

# ESTATE PLANNING advantage

The Estate Planning Newsletter of Sirote & Permutt



## Not So Common Knowledge about COMMON LAW MARRIAGE

Only ten states in the country recognize common law marriage, and Alabama happens to be one of them. Cohabitation of non-married partners and couples who have previously divorced each other is becoming more pervasive. Yet, most people are either unaware or misinformed about how one enters into a legally recognized marital relationship without the traditional formalities of a ceremony or license.

Legal historian, Otto E. Koegel, aptly described common law marriage as a "marriage which does not depend for its validity upon any religious or civil ceremony but is created by the consent of the parties as any other contract."

In addition to having the capacity to be married (i.e. being of proper age and not otherwise married), basic requirements for entering a common law marriage in Alabama are: (1) an exchange of consent between two people; (2) cohabitation; and (3) a holding out publicly of living together as husband and wife. Some indications that a couple holds itself out as husband and wife include: using a common last name, filing a joint tax return, having a joint bank account, and telling people in the community they are married. Contrary to popular belief, there is no specific length of time required to establish a common law marriage, and no particular words are necessary to show the parties' present agreement to marry. Additionally, proof of actual words of consent are not required; an agreement may be inferred from circumstances. Thus, it is possible for a common law marriage to be inferred and legally recognized, even when one or both of the parties (or more commonly, their respective families) are not aware such a marital relationship even existed.

In Alabama, once a common law marriage has been established, the status of the two individuals is forever changed – they are deemed married. Therefore, the only methods for dissolving their marital relationship are through divorce or annulment. Common law marriage partners and ceremonially-married couples are subject to the same divorce laws because Alabama treats both forms of marriage the same. An Alabama

court may divide a common law couple's property and award alimony. Additionally, among other things, common law married couples may file a joint income tax return, claim each other on family health insurance plans, assert inheritance claims against the deceased spouse's estate and receive spousal benefits under the Alabama Workers' Compensation Act.

While these legal outcomes may be appropriate for a couple who intends to be married under common law, an individual who does not expect or desire these consequences must take precautions to protect against a claim of common law marriage.

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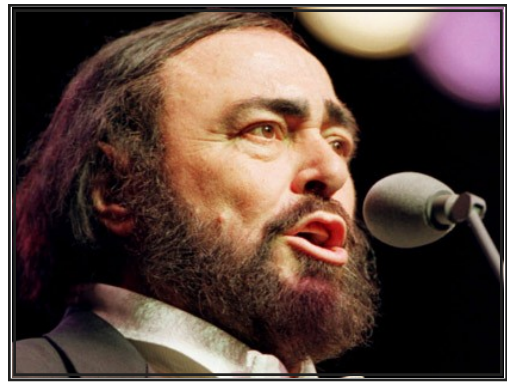

In addition to obtaining a premarital agreement (most commonly referred to as a pre-nuptial agreement), a couple may consider entering into a cohabitation agreement. This type of agreement is just like any other contract, and can specify that although the two parties intend to live together, share property and enjoy certain spousal privileges, they do not intend to be married. Parties may also desire to specify what should happen to shared property in the event of the death of one or both parties, or in the event that the parties decide not to remain together. Such an agreement can help to avoid future conflicts, as well as protect against unintended legal consequences that can significantly affect the individuals involved and their sometimes unsuspecting families.



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# ESTATE PLANNING

## of The RICH & FAMOUS



### PAVAROTTI'S PLANNING PREDICAMENT

In conjunction with the last issue's *Lessons from Leona*, we continue our series on "Estate Planning of the Rich and Famous" with Pavarotti's Planning Predicament.

Luciano Pavarotti's voice was enjoyed by nearly everyone. Unfortunately, the world lost Pavarotti September 6, 2007. Pavarotti, like many individuals, finalized his affairs in the last months of his year-long battle with cancer. Planning an estate and preparing a Will is something most people do not enjoy, but such planning is necessary to ensure that a person's final wishes are carried out as smoothly as possible.

Because Pavarotti owned property in the United States and Europe, he executed two Wills. His first Will was dated June 13, 2007, and was executed in accordance with Italian law and intended to deal with property in Italy. Pursuant to that Will, half of his assets were to be distributed to his wife, Nicoletta Mantovani, and half of his assets were to be distributed to his children from his two marriages (three adult daughters and one minor daughter).

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His second Will was dated July 29, 2007. This document was intended to govern his United States assets. According to the second Will, he left certain New York apartments in trust, with his wife, Mantovani, in charge of managing the trust. It is estimated that the two Wills govern a \$250 million fortune (although his adult daughters have made comments indicating his estate is not that large). There have been accusations that the second Will was improper.

Regardless of the size of an individual's estate, certain lessons can be learned from Pavarotti's Wills and unfolding estate administration. First, if an individual owns property in two countries, it is important that the probate law for both countries be reviewed. In some cases, it may be necessary to have a lawyer in each country prepare a Will and to make

sure the lawyers are communicating so the Wills are consistent and can be administered together. The United States has entered into treaties, including conventions with many other countries, to help alleviate inconsistencies between different countries' laws.

Second, even if an individual does not own property in two countries, it is important that amendments, addendums, or supplements to a Will are executed with proper formality and work in connection with the underlying primary document. If there is a chance for any misunderstanding, it is best to clearly explain in the documents themselves the testator's intent to help the executor and the beneficiaries understand how all of the documents are intended to work together. It is important to make it clear in the addendum whether the amendment or codicil replaces the previous provisions, adds to the previous provisions, or deletes the previous provisions.

An issue that can arise, especially in Alabama, is an attempted partial revocation of the provisions of a Will. Alabama does not recognize partial revocation of a Will by physical act. This means an individual cannot simply mark through a single provision to remove a beneficiary.

Instead, the beneficiary removal must be carried out in accordance with Alabama law, which requires the formalities of executing the Will -- i.e., a separate written document with the appropriate number of witnesses, etc. Without proper revocation of a provision in a Will, beneficiaries will be left wondering about the testator's intent, and the Will may be carried out contrary to what was actually intended.

Pavarotti's estate demonstrates that even with advisors involved, terms can conflict, and miscommunications and misunderstandings can arise. Both his Wills demonstrate the importance of clearly stated provisions along with a clear understanding of how all the documents work together.

As a side note, the story may become even more complex as people speculate that Pavarotti's first wife of 35 years may make a claim for assets. The Wills left nothing to her, but it is reported that they reconciled their friendship before his death.



**Craig M. Stephens** is co-chair of the Estate Planning Group at Sirote & Permutt. His practice focuses on taxation, estate planning, and trust and estate administration.

# Deducting Educational Costs for Children with Disabilities



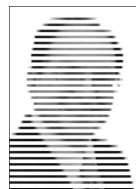
Ordinary educational expenses are not deductible for federal income tax purposes. However, educational expenses may qualify as a deductible medical expense if your child has a disability and attends a special school whose resources are designed to alleviate your child's condition and is a principal reason for your child's presence at the school. Medical expenses include tuition, transportation, meals, lodging and the cost of any incidental ordinary education furnished by the school. Total medical expenses, including special schooling costs, are deductible to the extent they exceed 7.5% of your adjusted gross income and you itemize deductions on your tax return. If your child's condition is such that the availability of medical care in the school is not a principal reason for his presence there, then only that part of care attributable to medical care is deductible, so meals and lodging ordinarily would not qualify as a deductible medical expense. For example, a school that does not provide a special program, but is beneficial because of small class size or because it provides added services within a normal academic setting, is not a special school, since the primary purpose of the school is academic. However, if your child attends a school which does not qualify as a special school, the extra costs of a special program or special treatment may still be a deductible medical expense even though the cost of regular tuition or meals and lodging may not be.

needs of children with I.Q.s between 50 and 75, in order to educate students

who are not able to profit from the education being offered through ordinary classroom instruction, but whose intellectual ability indicates the possibility of scholastic attainment with special teachers, methods and materials, qualified as a special school. A school with programs for treating severe learning disorders due to neurological disorders or dyslexia may qualify as a special school, so long as the principal reason for attending is overcoming such learning disabilities. A school can have a traditional education program for most students and a special education program for those who need it and thus be a "special" school for some students so long as the regular school is "incidental." If an ordinary school develops a special program that meets a child's needs, the school will qualify as a special school, since the determination is made on the basis of the child's curriculum, not the school curriculum as a whole.

Deductibility of educational expenses as a medical expense depends upon the circumstances of each case and the type of school or curriculum a child utilizes. Consult a tax professional about the opportunity to deduct some or all of these costs.

The distinguishing characteristic of a "special" school is the content of its curriculum. It may include some ordinary education, but this must be incidental to the school's primary purpose, which is to enable students to compensate for or overcome handicaps, to prepare them for future normal education or normal living. For example, the IRS has ruled that a school providing a curriculum designed to meet the



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## LEGISLATIVE UPDATE



### A Gift to Taxpayers

The "Mortgage Forgiveness Debt Relief Act of 2007," enacted December 20 of last year to ease the foreclosure crisis by protecting homeowners from paying taxes on cancelled mortgage debt, contained another gift to taxpayers. It added a provision to the Internal Revenue Code to allow a surviving spouse to sell his or her home and exclude \$500,000 of gain from the sale if 1) the sale occurs not later than two years after the date of death of the deceased spouse, 2) during the five-year period ending on the date of sale either spouse had owned the home and both spouses had used the home as their principal residence for periods aggregating two years or more, and 3) neither spouse had previously excluded gain from the sale of a residence during the two-year period ending on the date of sale. Before the new law, a surviving spouse would have had the benefit of excluding \$500,000 of gain only if the last two requirements above were met and the sale occurred during the calendar year of the deceased spouse's death and the surviving spouse filed a joint return with the deceased spouse for that year. If that same sale occurred after the year of death, but still within the two years allowed by the new law, the surviving spouse would have had to meet the final two requirements above without regard to the deceased spouse's ownership and use and the limit for gain exclusion would have been only \$250,000. This significant benefit has not been highly publicized.

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