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CONTRACTING FOR COHABITATION: ADAPTING THE CALIFORNIA STATUTORY MARITAL CONTRACT TO LIFE PARTNERSHIP AGREEMENTS BETWEEN LESBIAN, GAY OR UNMARRIED HETEROSEXUAL COUPLES

Brooke Oliver*

I. INTRODUCTION

The romantic, celebratory rituals of a traditional marriage ceremony solemnize an underlying legal and economic relationship: a civil contract with the state as a party.¹ This article offers a comprehensive checklist of statutory rights and duties of marriage in California which may be included in life partnership contracts for lesbian, gay and unmarried heterosexual couples. The checklist is a practical tool designed to assist lawyers in counseling their clients about what California's marital "package" includes, so that the clients may make informed personal choices about how to structure their own agreements.

The California statutory marital contract is based on heterosexual values and traditions and is not necessarily an ideal which couples would want to mirror. One of the positive aspects

* Golden Gate University School of Law, Class of 1994. Thanks to my editors, Susan Crocker, Asha Khosla and Rosanne Calbo-Jackson, for helping make this project manageable, and to my own life partner, Mishaa DeGraw, for the twelve years of living, working and loving together which have made this subject so dear to my heart.

1. CAL. CIV. CODE § 4100 (Deering 1984) defines marriage to be a civil contract "between a man and a woman."

about not being covered by the law is that same gender couples² have the opportunity to create new family models not bound by traditional, and some would argue restrictive, roles and stereotypes.³ Married heterosexual couples preferring to define the terms of their marital contract personally rather than default to the dictates of the state may also be interested in this checklist, so that they may modify the state's terms by establishing their own nuptial contract.

Nearly 450 California statutes deal with rights, duties and privileges associated with heterosexual marriage, either in the statute itself or in its interpretation as reflected by annotations.⁴ These rights, duties and privileges comprise the California civil marital contract. The primary focus of this article is to distill, from all the rights, duties and privileges of that civil marital contract, most of those which may be incorporated into contracts between cohabiting adults. Statutes which do not lend themselves to inclusion in a contract between private parties have been excluded.

This checklist will help legal practitioners provide accurate and comprehensive advice to couples about the entire range of subjects they may include in their cohabitation contracts. In turn, contracting couples will be able to make more informed, conscious choices about the legal aspects and implications of

2. While this article is for and of interest to unmarried heterosexuals, and married couples who wish to write their own marital agreements, listing each group every time all are appropriately included is awkward. To avoid this repetitive listing, the rest of the text will refer to same gender couples only, and the reader should interpret the reference to include unmarried heterosexuals and married couples where appropriate. The goal here is not to be exclusive or to narrow the audience, but to make the article more readable.

3. See Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians As Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, (1990), a particularly thought-provoking article discussing the conflict between contract theory and lesbian legal theory. Referring to relationship contracts, they cautions: "Finally, when negotiating such contracts, each party should seriously discuss and confront the contract myths of equality and freedom and how these myths operate in their particular situation. The goal of lesbian legal theory must always be for lesbians to use a contract rather than be used by it." *Id.* at 527.

4. 445 statutes were retrieved from Deering Annotated California Codes (1992), using a key word search on Lexis in August, 1992. The key words were: "marri! or spouse w/10 duty or responsib! or right!" Over 3,000 annotated statutes were retrieved using a broader search of all statutes and their annotations which referred to marriage, husband, spouse or wife.

their relationships. While signing a contract does not have the same joyful, romantic associations as slipping on a ring or crushing a glass beneath a canopy, the heightened seriousness which comes with being aware of exactly what rights and responsibilities are entailed may well foster more stable relationships.

II. THE CALIFORNIA STATUTORY MARITAL CONTRACT: THE DEFAULT CONTRACT FROM THE STATE FOR HETEROSEXUALS

There is a strong public policy in California favoring marriage.⁵ The state legislature and the courts have extended many rights and preferences to married couples that are not extended to unmarried couples, whether heterosexual or homosexual.⁶ In addition to rights and preferences, marital duties, such as a duty to financially support a spouse,⁷ are also articulated in California statutes.

Many of the rights and privileges associated with heterosexual marriage are difficult or impossible for a same gender couple to establish by contract.⁸ Individuals may contract to regulate matters only between themselves; they may not contract for a legislatively granted privilege, such as the privilege not to testify against a spouse.⁹ Parties cannot create for themselves a legal privilege the legislature has not seen fit to extend to them. The courts have expressly denied other marital rights and privileges to same gender or unmarried heterosexual partners, including the marital communications privilege,¹⁰ the right to bring a

5. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976); *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988); *Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904, 909 (Cal. 1983); *Hinman v. Dep't of Personnel Admin.*, 213 Cal. Rptr. 410, 417 (Cal. Ct. App. 1985); *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 600 (Cal. Ct. App. 1992), *review denied* 1992 Cal. Lexis 4411 (Cal. 1992).

6. *Beaty*, 8 Cal. Rptr. 2d at 600.

7. CAL. CIV. CODE § 242 (Deering 1990).

8. See also Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 92 (1990/1991), listing marital rights not extended by laws to unmarried couples, including community property rights, tax breaks, pension benefits, testamentary benefits, spousal testimonial privileges and status as next-of-kin to make medical decisions or burial arrangements.

9. CAL EVID. CODE § 970 (Deering 1986). See also CAL EVID. CODE §§ 971-973 (Deering 1986).

10. *People v. Delph*, 156 Cal. Rptr. 422, 424-25 (Cal. Ct. App. 1979).

wrongful death action if a third party kills the other partner,¹¹ and the right to sue for loss of consortium and negligent infliction of emotional distress.¹² Other rights, such as the right to divide community property and to seek spousal support on the termination of marriage,¹³ have been denied to same gender or unmarried heterosexual partners, but may be created by contract.

When a heterosexual couple marries, these statutory and common law rights, as well as many duties, become part of their civil marital contract.¹⁴ These rights and duties apply by law to the couple whether or not the parties to the marriage have discussed them or are even aware of them.

Same gender life partners, however, may not be legally married,¹⁵ no matter how significant and lasting their relationship and regardless of their desire to be married.¹⁶ Thus, the rights and benefits conferred by state statute and the courts on a married¹⁷ heterosexual couple are not extended nor applicable to life partners of the same gender.¹⁸ Lesbian and gay couples must write detailed contracts covering their relationships to even ap-

11. *Nieto v. City of Los Angeles*, 188 Cal. Rptr. 31, 32, 34 (Cal. App. 1982) (refusing to extend the right to bring a wrongful death action if a third party kills the other spouse to unmarried cohabitants); *contra* CAL. CIV. PROC. CODE §377 (Deering 1991) (granting that right to married people).

12. *Elden v. Sheldon*, 758 P.2d 582, 588-90 (Cal. 1988) (right to sue for loss of consortium and negligent infliction of emotional distress).

13. *Marvin v. Marvin*, 557 P.2d 106, 122 n.24 (Cal. 1976) (refusing to extend community property laws, including the right to divide community property and to seek spousal support on the termination of marriage).

14. CAL. CIV. CODE §4100 (Deering 1984).

15. CAL. CIV. CODE §4100 (Deering 1984) defines marriage as being between a man and a woman. *See also* Treuthart, *supra* note 8, at 93, 96, and 105.

16. Many homosexual life partners would choose not to marry even if it were legally possible for them to do so, just as many heterosexual couples choose to cohabit rather than marry. This article does not deal with pros and cons of marriage, nor of extending the right to legally marry to same gender couples. Of the 445 statutes which deal with the rights, privileges and duties of the California civil marital contract, only 157 are rights and duties about which private parties may contract between themselves, and those are included in the appended checklist. The remaining 288 do not lend themselves to private contracts, and have not been included in this article. The objective of this article is simply to provide information so that legal practitioners and their clients may make more informed choices about the terms they may choose to include in their life partnership agreements.

17. A note about terminology: whenever the term "married" is used for the remainder of this article, it will refer to heterosexuals, since only heterosexuals may marry.

18. *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 600 (Cal. Ct. App. 1992).

proximate the civil contract granted automatically to married couples. Some excellent "how to" books cover important points to be included in a life partnership contract.¹⁹ This article will supplement those materials with a detailed checklist of California statutory marital rights, duties and privileges which same gender couples may include (or exclude) from their own life partnership contracts. This checklist, while the centerpiece of this article, is appended, both to make the checklist itself easier to use and to allow an uninterrupted reading of the article text.

The legal principles guiding the rights of unmarried couples were set forth by the California Supreme Court in *Marvin v. Marvin*.²⁰ The court held that marital community property laws do not apply to couples who are not legally married, but that unmarried adult couples may make written and oral contracts to govern their economic relations as long as the contracts are not based upon a consideration of meretricious sexual services.²¹ The principles of *Marvin* have been extended to homosexual couples.²²

III. CONTRACTING FOR A LIFE PARTNERSHIP

A. WHY MAKE A LIFE PARTNERSHIP CONTRACT?

Many couples do not have life partnership contracts, even when they hold property or are raising children together. For some, the time and expense involved in developing a contract seems prohibitive. Others fear making a contract implies a lack of trust in one another's commitment or integrity. Despite these concerns, there are good reasons for same gender or unmarried heterosexual families to invest the time, energy and courage re-

19. See generally, NATIONAL LAWYERS GUILD, *SEXUAL ORIENTATION AND THE LAW*, (R. Achtenberg, ed. 1989) (hereinafter ACHTENBERG) (providing excellent guidance for the legal practitioner) and HAYDEN CURRY & DENIS CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (6th ed., Nolo Press 1991) (an entertaining and readable, yet legally accurate guide to the law for lesbian and gay couples, with sample wills, durable power of attorney forms, and living together contracts which cover alternatives like sharing property, keeping most property separate, agreements when one partner is in school and being supported by the other, sharing rental property, buying a home together, co-parenting agreements, and many other things same gender couples should consider).

20. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

21. *Id.* at 122.

22. See, e.g., *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 408 n.1 (Cal. Ct. App. 1988).

quired to draft life partnership contracts.

The strongest rationale for developing such a contract, even for the most loving and trusting of couples, is that the couple does not live in the world alone. Discrimination, accidents or litigation involving them, their children or their property could arise any time. An unexpected car accident resulting in the incapacity of one partner could suddenly turn their lives upside down.²³ Less drastic, but nearly as disturbing, situations occur and these families must seek recourse in the courts, or are brought into court by other parties. Their rights may be challenged by school officials, landlords, hostile relatives, estate executors, hospital administrators or welfare workers. Unmarried life partners are better prepared to face any of these situations when their legal and financial affairs are in order and the family nature of their relationship is clearly documented.

23. The extensively publicized case of Sharon Kowalski and Karen Thompson graphically demonstrates this. *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986), *cert. denied*, 475 U.S. 1085 (1986). Robson and Valentine summarized the women's horrific experience:

Kowalski and Thompson are lesbian lovers who, until November 1983, lived a life not unlike many lesbian couples in the United States. [Citation]. Their 'life partnership' is described by Karen Thompson 'as similar to marriage.' [Citation]. They had exchanged rings. [Citation]. They were buying a house together. [Citation]. Their extra-legal 'marriage,' however, was disturbed by two devastating disasters.

On November 13, 1983, Sharon Kowalski's car was struck by a drunk driver, [citation] leaving her with extensive physical and neurologic injuries. [Citation]. In addition, this tragedy precipitated extensive legal proceedings which are still ongoing. Karen Thompson petitioned for guardianship [citation] and Sharon Kowalski's parents immediately counter-petitioned. The issue in conflict was the relationship between Thompson and Kowalski. Kowalski's parents insisted that either there was no such relationship, [citation] or that the existence of such a relationship was detrimental. [Citation]. The lovers were kept apart for three and one-half years, [citation] contributing to deterioration in Sharon Kowalski's health and an interruption of her rehabilitation process. [Citation]. The case attracted attention not only of lesbian and gay activists, but also of feminists and disability activists. [Citation]. Robson & Valentine, *supra* note 3, at 514-15.

1. *The Evidentiary Value of the Contract*

"[A]djudicating the civil claims of individuals requires the courts to resolve ambiguities and interpret terms in statutes, ordinances and regulations, relying on legislative intent, rules of statutory construction and considerations of public policy."²⁴ Given the strong public policy favoring heterosexual marriage,²⁵ same gender couples face a more difficult legal challenge than married couples in securing the court's recognition of the legitimacy of their relationships and their rights as a family. Establishing and documenting the nature of their relationship through all legal means available provides evidence for a court to use in determining their true intent vis a vis each other, their children and their property. Legal means of documenting the "marriage-like" nature of their relationship currently available to same gender life partners include life partnership contracts, durable powers of attorney for financial matters and health care, co-parenting agreements, wills, trusts, beneficiary designations on life insurance or pension plans, second parent adoption of children, and domestic partner registration where possible.²⁶

2. *A Functional Definition of Family*

Courts have been called upon to determine who to include in the definition of family in cases involving 1) visitation rights,²⁷ 2) eligibility for public entitlement,²⁸ and 3) housing and zoning.²⁹ Some courts have accepted a functional definition of family,³⁰ and have been willing to extend the protections of

24. Treuthart, *supra* note 8, at 98.

25. *See supra* note 5.

26. *See generally*, CURRY & CLIFFORD, *supra* note 19.

27. *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991) (declining to grant visitation rights to a lesbian partner after the women's sixteen year relationship ended, despite the fact that the decision to have children by artificial insemination was made jointly during the relationship and both women had acted as parents in all respects).

28. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (striking down welfare statute which granted benefits only to families related by blood, marriage or adoption on the basis that it denied equal protection to illegitimate children).

29. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning ordinance with a narrow definition of family limiting occupancy to "nuclear families").

30. These cases include *Borough of Glassboro v. Vallorosi*, 568 A.2d 888 (N.J. 1990) (finding ten unrelated male college students living as a "stable and permanent living unit" to be within the borough zoning ordinance's definition of family) and *Braschi v.*

some statutes and regulations to same gender family arrangements. Gay and lesbian couples may be well advised to document how their families function in the unhappy event they become involved in litigation. A life partnership contract, combined with associated documents³¹ and conduct, would provide evidence about the seriousness of the couple's commitment and the extent their lives are intertwined — evidence that they do in fact function as a family. A same gender couple, or surviving partner, may use this evidence to persuade a court to include their relationship in its interpretation of family-related statutes and regulations.³² Such interpretations can dramatically impact a gay or lesbian person's life. For example, a New York court concluded in *Braschi v. Stahl Assocs. Co.* that a gay man, the surviving life partner of a deceased tenant, was included in the definition of family, and could keep the couple's rent-controlled New York apartment after his partner's death.³³

The court in *Braschi* concluded that the pair were family members by establishing a four factor test which emphasized the functions of a family unit.³⁴ These factors were: 1) the exclusivity and longevity of the relationship, 2) the level of emotional and financial commitment, 3) the manner in which the parties conducted their every day lives and held themselves out to society, and 4) the reliance placed upon one another for daily family

Stahl Assocs. Co., 543 N.E.2d 49, 53-55 (N.Y. 1989) (explaining that a functional definition of family is one based on how the members *function* in relationship to one another and with respect to the world at large, rather than "family" being narrowly limited to blood relations or to persons who have obtained a marriage license or an adoption order). *Braschi* said that families which were defined functionally were "long term, and characterized by an emotional and financial commitment and interdependence." *Id.* at 54. The factors used to determine whether a specific relationship may be characterized as a family under the functional definition of family are discussed below.

31. Associated documents include, for example, durable powers of attorney for health care, wills, contracts to jointly purchase property, insurance beneficiary designations, trusts, etc. Typically, life partnership contracts and property agreements may be incorporated into a single document together, except where property is acquired later, and it may be simpler to draft a separate document. Co-parenting agreements, wills, and durable powers of attorney are separate agreements.

32. *Cf.* Treuthart, *supra* note 8, at 99.

33. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (holding that: "the intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.")

34. *Id.* at 55.

services.³⁵ The common law rule is that any contract may be established by the conduct of the parties,³⁶ and the broadening of the definition of family in *Braschi* was based on how the parties acted toward one another.³⁷ This is a much higher standard of behavior than is required of married heterosexuals, whose day-to-day behavior does not determine whether they receive the rights and benefits of the civil marital contract.³⁸

California courts have been less sympathetic to this functional definition of family. In a case holding that a life insurance company was justified in denying marital rate discounts to same gender life partners, the court emphasized the evidentiary desirability of the "bright line" of legal marriage to objectively verify the family relationship of individuals.³⁹ The California Supreme Court denied review of that case.⁴⁰ A functional definition of family was specifically rejected by the California Appellate Court in *Nancy S. v. Michele G.*⁴¹

This area of the law in California is in flux, but the tendency appears to be against extending the definition of family beyond spouses and some unmarried children.⁴² Same gender life partners are not extended the same benefits and preferences as married couples.⁴³ Those who have documented the family nature of their relationship by contract and in every other way possible will be in a stronger position to prove their entitlements to rights and benefits associated with families than will the unmarried couple who has not done so. Therefore, couples should include the elements of a functional definition of family in their life partnership agreements.

35. *Id.* (emphasizing that the determination was controlled by the totality of the relationship rather than any single factor as evidenced by the dedication, caring and sacrifice of the parties); see also Treuthart, *supra* note 8, at 122 n.96.

36. *Marvin v. Marvin*, 557 P.2d 106, 118 (Cal. 1976).

37. *Braschi*, 543 N.E.2d at 55.

38. Treuthart, *supra* note 8, at 95.

39. *Beatty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 599 (Cal. Ct. App. 1992) (citing *Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904, 910 (Cal. 1983) and *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 417 (Cal. Ct. App. 1985)).

40. *Beatty v. Truck Ins. Exch.*, 1992 Cal. Lexis 4411 (Cal. 1992).

41. *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991).

42. See, e.g., *Hinman*, 213 Cal. Rptr. at 419; *Beatty*, 8 Cal. Rptr. 2d at 599 *Norman*, 663 P.2d at 909-10.

43. *Beatty*, 8 Cal. Rptr. 2d at 600.

Hopefully, a same gender couple and their children will never have to face serious illness, accident, incapacity or litigation. However, attending to these contractual and legal matters before such troubles arise places the same gender family in a more proactive legal position in the event they must face any of life's serious hazards. Executing durable powers of attorney, wills, and similar documents and having them easily accessible makes it more likely the couple's preferences will be upheld in an emergency or in court.

3. *The Existence of an Agreement Helps Avoid Litigation*

Equally important, the existence of an agreement may help avoid litigation "(defined by Ambrose Bierce as 'a machine which you go into as a pig and come out as sausage')"⁴⁴ between the parties in the event of a break-up. A same gender couple cannot file for divorce and rely on the clear statutory procedures and case law precedents applicable to married couples which establish who pays support⁴⁵ or how property is divided.⁴⁶ They must establish their own property, child custody, visitation and support settlements. Couples who have been as clear as possible about what their rights and duties are toward one another throughout their relationship may avoid having to litigate misunderstandings later. Just as eating right, exercising and getting regular checkups are good preventative medicine, writing a life partnership contract and putting a same gender family's other affairs in order are good preventative law.

B. ENFORCEABILITY OF THE CONTRACT

The general rules covering construction and enforceability of contracts are beyond the scope of this article. Only points which are particularly crucial to drafting life partnership contracts are discussed.

In the leading case governing cohabitation contracts, *Mar-*

44. CURRY & CLIFFORD, *supra* note 19, at 2:2.

45. *E.g.*, CAL. CIV. CODE §§ 4357, 4370, 4801, 4801.5-.6, 5100, 5131, 5132 (Deering 1984 & Supp. 1992).

46. *E.g.*, CAL. CIV. CODE §§ 4350, 4800, 4802-4805, 5102, 5120.160, 5133-5137 (Deering 1984 & Supp. 1992); CAL. PROB. CODE § 6122 (Deering 1984).

vin v. Marvin, the California Supreme Court reached three important conclusions: 1) unmarried couples may make written contracts; 2) unmarried couples may make oral contracts; 3) where no written or oral contract exists, the court may examine the couple's life and decide whether an implied contract or joint venture exists.⁴⁷ "Most state courts actually faced with the question of living-together contracts have enforced written ones, rejected implied ones, and fallen somewhere below the middle with oral ones."⁴⁸

A contract will not be enforced if it states, or even implies, that the promises in it were made in exchange for sexual services.⁴⁹ "Agreements between non-marital partners fail only to the extent that they rest upon a consideration of meretricious sexual services."⁵⁰ It is essential that the contract exclude any mention of sex or sexuality, and it is better to identify the parties as "partners" rather than "lovers."⁵¹

[L]iving together contracts are enforceable in court only to the degree that they concern financial matters. Provisions pertaining to personal conduct aren't enforceable. A judge won't tell your living companion how often she has to wash the dishes or to remember not to put cream in your coffee. Because a judge won't enforce personal arrangements in a life partnership contract, don't include them.⁵²

In *Jones v. Daly*,⁵³ an oral cohabitation agreement between two homosexual men to equally share property acquired during their relationship was held unenforceable against the defendant partner's estate where services provided by the complaining partner were limited to "lover, companion, homemaker, traveling companion, housekeeper and cook. . . ."⁵⁴ The court held

47. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). See also CURRY & CLIFFORD, *supra* note 19, at 2:5.

48. CURRY & CLIFFORD, *supra* note 19, at 2:5.

49. *Marvin*, 557 P.2d at 113.

50. *Id.*; CURRY & CLIFFORD, *supra* note 19, at 2:5 n.4. "[Meretricious] is the wonderful legal term for people who make love without a marriage license."

51. CURRY & CLIFFORD, *supra* note 19, at 2:7.

52. *Id.* at 3:5.

53. *Jones v. Daly*, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981).

54. *Id.* at 133.

that the pleadings showed that the plaintiff's rendering of sexual services to the defendant was the predominant consideration.⁵⁵ The court stated:

According to the allegations of the complaint, the agreement provided that the parties would share equally the earnings and property accumulated as a result of their efforts while they lived together and that [defendant] would support plaintiff for the rest of his life. Neither the property sharing nor the support provision of the agreement rests upon plaintiff's acting as [defendant's] traveling companion, housekeeper or cook as distinguished from acting as his lover. The latter service forms an inseparable part of the consideration for the agreement and renders it unenforceable in its entirety.⁵⁶

A subsequent California appellate decision in *Whorton v. Dillingham* enforced an oral cohabitation agreement between two homosexual men.⁵⁷ There, the court found that the parties' itemized mutual promises to be lovers served as consideration for each other, so were severable and independent of additional consideration for other services rendered.⁵⁸ The parties had specifically agreed that any part of the agreement found legally unenforceable was severable.⁵⁹ In *Whorton*, the plaintiff alleged that he provided services including being a chauffeur, bodyguard, secretary, partner and counselor in real estate investments.⁶⁰ The court found that these services are properly characterized as consideration.⁶¹ In contrast, the services alleged in *Jones*, being a "constant companion and confidant," were not normally compensated by money nor considered to be valid contractual consideration.⁶² Expressly distinguishing the facts before it from *Jones*, *Whorton* held that the separately itemized services of companion, chauffeur, bodyguard, secretary, partner and business counselor were, except for companion, significantly

55. *Id.*

56. *Id.* at 134.

57. *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988).

58. *Id.* at 409-10.

59. *Id.* at 407.

60. *Id.* at 410.

61. *Id.*

62. *Id.*

different than household duties normally attendant to non-business cohabitation and were those for which monetary compensation ordinarily would be anticipated.⁶³ On that basis, the contract was upheld.⁶⁴

Whorton also held that the cohabitation agreement between the two partners was not an employment contract, so it was not terminable at will.⁶⁵ Rather, it was a cohabitor's agreement covering how two nonmarital partners had agreed to order their economic affairs.⁶⁶ This is an important distinction, in that while each partner has a right to end the relationship at any time, a cause of action on the contract remains concerning whether the facts support an award of money or property.⁶⁷ Some contracts specify how property will be divided in the event of a separation.⁶⁸

It appears from these two cases that, in addition to leaving out any reference to "lovers," same gender life partnership contracts must include a carefully crafted statement of valid consideration. For example, where expenses will be shared or property jointly purchased, the contract should include a recitation of the mutual promises to invest in the life enterprise. A contract could also be supported by other mutual promises, such as taking turns putting one another through school.⁶⁹ Where one partner will primarily provide the financial support while the other "keeps house," as was the case in both *Jones* and *Whorton*, the contract should include an itemization of services the supported partner will provide which are normally compensated by money. "[A] promise to perform homemaking services is, of course, a lawful and adequate consideration for a contract. . . ."⁷⁰ Itemized mutual investments and/or services would provide consideration for the contract apart from those normally incident to cohabitation, and clearly distinguishable from meretricious consideration. An itemization of this sort may seem strange to partners

63. *Id.*

64. *Id.*

65. *Id.* at 411.

66. *Id.*

67. *Id.*

68. See Appendix B: Sample Life Partnership Agreements (immediately following this article).

69. See CURRY & CLIFFORD, *supra* note 19, at 3:19-20.

70. *Marvin v. Marvin*, 557 P.2d 106, 113 n.5 (Cal. 1976).

whose primary motivation for joining together is love and a commitment to share a life together. However, the rights and duties heterosexuals acquire through marriage, same gender couples must acquire contractually, and for the cohabitation contract to be valid, it requires valid consideration.⁷¹

The severability clause in *Whorton*, wherein the parties specifically agreed that any part of the agreement found legally unenforceable was severable, was important to the court in upholding the remainder of the agreement between the parties in *Whorton*.⁷² In light of this, it would be advisable to include a similar severability clause in all same gender life partnership agreements.

C. SELECTING AND DRAFTING THE TERMS OF THE CONTRACT

Each contract must be adapted to reflect the situation, resources and desires of the individuals entering into it.⁷³ Some model contracts written by private practitioners in California are appended here.⁷⁴ No sample agreement, however, can possibly take into account all the issues a couple might want to consider, nor do they reflect all the provisions of the civil contract heterosexuals enter into automatically when they marry.⁷⁵ The California statutory marital contract, based as it is on traditional heterosexual values and history, is not necessarily the ideal model. However, the statutory marital contract is comprehensive and introduces many topics which practitioners and their clients might not consider spontaneously. The appended checklist of the rights and duties included in California's marital contract can serve as a starting point for couples and their attorneys, allowing them to pick and choose what terms they would like to include or exclude from their own agreement. They may also find terms or subject areas which they would like to defer until later, like a co-parenting agreement. Other considerations

71. *Id.*

72. *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 409-10 (Cal. App. 1988); *see also Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976).

73. *See generally* CURRY & CLIFFORD, *supra* note 19.

74. *See* Appendix B (immediately following this article).

75. CAL. CIV. CODE §4100 (Deering 1984); CURRY & CLIFFORD, *supra* note 19, at 2:2 ("Marriage is a contractual relationship, and saying 'I do' commits one to a well-established set of rules governing the couple's property rights.").

require a separate document, such as a will.⁷⁶

Main areas which should be covered in life partnership contracts and associated documents,⁷⁷ include the topics listed below.⁷⁸ The checklist in Appendix A offers a much more detailed list, and is designed for use by practitioners in client interviews as well as in drafting.

1. *Property*

- _____ arrangements for ownership and use of real and personal property whenever any mingling of use will occur, or an agreement to keep property separate and how that would be done;⁷⁹
- _____ division of equity in property;
- _____ management and control of property;
- _____ value of property improvements and distribution of that value between co-owners, and reimbursement of separate or joint funds for the cost of improvements;
- _____ in the event the parties' relationship is dissolved, which one gets to keep the property and which one buys the other out; terms or criteria for setting the terms of the buy out agreement;

76. The formalities and rituals required for a will are such that it is mandatory that the will be a separate document. A contract can govern provisions of the will, but a will contract can have many pitfalls and authorities advise against it. CALIFORNIA WILL DRAFTING §§ 1.8, 1.10 (Pamela J. Jester ed. 3d ed 1992).

77. See *supra* note 31.

78. See also the checklist in Appendix A; ACHTENBERG, *supra* note 19; CURRY & CLIFFORD, *supra* note 19.

79. Under *Marvin*, community property protections and other marital property laws are not extended to unmarried couples. Unmarried couples are treated as any individual adults, and may contract between themselves about their economic affairs. *Marvin v. Marvin*, 557 P.2d 106, 122 n.24 (Cal. 1976). As a result, neither the advantages nor the disadvantages of these laws apply to unmarried couples. Unmarried couples may divide ownership interests and rights to use property in any manner they choose, using community property laws as a guideline, or using models from non-community property states, or making their own arrangements without regard to marital property law. A discussion of the differences between the laws in community property and non-community property states is beyond the scope of this article.

- _____ division of proceeds from rental property, if any;
- _____ use of proceeds from insurance in the event property is damaged or destroyed;
- _____ interest in business ventures of either partner;
- _____ interest in professional or other licenses acquired during the relationship and as a result of the other partner's support through school;
- _____ interest in retirement pay or pensions accumulated during the relationship.

2. *Money*⁸⁰

- _____ what funds will be treated as joint funds and what funds are separate;
- _____ management and use of joint accounts;
- _____ use of joint or individual cash or credit to acquire real or personal property and how ownership interests relate to each individual's original investment (couples may want to consider drafting separate agreements for large purchases such as a home or an automobile);
- _____ arrangements for reimbursement of joint or separate funds used in such acquisitions;
- _____ financial support during the relationship and in the event of a break up;
- _____ services (other than meretricious) provided during the relationship and reimbursement for those services, if any;
- _____ Durable Power of Attorney for Finances which is either triggered by incompetency or may be effective

80. The tax implications of pooling resources may be significant, but are beyond the scope of this article.

even while the grantor is legally competent.

3. *Health, Medical Care and Death*

- _____ authority to make medical decisions in the event of incapacity;
- _____ visitation rights at hospitals and nursing homes;
- _____ authority to request an autopsy and to decide upon body disposition;
- _____ partners' rights in family cemetery plots;
- _____ administration of the estate and distribution of real and personal property upon death.

4. *Dispute Resolution*

- _____ agreement to use arbitration and mediation if that is preferred over litigation;
- _____ a cooling off period analogous to a legal separation before final dissolution of the partnership.

5. *Children*

- _____ which duties and rights of child rearing will be shared;
- _____ which partner, if both women, will bear the child;
- _____ obligation for child support, during the relationship and in the event of a break up;
- _____ what last name the child will use;
- _____ whether the child will be legally adopted by a non-biological parent, where legally possible;
- _____ custody and visitation rights in the event of a break up;

- _____ authority to make medical decisions about the child;
- _____ authority to communicate with school officials about the child;
- _____ guardianship of the child in the event of the biological parent's death or disability.

Including these provisions will not necessarily guarantee their enforcement, particularly in the area of child custody and visitation. In those instances, the court takes a more active role to decide the "best interests" of the child.⁸¹ For example, in one case involving lesbian co-parents, the court declined to grant visitation rights to a lesbian partner after the women's sixteen year relationship ended, despite the fact that the decision to have children by artificial insemination was made jointly during the relationship.⁸² Both women had acted as parents throughout the children's lives, and the children considered both women to be mothers.⁸³ Despite this, the court declined to expand the definition of parent beyond the natural mother, and denied the other mother custody and visitation.⁸⁴ The non-biological mother could not get custody because she had no standing: she was not a natural parent nor had she legally adopted the child.⁸⁵ This highlights how important it is for the non-biological parent to adopt a child whenever possible.

In dicta, the court said that it saw no reason why a child could not be adopted by someone of the same gender as the natural parent in California.⁸⁶ In practice, same gender second parent adoptions have been approved in some counties in California, yet there are difficulties involved. Such adoptions are currently possible in eight California counties: San Francisco, Alameda, Marin, Contra Costa, Los Angeles, San Diego, and Butte.⁸⁷ Recent developments indicate that such adoptions may

81. CAL. CIV. CODE §§ 4600(b), §4608 (factors the court will consider when evaluating "best interest") (Deering Supp. 1992).

82. *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991).

83. *Id.* at 215.

84. *Id.* at 219-20.

85. *Id.* at 219.

86. *Id.* at 219 n.8.

87. Interview with Ora Prochovnick, partner in Bayside Legal Advocates (a private

also be possible in San Mateo County.⁸⁸ According to one expert in the field of same gender second parent adoptions, the procedure for securing such an adoption even in those counties where there is precedent can be lengthy and arduous.⁸⁹ Same gender second parent adoptions have been approved where the birth mother gives consent for her same gender life partner to legally adopt the child, while retaining her own parental rights and role.⁹⁰ The relatively simple statutory step-parent adoption procedure, where the natural parent's new spouse adopts the child, is not available to same gender couples, since it requires a marriage license.⁹¹ Instead, same gender couples must rely on California Civil Code Section 226, the independent adoption statute, which normally applies only when both birth parents give up the child entirely.⁹²

An application for adoption must be filed with the State Department of Social Services (DSS).⁹³ Generally, DSS denies these applications on the grounds that there is no marriage between the partners.⁹⁴ The couple must then must apply for a hearing on the adverse DSS recommendation.⁹⁵ Where the couple prevails at the hearing, the judge overrules the DSS recommendation on finding that the best interests of the child would be served by approving the adoption.⁹⁶

IV. OTHER DOCUMENTS TO COMPLETE AND ACTIONS TO CONSIDER

Some things cannot be included in a life partnership contract, but may be included in separate written documentation,

law firm in San Francisco) and an expert on lesbian and gay second parent adoptions, on November 24, 1992. Ms. Prochovnick cited an undated notice published by the National Center on Lesbian Rights which accompanied their November newsletter.

88. *Id.*

89. Interview with Ora Prochovnick, attorney at law, on November 24, 1992.

90. *Id.*

91. *Id.*; see CAL. CIVIL CODE §§ 226, 227.5, 227a (Deering 1990); see also CAL. PROB. CODE §6408 (West 1991 & Supp. 1993) concerning who the adopted child may inherit from and through in the event of intestacy.

92. Interview with Ora Prochovnick, November 24, 1992; see CAL. CIV. CODE §§ 226-226m (Deering 1990).

93. Interview with Ora Prochovnick, November 24, 1992.

94. *Id.*

95. *Id.*

96. *Id.*

thereby allowing same gender couples to approximate some of the rights and duties included in the state's marital contract.

A. WILLS AND ESTATE PLANNING⁹⁷

Wills or will substitutes, such as beneficiary assignments on life insurance policies and pensions, joint property ownership or trusts, are essential if the same gender life partners desire to avoid the administration and distribution of their property according to state intestacy statutes, which would not distribute property to the surviving life partner.⁹⁸ If one member of the same gender couple wants their life partner to administer their estate and to prevent long lost Uncle Harry from taking the house, a will and/or will substitutes must be created during life. Decisions must be made about what will happen to property after the death of each partner, appointment of an executor, appointment of a guardian for minor children who have not been adopted by a co-parent, and provisions for what will happen in the event both partners die simultaneously.

Given the formalities required for a valid will, a will must be separate from the life partnership contract. These formalities in California normally include the requirement of publication (writing), acknowledgement and attestation by two witnesses,⁹⁹ except in the case of a holographic will.¹⁰⁰ However, the life partnership contract may provide remedies if the will is not in compliance with the terms of the contract.¹⁰¹

Trusts and other will substitutes, such as present joint tenancy ownership of property and beneficiary designations, may

97. A detailed examination of the law covering wills and estate planning, especially gift and estate taxation, is beyond the scope of this article. A readable introduction to wills may be found in CURRY & CLIFFORD, *supra* note 19, at 9:1-9:34.

98. CAL. PROB. CODE §§6400-6414 (Deering 1991). Instead, property will be divided among the decedent's blood relatives, such as children, parents, cousins and so on. This is done per capita by representation in California. CAL. PROB. CODE §240 (Deering 1991).

99. CAL. PROB. CODE §6110 (Deering 1991).

100. CAL. PROB. CODE §6111 (Deering 1991). A holographic will is one in which all the material provisions are written in the testator's handwriting and is signed by the testator.

101. Significant problems may result from will contracts, however, and they are not recommended. Practitioners should research this carefully before including provisions which could be interpreted to be a will contract. See CALIFORNIA WILL DRAFTING §§ 1.8, 1.10 (Pamela J. Jester ed. 3d ed. 1992).

also be used to establish who controls property and who receives the benefit of it.¹⁰² For example, a trust may be used effectively to give a life partner the use of any income from the property for life. Simultaneously, it could protect the property from the beneficiary partner's relatives at death by including a "gift over" of the remainder to a party the settlor designates.¹⁰³

B. LIFE, MEDICAL, DENTAL AND OTHER INSURANCE POLICIES; PENSIONS AND ANNUITIES

In *Hinman v. Department of Personnel Admin.*, the court held that a denial of dental insurance coverage under a state employee's group policy to the employee's homosexual partner was not a violation of the equal protection clause of the state constitution.¹⁰⁴ It said that all unmarried employees received identical treatment and that any distinction in treatment was "made solely on the basis of married and unmarried employees . . . not between heterosexual or homosexual ones."¹⁰⁵ This argument falls apart, however, in light of the fact that homosexuals may not marry.¹⁰⁶ Unmarried heterosexuals can change their marital status if they so choose, and by doing so, receive all the preferences and privileges associated with marriage. Homosexuals cannot, so their treatment is actually not equal to the treatment of unmarried heterosexuals because they cannot choose to change their status from unmarried to married. This is like telling a person in a locked room that they are treated the same as a person in an unlocked room just because they are both indoors. One has a choice about whether to go for a walk; the other does not.

Hinman held that the plaintiffs' . . .

. . . real quarrel is with the California Legislature if they wish to legitimize the status of a homosexual partner. Plaintiffs may achieve the reform they seek here only by attacking Civil Code sec-

102. See HAROLD WEINSTOCK, *PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES* §§6.12, 6.26-6.32 (2d ed. 1988) (hereinafter WEINSTOCK); see also WEINSTOCK, §§9.1-9.15 (2d ed. 1988 & Supp. 1992).

103. Cf. WEINSTOCK, *supra* note 102 §§8.35, 9.15 (2d ed. 1988).

104. *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 414 (Cal. Ct. App. 1985).

105. *Id.* at 416.

106. CAL. CIV. CODE §4100 (Deering 1984).

tion 4100, which defines marriage to be a civil contract 'between a man and a woman.' We cannot change that law here.¹⁰⁷

A few employers have voluntarily extended health insurance benefits to same gender domestic partners.¹⁰⁸ It is unlikely that the majority of same gender life partners will be able to enroll their partner as a spouse or dependent in their employee health plans without legislative action. This policy translates into higher costs of living for same gender life partners, since the uninsured partner may have to purchase health insurance separately from their partner's employee benefit plan. The differential in cost of living between married and same gender couples was recently increased by another insurance related court decision. Using reasoning similar to that in *Hinman*, the court in *Beaty v. Truck Ins. Exchange* held that life insurance companies may legally refuse to give same gender life partners the rate discounts they frequently extend to married couples.¹⁰⁹

While it may be difficult or impossible to have employee benefits or marital discounts extended to same gender couples, they may still use purchased insurance policies to provide some measure of security in the event of death or disability, and to further establish that they hold themselves out to the world as a family. Insurance policies are contracts between an insurance company and the policy holder. Each life partner may buy a policy insuring his or her own life, and designate his or her partner as beneficiary. If they choose the designated beneficiary route, the policy proceeds are paid to the beneficiary but the estate will be taxed on the face value of the policy.¹¹⁰ Another alternative is for each partner to buy a policy on the other, so that if the other dies, the survivor, who is the owner of the policy, receives the proceeds directly.¹¹¹ If each buys a policy on the other, the pol-

107. *Hinman*, 213 Cal. Rptr. at 419-20.

108. For a list of major law firms in California which have done so, see Jane Goldman, *Coming Out Strong*, CAL. LAW., Sept. 1992, at 35.

109. *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 594 (Cal. Ct. App. 1992).

110. I.R.C. §2037 (1991); see also WEINSTOCK, *supra* note 102, §§10.21-10.22.

111. Some life insurance companies are less likely to approve an application to purchase a life insurance policy on another person where the relationship between the two is not clearly a business partnership. This policy was explained in a January, 1992 interview with a life insurance agent employed by New York Life, who prefers to remain anonymous. He recommended two lesbian life partners initially purchase the policies on themselves and designate the other as beneficiary, to ease acceptance of the application,

icy proceeds do not go to the estate of the deceased partner, so the proceeds are not taxed as part of the estate. On the other hand, these tax considerations are not relevant unless the decedent's estate will be valued at over \$600,000.00, the amount of the normal federal estate tax deduction.¹¹² If the estate will not be worth that much, it may be preferable for each person to own their own policy so that they may control it in the event the relationship dissolves.¹¹³

Regardless of the way in which the policy is held, having both names on the policy adds to the "paper trail" which documents the familial relationship between the partners, and may ultimately aid them in securing a court's favorable interpretation of statutory rights. The same evidentiary function may be fulfilled with jointly purchased renter's insurance, homeowner's insurance and automobile insurance.¹¹⁴

Same gender couples may also designate each other as the beneficiary of any pension or other retirement plans, such as the State Teachers Retirement System¹¹⁵ or the Public Employee Retirement System.¹¹⁶ The same is true for beneficiary designations on any annuities they may hold which allow beneficiaries to be designated.

C. REAL PROPERTY TITLES

Property in California may be held by unmarried persons jointly either as partnership interests, tenants in common or as joint tenants.¹¹⁷ The rights and duties of co-owners vary with the form of ownership, and are beyond the scope of this article, but life partners considering co-ownership of property must decide which form they prefer. Tenants in common should also agree on how they will divide their interests in the property,

and change the ownership of the policies later after the company had already contracted to insure the person.

112. See WEINSTOCK, *supra* note 102, §§10.32-33, §10.35.

113. *Cf. id.* at §10.35

114. See generally CURRY & CLIFFORD, *supra* note 19, at 4:21-4:22 for a discussion of difficulties gay and lesbian couples have encountered in attempting to purchase such insurance jointly, and successful ways to overcome those.

115. CAL EDUC. CODE § 22654 (Deering 1989).

116. CAL GOV'T CODE § 21204 (Deering Supp. 1992).

117. CAL CIV. CODE § 682 (Deering 1990).

since they may hold unequal shares.¹¹⁸ If a joint tenancy is desired, it must be specifically declared in its creation, or the interest created will be tenants in common.¹¹⁹ Joint tenants each have undivided, equal shares in the property and have a right of survivorship.¹²⁰ Joint tenants should also decide whether they will retain the right to sever their share unilaterally¹²¹ or contract that neither will transfer or devise their share without the other's consent. In either case, co-owners of property should decide how they will divide maintenance costs and improvements, share down payments or other financing arrangements, how they will keep records of capital contributions, who has what rights to reimbursement, and how equity or any proceeds from rental income will be divided. Co-owners should also contract about how these things might change if one owner does not live in the house, and how the property is to be handled in the event the relationship ends.¹²²

D. DURABLE POWERS OF ATTORNEY FOR MEDICAL CARE AND FINANCES

A Durable Power of Attorney gives a trusted partner, friend, relative or attorney the authority to make necessary financial or medical decisions on another person's behalf, or to implement decisions that a person has already made, in the event they become incapacitated.¹²³ California has created a statutory form Durable Power of Attorney for Health Care which may be used in California.¹²⁴ Life partners need to create these powers of attorney, while they have legal capacity, in order to ensure their rights in the event of incapacity. Properly executing a Durable Power of Attorney and having it easily accessible will, at the discretion of the partner who grants the power, assure the right to visit in the hospital or in a nursing home, to make decisions about medical treatments, or even to decide whether to continue medical treatment at all. A Durable Power of Attorney helps to

118. CAL. CIV. CODE § 686 (Deering 1990).

119. CAL. CIV. CODE §§ 683, 686 (Deering 1990).

120. CAL. CIV. CODE § 683 (Deering 1990).

121. *Thompson v. Thompson*, 32 Cal. Rptr. 808, 810 (Cal. Ct. App. 1963).

122. See *Robson & Valentine*, *supra* note 3, at 516-517; *ACHTENBERG*, *supra* note 19, § 4.02; *CURRY & CLIFFORD*, *supra* note 19, at 5:1-5:38.

123. *CURRY & CLIFFORD*, *supra* note 19, at 8:4.

124. CAL. CIV. CODE §§ 2500-2508 (Deering 1986 & Supp. 1992).

ensure that the incapacitated person's wishes are fulfilled, rather than those decisions being made for them by less intimate blood relatives or by default to the regulations of the facility.

The Durable Power of Attorney for Health Care statutes prohibit giving the power to one's health care provider or to an employee of one's health care provider.¹²⁵ There is an exception to this general rule which allows a married person to appoint their spouse even if the spouse is an employee of their health care provider.¹²⁶ A significant and frequently encountered problem arises here for same gender couples: one may not appoint her same gender partner if the partner is employed by the clinic or hospital where she normally seeks medical treatment.¹²⁷ For example, if lesbian partners are both doctors at a hospital, and they normally receive in-patient care at that facility, they may not give each other Durable Powers of Attorney for Health Care. This is a difficulty which should be changed through legislative lobbying to amend the statute.¹²⁸

A Durable Power of Attorney for Finances allows a partner to use a checking account and make investments or other financial decisions as the agent of the partner giving the power.¹²⁹ Most Durable Powers of Attorney for Finances are triggered by incompetency, allowing the newly incapacitated person's finances to be managed without a judicial declaration of incompetency and appointment of a conservator.¹³⁰ Such Durable Powers of Attorney may be made effective even while the person is competent, during the relationship, so that the other partner can deal with all financial decisions.¹³¹ Such an arrangement more closely mirrors the spouse's power in a heterosexual relationship.¹³²

125. *Id.*

126. *Id.*

127. Telephone Interview with Ora Prochovnick, January 11, 1993.

128. *Id.*

129. Interview with Ora Prochovnick, November 24, 1992.

130. *Id.*

131. *Id.*

132. *Id.*

V. ECONOMIC BENEFITS FOR MARRIED COUPLES UNAVAILABLE BY CONTRACT BETWEEN LIFE PARTNERS

Some economic benefits are conferred upon married couples and families by third parties which are not made available to same gender couples and families.

A recent task force convened in Los Angeles documented pervasive marital status discrimination against consumers in the areas of rental housing, insurance, credit institutions, airlines, membership organizations (health clubs, museums, auto and travel clubs, and country clubs), hospitals and nursing homes, correctional facilities, and enterprises such as mortuaries and cemeteries. In some instances, unmarried consumers were precluded entirely from participation. In other cases, there were cost differentials, some nominal and some extremely onerous.¹³³

In *Beaty*, the California appellate court explicitly endorsed these types of cost differentials, stating that they encourage couples to marry, which fosters California's strong policy favoring marriage.¹³⁴ The court held that refusing to extend marital discounts to same gender couples was not discrimination based on sexual orientation, which is forbidden by the Unruh Civil Rights Act,¹³⁵ since the higher prices were charged equally to both unmarried heterosexuals and unmarried homosexuals.¹³⁶ As it did in *Hinman*, the court directed the plaintiff to the legisla-

133. Treuthart, *supra* note 8, at 104 (citing LOS ANGELES CITY ATTORNEY, UNMARRIED ADULTS: A NEW MAJORITY SEEKS CONSUMER PROTECTION, FINAL REPORT — CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION (1990)). Report is available through Spectrum Institute, Family Diversity Project, P.O. Box 65756, Los Angeles, CA 90065 (213) 258-8955.

134. *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 596 (Cal. Ct. App. 1992).

135. CAL. CIV. CODE §§ 51-51.8 (Deering 1990 & Supp. 1992). While discrimination on the basis of sexual orientation is not forbidden by the letter of the Unruh Act, many cases have extended it to include prohibitions against discrimination on the basis of sexual orientation. See *Rolon v. Kulwitsky*, 200 Cal. Rptr. 217, 218 (Cal. Ct. App. 1984); *Curran v. Mount Diablo Council of the Boy Scouts*, 195 Cal. Rptr. 325, 339 (Cal. Ct. App. 1983), *appeal dismissed*, *Mount Diablo Council of the Boy Scouts v. Curran*, 468 U.S. 1205 (1984); *Hubert v. Williams*, 184 Cal. Rptr. 161, 163 (Cal. Ct. App. 1982).

136. *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 596 (Cal. Ct. App. 1992).

ture for relief.¹³⁷ Thus, it appears that the courts will not soon provide relief from these differential practices.

Family discounts and similar benefits are frequently conferred upon married couples by clubs or companies through an express or implied contract. The two members of a same gender partnership cannot contract between themselves for what another non-contracting party will offer them, so benefits such as these are unavailable to the couple unless the company or club decides to offer them voluntarily. Some companies, like the California State Automobile Association, have decided to make family membership rates available to gay and lesbian couples as a result of political and media pressure.¹³⁸

VI. CONCLUSION

Same gender couples may contract between themselves about many rights and duties respecting the economic aspects of their lives together. Doing so puts them in a stronger position in many ways. They have, to the greatest extent possible, consciously focused on and ordered their lives according to their own resources, concerns and needs. The contracts, beneficiary designations, domestic partnership registrations, wills, trusts, and other agreements which they create serve to document their conception of themselves as a family and the extent of their interdependence and commitment. This strengthens their position in the event of accident or injury, because the required powers of attorney for medical care are already in place, authorizing one to act on behalf of the other quickly and efficiently. It also strengthens their position should they become a party to litigation, providing the court with evidence about the nature of their relationship and their intent. Finally, in the event of a separation or dissolution, their agreements about division of property, support, and children, generally reached when emotions were calmer, may make settlement easier to arrive at and more equitable.

In contrast to married couples, who have so much of this difficult contracting work done for them by the state, cohabiting

137. *Id.* at 600.

138. Interview with Ora Prochovnick, November 24, 1992.

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heterosexuals and same gender life partners must discuss many difficult questions forthrightly and arrive at workable agreements between themselves. This is an arduous and emotionally challenging process. It requires a substantial commitment of time, money and energy to come to terms with one another and then to complete all the paperwork involved. However, the result is a heightened awareness of one another's values and concerns. This deeper mutual understanding may ultimately foster more stable relationships than those whose affairs are dictated by the state.

APPENDIX A

PRACTITIONER'S CHECKLIST OF CALIFORNIA STATUTORY MARITAL RIGHTS, DUTIES AND PRESUMPTIONS

The California statutes selected for this list define rights and duties which may be incorporated into (or excluded from) a life partnership contract between same gender or unmarried heterosexual couples. Statutes which are part of the California civil marital contract, but which couples may *not* include in contracts between themselves, such as the legal privilege not to testify against a spouse, are excluded from the checklist, since practitioners drafting life partnership contracts would not find them immediately useful. (They do present, however, a startlingly large body of legal protections and responsibilities to which lesbian and gay couples have no access.)

The checklist is designed to be a working tool for practitioners who draft life partnership agreements between cohabiting adults. It will also aid them when counseling clients about the entire range of issues which may be covered in such an agreement, helping the clients make the most informed choices about how they may legally structure their relationships. Since this is designed as a working tool, we have intentionally diverged from the normal law review practice of including all citations in footnotes. The checklist is easier to use when the relevant statute is cited immediately at the end of the listed item or passage. Case authorities, where included, are footnoted in the traditional manner.

I. GENERAL DUTIES¹³⁹

——— “Nature and elements of marriage: Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a li-

139. CAL. CIV. CODE §§ 5100-5138 comprise a complete chapter in the California Civil Code titled “Husband and Wife.” This is a substantial body of law directed at heterosexual marital relationships and excluding other life partnerships.

cense and solemnization as authorized by this code, except as provided by Section 4213." CAL. CIV. CODE § 4100 (Deering 1984).

————— Every individual has a duty to support his or her spouse, CAL. CIV. CODE § 242, 4805, 5100, 5132 (Deering 1990), and dependent children, CAL. CIV. CODE § 242, 4700 (Deering 1984 & Supp. 1992), and shall support his or her parent when in need. CAL. CIV. CODE § 242 (Deering 1990).

————— Husband and wife are subject to the general rules covering fiduciary relationships, which imposes a duty of the highest good faith and fair dealing on each spouse. CAL. CIV. CODE § 5103 (Deering Supp. 1992).

————— Spouse's mutual obligations: "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support." CAL. CIV. CODE § 5100 (Deering 1984); *see also* CAL. CIV. CODE §§ 5102-5138 (Deering 1984 & Supp. 1992).

II. PROPERTY

Community property rights were expressly not extended to unmarried couples by *Marvin*.¹⁴⁰ However, same sex life partners may use the community property laws as background information, to determine whether they desire to have a similar or entirely different arrangement in ordering their own affairs.

A. OWNERSHIP

————— Characterization of marital property. CAL. CIV. CODE §§ 5107-5119 (Deering Supp. 1992).

————— Community property: The interests of each spouse in the assets acquired during a marriage are present, existing and equal during the continuance of the marriage. CAL. CIV. CODE § 5105

140. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

(Deering 1984). On dissolution, each spouse possesses an equal and absolute right to one half of the community property. CAL. CIV. CODE § 4800 (Deering Supp. 1992).

Types of property discussed in statutory notes or annotations:

- _____ copyright ownership;¹⁴¹
- _____ good will of professional practice;¹⁴²
- _____ pension or retirement benefits;¹⁴³
- _____ retirement pay earned during the marriage is to be paid from each before-tax payment as it is received, and is not to be discounted to present value;¹⁴⁴
- _____ disability pension rights are subject to equal division;
- _____ military pension rights;
- _____ professional degree or license;¹⁴⁵
- _____ Presumption that property acquired during marriage, except as provided in CAL. CIV. CODE § 5107 (wife's separate property), § 5108 (husband's separate property) and § 5126 (personal injury damage awards) is community property. CAL. CIV.

141. David Nimmer, *Copyright Ownership By the Marital Community: Evaluating Worth*, 36 UCLA L. REV. 383 (1988).

142. Martin J. McMahon, Annotation, *Divorce and Separation: Goodwill in Law Practice as Property Subject to Distribution on Dissolution of Marriage*, 79 A.L.R.4th 171 (1990).

143. Charles C. Marvel, Annotation, *Pension or Retirement Benefits as Subject to Award or Division By Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176 (1979).

144. *In re Wilson*, 519 P.2d 165 (Cal. 1974).

145. Michael G. Walsh, Annotation, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support or Property Settlement*, 4 A.L.R.4th 1294 (1981).

CODE §§ 4800.1, 5110 (Deering 1984 & Supp. 1992).

- _____ Property owned by husband or wife before marriage and that acquired afterwards by gift, bequest, devise, descent and from rents, issues and profits therefrom is separate property. CAL. CIV. CODE §§ 5107, 5108 (Deering 1984 & Supp. 1992).
- _____ Damages for personal injuries of spouse are community property unless the cause of action for damages arose after legal separation or dissolution of marriage. If spouse of injured person has paid expenses for injured person from separate property, that spouse is entitled to reimbursement. CAL. CIV. CODE § 5126 (Deering 1984).
- _____ Right to reimbursement for separate property contributions to acquisition of property absent a waiver. CAL. CIV. CODE § 4800.2 (Deering 1984).
- _____ Right to reimbursement for community contributions to education or training. CAL. CIV. CODE § 4800.3 (Deering 1984). Medical degrees are not community property; right to reimbursement for educational expenses is the only redress available.¹⁴⁶
- _____ Right to division of retirement benefits on dissolution. CAL. CIV. CODE § 4800.8 (Deering Supp. 1992).
- _____ Right to spousal support until spouse acquires other, more marketable skills or employment and criteria for determining amount. CAL. CIV. CODE § 4801 (Deering Supp. 1992).
- _____ Spouse has right to exclusive occupancy of his or her family dwelling pending final determination of divorce action. Neither husband nor wife can be

146. *In re Marriage of Watt*, 262 Cal. Ct. Rptr. 783 (Cal. Ct. App. 1989).

excluded from the family dwelling except as provided by statute. CAL. CIV. CODE § 5102 (Deering 1984).

_____ All earnings and accumulations of a spouse after separation are the separate property of that spouse. CAL. CIV. CODE §§ 5118-5119 (West 1983 & Supp. 1993).

_____ Revocable living trust of community property remains community property during marriage. CAL. CIV. CODE § 5110.15 (Deering 1984).

B. MANAGEMENT AND CONTROL OF PROPERTY

_____ Right of management and control over community *personal* property belongs to both spouses. CAL. CIV. CODE §§ 5125 (Deering 1984 & Supp. 1992).

_____ Right of management and control of community *real* property belongs to both spouses. CAL. CIV. CODE § 5127 (Deering Supp. 1992).

_____ Both spouses have a duty to deal in good faith with regard to the management and control of community property. This duty requires disclosure of all community assets, but not their valuation. CAL. CIV. CODE § 5125 (Deering Supp. 1992).

_____ Property transactions: husband and wife are subject to the general rules governing fiduciary relationships. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and is subject to the same rights and duties of nonmarital business partners. CAL. CIV. CODE § 5103 (Deering Supp. 1992).

This includes a duty to render true and full information of all things affecting any transaction which concerns the community property, but no duty on either spouse to keep detailed books and records. CAL. CIV. CODE § 5103(2) (Deering Supp. 1992).

It also includes a duty to provide an accounting to the spouse, and for holding as a trustee any benefit or profit derived from any transaction by him or her without the spouse's consent. CAL. CIV. CODE § 5103(3) (Deering Supp. 1992).

—— Spouse has a claim against the other spouse for breach of the fiduciary duty imposed by section 5125 or 5127 that results in impairment to the claimant spouse's present undivided one-half interest in the community interest; specifies remedies for different types of breach, and discusses accounting. CAL. CIV. CODE § 5125.1 (Deering Supp. 1992).

—— Legal capacity with respect to community property: describes when a spouse lacks legal capacity, giving other spouse the right to manage and control community property. CAL. PROB. CODE § 3012 (Deering 1991).

—— The rights of the spouses in community property, except for the management, control and disposition of it, or their rights in the proceeds, rents, issues or profits of community property are not altered where one spouse lacks legal capacity. CAL. PROB. CODE § 3020 (Deering 1991).

—— The lack of legal capacity of one spouse does not affect the right of the spouse having legal capacity to manage and control community property or to dispose of the property, whether or not the other spouse has a conservator. The authority given the spouse having legal capacity is limited by Section 3071, which applies in any case where joinder or consent would be required for a transaction if both spouses had legal capacity. CAL. PROB. CODE § 3051 (Deering Supp. 1992).

—— The spouse having legal capacity has the duty of good faith in managing and controlling the property. See CAL. CIV. CODE § 5125. (Deering Supp.

1992). Any interested person, or the conservator where the spouse has a conservator, who has knowledge or reason to believe that the rights of a spouse without legal capacity in the community property are being prejudiced may bring an action on behalf of such spouse to enforce that duty of good faith in the management and control of the community property. CAL. CIV. CODE §3057 (Deering 1991).

——— Enforcement of support of spouse who has a conservator. CAL. PROB. CODE §§ 3080-3092 (Deering 1991 & Supp. 1993).

C. LIABILITY FOR DEBTS

——— Liability of community property for debts; liability of earnings. Generally, community property is liable for a debts incurred by either spouse before or during marriage regardless of which spouse has control or management of property and regardless of which spouse is the party to the debt or judgment for the debt. Earnings of a married person during marriage are not liable for debts incurred by a spouse before marriage as long as the earnings are deposited in an account in which the debtor spouse has no right of withdrawal and the funds are not co-mingled with other community property. CAL. CIV. CODE §§ 5120.110-5120.160 (Deering Supp. 1992). General definitions and rules for liability of all marital property are found in §§ 5120.010-5122 (Deering Supp. 1992).

——— On dissolution, the court will characterize liabilities as separate or community property. CAL. CIV. CODE § 4800(a) (c) (Deering Supp. 1992).

——— Right of reimbursement: community property applied to separate debts is entitled to reimbursement, unless the spouse expressly waived that right in writing. It also establishes criteria for measuring the amount of reimbursement and

when to apply for it. CAL. CIV. CODE § 5120.210 (Deering Supp. 1992).

Consider the note to CAL. CIV. CODE § 5125 when drafting: "The legislature further finds and declares that (1) the liability of community property for the debts of the spouses has been coextensive with the right to manage and control community property and should remain so. . ." CAL. CIV. CODE § 5125 legislative note.

Same gender couples may want to specify whether debts incurred are strictly the responsibility of the individual who incurs them, or whether the "community" will be jointly liable for them. If the latter course is chosen, they may also want to specify how decisions to incur debt against joint property will be made and may want to make separate agreements covering major indebtedness. For example, the couple may want to set agreed upon limits to which each individual may incur debt against joint resources on their own power, without the consent of the other partner.

Tort liability: community property is generally not liable for a spouse's tort. However, if the liability of the married person is incurred while performing an activity for the benefit of the community, the liability will be satisfied first from community property. Where community property is used to satisfy a tort judgment against one spouse, the other spouse has a right to reimbursement of the community property by the tortfeasor spouse. The statute limits the order of satisfaction requirement to liabilities not covered by insurance, and imposes a seven year limitation period on any reimbursement. CAL. CIV. CODE § 5122 (Deering Supp. 1992).

D. FOUNDATIONS

Right of educational trust's grantor's surviving spouse to act as trustee. CAL. EDUC. CODE §21107

(Deering 1989).

- _____ Foundation grantor's right to convey life estate to spouse. CAL. EDUC. CODE § 21111 (Deering 1989).
- _____ Right of any substantial contributor or his spouse to designate annually the recipient, from among organizations described in paragraph 1 of Section 509(a) of the Internal Revenue Code, of the income attributable to the donor's contribution to the fund. CAL. REV. & TAX CODE §23707 (Deering 1988).

E. RETIREMENT AND DEATH BENEFITS

Life partners may be able to establish some of these rights by designating the non-employee partner as beneficiary, and/or establishing their right to use retirement accounts through powers of attorney.

- _____ State Teacher's Retirement System: rights of non-member spouses include:
 - _____ right to a retirement allowance; CAL. EDUC. CODE §§22651.5, 22653, 22658, 22662 (Deering 1989 & Supp. 1992);
 - _____ right to designate beneficiaries; CAL. EDUC. CODE § 22654 (Deering 1989);
 - _____ right to a refund of accumulated retirement contributions; CAL. EDUC. CODE § 22655 (Deering 1989);
 - _____ right to redeposit accumulated retirement contributions; CAL. EDUC. CODE § 22656 (Deering 1989);
 - _____ right to purchase additional service credit. CAL. EDUC. CODE § 22657 (Deering 1989).
- _____ Retirement Benefits for Legislators. CAL. GOV'T CODE §9354, 9359 (Deering Supp. 1992).
- _____ Legislator's surviving spouse's benefits. CAL. GOV'T CODE §9361.1 (Deering 1982).
- _____ Public Employee's Retirement System (PERS)

(accumulated retirement benefits are community property). CAL. GOV'T CODE §§ 20000-20685, 20950-21158, 21200-21406 (Deering 1982 & Supp. 1993); CAL. GOV'T CODE §§ 21200-21406 (Deering 1973 & Supp. 1993).

——— Member of PERS may designate a beneficiary. CAL. GOV'T CODE § 21204 (Deering Supp. 1992).

——— Designation of a spouse as beneficiary by member of Public Employee's Retirement System is automatically revoked upon dissolution of marriage, if dissolution occurs before payments begin to be made. After payments have commenced, beneficiary designation is irrevocable. CAL. GOV'T CODE § 21205 (Deering Supp. 1992).

Same gender partners might want to consider including a clause in their property agreements, in the event of dissolution of their partnership, that each partner will carry out whatever procedures are required to revoke beneficiary designations if and where appropriate.

——— County Employee Retirement System for counties of different sizes. Spouse receives top priority in payment upon death of retired member. CAL. GOV'T CODE §§ 31486.6, 31492, 31494.1, 31497.7, 31499.5, 31499.15 (Deering Supp. 1992).

——— Judge has a vested right to a retirement allowance, CAL. GOV'T CODE §§ 75025, 75026, 75033.5 (Deering Supp. 1992), and the allowance is considered community property under Article 2.5 of the CAL. GOV'T CODE.

F. MONEY AND ACCOUNTS

——— Joint accounts: Creates a presumption that if the parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is and will remain their community prop-

erty. CAL. PROB. CODE §5305. (Deering Supp. 1992). Right of survivorship of the surviving spouse can be modified by the parties, e.g. by will. If the deposit agreement or the terms of the account clearly indicate an intent that there be no survivorship right, either spouse can designate one or more P.O.D. payees or Totten trust beneficiaries to take that spouse's share of the account upon the death of that spouse. Law Revision Commission Comment 3 to CAL. PROB. CODE §5130 (Deering Supp. 1992). The notes for that statute offer a lengthy explanation of how the terms of the contract of deposit may be changed to eliminate or add rights of survivorship. *See also* CAL. PROB. CODE § 5301, 5302 (ownership during lifetime) (Deering 1991).

——— Statutory survivorship provisions have no effect on a surviving spouse's right to his or her share of community funds deposited in a multiple-party account under which a third person has a survivorship right upon the death of the other spouse. Law Revision Commission Comments to CAL. PROB. CODE § 5304 (Deering 1991).

Same gender couples who have a third party with survivorship rights on any account must make explicit provisions for how each partner's share of the funds in the account will be handled on the death of the other partner.

G. CEMETERY PLOTS

——— Family plots are inalienable. CAL. HEALTH & SAFETY CODE §8650 (Deering 1975) and Law Revision Commission Comments to CAL. CIV. PROC. CODE §§ 704.200(b) (Deering 1983).

——— Spouse has a vested right of interment in a family cemetery plot, CAL. HEALTH & SAFETY CODE §§ 8601, 8651, 8676 (Deering 1975), unless terminated by final divorce decree, CAL. HEALTH &

SAFETY CODE § 8602 (Deering 1975), waived, CAL. HEALTH & SAFETY CODE § 8653 (Deering 1975), or terminated by interment elsewhere. CAL. HEALTH & SAFETY CODE § 8653 (Deering 1975).

_____ Order of right of interment if no surviving spouse: first to surviving child or surviving parent; if no parent or child survives, the right of interment goes in the order of death first, to the spouse of any child of the record owner and second, in order, to the next heir-at-law of the owner or the spouse of any heir-at-law. CAL. HEALTH & SAFETY CODE § 8652 (Deering 1975).

H. MISCELLANEOUS

_____ Right to recover gift made in contemplation of marriage on abandonment of project or refusal of donee to proceed. CAL. CIV. CODE § 1590 (Deering 1971).

II. CHILDREN

_____ Both parents have a duty to support their child. CAL. CIV. CODE §§ 196, 196a (Deering 1990 & Supp. 1992). *See also* CAL. CIV. CODE §§ 242 (Deering 1990).

_____ Absent an agreement to the contrary, a parent is released from the legal duty of support upon the complete emancipation of a minor child by its lawful marriage, upon court appointment of a guardian for the child or upon its attaining majority. CAL. CIV. CODE §204 (Deering 1990).

_____ Parents have a duty to support their needy children who are unable to provide for themselves by work, and that duty persists even if the child is emancipated. Adult children have a reciprocal duty to support their needy parents. CAL. CIV. CODE § 206 (Deering 1990).

——— Custody of child. CAL. CIV. CODE §§ 197 (Deering 1990 & Supp. 1993); CAL. CIV. CODE §§ 4600-4608 (Deering 1990 & Supp. 1993).

“The legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where that contact would not be in the best interest of the child, as set forth in § 4608.” CAL. CIV. CODE §§ 197 (Deering 1990 & Supp. 1993); *See also* CAL. CIV. CODE §§ 4600-4608 (Deering 1990 & Supp. 1993).

——— Visitation rights. CAL. CIV. CODE §§ 197.5 (Deering 1990) and CAL. CIV. CODE § 4601 (Deering Supp. 1992). Consider the effect of future adoption of the children by another step parent on visitation rights. *See also* Carroll J. Miller, Annotation, *Visitation Rights of Homosexual or Lesbian Parents*, 36 A.L.R.4th 997 (1985).

——— Child support after marriage terminates. CAL. CIV. CODE §4700 (Deering 1984 & Supp. 1992).

——— Father of child conceived by artificial insemination: whether a sperm donor is legally the father of the child conceived, and the role of a physician in the process. CAL. CIV. CODE §7005 (Deering 1984).

A recent trial court decision has serious legal implications for lesbians, gay men and bisexuals seeking to build families. The trial court decision has been decertified for citation. In *Steven W. v. Martha Andra N. and Mary M. N.* (no case citation available since the case has not been decided), a paternity case currently before the Third District Court of Appeal in Sacramento, the donor of sperm to a lesbian couple successfully established paternity at the trial court level and now

seeks accompanying legal rights. CAL. CIV. CODE §7005 makes the role of a doctor in the process critical to the determination whether the sperm donor is legally the father of the child conceived. Relying on this interpretation, the lesbian couple underwent medically-supervised artificial insemination, believing that doing so would secure their rights as parents against the sperm donor. The trial court held that the doctor must convey the inseminating sperm to the biological mother in order to obviate the paternity of the donor. This did not occur in Martha and Mary's case. The case is currently on appeal. Michael Adams, *Artificial Insemination and Paternity Rights*, Bay Area Lawyers for Individual Freedom Newsletter, Vol. 9, No. 5, Sept. 1992.

——— Parent and child relationship extends equally to every child and to every parent, regardless of marital status of parents. CAL. CIV. CODE § 7002 (Deering 1991).

Same gender parents will also have to decide between themselves whether their child will bear both surnames or that of one or the other parent.

——— Step parent may be awarded reasonable visitation rights if the court determines it is in the best interest of the child. This statute applies narrowly only to legally married stepparents. CAL. CIV. CODE § 4351.5 (Deering Supp. 1992).

III. PROBATE AND DECEASED SPOUSE'S PROPERTY

——— Order of inheritance and distribution of shares if decedent dies intestate: per capita, by representation, to surviving spouse and surviving children, and if none, to surviving parents, then to surviving brothers and sisters and their issue, then to surviving grandparents and their issue (uncles and aunts), then to stepchildren and then a modified civil system to next of kin, then escheat to the

state. This system is also used to determine who is in the class when a class gift has been made. CAL. PROB. CODE §§ 6400-6414 (Deering 1991).

———— A cemetery plot where no interment has been made descends to the heirs-at-law of the owner subject to the rights of interment of the decedent and his surviving spouse. CAL. HEALTH & SAFETY CODE § 8603 (Deering 1975).

———— Anti-lapse statute provides that if a beneficiary dies before a testator, the bequest goes to the testator's intestate takers. CAL. PROB. CODE § 6447 (Deering 1991). This may be avoided by drafting to include alternative takers in the event the beneficiary dies first.

———— Surviving spouse has a right to sell or otherwise dispose of decedent's real property, except where a notice claiming an interest has been filed with the county recorder. CAL. PROB. CODE §§ 13540-13542 (Deering 1991 and Supp. 1992).

———— Order of abatement of beneficiaries' shares if estate is not sufficient to cover all bequests in the will: 1) property not disposed of by instrument; 2) residuary gifts; 3) general gifts to persons other than relatives; 4) general gifts to relatives; 5) specific gifts to persons other than relatives; 6) specific gifts to relatives. "Relatives" is as defined under intestacy statutes. CAL. PROB. CODE § 21402 (Deering 1991); *see also* CAL. PROB. CODE § 21400-21406 (Deering 1991).

———— Simultaneous death: when beneficiary and testator die at once, property of each person shall be disposed of as if she had survived and the other person predeceased her. Statutes leave each person owning their own property so that it goes to their estate rather than to the estate of the person who died with them. CAL. PROB. CODE §§ 220-224 (Deering 1991).

- _____ Access to the decedent's safe deposit box to remove the decedent's wills, trust instruments, and instructions for disposition of the decedent's remains, and to inventory the contents of the box belongs to the person who has the key to the box. CAL. PROB. CODE § 331 (Deering Supp. 1992).
- _____ Decedent's tangible personal property will be delivered to the surviving spouse or relative by a public administrator, law enforcement agency, hospital or institution in which the person died. CAL. CIV. CODE §330 (Deering 1991).
- _____ Community property: at death, surviving spouse gets his/her own half share and 100% of the half share of the deceased spouse. CAL. PROB. CODE § 100 (Deering 1991).
- _____ Quasi-Community property (property acquired while residing in a non-community property state by a married person who has moved to California): If the spouse who acquired the property in a non-community property state dies first, their surviving spouse gets 50% of the quasi-community property, leaving the other 50% with the acquiring spouse's estate. If the non-acquiring spouse dies first, the surviving spouse (the one who acquired the property) keeps 100% of the property they acquired and nothing passes to the non-acquiring spouse's estate. CAL. PROB. CODE § 101 (Deering 1991).
- _____ Spouse and minor children have temporary right to remain in possession of the family dwelling. CAL. PROB. CODE § 6500 (Deering 1991).
- _____ Family allowance: a surviving spouse, minor children, and other enumerated relatives are granted a reasonable allowance out of the estate of the deceased spouse as shall be necessary for the survivor's maintenance according to his or her circumstances during the settlement of the estate. CAL.

PROB. CODE § 6540 (Deering 1991). That right may be waived in whole or in part, whether the waiver is executed before or during marriage. See CAL. PROB. CODE §§ 140-147 (Deering 1991).

——— Liability of surviving spouse for debts of deceased: with some exceptions, the surviving spouse is personally liable for the debts of the deceased not exceeding the value of the community property and quasi-community property plus the separate property of the spouse. CAL. PROB. CODE § 13550-13554 (Deering 1991).

——— Allocation of debts between the estate and the surviving spouse may be petitioned for where appropriate. CAL. PROB. CODE § 11440-11446 (Deering 1991).

——— Passage of property to surviving spouse without administration. CAL. PROB. CODE § 13500-13540 (Deering 1991).

——— Right of a surviving spouse to deal with community and quasi-community property securities is not affected by the death of the other spouse. Thus, the fact that there may be a person having a superior right by testate succession to the decedent's share of securities does not impair the ability of the surviving spouse in whose name the securities are registered to make binding transactions affecting the securities. Law Revision Commission Comments to CAL. PROB. CODE § 13545 (Deering Supp. 1992).

——— Claims for child or spousal support from a trust: court may order a trustee to satisfy spousal or child support judgment, notwithstanding any provision in the trust document (e.g. spendthrift clauses). CAL. PROB. CODE § 15305 (Deering 1991).

——— Trustee and surviving spouse may make an agreement regarding allocation of debts between the

trust and the surviving spouse. CAL. PROB. CODE § 19324 (Deering Supp. 1992).

——— Surviving spouse is personally liable for the half of community property and quasi-community property belonging to the deceased spouse which is in his or her possession. CAL. PROB. CODE § 13560-13564 (Deering Supp. 1992).

IV. DIVORCE OR DISSOLUTION

——— Spouse has right to temporary support, costs or counsel fees pending final divorce decree. CAL. CIV. CODE § 4357 (Deering Supp. 1992).

——— In an action to enforce an order for spousal support, the court may award attorneys fees and costs. CAL. CIV. CODE § 4370 (Deering Supp. 1992). Life partners could make a provision for these in their contract.

——— Sample marital property settlement agreements. CAL. CIV. CODE § 4802 (Deering 1984).

While the state divorce court does not take an interest in the dissolution of unmarried cohabitants relationships, some of the provisions applicable to married people could be part of a property settlement between unmarried parties, where appropriate. Some of the subjects covered in the annotations to the statute include:

- rights to earnings of the other;
- alimony;
- maintenance and support;
- family allowance;
- probate homestead;
- waiver of rights to inherit; *see also* CAL. PROB. CODE §§ 140-147 (Deering 1991 & Supp. 1993) and § 6122 (West 1991);
- waiver of right to act as administrator or executor of estate; *see also* CAL. PROB. CODE §

6122 (West 1991);

_____ waiver of right to participate in the spouse's estate; *see also* CAL. PROB. CODE § 6122 (West 1991);

_____ attorneys fees for settlement;

_____ child custody and support.

See also CAL. CIV. CODE §§ 5200-5203 (West 1983 & Supp. 1993) (premarital agreements).

_____ Presumption of decreased need and modification of support payment of party cohabiting with person of the opposite sex. CAL. CIV. CODE § 4801.5 (West 1983 & Supp. 1993).

_____ Liability of separate property owned at the time of division of property at dissolution: when debt incurred by one spouse is assigned for payment to the other spouse on dissolution, the spouse who pays has a right of reimbursement from the debtor spouse to the extent of the property applied, with interest at the legal rate, and may recover reasonable attorney's fees incurred in enforcing the right of reimbursement. CAL. CIV. CODE § 5120.160. (West Supp. 1993).

_____ Spousal support during separation by agreement. CAL. CIV. CODE § 5131 (West 1983 & Supp. 1993).

V. HEALTH AND MEDICAL CARE, DEATH

_____ Right to control disposition of remains of deceased person, unless other directions have been given by decedent, vests in, and duty of interment and liability for reasonable cost of interment of such remains devolves, in order, on surviving spouse, children, parents, other kindred and the public administrator. CAL. HEALTH & SAFETY CODE § 7100, 7101, 7102 (Deering 1975 & Supp. 1992).

_____ Surviving spouse or, if none, other enumerated relatives, may request an autopsy, which the Coroner has a duty to perform if the request is made.

CAL. GOV'T CODE § 27520, CAL. HEALTH & SAFETY CODE § 7113 (Deering 1974). Who may and who may not request an autopsy should be provided for in the Durable Power of Attorney for medical care. (A couple cannot, however, create a duty for the Coroner to perform an autopsy in a contract between themselves.)

Preservation of personal property of a mentally disordered person who is detained for involuntary psychiatric evaluation and treatment, or of a person detained for evaluation of impairment by chronic alcoholism or drug abuse is the duty of a responsible relative. "Responsible relative" is defined to include the spouse, parent, adult child or adult brother or sister of the person, except it does not apply to the person who applied for the petition under this article. CAL. WELF. & INST. CODE § 5156, 5229 (Deering 1988).

Responsible relative, as defined above, may be involved in the process of giving consent for the performance of psychosurgery or convulsive treatments, but is not required to be involved. CAL. WELF. & INST. CODE § 5326.6 (Deering 1988).

In-Home Supportive Services: legislative intent limits the class of persons financially responsible for providing such services to the parents of minor children or spouses. CAL. WEL. & INST. CODE § 12304(b) (Deering 1985 & Supp. 1992) as interpreted by *Miller v. Woods*, 196 Cal. Rptr. 69 (Cal. Ct. App. 1983).

Spouse may give consent for disclosure of medical treatment where the medical information being sought is for the sole purpose of applying for health insurance or enrolling in other health plans, where the spouse is to be an enrolled spouse or dependent under the plan. CAL. CIV. CODE § 56.11(3) (Deering 1990).

APPENDIX B: SAMPLE COHABITATION AGREEMENTS¹⁴⁷

SAMPLE COHABITATION AGREEMENT #1¹⁴⁸

This AGREEMENT is made this * day of *, 199*, by and between * and *, hereafter referred to as the parties.

RECITALS

WHEREAS, the parties live together and intend to continue living together until either decides to terminate the cohabitation;

WHEREAS, the parties intend and plan to participate in a marriage ceremony within several weeks after the date hereof and thereafter to behave towards each other in all manners as if married;

WHEREAS, the parties intend and plan to register their domestic partnership relationship with the City and County of San Francisco, California within several weeks after the date hereof;

WHEREAS, each owns substantial assets consisting of both real and/or personal property;

WHEREAS, each desires to set forth their mutual agreement and understanding in writing, including agreements by the parties regarding property held by each, payment of expenses during cohabitation, rights to support by one of the other, possession of the cohabited premises, and certain other concerns of

147. All of the agreements in this Appendix are sample agreements only and their validity has not been tested in any court of law.

148. This agreement was drafted by Ora Prochovnik. Ms. Prochovnick is the founding partner of Bayside Legal Advocates, a private law firm specializing in Lesbian and Gay Family Law, Tenant Advocacy, Wills & Trusts, Personal Injury and Adoptions. The author would like to express her gratitude for this and the other assistance Ms. Prochovnik has provided on this article and as a legal mentor. An asterisk in the text indicates that a name or other information should be inserted into or edited out of the text as appropriate to individual clients. Ms. Prochovnick may be reached at Bayside Legal Advocates, 3136 Mission St., Suite 300, San Francisco, CA 94110; or by phone at (415) 282-9300.

the parties hereto.

NOW THEREFORE, the parties hereto for good and valuable consideration, and the further consideration of * their forthcoming marriage and the mutual covenants and agreements herein contained, hereby mutually agree and covenant as follows:

1. The aforesaid recitals and statements are true and correct in all material respects.

2. Each clause of this AGREEMENT is separate and divisible from the others, and, should a court refuse to enforce one or more clauses of this AGREEMENT, the others are still valid and in full force.

3. The parties live together and plan to continue to do so indefinitely.

4. The parties agree that all of each party's "Separate Property," as herein defined, whether real or personal is the exclusive property of each party and that such property and the rents, issues and profits from it are the sole and separate property of the party who owns it, and that neither party has acquired an interest or shall acquire any right to or interest in that property or the rents, issues and profits from it by virtue of the parties' cohabitation or any other circumstance, except as provided herein.

For all purposes of this AGREEMENT, and as used herein, the term "Separate Property" shall mean, with respect to a party hereto, all of such party's right, title, and interest, legal or beneficial, in and to any and all property and interests in property, real, personal, or mixed, wherever situated, and regardless of whether now owned or hereafter acquired including, but not limited to, property inherited by a party, property gifted to a party by a third party and property which will be transferred by a third party in fulfillment of a legal obligation.

5. The earnings and income resulting from personal services after the date of execution of this AGREEMENT shall remain the separate property of the party whose services are compensated.

6. All property received by either party by gift, descent or devise shall remain the sole and separate property of the party receiving it, and the other party shall have no right to or claim in said property by virtue of the parties' cohabitation or any other circumstance.

7. The parties shall be jointly responsible for basic living expenses. Such expenses include, and are limited to: rent or mortgage, if any, utilities (including electricity, gas, water), telephone (excluding long distance charges which shall be allocable to the party who made or received the calls), real property tax, home owner's insurance, food and beverages. It is expressly agreed that basic living expenses for which the parties agree to be jointly responsible do not include the costs of medical care, income tax liability, or the cost of room and board of a dwelling other than the one jointly occupied by the parties.

8. In the event the parties jointly acquire any real or personal property, they shall list a full description of such property on a separate schedule, which shall be maintained with records pertaining to this AGREEMENT and their cohabitation. Ownership by the parties in jointly acquired property shall be in a fifty/fifty ratio, unless otherwise noted in a writing signed by both parties.

9. The parties currently cohabit the real property commonly referred to as *, California. * is the legal owner of * a fifty percent tenancy in common interest in said property. It is understood and agreed that * has an equitable interest in said property.

* and * are both entitled to possession of the entire property on an equal basis during the duration of their cohabitation. In the event of a separation, as defined herein, it is agreed that * will vacate the subject real property. It is further agreed that * will execute a deed and any other documents necessary to transfer *his/her ownership interest in the subject property to such third party as * shall designate at the time of separation, and * shall make no claim that s*he is entitled to any interest in said property.

10. The parties agree that neither has obtained by this

AGREEMENT or by the fact of cohabitation or by any other means, the right to succeed to or inherit property from the estate of the other except by valid Will, or the acquisition of property in joint tenancy with right of survivorship, after the date of this AGREEMENT. The parties understand that neither is obligated to give property to the other by Will or otherwise.

11. The parties agree that "separation" for purposes of this AGREEMENT shall exist when one of the parties a) delivers to the other a notice of intention to separate; and b) either vacates the premises or requests that the other party vacate the premises.

12. In the event of a separation, the parties shall equally divide all jointly held and jointly acquired property. The parties shall attempt to distribute the property to be divided in kind where feasible; property to be divided which cannot be distributed in kind shall be sold and the proceeds divided. Distribution of property, or proceeds from sale of property, shall be in accordance with ownership as provided in paragraphs 5., 6., 8. and 9. above.

13. It is further agreed that if during the period of cohabitation, * made any payments toward repairs, renovations or capital improvements of the * real property, upon separation s*he shall be entitled to receive full reimbursement of all such payments from *. The parties shall keep a written record of all such repair and/or improvement payments made by *. * shall also be entitled to receive interest on all such payments. The interest shall be calculated based upon the cost of living in accordance with the U.S. Government COLA index, during the intervening years between the date of the repair/improvement payment and the date of separation.

14. In the event that the parties are unable to agree to a division of their jointly-owned property, they shall select a panel of three arbitrators, in accordance with the procedures of paragraph 19. below. The arbitrators shall a) appraise the jointly-owned property at fair market value and b) divide the jointly-owned property as nearly equally between the two parties as possible. In the event an equal in kind division of the property is not possible, the parties agree to sell such items of their jointly-

owned property as the arbitrator shall select. In the event that an equal division of the property is not possible, and the parties and arbitrators agree that sale of any item of jointly-owned property would be impossible or wasteful, then the arbitrator may award more than a one-half share of the property to one party in exchange for cash or a promissory note to the other party, upon reasonable terms and interest. In making such an award, the arbitrator shall take into consideration the parties' relative financial conditions.

15. In the event of a separation, the parties agree that * shall pay to * for a period of three months following the date * vacates the shared real property, any and all rental income received from the rear cottage located at the * property. With the exception of this payment of rental income, it is agreed that neither party has any right to support or other compensation from the other party in consequence of cohabitation or this AGREEMENT.

16. In the event of a separation, the parties promise and agree that they shall each return to the other any and all letters written by the other.

17. In the event of a separation, it is agreed that * shall not write or publish any articles, stories or other writing about * or about her relationship with *.

18. In the event of a separation, * agrees that s*he is not entitled to receive any motor vehicles acquired during the relationship, unless s*he is the registered owner of the vehicle.

19. Each party covenants and agrees that any dispute pertaining to this AGREEMENT which arises between them shall be submitted to binding arbitration according to the following procedures:

- a. The request for arbitration may be made by either party and shall be in writing and delivered to the other party;
- b. Pending the outcome of arbitration, there shall be no change made in the language of the AGREEMENT;
- c. The arbitration panel that will resolve any disputes re-

garding the AGREEMENT shall consist of three persons: one person chosen by *, one person chosen by *, and one person chosen by the other panel members so selected.

- d. Within fourteen days following the breakdown of mediation, the arbitrators shall be chosen;
- e. Within fourteen days following the selection of all members of the arbitration panel, the panel will hear the dispute between the parties;
- f. Within seven days subsequent to the hearing, the arbitration panel will make a decision and communicate it in writing to each party.

20. If a party institutes legal action to enforce *his/her rights under this AGREEMENT, or to have a court determine the meaning of a dispute term, the prevailing party shall be entitled to reasonable attorneys' fees as fixed by the court. Notwithstanding the above, no party who fails or refuses to submit a dispute for resolution pursuant to the provisions of paragraph 19. above, shall be entitled to attorneys' fees in any legal action in which such dispute is all or part of the cause of action being sued upon.

21. Each party agrees that all questions with respect to the interpretation and enforcement of this AGREEMENT shall be resolved pursuant to the laws of the State of California.

22. Each party acknowledges and agrees that s*he signed this AGREEMENT voluntarily and freely, of *his/her own choice, without any duress of any kind whatsoever.

23. This AGREEMENT contains the entire understanding of the parties. There are no promises, understandings, agreements or representations between the parties other than those expressly stated in this AGREEMENT.

24. This AGREEMENT may be altered or amended only by written agreement signed by both parties.

25. Each party further acknowledges that this AGREE-

1993]

CONTRACTING FOR COHABITATION

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MENT was drafted by *, Attorney At Law, at the request of both parties; that they were advised that they might be waiving valuable rights by signing this AGREEMENT; that each party has been advised to seek the advice of separate counsel of *his/her own choosing; and that each party understands the meaning and significance of each provision of this AGREEMENT, the force and effect of each such provision having been explained prior to execution of this AGREEMENT.

IN WITNESS WHEREOF, the parties hereunto have executed this AGREEMENT, in the City and County of San Francisco, California, on the day and year first above written.

 *

 *

| | | |
|-------------------------|---|-----|
| State of California |) | |
| |) | SS. |
| County of San Francisco |) | |

On * _____ before me, the undersigned, a Notary Public in and for said State, personally appeared * and * known to me to be the persons whose names are subscribed to the within AGREEMENT, and acknowledged that they executed the same.

WITNESS my hand and official seal.

SAMPLE COHABITATION AGREEMENT #2¹⁴⁹
(more closely resembling the heterosexual civil marital
contract)

BETWEEN
BLANK1 and BLANK2

This Agreement is entered into this _____ day of _____, 1993, by BLANK1, hereinafter "BLANK1," and BLANK2, hereinafter "BLANK2," or hereinafter collectively referred to as "the PARTIES," each of _____ County, California.

RECITALS. The PARTIES live together and intend to continue living together until either decides to terminate the cohabitation. This document sets forth agreements by the PARTIES regarding property held by each, payment of expenses and debts, possession of the cohabited premises, and certain other concerns of the PARTIES hereto.

THE PARTIES AGREE AS FOLLOWS:

For purposes of this Agreement, "separation": as used in this Agreement shall exist after one of the PARTIES delivers to the other a written notice of intention to separate.

1. *Property Ownership:*

The PARTIES have acquired a joint ownership interest in that certain improved property commonly known as _____, _____, California (hereinafter "the property" or "the real property"). The PARTIES have entered into a written Agreement concerning said real property on _____, 1993, setting out their respective interests and rights in the property, and said Agreement concerning said Real Property is attached hereto and incorpo-

149. This sample cohabitation agreement was drafted by Linda Scaparotti, a sole practitioner specializing in Family Law, Sexual Abuse, Wills & Probate, Estate Planning & Trusts, and Personal Injury. Her ready willingness to provide this sample agreement and other advice has been greatly appreciated. Ms. Scaparotti may be reached at The Law Office of Linda Scaparotti, 1611 Telegraph Ave., Oakland, CA 94612; or by phone at (510) 835-0850. This agreement, as are the others in Appendix B, is a sample only and has not been tested for validity by any court of law.

rated herein. Said Agreement must be read in conjunction with this Agreement in terms of all questions and issues pertaining to the jointly owned house and real property.

2. *Earnings and Income During Cohabitation:*

The earnings and income resulting from personal services after the date of execution of this Agreement and during the cohabitation shall become the joint income of both PARTIES regardless of which PARTY earned it and said money will be deposited in the joint checking account (referred to in paragraph 5 below).

However, upon separation, if any, neither PARTY will have any right to the income of the other PARTY. The PARTIES agree that, upon separation neither PARTY will have any right to receive support from the other PARTY.

3. *Business Interests:*

The PARTIES agree that any business or business interests owned by one PARTY prior to the cohabitation is the sole and separate property of that PARTY but all income received therefrom becomes the PARTIES' joint income during the cohabitation.

However, neither PARTY shall have any interest in the business, business interest or in the income from any business of the other PARTY upon separation. As to any business jointly created or owned during the cohabitation, the PARTIES agree to draft a separate partnership agreement setting out the respective rights and responsibilities of the PARTIES in relation to the business.

4. *Gifts, Inherited Property, Etc.:*

All property and money received by either PARTY by gift, descent, or devise shall remain the sole property of the PARTY receiving it (during the cohabitation and upon separation), and the other PARTY shall have no right to or claim in said property by virtue of the PARTIES' cohabitation or any other circumstance unless said gift, descent or devise is deposited into a

joint account, or the title is held in joint tenancy, at which point it becomes jointly/equally owned. Further, any income or property derived from said gift, descent or devise remains the separate and sole property of the PARTY receiving the original gift, descent or devise, unless it is deposited into a joint account or title is held in joint tenancy, at which time it becomes jointly owned.

5. *Bank Accounts:*

- a. The PARTIES have agreed to, and have in fact, set up, a joint checking account for all house-related and all living and traveling expenses, as well as paying for all of their joint personal debts and expenses.
- b. Each PARTY will make monthly deposits into the account by depositing her paycheck or other income by the twenty-fifth (25th) of each month.
- c. The PARTIES may maintain other checking, money market, savings, credit union or similar accounts. Any accounts held in the separate name of a PARTY shall be that PARTY's separate account, and upon separation as well.
- d. Any accounts held in both names as joint accounts shall belong equally to both PARTIES and shall be divided equally between the PARTIES if they separate. However, due to the fact that BLANK2 contributed an additional \$BLANK3 to the opening of the joint checking account, upon separation, if any, BLANK2 is to first be reimbursed from any or all of the joint accounts the sum of \$BLANK3 before money in those accounts is divided equally. If there is not enough money to fully reimburse BLANK2, she will take however much there is up to \$BLANK3.

6. *Records and Accounts:*

The PARTIES shall maintain an accurate ledger of the joint house checking account and any other joint accounts or ventures showing all deposits and withdrawals, and keep all receipts for all house expenditures, i.e., mortgage, insurance, taxes,

repairs, improvements, etc.

7. *Personal Property:*

The PARTIES agree that they have separately purchased personal property in the past and will continue to do so and that such property will remain the separate property of the PARTY who purchased it even upon separation.

However, in terms of any personal property which was or is purchased jointly by the PARTIES, both PARTIES agree that, in the event of separation, they will negotiate in good faith an equal division of the property. If an equal in kind division is not possible, then whichever jointly purchased property BLANK2 takes, and whichever jointly purchased property BLANK1 takes, each will pay the other PARTY one-half of the depreciated value of said property. The PARTIES shall attempt to agree as to what is the fair depreciated value of said property. However, if they cannot so agree, they will each choose a person to arrive at a value and they will take the average of the two evaluations. If none of these arrangements are possible or if both PARTIES prefer, the jointly owned personal property shall be sold and the proceeds divided equally.

The PARTIES agree that, as of the date of the signing of this Agreement, the items listed on Schedule A are BLANK2's separate property and the items listed on Schedule B are BLANK1's separate property, while the items listed on Schedule C are their joint property. The PARTIES agree to update the lists annually, and to sign and date the updated lists.

8. *Expenses/Debts:*

a. The PARTIES agree to pay for all jointly acquired or held expenses and debts out of the joint checking account. The PARTIES agree presently that all expenses and debts listed on Schedule D shall constitute the joint debts and expenses of the PARTIES. The PARTIES agree to update the schedule at least annually to reflect all joint debts/expenses. Both PARTIES agree to divide and pay equally all jointly acquired or held debts upon separation.

b. The PARTIES further agree that during the cohabita-

tion they will pay separate debts of each PARTY from the joint checking and savings or similar accounts as well. However, each PARTY agrees to pay for her own separate debts upon separation and does not expect any contribution thereon from the other PARTY, nor is she entitled to payment of the separate debts with any joint funds.

c. Both PARTIES further agree to dissolve any credit card accounts that they may hold jointly upon separation, or to transfer accounts into the sole names of the PARTIES upon separation. Any separate charges of an individual PARTY on the joint credit card(s) shall be paid by the individual PARTY upon separation.

9. *Mediation:*

Any disputes between the PARTIES involving any of the provisions set out in this agreement, shall, on the written request of one PARTY to the other, be submitted to mediation within fourteen (14) days from the date of the request. A mediator shall be chosen by both PARTIES, or if they cannot so agree, the mediator shall be chosen by two people, each of whom shall be selected by a PARTY hereto. If PARTIES prefer, they may each choose a mediator and conduct the mediation sessions with two (2) mediators. The PARTIES may choose a mediation service such as GLADRS in San Francisco, and agree to follow all procedures of GLADRS, including their mediator(s) selection process. If the PARTIES are unable to reach agreement to resolve the dispute(s) after five (5) mediation sessions, the PARTIES shall submit the issue to arbitration, as provided below. The costs of mediation shall be borne equally by the PARTIES unless they agree otherwise.

10. *Binding Arbitration:*

In the event that the PARTIES are unable to resolve their disputes by means of mediation, the issue or issues in controversy shall be submitted to an arbitrator selected by the PARTIES, or if they cannot so agree on an arbitrator, to an arbitrator selected by two persons, each of whom shall be selected by one of the PARTIES. If either PARTY so requests in writing to the other PARTY, the arbitrator shall be competent to conduct

arbitration proceedings in conforming to, and the arbitration proceedings shall comply with, the arbitration provisions of the California Arbitration Act 1280-1294.2 of the California Code of Civil Procedure, or any successor statutes. For the purpose of this section, "arbitrator" means either an individual arbitrator or an arbitration panel which would include more than one arbitrator. An arbitration meeting shall be held within seven (7) days after the arbitrator or arbitration panel has been named. Each person shall be entitled to present whatever oral or written agreements she wishes and may present witnesses. Neither person may be represented by a lawyer or any third party unless both PARTIES agree to same. The arbitrators shall make their decisions in writing within five (5) days after the arbitration hearing. If one of the PARTIES fails to choose any arbitrator within the ten (10) days given, or in any way delays the arbitration process for other than good cause, the other PARTY may proceed to arbitration with the arbitrator she has chosen, if she gives the other party an additional five days written notice of "intention to proceed to arbitration." If there is still no response, this PARTY may proceed with the arbitrator she has chosen and that arbitrator's decision shall have the same force as it had been settled on by the mutually agreed-upon arbitrator(s). The cost of arbitration shall be born equally by the PARTIES. The arbitration award or result shall be conclusive (binding) on the PARTIES, and shall be set out in such a way that a formal judgment can be entered thereon in the court having jurisdiction over the dispute if either PARTY so desires.

11. *Consideration:*

The consideration for this Agreement is the mutual promises of the PARTIES as provided herein.

12. *Attorneys Fees:*

If one of the PARTIES institutes legal action to enforce her rights under this Agreement, or to have the court determine the meaning of a disputed term, the prevailing PARTY shall be entitled to reasonable attorney's fees as fixed by the court.

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13. *Heirs and Assigns:*

This Agreement shall be binding on each of the PARTIES and her heirs, assigns, and her successors in interest.

14. *Governing Law:*

The validity, interpretation, and effect of this Agreement shall be governed by the law of the State of California.

15. *Severability:*

Should one or more of the provision of this Agreement be determined to be invalid by a court of competent jurisdiction, the remaining provision shall remain in full force and effect.

16. *Amendments:*

This Agreement may be altered or amended only by written agreement or addendum signed by both PARTIES.

17. *Whole Agreement:*

This document contains the entire agreement of the PARTIES. No terms have been wholly or partially omitted, and neither PARTY has entered this Agreement in reliance on any term or representation not stated herein.

IN WITNESS WHEREOF, the PARTIES have signed this Agreement on the day and year set forth next to their signatures.

Dated: _____
BLANK1

Dated: _____
BLANK2

State of California)
) SS:
County of)

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On this _____ day of _____ in the year 1993, before me, a notary public for the State of California, personally appeared BLANK1 and BLANK2, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to this instrument, and acknowledged that they executed it.

Notary Public

Seal

This document was drafted by
the Law Offices of
Linda M. Scaparotti
1611 Telegraph Avenue, Suite 1200
Oakland, California 94612

APPENDIX B: SAMPLE PROPERTY OWNERSHIP
AGREEMENT #1¹⁵⁰

PROPERTY OWNERSHIP AGREEMENT

THIS AGREEMENT is entered into between Blank A, an unmarried woman (hereinafter "A") and Blank 2, an unmarried woman (hereinafter "B"), and is entered into with reference to the following facts:

A. WHEREAS A is the Owner of that certain real property located at and commonly known as 123 Our Street, City of Our Town, County of Our County, California (hereinafter "the Property");

B. WHEREAS the Property is in need of certain capital improvements, the cost of which will total approximately \$50,000;

C. WHEREAS B can afford to finance the capital improvements to the Property by making payments on a loan to cover their cost;

D. WHEREAS A, in recognition for the financing of improvements upon the Property by B, desires to transfer an undivided proportionate ownership interest in the Property to B, and has done so;

E. WHEREAS A and B (together, "The Parties") intend to own the Property as tenants in common, and desire to provide for the orderly and efficient ownership, management, operation, renovation, and occupancy of the Property, and such other matters set forth herein;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the Parties agree as follows:

150. This sample property ownership agreement was drafted by Teresa Friend, partner in the law firm Friend & Friedman. The author is grateful for Ms. Friend's contribution. Friend & Friedman specializes in Housing Discrimination, Plaintiff's Personal Injury, Premises Liability, Wills, Powers of Attorney, Sexual Orientation Discrimination, and Gay Rights. Ms. Friend may be reached at Friend & Friedman, 1440 Broadway, Suite 515, Oakland, CA 94612; or by phone at (510) 272-9700. As with other sample agreements, the validity of this agreement has not been tested in a court of law.

1. **RECITALS INCORPORATED INTO AGREEMENT.** The foregoing recitals are hereby incorporated into this Agreement, and are made an operative part hereof.

2. **BIDS FOR CONSTRUCTION OF IMPROVEMENTS.** The Parties shall obtain bids for the construction of the necessary capital improvements—which include roofing work, replacement of the kitchen, and other items—from at least two licensed, bonded general contractors.

3. **APPRAISAL OF PROPERTY BEFORE IMPROVEMENTS.** The Parties have obtained an appraisal of the Property in its present condition, before the construction of the improvements. This appraised value of the property, \$200,000, shall be used to calculate A's proportionate contribution to the value of the Property as a whole. The cost of the appraisal shall be borne evenly by both Parties.

4. **TRANSFER OF THE TITLE TO B.**

(a) **PERCENTAGE OWNERSHIP:** The shares of ownership of A and B will be determined as follows: A's share of ownership shall be \$200,000 divided by the sum of \$200,000 plus the actual cost of the capital improvements; B's share of ownership shall be \$200,000 divided by the sum of \$200,000 plus the actual cost of the capital improvements.

(b) **TRANSFER OF TITLE:** To effectuate the purposes of this Agreement, A has transferred title to the Property to herself and B as tenants in common. The fact that the transfer deed does not specify the percentage ownership of the tenants in common shall be of no significance whatsoever; the Parties' respective interests in the Property shall be calculated according to the terms of this Agreement.

(c) **ALLOCATION OF DEBT:** B's interest in the Property shall be encumbered by the full amount of the debt undertaken to finance the capital improvements, such that there shall be no transfer of equity in the Property from A to B. A's interest in the Property shall be encumbered by her first mortgage.

5. **HOME IMPROVEMENT LOAN.** In order to effectuate the purposes of this Agreement, the Parties have jointly obtained a

home improvement loan in the amount of \$46,000 to finance the capital improvements. B shall make all payments of principal and interest on this home improvement loan.

6. **ADDITIONAL FINANCING FOR CAPITAL IMPROVEMENTS.** If the home improvement loan discussed in Paragraph 5 above does not cover the actual cost of the capital improvements, then B shall be responsible for paying or financing the shortfall. It is contemplated that one method of financing such a shortfall is for a \$5,000 loan to be taken out secured by a tax shelter belonging to A. Beyond offering B the opportunity to use the \$5,000 tax shelter loan, A shall not be required to participate or assist in financing any remaining shortfall.

7. **CLOSING COSTS.** B shall be responsible for all closing costs incurred in connection with the home improvement loan. These closing costs may be financed—included in the total loan amount—if B in her sole discretion decides to; however, B's share of ownership shall not be recalculated on this basis.

8. **EQUAL MANAGEMENT.** A and B shall have equal rights in the management and conduct of the Property; however, they may designate one or the other as a financial manager, who shall be responsible for the day-to-day operation of the Property.

9. **MAINTENANCE EXPENSES.** The expense of property taxes shall be borne by the Parties in direct proportion to their ownership shares of the Property. Payment of insurance and all other maintenance expenses, including any accountants' fees, attorneys' fees, or other charges such as water, utilities, and garbage collection fees incurred to own, operate, and manage the Property shall be borne evenly by A and B. *Additionally*, B shall pay to A the sum of \$200 per month to offset A's share of these costs, regardless of the actual cost of these items, in recognition of the fact that A has greater expenses for debt maintenance on the Property. The Parties may adjust the \$200 payment from time to time to such other sum as may be mutually agreed upon.

10. **CAPITAL IMPROVEMENTS.** Capital improvements to the Property can be made with the consent of both Parties. If the Parties cannot agree as to whether a particular capital improvement should be made, then it shall not be made, unless it must

be made to prevent imminent damage to the Property. The Parties shall share in the cost of capital improvements in direct proportion to their shares of ownership of the Property.

11. RENTAL OF PROPERTY. Neither Party shall rent any part of the Property without the approval of the other Party.

12. SALE OF A PARTY'S INTEREST TO THE OTHER PARTY.

(a) *RIGHT OF FIRST REFUSAL*: If either Party at any time desires to sell her interest in the Property, the non-selling Party shall be given a right of first refusal to purchase the selling Party's interest. If the non-selling Party does not exercise the right of first refusal in accordance with sub-Paragraph (e) below, then the selling Party has the right to force a sale of the Property to a third party. Each Party shall be entitled to specific performance of this covenant.

(b) *RIGHT TO BUY OUT*: A shall have the right to buy out B's interest in the Property at any time. A shall be entitled to specific performance of this covenant.

(c) *DETERMINATION OF PROPERTY'S FAIR MARKET VALUE*: For the purpose of determining the value of a Party's interest, both the selling Party and the non-selling Party shall attempt to agree upon a licensed appraiser to provide them with the fair market value of the Property as of the date the selling party desires to sell. In the event that the parties are unable to agree upon a mutually acceptable appraiser, then the selling party and the non-selling party each shall, within ten (10) days, appoint a licensed appraiser of her choice and at her own expense. (Inability to agree can be established by either party in writing to the other.) The two (2) people so appointed shall each prepare appraisals of the Property's fair market value within three (3) weeks of their appointment. After both such appraisals have been received, the Parties shall again attempt to agree on the Property's fair market value. In the event that the Parties are still unable to agree, a third appraisal shall be obtained through a licensed appraiser, selected jointly by the first two appraisers or, if that is not possible, by some other method agreed upon jointly by B and A. If required, such appraiser shall prepare a third appraisal of the fair market value

of the Property, after being furnished with copies of both prior appraisals. The third appraiser shall submit a written appraisal of the fair market value of the Property within three (3) weeks of appointment, delivering copies to both the selling party and the non-selling Party. The Property's fair market value shall then be the median of the three appraised values (the middle one, after eliminating the high and low appraisals). The Parties shall equally share all costs of obtaining the independent appraisal. In the event that a sale is consummated, the Parties shall evenly divide the cost of any transfer tax.

(d) *DETERMINATION OF SELLING PARTY'S INTEREST IN THE PROPERTY*: The sale price of the selling Party's interest in the Property, when selling to the non-selling Party, shall be the Property's fair market value, determined as hereinabove provided, multiplied by the percentage share owned by the selling Party, unless B is the selling party and the sale price thus computed is lower than the amount of the outstanding indebtedness owed by B on the home improvement loan, in which case the sale price of B's interest shall be equal to the amount of the outstanding loan plus the amount of her share of the transfer tax.

(e) *EXERCISE OF RIGHT OF FIRST REFUSAL*: The non-selling Party's right to purchase the interest of the party desiring to sell shall be exercised, if at all, in writing, and within one hundred and twenty (120) days from the date on which the Property's fair market value is established pursuant to this Paragraph. Nothing in this Paragraph shall prevent the non-selling Party from obtaining a purchaser of her choice to exercise the right of first refusal contained herein.

(f) *TERMS OF SALE*: The terms of sale shall be negotiated in good faith between the Parties at the time of sale. Provided, however, that the selling Party shall be entitled to have any outstanding indebtedness secured by the Property assigned to or paid off by the non-selling Party, thereby completely releasing the selling Party from further debt secured by the Property.

Provided, further, that the selling Party shall be entitled to receive a cash sum at the time of sale equal to twenty percent

(20%) of the net proceeds due from the sale (the net proceeds being the sales price of the Party's interest less the amount of indebtedness from which the selling Party is released), with the remainder being paid off according to a ten-year amortization schedule, for payments of principal and interest at the Wall Street Journal prime rate, the prime rate being determined at the time of the signing of the note. The note shall be secured by a deed of trust on the Property.

(g) *COOPERATION REQUIRED*: Each Party agrees to execute such instruments and agreements as may be required in connection with the sale of the Property and otherwise shall act in good faith in connection with any sale under this Paragraph.

13. SALE OF THE PROPERTY TO A THIRD PARTY.

(a) *CONDITIONS FOR SALE*: The Property shall not be sold to a third party without the written consent of both Parties or except as otherwise provided in this Agreement.

(b) *COOPERATION REQUIRED*: In cases in which a sale to a third party is agreed upon or mandated by this Agreement, each Party agrees to execute such instruments and agreements as may be required in connection with the sale of the Property and otherwise shall act in good faith in connection with any sale.

(c) *DETERMINATION OF FAIR MARKET VALUE*: The fair market value of the property shall be determined in accordance with Paragraph 11(c) above, or by agreement of the Parties. The Parties agree to accept any offer to purchase the Property for a least ninety-five percent of the fair market value of the Property. This covenant may be enforced by specific performance.

(d) *DIVISION OF PROCEEDS*: The "net sales proceeds" shall be computed as the actual sales price less all costs and commissions associated with the sale of the Property. Each Party shall receive her percentage share of the net sales proceeds less any outstanding indebtedness that encumbers that Party's share. If the indebtedness encumbering a Party's share is greater than that Party's share of the net sales proceeds, then the net

sales proceeds will be applied so as to pay off the indebtedness, such that the Party will not be responsible for any future payment on the indebtedness, but the Party will receive no pay-out of proceeds.

14. RESTRICTION UPON SALE AND/OR PARTITION. Neither Party shall exchange, partition, lease, mortgage, convey by deed of trust, hypothecate or otherwise encumber the Property, or the interest owned by him in the Property, or any part thereof, or indirectly or directly sell, transfer, or assign the Property, or her interest therein, or any part thereof, to any third party, except upon first obtaining the written consent of the other Party, or upon the express terms and conditions set forth in this Agreement. Any such prohibited action shall be null and void and of no force or effect whatsoever.

15. DEFAULT. A Party to this Agreement shall be in default in the event that any of the following occur:

(a) She fails to fully meet all financial obligations with respect to the Property, as set forth in this Agreement, for three (3) successive months;

(b) She files any petition under the bankruptcy laws, and/or is adjudicated bankrupt, and/or makes an assignment for the benefit of creditors;

(c) She permits a lien to be recorded against her interest in the Property, which lien is not removed within six (6) months; or

(d) She fails to comply with any term or condition of this Agreement within six (6) months after written notice of her failure to do so is received from the other Party.

16. PROVISIONS APPLICABLE UPON A PARTY'S DEFAULT. In the event that a Party is in default pursuant to the provisions of Paragraph 15, the non-defaulting Party shall have the right to cure said default. In such event, the defaulting Party's entitlement to her share of the proceeds of any ultimate sale of the Property, shall be reduced by the amount necessary to cure the default.

17. **INSURANCE.** The owners shall maintain fire and extended coverage insurance for the full replacement value of the Property and comprehensive public liability and property damage insurance for the mutual benefit of the Parties.

18. **NO WAIVER.** A Party's failure to strictly enforce any default of the other Party hereunder, or to enforce any term of this Agreement, shall not be, or be construed as, a waiver thereof. Nor shall any customary practice which may develop between the Parties in the course of this Agreement be construed to waive or diminish the right of the other party to insist upon the full performance by the others of any terms, conditions, or covenants hereunder, or to exercise any rights given to any party given by reason of the default of the other party. A waiver of any particular breach or default shall not be deemed to be a continuing waiver, or a waiver of the same or of any other subsequent breach or default.

19. **COOPERATION.** The parties shall, upon request, execute, acknowledge, and deliver all such further instruments and to do all such other acts, as may be necessary or appropriate in order to carry out the intent and purposes of this Agreement.

20. **COUNSELING.** If any dispute arises concerning this Agreement or the terms or conditions hereof, the Parties shall attempt to resolve the dispute by attending counseling sessions with a counselor acceptable to them both.

21. **MEDIATION.** If the Parties have failed to resolve the dispute after five sessions of counseling as provided in Paragraph 20, then the Parties agree to submit the dispute to mediation with a mediator or mediating organization acceptable to them both.

22. **ARBITRATION.** If the Parties have further failed to resolve the dispute after five sessions of mediation, as provided in Paragraph 21, the dispute shall be settled by arbitration. Arbitration proceedings shall be conducted under the applicable rules of the American Arbitration Association, at the time a demand for arbitration is made, at San Francisco, California. The decision of the arbitrator shall be conclusive, final, and binding on the Parties, as well as their respective heirs, legal representatives, suc-

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cessors, and assigns. Any award of an arbitrator may be entered as a judgment in any Court having jurisdiction over the subject matter.

23. **SUCCESSORS AND ASSIGNS.** Subject to its terms and conditions, this Agreement is intended to, and does bind the heirs, executors, administrators, successors, and assigns of the Parties hereto. *Provided, however,* that an original Party to this Agreement shall have the right to buy out the successor Party according to the terms of Paragraph 12 above, and a Party's successor shall not have the right to buy out an original Party without the original Party's consent.

24. **MODIFICATION.** This Agreement shall not be modified except in writing executed by both Parties.

25. **ENTIRE AGREEMENT.** This document represents the entire Agreement of the Parties with respect to the Property and each of the Party's respective rights, obligations, and responsibilities with respect to the Property. Accordingly, it supersedes any prior Agreements or understandings regarding the Property in any manner, whether oral or written.

26. **SEVERABILITY.** Should any term, condition, or clause of this Agreement be held to be void, invalid, or inoperative by a Court of competent jurisdiction, such holding shall not affect or render any other term, condition or clause hereof to be void, invalid, or inoperative.

27. **GOVERNING LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.

28. **JOINT REPRESENTATION BY ATTORNEY.** The Parties acknowledge that in executing this Agreement that they were jointly represented by Alissa Friedman of Friend & Friedman, Attorneys at Law, at their mutual request. The Parties further acknowledge that they were advised of the benefits of retaining separate counsel.

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IN WITNESS WHEREOF, the Parties have executed this Agreement, in duplicate on the dates listed below.

Date: _____
A

Date: _____
B