invoke a taxable gift which cannot later be revoked if the couple breaks up.

TIC is a form of ownership which allows the partners to own different percentages of the property, which can be defined and changed over time. One partner can gift shares to the other partner equal to the annual exclusion amount, and thus avoid paying gift tax in adding a partner to the title of an asset. However, unlike JTROS, partners will need to engage in some estate planning to pass title upon death as there is no automatic transfer.

Avoiding probate is a common goal in many estate plans. The most common way to ensure that certain assets avoid the probate process is to appoint a designated beneficiary whenever possible. This means all accounts, retirement plans, life insurance policies and the like should name your partner as the designated beneficiary. Unlike a Last Will and Testament, which can be

challenged in court, it is unlikely that a family member would challenge a beneficiary designation of an account, retirement plan or life insurance policy.

Conclusion

The above outlines the basic tools used in planning for cohabitants and unmarried life partners. It is important for family lawyers to be aware of the use and effect of cohabitation agreements for these non-traditional families, but also the need for proper estate planning to fully protect them. Due to the uncertainty in the estate tax law and the ever-changing tax laws, it is important to consult with an experienced estate and tax planning attorney to ensure that the clients' needs are being met both during their relationship and upon termination of the relationship, whether due to separation or death. It is also important for non-traditional families to review their planning documents every few years because state laws regarding same-sex couples may change over time.

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Endnotes:

¹ *Posik v. Layton*, 695 So. 2d 759 (Fla. 5th DCA 1997); *Stevens v. Muse*, 562 So. 2d 852 (Fla. 4th DCA 1990).

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³ *Id.* at 762. In *Posik*, for example, the Court recognized and enforced a cohabitation agreement despite the parties' sexual relationship because the parties contracted for "a permanent sharing of, and participating in, one another's lives." *Id.*