

# Price & Farrington's Estate and Tax Planning FastFaxts

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Estate, Tax, Business and Wealth Planning for Advisors and Clients

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## Joint Ownership Agreements Between Un-Married Couples: "Is That All There is?"

Just as the Peggy Lee song asks, "Is That All There Is?", the estate planning attorney who is preparing a property agreement for an unmarried client must ask, "Is that all there is?" The attorney must fully examine the nature of the client's relationship in light of Washington's so-called "meretricious relationship" law. The result might be the drafting of a broad domestic partnership agreement that addresses all of the cohabitation issues, not just whether the home is owned jointly. Creating only a joint ownership agreement might not fully address future legal issues that could arise if the parties separate.

In Washington a contractual agreement between an unmarried couple living together ("cohabitants") is enforceable. They have the same right to dispose of their property as other couples. The Washington Supreme Court has held that property acquired by the parties during the term of a "meretricious relationship" is subject to *equitable distribution* by the court when the relationship is dissolved. To protect themselves, an unmarried couple should use a written contract that is similar to, but broader than, a pre-nuptial or post-nuptial agreement.

**What is a meretricious relationship?** A meretricious relationship is determined by looking at all of the circumstances. While it doesn't have to be "long-term", that can be a significant

factor. It could be short-term, but it must also have a number of other important factors present, such as: *continuous* cohabitation; the *duration* of the relationship; the *intent* of the parties; the *pooling* of resources; and the *purpose* of the relationship.

The relationship must be stable. In a marriage, the dissolution (divorce) laws apply whether the marriage was stable or not, and evidence of an affair is not relevant. But an affair or other relationship during a long-term cohabitation can result in a finding that the relationship is not meretricious (Pennington case). In a 1984 decision (Warden), the Washington Court of Appeals found the relationship was tantamount to a marriage *even though one party married another in Canada and the parties had periods of separation*. Even though the parties in the Warden case had a child together, their relationship might not have been held to be meretricious under Pennington..

**Death rights.** In Washington, the surviving partner of a meretricious relationship is not considered to be a spouse. He or she *cannot inherit* the share of the deceased partner's estate under the laws of intestate succession (i.e., dying without a will). Widows' benefits under the Social Security Act are not available to a female survivor of an unmarried relationship. In Washington the share for a surviving partner of a meretricious relationship following a death is based on the same kind of *equitable distribution* as following a dissolution of a marriage. The surviving partner's share is based on equity, contract or trust, and *not on inheritance*. The result is that what happens to the surviving partner of a



"We waited too long to run it by legal. Now we need to run it by a judge."

meretricious relationship following a death is much less predictable than in the dissolution process, where many laws exist to protect a surviving spouse.

**Conflict of interest.** An attorney should not represent both parties to a joint ownership or domestic partnership agreement. The potential for an actual conflict is high, if not inevitable. Where the parties use the same attorney, the agreement might not be enforced by the court. There is no absolute requirement for independent legal counsel, but its absence is a factor to be considered, especially where the agreement calls for one of the parties to give up rights.

**Joint Tenancy.** Unmarried couples commonly utilize joint tenancy with rights of survivorship (JTWROS) to avoid probate and guard against family interference. But joint tenancy can lead to undesirable gift and estate tax consequences and may thwart the partners' estate planning goals. (See January, 2002 *FastFaxts* on our website) One joint tenant can convert the joint tenancy to a tenancy in common by conveying his or her interest, even by deeding it to himself or herself, without the consent of the

"If you took all the laws and laid them end to end, there would be no end."

--Mark Twain

"I told you that you should've got yourself some legal advice before running to a lawyer." --overheard in a courthouse corridor

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other joint tenant even being required.

**Domestic partnership agreements.** A property agreement between spouses requires full and fair disclosure of all material facts relating to the amount, the character and the value of the property of the parties, together with full knowledge of all facts and circumstances. While it is unclear whether the same criteria applies to agreements between *unmarried couples*, it is advisable to use the same requirements, i.e., independent legal counsel, full and fair disclosure, and knowledge of rights that have been given up. Why is this advisable? Because *the unmarried couple that continues to cohabit without benefit of a broad domestic partnership agreement risks the application of meretricious relationship law when the relationship ends.*

Unlike in a marriage, where the dissolution remedy is automatically available, the parties dissolving an unmarried domestic partnership face the primary question of whether a meretricious relationship existed before they even get the weak and unequal remedies provided by the meretricious relationship law. Even if a relationship is, or is

likely to be found to be, meretricious, the results from ending it can vary significantly. The following factors make the process harder and the outcome less fair and predictable:

- ☑ There is no ability to recover attorney's fees.
- ☑ There is no spousal maintenance (even if a partner has been a stay-at-home parent for years with the parties' children).
- ☑ A division of property based on pro-rata contribution (instead of the usual 50/50 in short marriages) has been found to be "fair and equitable".

- ☑ There is no jurisdiction over separate property of the parties.
- ☑ It's unclear what community property principles might apply.
- ☑ There is no access to restraining orders that are routine in dissolutions, so the parties are free to dissipate joint assets.

**Retirement plans.** The fact that retirement benefits, IRAs and other qualified plans cannot be split between unmarried partners under federal law makes distribution of property issues difficult when one of the parties has acquired a significant interest in such accounts during the relationship.

### Checklist for domestic partnership agreements.

- ⇒ Characterization of all property (real, personal, tangible, intangible, retirement, life insurance etc.).
- ⇒ What is separate and what is joint property (including inheritance, gifts, future acquisitions, etc.)
- ⇒ Impact of contributions of property, income, labor, services, etc.
- ⇒ Management of property during the relationship.
- ⇒ Distribution of joint property.
- ⇒ Buy-out of home or other real property.
- ⇒ Effect of death of a party.
- ⇒ Right to restraining orders.
- ⇒ Right to remain in home.
- ⇒ Waiver or confirmation of any support upon separation.



- ⇒ Attorney's fees provision.
- ⇒ Mediation and/or arbitration.
- ⇒ Confirm full and fair disclosure; right to separate counsel.
- ⇒ Governing law and jurisdiction.
- ⇒ Specify how title to real property is to be held.
- ⇒ Other possibilities: confidentiality terms, insurance, record-keeping duties, household expenses, management of finances, remedies for defaults etc.

**Bottom line.** Helping clients properly address their estate planning issues is always an important function of their professional advisors. Where unmarried couples are involved, the absence of effective estate planning invites especially serious problems the law simply does not address. An experienced estate planning attorney can help advisors and their clients achieve the very best results in planning for unmarried partners. *We wish you good planning! Let us know how we can best help you.*

GDP ■



**Jokes, Quotes & Anecdotes**

**Judge:** "One year and a fifty dollar fine."  
**Defendant's Lawyer:** "I would like to make a motion to have that sentence reversed."  
**Judge:** "All right, fifty years and a \$1 fine."

☞

**Judge to Jury:** "What possessed you to acquit the defendant?"  
**Jury Foreman:** "Insanity."  
**Judge:** "Not all twelve of you at the same time."

☞

**Litigant, n.** A person about to give up his skin for the hope of retaining his bones.

☞

**Lawyer to Client:** "Which do you want first, bad news or worse news?"  
**Client:** "Give me the bad."  
**Lawyer:** "Your wife discovered a picture worth \$400,000."  
**Client:** "All right! What could be worse news?"  
**Lawyer:** "It was a picture of you and your secretary."