

REVIEW ESSAY

A Review Essay: Tax and Financial Planning for Same-Sex Couples: Recommended Reading

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I. INTRODUCTION

In 1980, Hayden Curry and Denis Clifford, both attorneys in Oakland, California, authored the first edition of *A LEGAL GUIDE FOR LESBIAN & GAY COUPLES*.² As Donna Hitchens³ wrote in the foreword to that edition, “[o]ne of the most dramatic changes in gay life in recent years has been the increased number of lesbian and gay couples openly living together as loving couples. This is one area in which solid legal information has long been needed.”⁴

Before the publication of this guide, very little had been written that focused on estate planning for same-sex couples. In 1977, the Eighth National Conference on Women and the Law⁵ included, for the first time in the history of the Conference, a number of workshops focusing on legal issues affecting lesbians.⁶ The “lesbian law cluster” included a workshop on estate planning. From that time on, the National Conference on Women and the Law, until its demise,⁷ would

2. HAYDEN CURRY ET AL., *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (1st ed. 1980).

3. Donna Hitchens was at that time the Director of the Lesbian Rights Project, which evolved into the National Center for Lesbian Rights, San Francisco. She is currently a judge in San Francisco.

4. CURRY ET AL., *supra* note 2, at x.

5. The National Conference was hosted in Madison, Wisconsin, and planned by law students at the University of Wisconsin.

6. For a short history of the National Conference on Women and the Law, see Patricia A. Cain, *The Future of Feminist Legal Theory*, WISC. WOMEN'S L.J. 367, 378-83 (Summer 1997). See also Elizabeth Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past Into the Future*, VA. J. SOC. POL'Y & L. 1, 2-6 (Fall 1994).

7. The annual conferences ceased in 1992. In 1998, the conference was revived for one final meeting in San Francisco.

include workshops on drafting cohabitation agreements and related estate planning documents, such as wills, trusts, and durable powers of attorney. I was an active participant in these workshops and learned many practical insights from the practitioners who attended as panelists and discussants. As a professor of law, who taught federal tax courses and the substantive course on wills and estates, I previously had little occasion to consider the special problems that arose for lesbians and gay men as they tried to plan their joint retirements and their joint accumulation of property. Premature, unexpected deaths are difficult to live through even in the best of circumstances. For a lesbian or gay man who must put her or his life back together after the death of a partner, the problems encountered are exacerbated by lack of planning and by the fact that the law considers such partners strangers. Discussions at these conferences alerted me to the need for "solid legal information."

Not much has changed since those early days, except that the number of lesbian and gay couples living together openly has increased.⁸ Workshops at the National Conference on Women and the Law have been replaced by workshops at the annual Lavender Law Conference.⁹ Solid legal information for lesbian and gay couples is still in demand. A LEGAL GUIDE, now in its ninth edition, continues to serve the lay population by providing basic property, financial and estate planning information.¹⁰ The two additional books that are the topic of this review essay, LEGAL AFFAIRS¹¹ and PERSONAL FINANCIAL

8. Measuring the number of same-sex couples who live together poses a number of problems. Until recently, the U.S. Census did not count the number of same-sex couples, and even now that it does, the question asked includes all same-sex couples and not just gay and lesbian couples. However, these counts tell us something. The number of same-sex couples reported by the Census has been steadily increasing since 1990, although at a rate below the increase in opposite-sex couples who live together. See Mary Louise Fellows, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQUALITY 1, 3 (1998). As of March 1997, there were approximately two million same-sex couples living together in a single household. See CENSUS BUREAU, MARITAL STATUS AND LIVING ARRANGEMENTS (March 1997) (Update) Table 8.

9. Lavender Law is an annual conference for lesbian and gay lawyers, sponsored by the National Lesbian and Gay Law Association, an affiliate of the American Bar Association. The first Lavender Law Conference was held in 1988 in San Francisco. The first five conferences were held every other year. Since 1996, the conference has been held annually. The eighth conference will be held in Seattle, Washington during the fall of 1999.

10. Hayden Curry died from AIDS in 1991. His friend and co-author, Denis Clifford, continues the work they began together and has been joined by Robin Leonard. See HAYDEN CURRY ET. AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES xiii-xiv (9th ed. 1996) [hereinafter A LEGAL GUIDE].

11. FREDERICK HERTZ, LEGAL AFFAIRS: ESSENTIAL ADVICE FOR SAME-SEX COUPLES (1998) [hereinafter LEGAL AFFAIRS].

PLANNING FOR GAYS AND LESBIANS,¹² are welcome additions and help answer the demand by the lay population for solid, affordable and accessible legal information.

All of these books are helpful in answering questions for potential clients. What they don't provide, and what no other book provides, is solid and specific information for attorneys who work with such clients. The only book that comes close to doing this is *SEXUAL ORIENTATION AND THE LAW*.¹³ The two volume treatise contains one chapter on Property and Cohabitation Agreements,¹⁴ one chapter on Federal Taxes,¹⁵ and one chapter on Death, Incapacity and Illness.¹⁶ These chapters, however, are written more for the general practitioner than for the tax or estate planning expert, and thus are not much more advanced than the three books that are the subject of this essay, all of which were written for lay audiences. In fact, because these three books are written for lay audiences, and because our clients are likely to have read some portion of the advice given in these books, I believe it is particularly helpful for practicing attorneys to read these books as well.

This review essay is addressed to practicing attorneys and law students who may be considering representing lesbian and gay clients in estate planning matters. First, I will briefly describe the books and identify their strong and weak points. Then I will focus on two substantive areas of the law that are of concern to lesbian and gay couples in the estate planning process: life insurance and joint tenancy. All three books misstate (or, in some cases, overstate) the legal concerns that arise for lesbian and gay couples when naming each other as a beneficiary on an insurance policy or as joint tenant on a deed. Because couples often use life insurance and joint tenancy in their estate plans, I believe more detailed information regarding the applicable law, and its variations state by state, is needed. Thus, this essay should prove useful not only to lawyers and law students, but to the couples whose lives are affected by the legal rules I discuss.

12. PETER M. BERKERY, JR., *PERSONAL FINANCIAL PLANNING FOR GAYS AND LESBIANS* (1996) [hereinafter *PERSONAL FINANCIAL PLANNING*]; see also PETER M. BERKERY, JR. AND GREGORY A. DIGGINS, *GAY FINANCES IN A STRAIGHT WORLD: A COMPREHENSIVE FINANCIAL PLANNING HANDBOOK* (1998) (an easy-to-read paperback that contains much of the same information as Berkery's *Personal Financial Planning for Gays and Lesbians*, which was published in hardback, and will not be re-issued in a new edition).

13. See generally ROBERTA ACHTENBERG, ED., *SEXUAL ORIENTATION AND THE LAW* (1985 & Supp. 1998).

14. See *id.* at 2-1-2-69 Chapter 2.

15. See *id.* at 3-1-3-51 Chapter 3.

16. See *id.* at 4-1-4-63 Chapter 4.

II. THE BOOKS

A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES, NINTH EDITION. By Hayden Curry, Denis Clifford & Robin Leonard. Berkeley: Nolo Press, 1996. Pp. 258. \$24.95.

PERSONAL FINANCIAL PLANNING FOR GAYS & LESBIANS. By Peter M. Berkery, Jr.. Chicago: Irwin Professional Publishing, 1996. Pp. 371. (out of print).¹⁷

LEGAL AFFAIRS: ESSENTIAL ADVICE FOR SAME-SEX COUPLES. By Frederick Hertz. New York: Henry Holt and Company, 1998. Pp. 262. \$17.95.

All three of these books are written for a lay audience. A LEGAL GUIDE is intended to provide basic information about a wide range of topics that affect lesbian and gay couples, from parenting to property ownership to estate planning.¹⁸ But it goes further than mere explanation. The book also provides sample forms and suggestions to enable readers to act as their own lawyers.¹⁹

Peter Berkery's PERSONAL FINANCIAL PLANNING FOR GAYS AND LESBIANS is organized so that it first explains the fundamentals about a particular topic (i.e. the income tax) by setting out the "straight facts," and then it addresses the issues of particular concern to the lesbian and gay community under a separate heading entitled "our issues."²⁰ For lawyers who advise clients on financial and tax matters, this organization should be particularly helpful. Those who know the "straight facts" can move directly to the material discussed under "our issues" to see whether they have overlooked anything. At the end of each topic, Berkery includes a section entitled "related topics" which serves as a useful cross reference for the reader.

Frederick Hertz takes a somewhat different approach in his book, LEGAL AFFAIRS: ESSENTIAL ADVICE FOR SAME-SEX COUPLES.²¹ Not only does Hertz offer general explanations about legal problems that may arise in the course of a same-sex relationship, he also offers some

17. This book is currently out of print, and the author says there is no plan to reissue it in a new edition. *But see* Peter M. Berkery, Jr. and Gregory A. Diggins, *Gay Finances in a Straight World: A Comprehensive Financial Planning Handbook*, published in 1998 by MacMillan (\$19.95). This book contains much of the same information as the out of print book, although it is not as comprehensive.

18. *See generally* A LEGAL GUIDE, *supra* note 10, at vii-ix.

19. *See id.* at form 1-1, form 11-3.

20. *See* PERSONAL FINANCIAL PLANNING, *supra* note 12.

21. *See generally* LEGAL AFFAIRS, *supra* note 11.

very sage advice about relationship building and dissolving. The result is a richly textured account of the highs and lows and varieties of same-sex relationships, with the law always there as a backdrop. Neither the law nor legal concerns drive the organization of the book. Rather, the relationship does. The book begins with courtship, continues through commitment, and then focuses on the problems of dissolution if the couple decides to terminate the relationship. Termination of the relationship upon the death of one partner is not dealt with separately, instead, estate planning advice is given throughout the book. *LEGAL AFFAIRS* is very easy to read. Because it is written by a practicing attorney who has represented gay and lesbian couples for a number of years, it provides a wealth of practical insights and information about gay and lesbian relationships generally. Practicing attorneys or law students who want more insight into the emotional and psychological lives of the clients whom they might represent will gain valuable practical knowledge from this book.

Writing about the law for a lay audience is something lawyers do all the time. Still, the task is not an easy one. Crafting an opinion letter that states the law both accurately, and in language and concepts that the client can understand, is a talent developed over time. Often, it is not possible to make general statements that are absolutely accurate. General legal rules always have exceptions and a slight change in the particular facts of a case can trigger application of a different rule. The authors of all three books do a very good job of speaking in general terms about complex issues. Young and inexperienced lawyers may benefit from reading any one of these books simply to remind themselves of how little clients sometimes know and to garner examples of how to explain to such clients certain basic concepts such as what a durable power of attorney is.

In all of these books, the authors have chosen to address their comments directly to the client. To do this successfully, they have to consider the possibility that all the “client” readers are in different types of relationships, have different sorts of property ownership, and have different desires. Hertz takes care of these differences in *LEGAL AFFAIRS* by noting at the outset that couples exist in many different forms. He describes four different types of coupling that range from the uncommitted (girlfriends or boyfriends) to the lifetime commitment of what he calls “the nuclear model” (a relationship that mirrors traditional legal marriage).²² In between these two extremes,

22. See *id.* at xlvi-xlix.

he offers two alternative models. His “atomic model”²³ is for couples who wish to maintain separate spheres no matter how deep the commitment and his “fusion model”²⁴ is for couples who wish to do more blending or merging, typically in domestic matters, while maintaining some separation in other matters. The authors of *A LEGAL GUIDE* discuss similar differences in taste when discussing joint bank accounts.²⁵ The “marriage model” is for couples who view all property acquired during the relationship as jointly owned.²⁶ The “socialist model” is for couples who believe contributions to expenses and capital purchases should be made in accord with relative abilities.²⁷ The “business partnership model” is used by couples who maintain joint accounts for certain activities only, i.e., investment property or the residence.²⁸ Finally, there is the “splitsies model,” which requires separate accounting by each partner and no joint accounts.²⁹ Berkery notes early on in his book that some couples combine their finances (the Ozzie and Harriet couple), whereas others keep their finances separate.³⁰

A major issue for many lesbian and gay couples is how much sharing and how much separateness there should be in the relationship. For married couples, there are culturally-created expectations of a certain amount of sharing. In whose name the account is opened and whose name is on the deed are often less important questions for married couples than for same-sex couples who cannot marry. The marriage contract imposed by the state requires a certain amount of sharing. Spouses are liable for each other’s support and if the marriage ends, property acquired during the marriage is divided equitably, if not equally.³¹ The marriage ceremony and the resulting contract terms imposed by the state signal commitment and responsibility. For lesbian and gay couples, promises of commitment and responsibility may be empty gestures in the absence of a retitling of assets or the execution of a contract. Reluctance to merge assets is sometimes viewed by one partner as an indication that the other partner is less committed. Yet, a savvy and

23. *See id.* at xlvi.

24. *See id.* at xlvi-xlvii.

25. *See id.* at 2-15.

26. *See id.* at 2-15.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See PERSONAL FINANCIAL PLANNING, supra* note 12, at 12.

31. *See, e.g.,* CARL E. SCHNEIDER & MARGARET F. BRINING, *AN INVITATION TO FAMILY LAW* 234, 260 (1996).

financially responsible individual should not begin merging assets without understanding the legal consequences. Thus it is that many lesbians and gay men seek information about merging their assets with their partners before consulting an attorney.

All three books can be recommended to gay men and lesbians who are looking for such information. And there's plenty of good information in all these books. But there is also some misinformation.³² Misinformation is bound to occur no matter how diligent the authors are because (1) the law changes and (2) the law is different in different states. Berkery and Hertz are more diligent in their warnings to readers about these risks than are the authors of *A LEGAL GUIDE*.³³ Both Berkery and Hertz are careful to suggest that the reader consult a local attorney to learn more.³⁴ However, because *A LEGAL GUIDE* is structured to replace the need for local attorneys, the warnings occur less often in that book. On balance, the valuable advice and information in *A LEGAL GUIDE* far outweighs the risk that a do-it-yourself contract will make a couple worse off rather than better off. Although I believe strongly that individuals with significant assets ought to consult attorneys before merging assets, a do-it-yourself contract, or will, may be the best (or only viable) option for those with fewer assets. After all, if the alternative is no contract or no will, then we know that the surviving partner is likely to lose everything.³⁵ At their core, all three books make the case that lesbian

32. See *A LEGAL GUIDE*, *supra* note 10, at 5-29. In this section, the authors set out the amounts that are exempt from federal estate taxes, and show \$625,000 as the amount for 1996, increasing by \$25,000 each year to a maximum amount of \$750,000 as of 2001. Although this increase was proposed by the Job Creation and Wage Enhancement Act (H.R. 9) in 1995, it never became law. However, an increase in the exemption equivalent amount was enacted in 1997. The exemption amount for 1998 was set at \$625,000, increasing incrementally to \$1,000,000 in 2006. See IRC § 2010 (West 1998). Hertz also misstates the exemption amount in his book, when he says it will increase to \$1,000,000 by the year 2000. See *LEGAL AFFAIRS*, *supra* note 11, at 155. Berkery gets it right in his book, but his book was published before the new law was enacted. See *PERSONAL FINANCIAL PLANNING*, *supra* note 12, at 328. Thus, his book shows the now outdated \$600,000 amount. See *id.*

33. See *LEGAL AFFAIRS*, *supra* note 11, at xxi-xxii; *PERSONAL FINANCIAL PLANNING*, *supra* note 11, at 299, 302, 310, 348.

34. See *LEGAL AFFAIRS*, *supra* note 11, at xxiv; *PERSONAL FINANCIAL PLANNING*, *supra* note 12, at vii.

35. There is always the possibility that the surviving partner can assert claims based on oral contracts, implied or express. Ever since the *Marvin* case was decided in 1976, courts across the country have been more willing to enforce contracts between unmarried cohabitants. See *Marvin v. Marvin*, 557 P.2d 106, 122-23 (Cal. 1976) (holding contracts between opposite sex cohabitants enforceable despite claim that enforcement of an agreement made in furtherance of a meretricious relationship violates public policy favoring marriage, provided there is consideration other than sexual services.) Most of the successful cases, however, involve cohabitants who have terminated their relationships during the lives of both partners. Asserting a *Marvin* claim after the death of one partner is more difficult because of the Statute of Frauds and the Statute of Wills.

and gay men who are serious about the well-being of their partners, owe it to themselves and their partners to plan for the future by either drafting the requisite documents for themselves or hiring lawyers to do so.

Despite my praise for these books and their positive contribution to the information deficit for lesbian and gay couples, I came away from my final reading of all three books with some concern about how several topics were treated. Two topics in particular are worthy of greater focus because they play a central role in the financial affairs and estate planning goals of many lesbian and gay couples. Those two topics are: (1) Using life insurance to protect against financial difficulties that can stem from premature death. I will deal with both of these topics in the following section, and (2) Joint ownership of the residence.

III. TOPICS OF SPECIAL CONCERN

As Elizabeth Birch, Executive Director of the Human Rights Campaign, observed: “The financial rules of this country were not written with gay and lesbian Americans in mind.”³⁶ Life insurance and joint property ownership are two specific areas in which the rules continue to ignore the reality of gay and lesbian families.

A. *Life Insurance*

1. Who Needs It?

Curry, Clifford and Leonard state in *A LEGAL GUIDE*: “Most lesbian and gay people we know don’t have life insurance, and, with a few exceptions, we don’t see any reason for them to get it.”³⁷ The exceptions they note are (1) couples with minor children who need life insurance to support the children in the event of a premature death, and (2) couples who are financially dependent on each other for such things as making the mortgage payment.³⁸ Hertz makes a similar point in his book when he observes that “you need to ask

But see *Byrne v. Laura*, 60 Cal. Rptr. 2d 908, 913 (Ct. App. 1997) (holding that a claim survived summary judgment because there was evidence of more than an oral agreement to hold as joint tenants and there were equitable arguments to avoid the Statute of Frauds); *Davis v. Roberts*, 563 N.W.2d 16, 21-22 (Iowa Ct. App. 1997) (finding that an oral agreement between co-tenants to hold as joint tenants with the right of survivorship may be enforced after the death of one co-tenant despite the Statute of Frauds).

36. *PERSONAL FINANCIAL PLANNING*, *supra* note 12 (emphasizing the need for such works on the jacket of *PERSONAL FINANCIAL PLANNING*).

37. *A LEGAL GUIDE*, *supra* note 10, at 2-21.

38. *See id.*

yourselves if you need or can afford life insurance. If you are both financially independent and are likely to stay this way for a while, life insurance may not be necessary.³⁹ Berkery offers more detailed information about life insurance.⁴⁰ He includes a discussion of the many different uses of life insurance and offers some rule of thumb guidance about how much you may need.⁴¹

While I agree that life insurance might not be a wise investment for many lesbian and gay couples, I also believe all couples should be encouraged to look closely at the issue of financial dependence. Even if both partners in the couple are employed and earning hefty salaries, questions about financial dependence are relevant. At the top of Berkery's list of the uses of life insurance is "[m]aintaining a standard of living."⁴² When two people are contributing to the standard of living, it is likely to result in a higher standard of living than if only one person is contributing. Two people can buy a more expensive home, they can pay higher utility bills, they can pay for better landscaping and home maintenance services, and they can better afford a vacation home and its maintenance costs. Even when one person is staying home, the standard of living is likely to be higher because of the wage-free and tax-free performance of services in the home. Whenever two people have become sufficiently coupled so that they depend on joint incomes or a combination of income and services, the premature death of one of the partners will leave the survivor at a financial disadvantage. Life insurance was created to fill this need and to protect against such disadvantages.

Whether purchase of life insurance makes sense in a particular fact situation depends on the extent of the potential disadvantage and the cost of the insurance. For employees whose employers provide group term life insurance as one of the fringe benefits offered all employees, the cost is likely to be quite low and well worth choosing. For others, term insurance is likely to fill the need because its cost is low when the insured is young and that is when people need insurance the most.

39. LEGAL AFFAIRS, *supra* note 11, at 152.

40. See PERSONAL FINANCIAL PLANNING, *supra* note 12, at 37-49.

41. See *id.* For example, if someone is dependent on your income stream, you might need to buy life insurance with a face amount of five to seven times your salary in order to protect that person. Of course, the exact amount needed depends on whether your dependent needs the full income stream and on the length of time he or she may need that source of support. See *id.* at 39.

42. *Id.* at 37.

Second on Berkery's list of uses for life insurance is the payment of estate taxes.⁴³ Estate taxes are more of a problem for lesbian and gay couples because the full amount of wealth passing from the first to die to the survivor is subject to the tax.⁴⁴ Spouses, by contrast, can leave their estates to each other free of the estate tax.⁴⁵ For gay and lesbian couples residing in states that still have an inheritance tax, the tax cost of death is increased. Iowa, for example, taxes transfers to an unrelated individual at the rate of 15% with no exemptions.⁴⁶ Thus a lesbian partner who leaves her \$650,000 estate to her partner of thirty years will pay no federal estate taxes,⁴⁷ but will pay over \$90,000 in Iowa inheritance taxes.⁴⁸ If the surviving partner had been relying on the full \$650,000 as additional support after her partner's death, she will be out of luck. Life insurance is a sensible solution for such couples.

Married couples purchase life insurance to cover estate taxes as well, but for them the estate tax bite typically occurs at the death of the second to die, when the combined estates of both spouses will pass to the next generation, the children.⁴⁹ The life insurance industry has responded to the needs of such couples by offering a product known as "second to die" life insurance.⁵⁰ The face amount of the life insurance policy should be high enough to cover the estimated estate taxes and the risk covered will be the death of the second spouse. The policy premium for insurance that pays only once on two lives is cheaper than the premium would be if both spouses purchased individual policies. While it is true that the individual policy option would result in twice as much insurance coverage, the couple only needs for the policy to pay once, not twice.

43. *See id.* at 37, 335-336.

44. *See* I.R.C. § 2056, 2523 (West 1999).

45. The federal transfer tax system contains a marital deduction which effectively exempts all spousal transfers (whether by inter vivos gift or at death) from the transfer tax. *See id.*

46. The first \$50,000 is taxed at 10%, the next \$50,000 at 12%, and amounts in excess are taxed at 15%. *See* IOWA CODE ANN. § 450.10(2) (WEST 1999).

47. As of 1999, the exemption equivalent amount for federal estate and gift taxes is \$650,000. That means that a taxpayer can make cumulative lifetime and deathtime gratuitous transfers of \$650,000 before he or she will owe any federal taxes on the transfers.

48. *See* IOWA CODE ANN. § 450.10(2) (WEST 1999).

49. For example, consider a husband and wife who each have accumulated estates worth \$800,000. If husband dies first and leaves all of his property to his spouse, there will be no estate tax. (Of course, a wiser option for him would be to leave his exemption equivalent amount to his kids or in a credit shelter trust for the benefit of his wife and kids.) However, at the wife's death, she will have a combined estate of \$1.6 million which will trigger a sizeable estate tax.

50. *See generally* L. Henry Gissel, Jr. PLANNING TECHNIQUES FOR LARGE ESTATES, SD 33 ALI-ABA 375 (November 16, 1998).

Berkery discusses second to die life insurance in his book and notes that it can be used for gay and lesbian couples who wish to use it to pay the estate tax on the death of the second partner.⁵¹ He is correct in his observations and perhaps second to die insurance makes sense for those couples who wish to pass as much of their combined wealth as possible to their children. But for most gay and lesbian couples, the primary concern with estate taxes occurs at the death of the first to die, when the government takes a chunk out of the wealth that the surviving partner might need to maintain his or her established standard of living. Neither Berkery, nor any other writer on the topic of gay and lesbian estate planning that I have seen, has ever considered the use of “first to die” life insurance to meet the needs of the lesbian and gay community.

2. First to Die Life Insurance

“First to die” (FTD) life insurance was used by spouses in the days before the unlimited marital deduction, but it was never very popular.⁵² Today it is used primarily to fund buy-sell agreements.⁵³ For example, if *A* and *B* are partners in a business, they may want to agree that upon the death of the first partner, the surviving partner will have to pay the fair market value of the deceased partner’s interest in the business to the estate of the first to die. Since they have no way to know which of them will die first, they must take out insurance covering both lives. But they only need the insurance to pay out once, upon the death of the first to die. Taking out two single policies would overfund the buy-sell arrangement and it would cost more. The solution is to purchase a single policy covering both lives that will pay out only at the first death, when the buy-sell obligation is triggered. Similarly, if *A* and *B* are life partners, they can use FTD life insurance to fund the estate tax payment to the federal government on the death of the first to die in much the same way as business partners *A* and *B* use it to fund their buy-sell agreement. Their alternative plan would be to take out a term policy on *A*’s life, payable to *B*, and to take out a separate term policy on *B*’s life, payable to *A*.

Assume that the estimated estate and inheritance tax liability on the death of the first to die is \$200,000. The question is whether it makes more sense to fund that liability by purchasing two \$200,000

51. See PERSONAL FINANCIAL PLANNING, *supra* note 12, at 335-336, 339.

52. See generally Gissel, *supra* note 50.

53. See *id.*

policies, one on each partner's life, or by purchasing a single FTD policy that will pay out \$200,000 only once, on the death of the first to die. It has been estimated that some FTD policies cost 40% less than two single policies in the same face amount.⁵⁴ At that discount, the FTD option seems well worth the cost so long as the couple truly has no concerns about liquidity or taxes due at the death of the second to die. For example, if the estate plan calls for a distribution upon the death of the second to die to collateral relatives who are in no way dependent on the survivor, then life insurance on the survivor seems unnecessary. The same would obviously be true if the estate plan called for charitable gifts upon the death of the second partner.

a. Tax concerns

There is, however, another concern if FTD insurance is used. That concern centers on the potential tax cost to the couple of using a FTD policy instead of two term policies, one on each partner's life. To avoid paying an additional estate tax on the \$200,000 life insurance, the insurance cannot be owned by the insured.⁵⁵ Nor can the proceeds be payable to the estate of the insured.⁵⁶ In either case, section 2042 will require inclusion of the proceeds in the estate of the insured. The challenge is to figure out a plan for ownership of the FTD insurance that will avoid section 2042, as well as other estate tax inclusion provisions.

i. Section 2042 and the Incidents of Ownership Test

Section 2042 of the Internal Revenue Code includes life insurance in the gross estate if the deceased owned the policy.⁵⁷ If partners *A* and *B* decide to fund the estate tax liability on the death of the first to die using two term life insurance policies, it is easy to arrange ownership of the policies so that neither owns the policy on her own life. *A* can own the policy on *B*'s life and *B* can own the policy on *A*'s life. There is no need to establish an irrevocable trust to hold these policies because upon the death of either partner, presumably the policy on the surviving partner would be canceled as

54. *See id.*

55. *See* I.R.C. § 2042 (West 1999). Under section 2042, the face amount of any life insurance owned at death is included in the taxable estate of the insured. To escape this inclusion rule, the insured must arrange for someone else to own the policy. In fact, he must be sure that he retains no single incident of ownership (e.g., the right to name the beneficiary or to determine how the policy will pay out at death).

56. *See* I.R.C. § 2042(2) (West 1999).

57. *See id.*

it is no longer necessary.⁵⁸ But who can own a FTD policy in order to avoid the tax imposed by section 2042?

The problem is that we have a single policy that covers two lives. Obviously this is one asset that should not be jointly owned. If both *A* and *B* own the policy, then no matter who dies first, the face amount of the policy will be included in that person's estate because that person was an owner of the policy. At the very least, the couple should decide that the person most likely to survive should own the policy. In that case, the risk of inclusion under section 2042 upon the death of the first to die is at least only 50/50. However, if the wrong person dies first, the estate tax is likely to be triggered at a high enough rate that the 40% savings in premium costs will not be sufficient to cover the tax.⁵⁹ Thus, the best arrangement would be to find someone other than *A* or *B* to own the policy.

Because the owner of the policy is usually the person who can name the beneficiary, *A* and *B* are unlikely to feel comfortable transferring ownership to a trusted friend or relative.⁶⁰ Besides, should the trusted friend or relative predecease *A* and *B*, the policy will have to find a new owner.⁶¹ A better solution in this case would seem to be the establishment of an irrevocable life insurance trust.⁶² The trustee must be someone other than *A* or *B*.⁶³ In addition, the

58. Use of a trust to own the life insurance policy makes sense if the policy owned by either partner is intended to continue in existence after the death of the first partner. For example, if *B* owns the \$200,000 policy on *A*'s life, then at *B*'s death the policy will pass through *B*'s estate to *B*'s heirs or beneficiaries. If the policy has value, it will be taxed in *B*'s estate. If the policy is a term policy, the value may be a small percentage of the face amount, depending on what the renewable rights are. If *B*'s will leaves everything to *A* then the couple will have paid a tax on a transfer from *B* to *A* of an asset that *A* didn't want taxed in *A*'s estate. And of course now that *A* owns the policy, it will be taxed in *A*'s estate. If *A* intends to maintain the policy after *B*'s death, then it would make sense to consider using an irrevocable life insurance trust to own the policy from the beginning in order to gain the estate tax advantage of keeping the asset out of *A*'s estate. Using a trust raises problems about who will be the trustee after *B*'s death and who will pay the premiums. My view of this situation, however, is that the policies were only taken out by *A* and *B* to fund the estate taxes on the death of the first to die. Thus, at *B*'s death, the purpose of the arrangement will have been carried out via the policy on *B*'s life, which is owned by *A*. After *B*'s death, *A* should simply cancel the policy on *A*'s life as it is no longer needed. Of course the value of the policy on *A*'s life as of *B*'s death will still be subject to estate taxes in *B*'s estate.

59. Even though the first \$650,000 in gratuitous transfers is exempt from the estate tax, the first dollar over that amount is taxed at the rate of 37%. See I.R.C. § 2001(c)(1) (West 1999).

60. In some cases, it is possible, however, to provide via contract with the insurance company that the beneficiary cannot be revoked.

61. There is also the "insurable interest" problem if the policy is owned by a friend. See discussion *infra* at pp. 19-27.

62. See generally Gissel, *supra* note 50.

63. This is especially true in the Fifth Circuit. See *Rose v. United States*, 511 F.2d 259, 264-65 (5th Cir. 1975); *Terrberry v. United States*, 517 F.2d 286, 289-290 (5th Cir. 1975) (both holding that a trustee who holds incidents of ownership on a life insurance policy on his own life,

trustee should be the one who takes out the insurance. If instead *A* and *B* take the insurance out and transfer to the trustee, they may be caught by the transfer rule of section 2035.⁶⁴

But if the trustee is to purchase and maintain the policy, where will the trustee get the money to pay the premiums? Presumably these funds will come from *A* and *B*. Annual payments of premiums by *A* and *B*, even if made through the trust, cause at least two problems. First, if either *A* or *B* is the motivating force behind acquisition of the policy,⁶⁵ then the IRS might argue that the motivating force is making a transfer of the policy to the trust or to the trust beneficiaries. If successful, this argument would trigger the rule in section 2035(d)(2) which includes in the taxable estate any life insurance once owned by the insured if it is transferred to another within three years of death.⁶⁶ Although payment of premiums is not generally treated as a transfer of a policy,⁶⁷ commentators usually warn that it is better to make funds available to the trustee and allow the trustee to pay the premiums as needed in the trustee's discretion.⁶⁸ In addition, it is crucial to have the trustee apply for the policy so that the insured never owns it. If the insured never has any incidents of ownership under section 2042, then section 2035 cannot apply to a "constructive transfer" of the policy.⁶⁹

even if he has no beneficial interest in the trust, will be treated as an owner of the policy under § 2042). *But see* *Hunter v. United States*, 624 F.2d 833, 839-840 (8th Cir. 1980); *Estate of Connelly v. United States*, 551 F.2d 545, 552 (3d Cir. 1977) (removing proceeds of decedent's life insurance policy from his estate because he did not meet the ownership experience); *Estate of Skifter v. Commissioner*, 468 F.2d 699, 701-702 (2d Cir. 1972); *Estate of Fruehauf v. Commissioner*, 427 F.2d 80, 83-85 (6th Cir. 1970) (distinguishing possession of power to revoke or change from where decedent holds powers merely as transferee).

64. Section 2035(d)(2) would include in the taxable estate the face amount of any life insurance policy that was transferred by the insured within three years of death. Although the IRS argued that payment of premiums was sufficient to make the payor the transferor of the policy for purposes of section 2035, that argument was rejected by the courts. *See* *Estate of Leder v. C.I.R.*, 893 F.2d 237, 240-41 (10th Cir. 1989); *Headrick v. C.I.R.*, 918 F.2d 1263, 1266-67 (6th Cir. 1990). The IRS has since acquiesced and no longer litigates this issue. *See* AOD 1991-012, 1991 WL 771258. *See supra* text accompanying notes 55-62.

65. One possible method would include making the funds available to the trust to pay annual premiums and requiring that they be used for that purpose.

66. *See* I.R.C. § 2035 (d) (2), (3) (West 1999).

67. *See Leder*, 893 F.2d at 242.

68. *See* Ann C. Harris, *Life Insurance and Annuities*, SC70 ALI-ABA 157, 195 (1998). "The trustee should not be required to use funds transferred to trust to pay premiums; but there should be no problem if the trustee has the authority to purchase insurance on the life of the grantor as an asset of the trust." *Id.*

69. But the IRS could argue in cases in which the insured has too much control over the trustee that the trustee is really just the agent of the insured and that the incidents of ownership ought to be allocated to the principal. *See* *Estate of Kurihara v. C.I.R.*, 82 T.C. 51, 60-61 (1984)

ii. Section 2042 and the “Payable to Estate” Test

Taxation of the policy at death will also be triggered under section 2042 if the policy proceeds are made available to the estate of the deceased insured.⁷⁰ Thus, an additional concern arises. Even if we can avoid the incidents of ownership rule of section 2042 and the transfer rule of section 2035, how can we make the life insurance proceeds available to pay the estate taxes? As the regulations explain:

It makes no difference whether or not the estate is specifically named as the beneficiary under the terms of the policy. Thus, if under the terms of an insurance policy the proceeds are receivable by another beneficiary but are subject to an obligation, legally binding upon the other beneficiary, to pay taxes, debts or other charges enforceable against the estate, then the amount of such proceeds required for the payment . . . is includable in the gross estate.⁷¹

Thus, the trustee of the irrevocable trust must not be required by the trust agreement to use the life insurance proceeds to pay the estate taxes of the first to die. If the estate requires liquidity in order to pay the taxes, the trustee might be given the power to use the proceeds to purchase nonliquid assets from the estate or to loan the funds to the estate at the going rate of interest. This arrangement works so long as the surviving partner is the beneficiary of both the estate and the trust.

iii. Additional Tax Problems

Even if we can avoid sections 2042 and 2035, there are additional tax problems caused by the fact that *A* and *B* are making monetary transfers to the trust in order cover the premium costs. The first problem caused by these transfers is a gift tax problem. Assume that *A* and *B* share the premium payments. Each time they transfer funds, they are making a transfer to a trust which vests the funds in the trust beneficiaries because the trust is irrevocable. Who will actually benefit from the trust is uncertain since both *A* and *B* have contingent future interests depending on who survives. For the trust to work as intended in their estate plan, the death benefits must be paid to the trust upon the death of the first to die and, at that time, the survivor's beneficial rights to the trust assets should become fully vested. Because the trust is irrevocable, each transfer is a completed gift. Because the interests in the beneficiaries are future rather than

(including life insurance proceeds in decedent's estate where trustees paid insurance premium with decedent's check).

70. See I.R.C. § 2042(2) (West 1999).

71. Treas. Reg. § 20.2042-1(b)(1) (1998).

present, the trust will have to include *Crummey* powers to avoid the gift tax.⁷²

The second set of problems caused by the transfer of money to pay premiums arises under estate tax provisions other than section 2042. Assume, for example, that *B* dies first. Because the trust owns the policy and the proceeds are not payable to *B*'s estate, section 2042 does not apply. But the arrangement might run afoul of other estate tax provisions. For example, section 2036 would include in *B*'s estate any portion of the trust assets attributable to transfers by *B* in which *B* retained a life estate. *B* will have made a transfer to the trust each year to cover her portion of the premium. Section 2036 may be avoided by providing in the trust document that all trust income earned during *A*'s and *B*'s joint lives, if any, shall be paid to charity.⁷³ Because the only asset of the trust will be a term insurance policy, there probably will be no income. But if *A* and *B* make substantial monetary contributions that are then held for investment by the trustee and used by the trustee to pay premiums on a life insurance policy for the benefit of *A* and *B*, the arrangement begins to look like a transfer with a retained benefit to *A* and *B* that will trigger section 2036 at the death of the first partner. If *A* and *B* contribute equally to the trust, then presumably only half the trust assets will be caught at the death of the first partner.

Section 2037 presents another hurdle.⁷⁴ Under this provision, trust assets will be included in the decedent's estate to the extent the decedent made a transfer in trust for the benefit of a beneficiary who can only enjoy the property by surviving the decedent so long as the decedent also retained a reversionary interest in the transferred property.⁷⁵ In addition, the reversionary interest must be worth more than 5% of the value of the entire property just before the decedent's death.⁷⁶ The trust provides that the survivor of *A* and *B* will claim the trust assets, which at *B*'s death will consist solely of the life insurance proceeds. Thus, *A* can only enjoy the trust assets by surviving *B* and

72. See *Crummey v. C.I.R.*, 397 F.2d 82, 88 (9th Cir. 1968).

73. They cannot simply provide for accumulation of the income if that means that the income will ultimately be distributed to either *A* or *B* at the time the trust terminates. Such a provision would still run afoul of section 2036. Furthermore, the direction to accumulate the income could itself be viewed as a transfer of property under which they have retained rights that will cause the accumulated income (or whatever is purchased with it) to be included in the estate of the first to die. See *United States v. O'Malley*, 383 U.S. 627, 634 (1966) (distinguishing situations where the grantor retains power inter vivos but his death affects transfers).

74. See I.R.C. § 2037 (West 1999).

75. See I.R.C. § 2037(a)(1), (2).

76. See I.R.C. § 2037(a)(2).

B, at the moment of her death, had a reversionary interest in the trust worth more than the requisite 5%. Trust ownership of FTD policy thus appears to be exactly the sort of arrangement that should be taxed at the death of the first to die under section 2037. Of course, if *A* and *B* share the premium costs by making equal transfers to the trust, then it would appear that only half the policy proceeds should be included in *B*'s estate because *B* only made a transfer for section 2037 purposes as to half.

There is no published authority supporting inclusion of a trust-owned FTD policy under either section 2036 or section 2037. But the risk seems sufficient to suggest that anyone wishing to pursue this option ought to consider requesting a private letter ruling in advance of the transaction. However, if the couple is considering the use of a FTD policy to help maintain standard of living upon the death of the first partner in an estate that is not large enough to trigger the federal estate tax, concerns about estate tax inclusion are irrelevant.

b. Summary

In sum, the FTD policy makes sense in terms of the cash needs of lesbian and gay couples since it will fund the estate tax liability on the death of the first to die. However, it is not clear that the policy can be owned in such a way to ensure that it will not be included in the taxable estate for federal estate tax purposes. If the policy is owned by an irrevocable trust to which both *A* and *B* contribute funds for premiums, then at least half of the policy is likely to be included in the taxable estate under section 2037 and maybe under section 2036. Alternatively, the couple might agree that one partner should own the policy. In that event, they have a 50% chance that 100% of the policy will escape taxation. By contrast, a term policy on each partner can be owned in such a way as to escape the estate tax completely. Purchasing a FTD policy to fund the estate tax liability of the first partner to die makes sense only if the estate taxes (or the risk of estate taxes) are lower than the premium savings.

Finally, a FTD policy makes a lot of sense if it will be used to fund a state inheritance tax or ongoing costs of living in an estate that triggers no federal estate tax. For example, if *A* and *B* live in Iowa and have separate estates below the exemption equivalent amount for the federal estate tax, they may nonetheless owe a substantial tax at the death of the first to die. As of 1999, the federal exemption equivalent is \$650,000.⁷⁷ If *B* has no insurance and leaves all of her

77. See Unified Credit Against Estate Tax, 26 U.S.C. § 2010(c) (1999).

assets (i.e., realty, stocks and bonds) to her partner, *A*, the resulting Iowa inheritance tax will be \$93,500.00. Had they purchased a FTD life insurance policy in the face amount of \$93,500, naming the survivor as the beneficiary, the policy proceeds would fund the tax liability. Further, under Iowa law, life insurance paid to someone other than the estate is not subject to the inheritance tax.⁷⁸ Thus for a lower premium than would be required to purchase two single policies, the couple can purchase a FTD policy that will pay the inheritance tax without triggering additional tax liability.

It is not surprising that none of the three books that are the focus of this essay discussed the FTD life insurance policy as an option for lesbian and gay couples. It is not surprising because FTD insurance does not appear to be an option that is currently in use by members of our community. That may be because the premium savings are not sufficient or because the tax costs associated with its ownership are too burdensome. But another explanation may be that insurance companies have not yet realized that the gay and lesbian community is a potential market for the product and thus they haven't streamlined the product to meet our needs. To echo Elizabeth Birch's observation set out at the beginning of this section: the insurance products of this country have not been structured with gay and lesbian consumers in mind.

3. Insurable Interest

The second way in which the life insurance industry has ignored gay and lesbian families is reflected in application of the "insurable interest" rule. All three of the books in this essay allude to the problems that can occur when a person desires to name a beneficiary who is unrelated by blood or marriage, and who thus may be viewed by insurance agents as having no interest in the ongoing life of the insured. The approach in all three books is to warn the reader that the life insurance company may not recognize a beneficiary who is unrelated to the insured. The suggested solution, according to Berkery, is to name someone else when the policy is first taken out and then change the beneficiary later, because the general rule is that if the policy was valid when it was originally taken out, then it remains valid despite the absence of an insurable interest.⁷⁹

78. See IOWA CODE ANN. § 633.5 (West 1999).

79. "There also was (and is) an awkward way to get around this problem. You can name someone such as a parent or a charity as the beneficiary on your application, as they always have an insurable interest in your life. Then, a few months later, you can change the designation to whomever you wish." PERSONAL FINANCING PLANNING, *supra* note 12, at 46.

While it is true that the insurable interest need only exist at the time the policy is taken out and that a subsequent change in the beneficiary will not affect the validity of the policy, in many cases it will not be necessary to establish that the beneficiary has an insurable interest at the inception. Provided the policy is taken out and owned by the insured, the insured can name anyone as beneficiary, including his or her same-sex partner, whether or not that partner has a demonstrable insurable interest.⁸⁰ Although in the past some states may have required that the beneficiary have an insurable interest in the life of the insured,⁸¹ the law is different now. Furthermore, the new rule (i.e., no insurable interest required) has been in existence for some time.⁸²

In most cases, of course, same-sex partners will have insurable interests in each other's lives because they are likely to own property jointly. The authors all recognize this fact and stress that the insured should make such financial dependencies known to the insurance agent.⁸³ But the authors should also make the point that there is no need to prove that any insurable interest exists if it is the insured who is taking out the policy and naming the beneficiary.

Thus, all three books overstate the problem regarding insurable interest. In doing so, they contribute to the misunderstanding amongst their gay and lesbian readers, who are led to believe that they will have difficulty obtaining life insurance which names a partner as the beneficiary. The likely explanation for these overstated warnings by

80. See, e.g., ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 180 (1988).

81. "In some jurisdictions it is held that every person has an insurable interest in his own life, and that he may insure it for the benefit of any person whom he sees fit to name as beneficiary, irrespective of whether such beneficiary has an insurable interest in his life or not . . . , but this is not the rule in this state." *Wilke v. Finn*, 39 S.W.2d 836 (Tex. Com. App. 1931).

82. See, e.g., *Castillo v. Canales*, 174 S.W.2d 251 (Tex. 1943) (holding a beneficiary designation valid in a fraternal insurance policy despite the fact that the beneficiary had no insurable interest); see also *McCain v. Yost*, 284 S.W.2d 898 (Tex. 1955) (discussing the 1953 amendment to the insurance code that modernized the insurable interest rule).

83. See *LEGAL AFFAIRS*, *supra* note 11, 151-52. "[U]nless you own a home together, it can be very difficult to buy insurance coverage for each other's benefit, whether you are buying your own policy or buying a policy on your partner's life." *Id.* See also *A LEGAL GUIDE*, *supra* note 10, at 2-21:

If you have a life insurance policy, you can name your lover as the beneficiary. When asked the nature of the relationship, you may have to state "business partners"—which is true if own any property—even a set of dishes—together. You cannot, however, buy a policy on your lover's life and name your self as the beneficiary. Insurance companies don't believe that non-married partners have an insurable interest in each other, and limit buying insurance on another person to married spouses or business partners.

the authors is that they have all probably experienced difficulties with life insurance agents who continue to rely on the old rules.

Let me give an example from my personal experience. When I was on the faculty at the University of Texas and was electing fringe benefits through one of the university's approved insurance companies, the representative of the company I had chosen to fund my retirement benefits met with me to go over my application. When we got to the blank for "beneficiary," I named my partner. The agent asked me what our relationship was and I said "we are not related." He suggested we fill in the blank with the word "cousin." My response was "absolutely not," because it struck me as risky to lie to an insurance company regarding a death beneficiary designation. I also knew Texas law. In Texas, as in most states, there is a statute providing that the insured can name anyone he or she chooses as the death beneficiary of an insurance policy, whether or not that person has an insurable interest in the traditional sense.⁸⁴ Thus, we didn't even need to consider whether or not my partner, whom I had vowed to support for life, had an insurable interest in my life (which I believe she did).

I have heard similar tales from lawyers in other states who represent lesbian and gay couples. The fact that Berkery, Hertz, and Curry all warn readers that the insurance company may not recognize an unmarried partner as a legitimate beneficiary is consistent with the practical experience of many lawyers. But it is not the law that causes the problem. It is the insurance company.⁸⁵

84. See TEX. INS. CODE ANN. art. 3.49-1(1) (West 1981 & Supp. 1997):

Any person of legal age may apply for insurance on his life in any legal reserve or mutual assessment life insurance company and in such application designate in writing any person, persons, partnership, association, corporation or other legal entity, or any combination thereof, as the beneficiary or beneficiaries, or the absolute or partial owner or owners, or both beneficiary and owner, of any policy or policies issued in connection with such application; and with respect to any such policy or policies any such beneficiary or owner so designated shall at all times thereafter have an insurable interest in the life of such person

85. In some cases, insurance companies may have a legitimate interest in the relationship between the insured and the beneficiary. For example, if the insurance is not really necessary to insure against risk of loss caused by the death (i.e., no insurable interest), that fact might signal to the insurance company that the insured has some other reason for purchasing the insurance (i.e., he thinks he is likely to die soon). See *Kieser v. Old Line Life Ins.*, 712 So. 2d 1261, 1263-1264 (Fla. Dist. Ct. App. 1998) (finding that an insured misrepresented the state of his health to an insurance company in which the company argued that if it had known the truth, it would have scrutinized his application because his brother, the beneficiary, didn't appear to have a significant insurable interest in the life of the insured).

The blackletter law in Texas is no different from the blackletter law in most states.⁸⁶ Indeed, “an insured who acquires insurance on his or her own life is permitted essentially complete freedom in designating the ‘beneficiary.’”⁸⁷ This rule makes sense if we think of insurance as being like any other asset or investment. If I can name my life partner as a beneficiary in my will so that my property will pass to her at my death, why can’t I also name her as the beneficiary of my life insurance policy so that the proceeds from that particular investment will pass to her at death? I can obtain the desired result in any event by naming my estate as the beneficiary of the policy, and then naming whomever I choose as the beneficiary of my estate.

By contrast, we might want a different rule if someone other than the insured owns the policy. For example, if we allow any Joe Blow to purchase a policy on my life then we may be indirectly authorizing a form of gambling. Life insurance policies pay upon the death of the insured. If Joe Blow wants to wager that I’ll get hit by a truck tomorrow, he can do so by taking out a life insurance policy on my life. Because gambling is against public policy, we ought to restrict life insurance contracts to those situations that do not resemble a mere wager. Requiring the owner of the policy to have an “insurable interest” voids those policies which resemble mere wagers.

The general rule, then, is that if *A* takes out a policy on her own life she should be able to name her partner, *B*, as the beneficiary without worrying about the insurable interest issue.⁸⁸ By contrast, if partner *B* takes out a policy on *A*’s life, then *B* becomes the owner of

86. At least 30 states have statutes that state positively that the insured has an insurable interest in his or her own life and can name anyone as beneficiary whether or not that person has an insurable interest. See ALA. CODE § 27-14-3(b) (1996); ALASKA STAT. § 21.42.020(a)-(b) (Michie 1993); ARIZ. REV. STAT. ANN. § 20-1104(A)-(B) (West 1995); ARK. CODE ANN. § 23-79-103(a) (Michie 1992 & Supp.1995); DEL. CODE ANN. tit. 18, § 2704(a)-(b) (1989); GA. CODE ANN. § 33-24-3(b) (1996); HAW. REV. STAT. § 431-413 (a), (b) (1993); IDAHO CODE ANN. § 41-1804(1)-(2) (1991); IND. CODE ANN. § 27-1-12-14(c) (Michie 1994); KAN. STAT. ANN. § 40-450(a), (c) (1993 & Supp. 1996); Ky. REV. STAT ANN. § 304.14-040 (2) (Banks-Baldwin 1997); LA. REV. STAT. ANN. § 22:613 (A)-(B) (West 1995); ME. REV. STAT. ANN. tit. 24-A, § 2404(1)-(2) (West 1990); MD. CODE ANN., Ins. § 12-201(a)(1), (2) (ii)-(iii), (d)(1995); MISS. CODE ANN. § 83-5-251(1)-(2) (Supp.1996); MONT. CODE ANN. § 33-15-201(1), (2) (1995); NEV. REV. STAT. ANN. § 687B.040(1) (Michie 1992); N.M. STAT. ANN. § 59A-18-4(A),(B) (Michie 1995); N.Y. INS. LAW § 3205(b)(1) (Consol. 1985); N.D. CENT. CODE § 26.1-29-09.1(1)-(2) (1995); OKLA. STAT. tit. 36, § 3604(A)-(B) (1990 & Supp.1997); OR. REV. STAT. § 743.024(1),(2) (1989); PA. STAT. ANN. tit. 40, § 512 (West 1992 & Supp.1996); R.I. GEN. LAWS § 27-4-27(a)-(b) (Michie 1994); S.D. CODIFIED LAWS § 58-10-3 (Michie 1996); TEX. INS. CODE ANN. art. 3.49-1(1) (West 1981 & Supp. 1997); VA. CODE ANN. § 38.2-301(A) (Michie 1994); WASH. REV. CODE ANN. § 48.18.030(1)-(2) (West 1984 & Supp. 1997); W. VA. CODE ANN. § 33-6-2(a),(b) (1996); WYO. STAT. ANN. § 26-15-102(a),(b) (Michie 1991 Supp. 1996).

87. KEETON & WIDISS, *supra* note 80, at 180.

88. See *id.*

the policy and must satisfy the insurable interest rule. A new issue arises if *A* takes out the policy originally but then later decides she wishes to transfer ownership to *B*, a not uncommon desire if the partners wish to avoid taxation of the policy under section 2042 of the Internal Revenue Code.⁸⁹ In the remainder of this section, I will explore the role that the “insurable interest” requirement plays in these three fact situations.

a. Insured is the Owner of the Policy

Most states provide by statute that the insured can name anyone as beneficiary of the policy.⁹⁰ Some state statutes are less clear, but certainly imply that the insured can name anyone as the beneficiary. Nebraska, for example, provides by statute that “no policy of insurance shall be issued upon the person of any individual except upon the application of the individual insured or with the written consent of the individual insured,”⁹¹ but does not say positively that the insured can name anyone as beneficiary. Because the statute provides no restrictions on the issuance of policies that are taken out by the insured, the statute is consistent with the rule that the insured may name anyone, even someone who does not have an insurable interest.⁹² Those states lacking similar statutes have judicial precedent recognizing the rule that the insured may name anyone as beneficiary.⁹³ While there are a handful of cases that contain language

89. To transfer the incidents of ownership to *B*, *A* must have some incidents herself and must have the legal right to transfer ownership. If the life insurance is a group term policy offered through the employer, then *A* may not have the right to transfer ownership to a third party.

90. See I.R.C. § 2042 (West 1999).

91. NEB. REV. STAT. § 44-704(1) (1993 & Supp. 1995).

92. Case law in Nebraska supports the blackletter rule. See *Guardian Nat'l Life Ins. Co. v. Eddens*, 13 N.W.2d 418, 420 (Neb. 1944) (finding that no limitation is made as to beneficiaries for issuance of policy upon application by insured).

93. See, e.g., *Day v. Walsh*, 42 A.2d 366, 368 (Conn. 1945) (citing *Allen v. Hartford Life Ins. Co.*, 45 A. 955, 956 (Conn. 1900) (observing that “every man has an insurable interest in his own life, and he can make a policy which he takes out upon it payable to whom he will, though no economic loss will come to the beneficiaries by his death”); *Mullenax v. National Reserve Life Ins. Co.*, 485 P.2d 137, 139 (Colo. Ct. App. 1971) (noting that “[a]ccording to the great weight of authority, where the insured purchases a policy on his own life, he is free to choose whomever he wishes as beneficiary without regard to the insurable interest of that beneficiary”); *Comegys v. National Union Assur. Soc’y*, 39 P.2d 861, 863 (Cal. 1935) (“It is a matter of common knowledge that one may not obtain an insurance policy upon the life of another in whom the applicant has no insurable interest. It is not so generally known, however, that the rule is otherwise where the applicant obtains the policy on his own life”); *Mitchell v. Knights of Honor*, 30 N.W. 865 (Iowa 1886) (observing that “it is now generally held that where the insured contracts directly with the insurer, paying the premiums himself; he may designate as beneficiary on who is totally without an insurable interest in his life.”); *Bloomington Mut. Life Benefits Ass’n v. Blue*, 11 N.E. 331, 333 (Ill. 1987) (noting that “a party may insure his own life, and

suggesting that the beneficiary must have an insurable interest, those cases usually contain significant other facts, such as the fact that the beneficiary was also the owner of the policy.⁹⁴ Thus, the general rule in every state is that the insured can name anyone as beneficiary of a life insurance policy on the insured's life.⁹⁵ No lesbian or gay purchaser of insurance should be forced to prove that the partner has an insurable interest in order to name the partner as beneficiary.

b. Insured is the Original Owner and Transfers the Policy to the Partner

For tax reasons, it is often advisable for a partner to own the policy on the other partner's life. By transferring ownership to the noninsured partner, the insured can remove the proceeds of the policy from the taxable estate.⁹⁶ Naming the noninsured partner as the owner

make the policy payable to anyone he may select, though such a person has no legal interest in his life").

The one state that appears to be an exception is Florida. There are no applicable statutes that state positively that the insured can name any beneficiary. Nor are there any cases so stating. Instead, there are cases that imply the beneficiary must have an insurable interest, but none of these cases involve an insured's choice of an unrelated beneficiary. Thus, no case actually decides the issue. *See Brockton v. Southern Life & Health Ins.*, 556 So. 2d 1138, 1139 (Fla. Dist. Ct. App. 1990) (stressing import of insurable interest of aunt in niece's life, but finding that the aunt was not only the beneficiary but also the person who took out the policy); *Geiser v. Geiser*, 693 So. 2d 59, 61 (Fla. Dist. Ct. App. 1997) (citing a statement at trial by insurance agent that beneficiary could not be a minor child and must be someone with an insurable interest); *Kieser v. Old Line Life Ins.*, 712 So.2d 1261, 1263-1264 (Fla. Dist. Ct. App. 1998) (finding that a company defended claim on basis of misrepresentations by insured unrelated to insurable interest, but also claimed had they been told the truth they would have refused coverage absent showing that beneficiary, who was insured's brother, had sufficient economic stake in insured's life to satisfy insurable interest requirement). *But see* FLA. STAT. ANN. § 222.13 (West 1998) which exempts insurance proceeds from creditors claims, by providing that the proceeds "shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy."

94. *See, e.g., Hicks' Estate v. Cary*, 52 N.W.2d 351, 354 (Mich. 1952), stating that the Michigan rule is that "a life insurance policy naming as beneficiary one who has no insurable interest in the life of the assured is a wagering contract, void as against public policy," but holding that the claim of voidness can only be raised by the insurance company. In *Hicks*, the beneficiary was also the person who took out the policy on the decedent. *See id.* Neither this case, nor any of the Michigan cases cited for the rule, held that the insured's right to name a beneficiary was limited to those persons holding an insurable interest. *See also* cases cited *supra* note 93.

95. In Ohio, the statute provides that a person may insure his own life for "the benefit of the person's spouse and children, or either, or other persons dependent upon such person, or an institution [that qualifies as a charity]." OHIO REV. CODE ANN. § 3911.09(A) (West 1995). Early court decisions established the blackletter rule that the insured may name anyone as beneficiary, despite similar language in early Ohio insurance statutes. *See, e.g., Schmidt v. Prudential Ins. Co.*, 174 N.E. 605, 605 (Ohio Ct. App. 1928); *Pierce v. Metropolitan Life Ins. Co.*, 187 N.E. 77, 78 (Ohio Ct. App. 1933).

96. The proceeds will be included under section 2042 only if the decedent insured held incidents of ownership at the time of death or if the proceeds are payable to the decedent's estate.

of the policy does raise insurable interest problems. However, the nature of the problem varies from state to state.

The general rule is that so long as the policy was valid at the time of the original contract with the insurance company, then it remains valid.⁹⁷ This means that the insured can take the policy out and name the partner as beneficiary and then immediately transfer the policy to the partner.⁹⁸ One major difficulty in using this approach is that the “transfer” by the insured will trigger section 2035 of the Internal Revenue Code.⁹⁹ If death occurs within three years, then section 2035 will include the full amount of the policy proceeds in the estate of the insured.¹⁰⁰

c. Partner is the Original Owner of the Policy

One way to avoid the tax problems caused by a “transfer” of the policy is to have the partner take out the policy as the original owner. Most states provide by statute that a life insurance contract is valid even if owned by the noninsured, so long as the initial beneficiary has an insurable interest at the time the contract is made.¹⁰¹ So long as the partner names someone as beneficiary who has an insurable interest, the partner can own the policy. Relying on the general rule that a policy remains valid so long as it was valid when the contract was made, the partner can then designate herself as the beneficiary at a later date. The risk in using this approach is that death might occur before the beneficiary is changed. But if the estate of the insured is named as beneficiary,¹⁰² then the proceeds will be available as planned to cover estate taxes. The only downside is that they will be taxed in the insured’s estate. So long as the beneficiary is changed in time, this approach will simultaneously give the proceeds to the partner and keep the proceeds out of the insured’s taxable estate. The advantage of this approach over a transfer by the insured to the partner is that there is no three year period of potential estate tax exposure because there is no transfer of the policy, only a change in beneficiary.

97. See KEETON & WIDISS, *supra* note 80, at 150.

98. See NEB. REV. STAT. § 44-704(1) (1993 & Supp. 1995). “Nothing in this section shall be deemed to prohibit the immediate transfer or assignment of a life insurance policy or annuity contract so issued.” *Id.*

99. See I.R.C. § 2035 (a) (West 1999).

100. See I.R.C. § 2035 (d)(2), (3) (West 1999).

101. See statutes cited *supra* note 86.

102. Indeed, naming the estate of the insured is certainly preferable to naming a parent or charity as suggested in Berkery’s book, so long as the partner is named as the beneficiary of the estate. See PERSONAL FINANCIAL PLANNING, *supra* note 12, at 335-336, 339.

In some states it is possible to avoid this roundabout naming, then renaming, of beneficiaries. Texas, for example, provides by statute that:

Any person of legal age may apply for insurance on his life . . . and in such application designate in writing any person . . . as the beneficiary . . . or the absolute or partial owner . . . or both beneficiary and owner, of any policy or policies issued in connection with such application; and with respect to any such policy or policies any such beneficiary or owner so designated shall at all times thereafter have an insurable interest in the life of such person.¹⁰³

Thus, in the original application, the insured partner may designate the other partner as both the insured and the beneficiary.¹⁰⁴ Similarly, in Virginia, so long as the insured designates the beneficiary, the policy itself may be taken out by the partner.¹⁰⁵

d. Lesbian and Gay Partners have Insurable Interests in Their Partner's Life

The insurable interest problem disappears so long as insurance companies presume that unmarried couples, like spouses, have legitimate and substantial interests in the ongoing lives of their partners. Based on the fact that all three books warn their readers that insurable interest questions may arise when naming a life partner as the beneficiary, it seems clear that insurance companies ought to consider retraining their agents about the role of the insurable interest doctrine. The main public policy reason to require the beneficiary to have an insurable interest is that otherwise the contract resembles a mere wager. From the life insurance company's perspective, there are other considerations related to adverse selection. If a person is interested in taking out a policy on his or her life simply to provide an

103. TEX. INS. CODE ANN. art. 3.49-1(1) (West 1981 & Supp. 1997) (emphasis added).

104. Query whether the insured's required participation in naming the partner as owner would constitute a "transfer" for estate tax purposes under section 2035. Note, however, that the insured's participation in the process of naming the partner as the owner might be considered a "constructive transfer" for estate tax purposes under section 2035 IRC. See *Bel v. United States*, 452 F.2d 683 (5th Cir. 1971) ("constructive transfer" theory applied to include life insurance proceeds in estate of deceased even though he never held incidents of ownership). Although the continued viability of *Bel's* "constructive transfer" theory has been called into question by amendments to the Code made in 1981, the case has never been overruled. See *Estate of Perry v. Commissioner*, 927 F.2d 209, 212-213 (5th Cir. 1991).

105. See VA. CODE ANN. § 38.2-301A (Michie 1994). See also NEB. REV. STAT. § 44-704(1) (1993 & Supp. 1995) ("[N]o policy of insurance shall be issued upon the person of any individual except upon the application of the individual insured or with the written consent of the individual insured" which appears to validate any policy so long as the insured gave written consent to the application).

unneded windfall to a chosen beneficiary, then that person may be betting on the fact that he or she will not live long. Insurance companies do their best to insure lives based on risk pools that do not include those with early death wishes. For efficiency purposes, they need bright line tests to determine who is a good risk and who is not. Requiring that the beneficiary have an insurable interest serves as a workable bright line. In that case, determining who does and does not have an insurable interest ought to be based on the reality of relationships and not presumptions about legal relationships.

State statutes are not particularly helpful in this regard. Most statutes define “insurable interest” as (1) “in the case of persons related closely by blood or by law, a substantial interest engendered by love and affection;” or (2) “in the case of [other] persons, a lawful and substantial economic interest in having the life, health, or bodily safety of the person insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death . . . of the individual insured.”¹⁰⁶

Because unmarried couples are not related by blood or law, insurance agents may begin with a presumption that they have no insurable interest in each other’s lives. But two people who live together, own property together, and who have promised to support each other both emotionally and financially ought to satisfy the insurable interest requirement. The support promise alone should be sufficient evidence of a substantial economic interest and even if the promise is not in writing, it is certainly a lawful one.¹⁰⁷

B. Joint Tenancy

1. In General

Joint ownership of property also raises a number of issues for lesbian and gay estate planning clients that are different from the issues facing married couples. For unmarried couples there are two basic ways to own property jointly: (1) as tenants in common, and (2) as joint tenants with right of survivorship.¹⁰⁸ All three of the books that are the subject of this review essay lay out the essential

106. ARIZ. REV. STAT. ANN. § 20-1104(A)-(B) (West 1995); ARK. CODE ANN. § 23-79-103(a) (Michie 1992 & Supp. 1995). See ALA. CODE. § 27-14-3 (a)-(b) (Michie 1995 & Supp. 1997).

107. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (holding that oral or implied agreements between unmarried cohabitants can be enforced so long as they can be proved).

108. Married couples in some states can own property jointly as tenants by the entirety and in community property states, the marital community can own the property. Neither tenancy by the entirety nor community property is an option for unmarried couples.

differences between owning property as joint tenants with right of survivorship and owning property as tenants in common. The main distinction is that joint tenancy carries with it survivorship rights.¹⁰⁹ Thus, when the first partner dies, sole ownership of the property vests automatically in the survivor. It is this survivorship feature that makes the joint tenancy option attractive to committed couples. Although the same result can be accomplished if the partners hold property as tenants in common and execute wills which pass the deceased partner's share in the property to the survivor, joint tenancy accomplishes the result without the need for a will. That means the property does not have to pass through probate, thereby saving time and money in the transfer of complete ownership to the survivor. In addition, some practitioners advise clients to gift property to their life partners during their lifetime via joint tenancy if they are worried that family members might contest a will giving all the property to the surviving partner. While no transfer is completely free from attack for undue influence or fraud, joint tenancy has the advantage of being viewed as a lifetime transfer in which the donee partner has a vested interest at the time of creation. That makes the transfer more difficult to attack once sufficient time has passed.¹¹⁰

These practical advantages of joint tenancy are not the sole reason lesbian and gay couples choose this form of ownership. Often a lesbian or gay couple will view joint tenancy ownership, especially of the home, as a symbolic statement about their commitment. In a world where such couples are denied the normal legal recognition accorded married couples, joint tenancy, with its accompanying survivorship right, serves as a surrogate for marriage.

2. Disadvantages of Joint Tenancy

All three books note that there are certain disadvantages to owning property as joint tenants, although they do so in varying degrees of detail. Although there are a number of disadvantages that stem from using joint tenancy in a gay or lesbian couple's estate plan, I will address only two of them in this section.¹¹¹

109. See GRANT S. NELSON, ET AL., CONTEMPORARY PROPERTY 302-303 (1996) [hereinafter CONTEMPORARY PROPERTY].

110. If the transfer from *A* to *A* and *B* as joint tenants is made during *A*'s lifetime, then *A*'s family has no standing to challenge the transfer unless they can prove that *A* is incompetent and one of them is then named as guardian. If the challenge comes after *A*'s death, statutes of limitations may affect the family's ability to attack the transfer.

111. For a more complete discussion of these disadvantages, see Patricia A. Cain, Estate Planning: From Margin to Center (unpublished manuscript on file with author).

a. Deaths in Close Succession

Because full ownership of the property passes to the survivor at the moment of death, clients should be asked to think about the situation in which one partner dies shortly after the other. In such a case jointly owned property will pass to the survivor and then to the survivor's heirs or beneficiaries. The final result may be that the jointly owned property ends up in the hands of the survivor's family, cutting out entirely the family of the first to die. Some clients may not be concerned about this risk, but others may want to draft will provisions that furnish a solution. For example, each partner might provide that if his estate contains property, whose ownership resulted from the survivorship feature of joint tenancy property, then that property should be split between members of the survivor's family and the family members of the predeceased partner.

b. Tax Problems

i. Gift Tax

If one partner wishes to transfer his or her property from sole ownership to a joint tenancy form of ownership with the other partner during lifetime, then the creation of the new joint tenancy may trigger the gift tax.¹¹² Often clients are unaware of the gift tax implications of creating the joint tenancy because they feel that the real gift does not occur until death. Creating a joint tenancy creates an immediately vested ownership right in the donee partner.¹¹³ In most states, joint tenancies may be unilaterally severed by either party,¹¹⁴ thereby transforming the ownership to a tenancy in common. Since the donee partner has the ability to sever the newly-created joint tenancy and thereby become vested with a freely alienable undivided half interest in the property, the federal tax law views the creation of the joint tenancy as a completed gift from donor to donee of half the value of the property.¹¹⁵ Thus, if partner *A* gratuitously transfers a home from sole ownership to joint tenancy ownership with *B*, and if the equity in

112. See Treas. Reg. § 25.2511-1(h)(5) (1998).

113. See CONTEMPORARY PROPERTY, *supra* note 109, at 259-263.

114. See discussion *infra* regarding the role of the four unities and the common law rule that breaching the four unities causes a severance. The most common way to breach one of the unities is for one joint tenant to convey his or her interest to a third party.

115. See Treas. Reg. § 25.2511-1(h)(5) (1998).

the home exceeds \$20,000, *A* will have made a taxable gift to *B* and should file a gift tax return.¹¹⁶

ii. Estate Tax

Section 2040(a) of the Internal Revenue Code provides that the full value of any property which is owned in joint tenancy at death will be included in the gross estate of the first joint tenant to die unless the survivor shows that he or she contributed to the purchase price of the property with funds that did not originate from the decedent.¹¹⁷ To the extent the survivor can prove such contribution, the amount included in the decedent's estate will be reduced.¹¹⁸ The burden of proof is on the survivor and there is very little authority explaining what sort of proof should suffice.¹¹⁹ Some practitioners suggest that if the estate is likely to be large enough to trigger the federal estate tax, no property should be held in joint tenancy even if the clients keep adequate records of all their joint purchases. The reason for this suggestion is that any client who reports less than 100% of the value of any joint tenancy property on the Estate Tax Return is likely to incur an audit by the Internal Revenue Service. And, even if the return survives the audit, the expense and worry can be costly.

State inheritance tax rules usually follow federal rules, including the principle behind section 2040(a). Thus, clients who are potentially subject to federal estate or state inheritance tax should be advised against owning property as joint tenants.¹²⁰

116. Assuming no other gifts by donor to donee during the same tax year, the first \$10,000 of any gift of a present interest is exempt from tax. See I.R.C. § 2503(b) (West 1999).

117. Even if the partners contribute equally to the purchase price, section 2040 will apply to include the full value in the estate of the first to die if any of the original purchase price of the property contributed by the survivor can be traced to a gift of cash or property by the decedent. See *Goldsborough v. Commissioner*, 70 T.C. 1077 (1978), *aff'd per curiam*, 49 A.F.T.R.2d 1469 (4th Cir. 1982) (holding that the portion of the value of the jointly owned stock traceable to the original gift of land from mother to daughters was included in mother's estate, but not the portion traceable to the capital gain on the land which accrued while the daughters held the property in their own names.)

118. Assume that *A* (decedent) and *B* (survivor) purchased Blackacre for \$100,000 and that Blackacre is worth \$300,000 at *A*'s death. The IRS will presume that *A* contributed the full \$100,000 and will include the fair market value at death, \$300,000, in *A*'s taxable estate. However, if *B* can prove that she contributed \$50,000 of her own money toward the purchase price, then only half the value of Blackacre, \$150,000, will be included in *A*'s taxable estate.

119. *But see* Estate of Fratini v. C.I.R., T.C. Memo. 1998-308, 1998 WL 525500, T.C.M. (RIA) 98,308 (Aug 24, 1998) (holding exact records are not necessary and that estimates will suffice).

120. The main benefits of joint tenancy can be achieved by transferring the property to a revocable trust naming the survivor as beneficiary. Property that passes to a partner via a revocable trust passes outside of probate. For a more complete comparison of the use of joint

3. The Equal Ownership Rule

It is a common misunderstanding that if two people wish to own property as joint tenants, they must own the property 50/50. At least two of the books state this rule clearly and explain that if some other proportion of ownership, say 60/40, is desired, then the partners must take title as tenants in common.¹²¹ The advice given seems to reflect accurately California statutory law, but ignores the fact that other states may have different rules. Further, the rule is probably stated too narrowly, even for California joint tenants. To explain why many lawyers share this common misunderstanding that joint tenants must own the property in equal proportions, I will first describe the development of the common law rules that applied to joint tenancy in England and then describe the development of new and different rules that apply to joint tenancies in the United States.

In England, at common law, joint owners were presumed to be joint tenants rather than tenants in common.¹²² In the United States, that presumption was reversed so that joint owners were presumed to be tenants in common rather than joint tenants.¹²³ Indeed, in many states, the joint tenancy form of ownership was purportedly abolished and there are still statutes in some states that begin with an abolition of the joint tenancy estate.¹²⁴ However, the modern trend in the United States has been to recognize joint tenancies if the intent to create them is clear.¹²⁵ Thus, it is only the common law presumption of joint tenancy that has been abolished and not the form of ownership itself.¹²⁶

At common law in England, one could not create a valid joint tenancy unless one satisfied the four unities of time, title, possession, and interest.¹²⁷ Thus, jointly owned property was presumed to be owned in joint tenancy, but if one of the four unities was proved to be

tenancies and revocable trusts in estate planning for unmarried couples, *see generally* Patricia A. Cain, Estate Planning: From Margin to Center (unpublished manuscript, on file with author).

121. *See generally* A LEGAL GUIDE, *supra* note 10, at 81; LEGAL AFFAIRS, *supra* note 11, at 7-15.

122. *See* CONTEMPORARY PROPERTY, *supra* note 109, at 303.

123. *See id.*

124. *See* TEXAS PROB. CODE ANN. § 46 (West 1987) which was amended in 1987. Prior to that time, the heading of this section read "Joint Tenancies Abolished." *Id.*

125. *See* CONTEMPORARY PROPERTY, *supra* note 109, at 303-304.

126. The presumption has since been abolished. Because a clear statement of intent is required to establish a joint tenancy, practitioners offer advise clients to include language such as "to A and B as joint tenants with right of survivorship and not as tenants in common." *See, e.g.,* A LEGAL GUIDE, *supra* note 10, at 7-17.

127. *See* CONTEMPORARY PROPERTY, *supra* note 109, at 302-304.

absent, the estate could not be held in joint tenancy.¹²⁸ In addition, if one of the four unities was broken, the joint tenancy would be immediately severed and the owners would instead hold title as tenants in common.¹²⁹ By contrast, in most states in this country, intent to create a joint tenancy, rather than the four unities, is the essential factor in creating a valid joint tenancy.¹³⁰

It is the unity of interest requirement, one of the necessary four unities under English common law, that lead many attorneys to conclude that joint tenancies require the joint tenants to have equal ownership interests. However, in states that have abolished the four unities test in favor of an intent test, joint tenants should not have to comply with the unity of ownership rule.¹³¹

California, by contrast, has retained the equal ownership rule, not as part of the common law requirements for creating a valid joint tenancy, but by statute.¹³² Thus, it is not surprising to find California lawyers who advise their clients that they can't own property as joint tenants unless their ownership in the equity is absolutely equal.

In many states, the role of the four unities, and, in particular, the unity of interest element, is not clear.¹³³ There are virtually no reported decisions stating directly that unequal ownership of the property will destroy the joint tenancy. There are, however, a number of decisions stating that joint tenants must own equal interests and thus, unequal contributions by the owners have no effect on either the nature of their estate nor their proportionate ownership interests.¹³⁴ Lawyers in these states, as in California, often conclude that to create

128. *See id.*

129. *See id.*

130. *See id.* at 303.

131. Even in states that have abolished the four unities in favor of an intent test, however, the unity of title requirement appears to linger on. Iowa, for example, which has abolished the four unities test by judicial decision, recognizes the doctrine of unilateral severance whenever the unity of title is broken by a conveyance to a third party. *See Estate of Baker*, 78 N.W.2d 863, 865 (Iowa 1956).

132. "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy." CAL. CIV. CODE § 683(a) (Deering 1990).

133. *See CONTEMPORARY PROPERTY*, *supra* note 109, at 303.

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133. *See CONTEMPORARY PROPERTY*, *supra* note 109, at 303.

133. *See CONTEMPORARY PROPERTY*, *supra* note 109, at 303.

134. *See, e.g., Bradford v. Dumond*, 675 A.2d 957 (Me. 1996); *Sack v. Tomlin*, 871 P.2d 298, 304-305 (Nev. 1994).

a valid joint tenancy the tenants must own equal interests in the property.

By contrast, there are also many court decisions dealing with the question of percentage ownership at the time joint tenancies are destroyed by partition sale.¹³⁵ And it is common to find judges claiming that, even though the deed states “joint tenants with right of survivorship,” the tenants do not necessarily own equal interests in the property for purposes of determining how to divide the partition sale proceeds.¹³⁶ In many states, the judicially-stated rule for splitting up partition proceeds for joint tenancies appears to mirror the rule for tenancies in common.¹³⁷ That is, the rule appears to be that equal ownership is presumed, but can be rebutted.¹³⁸ And it can often be rebutted by proving disparate contributions to the purchase price.¹³⁹ So long as the excess contribution by one joint owner is not a gift, then the excess contribution can be recovered via an unequal division of the sale proceeds.

It is not uncommon for lesbian and gay couples to purchase property jointly, but with disparate contributions over time. I am

135. See, e.g., *Duston v Duston*, 498 P.2d 1174 (Col. Ct. App. 1972) (holding the presumption of equal ownership was overcome); *Carozza v. Murray*, 492 A.2d 1349 (Md. Ct. App.) (recognizing that the presumption can be rebutted, but holding that it was not rebutted on the facts of the case); *Moat v. Ducharme*, 555 N.E.2d 897 (Mass. Ct. App. 1990) (recognizing that equality of interest is a rebuttable presumption at dissolution of joint tenancy); *Jezo v. Jezo*, 127 N.W. 2d 246, *reh'g denied and opinion amplified*, 129 N.W. 2d 195 (Wis. 1964) (holding that the presumption of equal ownership is rebuttable at partition of joint tenancy).

136. Even California courts have held that, in a partition suit, the court may divide the sales proceeds other than equally even though title is held as joint tenants. See, e.g., *Kershman v. Kershman*, 13 Cal. Rptr. 290 (Ct. App. 1961); *Cosler v. Norwood*, 218 P.2d 800 (Cal. Ct. App. 1950); *Thomasett v. Thomasett*, 264 P.2d 626 (Cal. Ct. App. 1953); see also *Remax v. Vajda & Co.*, 708 S.W.2d 804 (Mo. Ct. App. 1986) (pointing out that upon partition the joint tenancy is converted into ownership in severalty and that a joint tenant's interest may be nominal). *But see Cunningham v. Hastings*, 556 N.E.2d 12, 13 (Ind. Ct. App. 1990) (holding that once “a joint tenancy relationship is found to exist between two people in a partition action, it is axiomatic that each person owns a one-half interest.”)

137. See *Frederick v. Shorman*, 147 N.W.2d 478, 485-86 (Iowa 1966) (Becker, J., dissenting) (citing tenancy in common cases as authority for the rule that ought to apply in joint tenancy cases as well). In tenancy in common cases, ownership interests are presumed equal if the deed does not state otherwise. But the presumption can be overcome if contributions to the purchase price are unequal because it is presumed that parties intend to share in proportion to the amount contributed. Applying this rule to the joint tenancy deed in the case before it, the dissenting judge in *Frederick* believed the presumption regarding unequal contributions was controlling. See *id.* (Becker, J., dissenting). The majority decided that this presumption was itself rebutted by the claim that the mother's unequal contribution to the purchase price constituted a gift to her joint tenant son. See *id.* at 484-85.

138. See, e.g., *Carozza v. Murray*, 492 A.2d 1349, 1351 (Md. App. 1985); *Jezo v. Jezo*, 127 N.W.2d 246, 249 (Wis. 1964); *Frederick v. Shorman*, 147 N.W.2d 478, 482 (Iowa 1966).

139. *But see Bradford v. Dumond*, 675 A.2d 957, 961 (Me. 1996) (holding that disproportionate contributions do not affect the equal ownership quality of a joint tenancy).

often asked by such couples whether they can own the property as joint tenants with right of survivorship and provide for an unequal distribution of sales proceeds if the property is sold. It is the joint tenancy requirement of equal ownership interests that raises this question in their minds and often in the minds of their attorneys. It is statements like the ones in A LEGAL GUIDE and LEGAL AFFAIRS that suggest such arrangements are impossible.¹⁴⁰

Consider the following, not atypical, arrangement: Joe and Bob purchase a home jointly. Joe contributes the entire down payment of \$30,000 because he is the one with the available cash. Bob agrees to carry the mortgage until he has contributed as much as Joe. They want to hold the property as joint tenants with right of survivorship. They also want to agree that if the home is sold before Bob has contributed \$30,000 toward the purchase price, then the proceeds of the sale ought to be distributed unevenly in order to repay Bob for his excess contribution. Can they do it?

Curry and Hertz suggest that the answer is no, but neither book really discusses the equal ownership requirement sufficiently to cover this example. In a state like Iowa, I see absolutely no problem with such an arrangement. One Iowa case even discussed the possibility that a joint tenancy might be owned by a mother and son 100/0 during lifetime with the survivorship feature passing full ownership at death from the mother to the son.¹⁴¹ Even in states in which equal ownership interests are required during the duration of the joint tenancy, one can argue that the requirement ceases at the moment the joint tenancy is severed.¹⁴² In other words, Joe and Bob must own equal proportions so long as they own the property as joint tenants, but that requirement doesn't prevent them from signing an agreement that says if they should sever the joint tenancy by selling the property, then the proceeds from the sale will be divided unequally.

In a state like California, where the equal ownership requirement is stated clearly by statute,¹⁴³ I would not deed property to Joe and Bob in unequal proportions. Nor would I execute a side agreement that states that their ownership interests are unequal. All Joe and Bob care about is how the proceeds will be divided upon sale. Their

140. See A LEGAL GUIDE, *supra* note 10, at 5-28, 7-15; LEGAL AFFAIRS, *supra* note 11, at 81-85.

141. See *Frederick v. Shorman*, 147 N.W.2d 478, 484 (Iowa 1966) (holding that a joint tenancy was presumed to be owned 50/50, but that the presumption could be rebutted; however, the court further held that the mother failed to rebut the 50/50 ownership).

142. See *generally* CONTEMPORARY PROPERTY, *supra* note 109, at 303.

143. See CAL. CIV. CODE § 683 (a) (Deering 1990).

agreement should provide language that makes it clear that they own the property equally during the period of the joint tenancy, but that upon severance, the sales proceeds shall be divided unequally. Language similar to the following should suffice:

During the term of this joint tenancy, the parties shall have equal rights of possession and use. This joint tenancy shall not be severed except by mutual agreement.¹⁴⁴ In the event the joint tenancy is severed, the proceeds from any sale of the jointly owned property shall be distributed as follows

If the provision serves to pay Joe back for his excess contribution to the purchase price, then the provision merely serves to create a security interest in the property in favor of Joe to ensure that his advance is repaid. It does not provide for unequal ownership during the joint tenancy.

I do not mean to suggest that use of such an agreement is without risk. Judges often cite to the common law requirement of the four unities even though the unities may have been abolished by modern property law.¹⁴⁵ An angry family member expecting to inherit Joe's estate might rely on such language to argue that the agreement to divide proceeds unequally is evidence that Joe and Bob did not really own the property as joint tenants, but rather as tenants in common. If successful, that argument would destroy the survivorship feature and cause Joe's half interest in the property to pass to his estate at death. If Bob has been named as the residuary beneficiary in Joe's will, and if the will withstands challenge by Joe's family, then Bob should wind up with full ownership of the property anyway. But the litigation risk is there and clients should be warned about it.

144. Absent this provision, one of the parties might unilaterally sever the joint tenancy by conveying his interest to a third party, thereby destroying the survivorship provision. Clients often believe that the survivorship feature of joint tenancy truly means the survivor will take the property at death and are surprised to learn about the doctrine of unilateral severance, which is alive and well in most, but not all, states. *See, e.g.,* *Albro v. Allen*, 454 N.W.2d 85, 87-88 (Mich. 1990); *Snover v. Snover*, 502 N.W.2d 370-71 (Mich. Ct. App. 1993). Both *Albro* and *Snover* recognized that in Michigan, it is possible to create a joint tenancy in which the survivorship feature is not destroyed by severance.

145. Many courts continue to discuss the four unities as though they were essential to the creation of a valid joint tenancy even though the state legislature has enacted a statutory method for creation, which typically does not follow the common law four unity rule. *See, e.g.,* *Re v. Re*, 46 Cal. Rptr. 2d 62, 64 (Cal. Ct. App. 1995). And it is not unusual to find opinions in which the court cites to a state statute providing for the creation of joint tenancies so long as the intent of the grantor is clear and then immediately cites to case law stating that the four unities are necessary. *See, e.g.,* *Guilbeault v. St. Amand*, No. 93569, 1993 WL 392943 at *3 (Conn. Super. Ct. 1993). Although one can argue that the statutory rules have replaced the common law four unities requirement, in states such as these, the courts may not agree.

IV. CONCLUSION

I recommend that estate planning lawyers serving the lesbian and gay community familiarize themselves with the three books that are the subject of this review essay. The books are written for our clients and our clients are reading them. All of the books offer valuable advice to lay persons, but none of them is sufficiently detailed to cover the variations in state law, nor to offer specific estate plans for the varying needs of our clients. It is the responsibility of the legal community to fine tune the clients' needs to an estate plan that makes sense under the applicable state law. In this essay, I have tried to alert lawyers to some of the common misgivings that clients have about the requirements of state law. I have also suggested that the estate planning tools that have been developed for married couples do not always work for gay and lesbian couples. Life insurance and joint tenancy are two such examples. The legal and tax rules that apply to both were not developed with the lesbian and gay community in mind. As lawyers, we need to be keenly aware of these differences, not only when we represent our clients, but also as we struggle for legal changes that will improve the situation for gay and lesbian families generally.