

# PROVEN STRATEGIES FOR NEW CONCERNS:

How Lessons Learned from the Fight for LGBT Equality Can Help Non-Married Clients

By Ben Schenker

The composition of families and of a household has always varied, from multi-generational households, with grandparents assisting in the day-to-day raising of the children; to two women, building a life together; to a single mother with several children and a boyfriend; and of course, to the classic of the American 1950s, of mom, dad, two kids, and a dog. However, historically, the legal protections of marriage were only conferred on the latter.

There are over 1,000 legal benefits conferred once you are married. Mark F. Scurti, *Same Sex Marriage: Is Maryland Ready*, 35 U. Balt. L.F. 128, 135 (2005). Before same-sex couples could legally marry, their attorneys creatively developed a variety of legal tools to acquire many of the benefits that are conferred automatically with matrimony. These tools, while no longer necessary for same-sex married couples, can still be utilized by non-married people looking to avail themselves of some of the benefits of legally recognized matrimony.

Today the marriage rate is falling, as more people are choosing, for various reasons, not to get married. However, even without marriage, people are still in relationships, having children, and acquiring property. Attorneys for same-sex couples used alternative strategies to ensure that they could

enjoy some sense of security; without legal marriage, there was no certainty regarding child custody, property division following separation, or inheritance rights. Now, nontraditional families can borrow from these techniques that were developed before nationwide marriage equality and the Civil Marriage Protection Act. It is important for the attorneys of nontraditional families to consider a wide variety of tools to ensure that their clients are secure, and their families' issues are addressed. This article will discuss some of the strategies developed to provide the benefits of marriage to non-marital families, specifically - multiple parenthood, cohabitation and adult adoption.

## Multiple Parenthood

When a child is born to a married woman in an opposite sex relationship, that child is presumed to be the child of both parents. Md. Code Ann., Est. & Trusts, § 1-206. If the birth mother is not married, then the father must either be determined judicially to be the father, or the father must either acknowledge his paternity or recognize that he is the parent of his child. Md. Code Ann., Est. & Trusts, § 1-208.







When two unmarried people are raising a child together, the person who gave birth is the legal mother (surrogacy arrangements aside) and the mother's partner can make an acknowledgment of paternity.

In 2000, Maryland at least acknowledged a four-part test that could be used to establish a *de facto* parent in *S.F. v. M.D.*, 132 Md. App. 99 (2000), but since the case focused on visitation and not custody, the court did not establish whether it could be used to establish standing for seeking custody. The Court of Appeals was definitive, however, less than a decade later in *Janice M. v. Margaret K.*, 404 Md. 661 (2008). The case considered two women who were in a committed and long-term relationship. One had adopted a child and the other treated the child as her own but did not adopt. When their relationship ended, the non-adoptive parent sought to assert custody. The Court of Appeals declined the opportunity to establish *de facto* parenthood as Maryland law.

Then, in 2016, the Court of Appeals reconsidered the question in *Conover v. Conover*, 450 Md. 451 (2016). That case also involved a committed same-sex relationship, except the child was born to one of the spouses. When the pair sepa-

rated, the birth parent denied visitation to her former partner. The Court relied on Maryland's recognition of same-sex marriage, the noted difficulties for same-sex parents, and the growing trend among other states to recognize *de facto* parents to ignore *stare decisis* and justify its decision to reverse itself and establish *de facto* parenthood in Maryland.

The test to determine *de facto* parentage has four parts, which are found in *Conover*, at 74-75. First, the biological/adoptive parent must have consented to, and been active in creating, the third-party forming a relationship like that of parent and child. Second, the third party must have lived in the same household as the child. Third, the third-party must have "assumed the obligations of parenthood", including financially supporting the child. Fourth, the relationship with the child must have existed long enough to establish a "...bonded, dependent relationship parental in nature." *Conover, supra*.

With some planning, a family seeking to establish a legal parental relationship between a non-biological parent and their children could establish this. An affidavit can show a legal parent's consent to the relationship. A driver's license,



or utility bills, can show that the parties lived in the same household. A parenting plan can show that the client took on parenting obligations, and bank records could prove financial support. The last requirement, of a "...bonded, dependent relationship parental in nature..." is less easily quantified, but can be demonstrated via an interview with the children (if old enough) or through observation.

There is one key difference between the approach to multiple parents and that of other methods discussed below. Adult adoption is done with consent, and once it is done, it is done. The contractual relationships that establish property rights between cohabitants are accomplished without the court. However, regarding minor children, the court *always* has a right to insert itself. Md. Code Ann., Fam. Law § 1-201; *Neuwiller v. Neuwiller*, 257 MD. 285, 262 A.2d 736 (1970). Even if a client takes every possible step to show that there is a *de facto* parent relationship, the final discretion is in the court.

## Cohabitation

Although the most famous case regarding cohabitation was decided in 1976 in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), Maryland had already discussed this issue a half-century earlier in *Baxter v. Wilburn*, 172 Md. 160, 190 A. 773 (1937). In *Baxter*, the Court of Appeals held that Maryland would not recognize "meretricious relationships" (contracts where the consideration is sex).

The Court of Appeals again addressed cohabitation agreements sixty years later in *Unitas v. Temple*, 314 Md. 689 (1989). In *Unitas*, an unmarried partner sued her former partner's estate to enforce a verbal agreement they had made where he had promised to support her in his will, in exchange for her reconciling with him following a breakup and for her not seeking employment. The Court of Appeals applied contract law to hold that partial performance of the contract was not sufficient.

Recently, however, the Court of Special Appeals reached a different decision in *Porter v. Zuromski*, 195 Md.App. 361 (2010). The parties had been girlfriend and boyfriend, and had decided to buy a house together. When they applied for the mortgage, each party contributed to the down payment, they agreed to split expenses, and act as co-owners. However, only the boyfriend qualified for a mortgage, so only his name appeared on the mortgage application.

When they separated, the girlfriend sued for equitable relief and the circuit court imposed a constructive trust on the property. *Id.*, at 366-367. After the boyfriend appealed, claiming that it was a prohibited action for palimony, the court affirmed the holding, focusing on equitable claims.

A review of these laws and cases shows how crucial it is for non-married families to have an agreement in place. A cohabitation agreement can be used as evidence for a domestic partnership, as found in Md. Code Ann., Health-Gen. § 6-101. And since, in Maryland, the best result that has been

# We solve problems.



With over 30 years' experience we provide a broad depth of knowledge in all family law matters. In our centrally located office in Greenspring Valley, we advocate for you with efficiency and a real "get it done" attitude.

## The Law Offices of Julie Ellen Landau

1925 Old Valley Road • Suite 2 • Stevenson, MD 21153  
P.O. Box 219 • 410.625.1100 • FX410.625.2174

ALL FAMILY LAW MATTERS  
LITIGATION  
APPEALS  
MEDIATION  
NEUTRAL CASE EVALUATION  
COLLABORATIVE LAW



Rated  
Super Lawyers  
Multiple Years!

achieved for non-married cohabitants was a constructive trust, it is a good idea to draft a trust or similar agreement at the outset of the relationship. It can be difficult to reduce a romantic relationship to strict financial figures, particularly towards the beginning of the relationship. However, it is generally beneficial in the end.

Perhaps because of the lack of significant case law surrounding cohabitation agreements and that the legislature had not provided suitable remedies for non-married partners, Maryland established some rights for domestic partners when LGBT couples started seeking equality of treatment, and those rights are discussed below.

## Domestic Partnership

To establish a domestic partnership in Maryland, two people, who are not married and are not in a marriage with anyone else, sign an affidavit to show that they "...agree to be in a relationship of mutual interdependence in which each individual contributes to the maintenance and support of the other individual and the relationship..." They must also provide another piece of evidence, such as a relationship or cohabitation agreement. Md. Code Ann., Health-Gen. § 6-101. A domestic partner is treated like a spouse in various situations, such as health decisions on behalf of an incapacitated partner or taking care of a partner's remains, for insurance purposes, and for specific tax purposes, such as transfer and inheritance taxes (but not state income taxes or estate taxes).

A major advantage that domestic partnership confers is that, unlike with marriage, dissolution does not require specific grounds or court intervention. A major advantage that domestic partnership confers is that, unlike with marriage, dissolution does not require specific grounds or court intervention. However, since there is no status, foreign states do not have to recognize these decisions. There is also no preference for intestacy laws, so domestic partnership does not help with estate planning.

To establish marriage like rights concerning property and protections in incapacity and for certain tax purposes for non-married couples, there are a variety of remedies. They all require planning such as establishing trusts for sharing property, or at least a cohabitation agreement for establishing a domestic partnership. The important thing to note is that relying on the courts to protect non-married couples is not a safe bet.

## Adult Adoption

Adult adoption is a more complicated tool to utilize, as it is essentially irrevocable. However, particularly in the planning for wills, trusts, and estates, it can be very useful. When a person dies intestate (or property is not disposed of by will), consanguinity governs who inherits the decedent's property. Md. Code Ann. Est. & Trusts, § 3-101. A spouse

may inherit half to all of the property not disposed of by will. Even if there is a will, the surviving spouse is entitled to up to half of the estate, even if the spouse is not mentioned in the will. Md. Code Ann. Est. & Trusts, §§ 3-102; 3-203; 3-208. If a person is not married, there are not such protections for that person's partner. Instead, that person's children, if there are any, would inherit, and that includes adopted children.

Md. Code Ann. Est. & Trusts, §§ 1-207, 1-209, 3-101, 3-103.

Estate planners knew that estate laws protect people who belong to the decedent's blood-

line. They seized upon the idea of adult adoptions to protect someone in cases of intestacy. It's important to remember that although adoption has existed since at least the Roman Empire, English common law did not provide for it, and so legal adoption in the U.S. is relatively new, for children and adults alike. It was first established for children in Maryland in 1898 and for adults in 1937. Walter Wadlington, Adoption of Adults: A Family Law Anomaly, 54 Cornell L. Rev. 566, 584 (1968-1969).

Couples in the LGBT community have used adult adoption to establish legal relationships since at least the early 1980s. Peter N. Fowler, Adult Adoption: A New Legal Tool for Lesbians and Gay Men, 14 Golden Gate U.L.Rev. 667, 708 (1984). For these couples, inheritance was only one consideration: adoptees could receive next-of-kin designation, they could avoid violating discriminatory housing and zoning restrictions, and partners could receive insurance, employment, and immigration benefits. *Id.*

In many states, there are various restrictions that may prohibit adult adoptions, such as required age differences, prohibiting adult adoption unless the adoptee is incapacitated, or requiring a specific relationship. Jennifer Fairfax, The Adoption Law Handbook: Practice, Resources, and Forms for Family Law Professionals, 204 (ABA, 2013). Such prohibitions don't exist in Maryland. (Although resources refer to adoption of a child, they generally cover adult adoptions too). Courts also may be reluctant to grant adoptions to adults, especially when the would-be parent and child intend to engage in sexual activity. *Id.*, at 208.

The pitfalls of adult adoption can be significant. First, adoption is generally irrevocable; it can only be undone if the adopted "child" is subsequently adopted by another "parent." Md. Code Ann. Est. & Trusts § 1-207(b); Madeleine N. Foltz, Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals, Including Drastic Resort to Adult Adoption of Same-Sex Partners, Necessitate Revision of Maryland's Intestacy Law to Provide Heir-at-Law Status for Domestic Partners, 40 U. Balt. L. Rev. 495, 542, at 514-515 (2011). Adoption also cuts off the ability for adoptees' to automatically inherit from their natural parents. Md. Code Ann. Est. & Trusts § 1-207(a); Foltz, *supra*, at 515-516. Additionally, an adoptee is prohibited from marrying their adopted parent. Same-sex

**The important thing to note is that  
relying on the courts to protect  
non-married couples is not a safe bet.**



“But flexing our minds, considering all available options and tools to solve our clients’ issues and making sure that we examine topics beyond the standard expertise can help us as advocates and can help our clients.”



couples who utilized this tool in the past have found that they are now unable to avail themselves of legal matrimony today. Md. Code Ann. Family Law § 2-202; Foltz, *supra*, at 540. Nonetheless, adult adoption can be a useful tool for clients who want to establish official relationships without marriage, particularly as regarding wills, trusts, and estate planning.

## Conclusion

Maryland legislation and judicial decisions establish that marriage is, at its heart, a contract (albeit a *special* one). In general contract law, however, parties are given freedom to set their own terms, and states are not allowed to interfere. It is not only understandable that people might not want to subject themselves to state-regulated relationships, it is provable by the rising growth of non-marital families. One major takeaway is that courts (especially in Maryland) will put more emphasis on financial agreements than ones based on family services. Monetizing their relationship may be a

tough pill for clients to swallow, but it could be necessary and, overall, beneficial.

The attorneys who developed these tools were incredibly creative when employing concepts from family law, contracts, estate planning, and equity to solve their clients’ problems. While Maryland attorneys are supposed to be generalists and to not specialize, many attorneys do limit their practice fields and gain expertise in very specific areas. There is nothing wrong with that; it is impressive to see colleagues understanding and interpreting the ins and outs of very precise legal situations. But flexing our minds, considering all available options and tools to solve our clients’ issues and making sure that we examine topics beyond the standard expertise can help us as advocates and can help our clients.

*Mr. Schenker is a family law and estate planning attorney focusing on the LGBTQIA/GSM community and alternative, non-traditional, and polyamorous families. He can be reached at [ben@mdschenkerlaw.com](mailto:ben@mdschenkerlaw.com). The author wishes to acknowledge the contributions of Bill Singer to this article.*