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Executive Summary:

IRA Assets and Contributions, 2007

- ***IRAs are the largest repository of U.S. retirement wealth:*** Total IRA assets are larger than those accumulated in either private-sector defined benefit (pension) plans or defined contribution (401(k)-type) plans. At year-end 2007, IRAs held \$4.75 trillion, private-sector defined contribution (401(k)-type) plans held \$3.49 trillion, and private-sector defined benefit plans held \$2.33 trillion. IRA growth continues to be fueled by rollovers from other types of retirement plans, not new contributions.
- ***Mutual funds hold most IRA assets***—There has been a big shift in market share in IRA assets over the past quarter-century, with mutual funds and brokerage accounts now dominant. Mutual funds held 47 percent of IRA assets at year-end 2007, followed by brokerage accounts (38 percent). Life insurance companies (8 percent) and banks/thrifts (7 percent) split the remainder.
- ***Traditional IRAs still hold most assets:*** About 90 percent of all IRA assets are held in traditional (taxable on withdrawal) IRAs, but most contributions are going into Roth (untaxed at withdrawal) and other types of IRAs.

Domestic Partner Benefits: Facts and Background

- ***September 2008 update:*** This article updates previous research by EBRI providing information on why employers offer domestic partner health benefits, legal issues involved, recent developments, and current data.
- ***Domestic partner benefits do not drive up benefit costs:*** Employers that provide domestic partner benefits do so to attract talented employees from a diverse work force and as a matter of fairness. Studies have shown that offering domestic partner health coverage costs employers no more than spousal health coverage, and that few workers choose the benefit when it is offered. The vast majority of workers who enroll in domestic partner benefits tend to be unmarried heterosexual couples.
- ***Domestic partner benefits remain taxable:*** Domestic partner health benefits, unlike spousal benefits, are treated as taxable income. Since marriage is regulated at the state level, and some states have legalized same-sex marriages, it might appear that same-sex spousal health benefits would also be tax-exempt. However, the federal Defense of Marriage Act (DOMA), which defines “marriage” as a legal union between one man and one woman, denies favorable tax treatment of same-sex spousal health benefits.

IRA Assets and Contributions, 2007

By Craig Copeland, EBRI

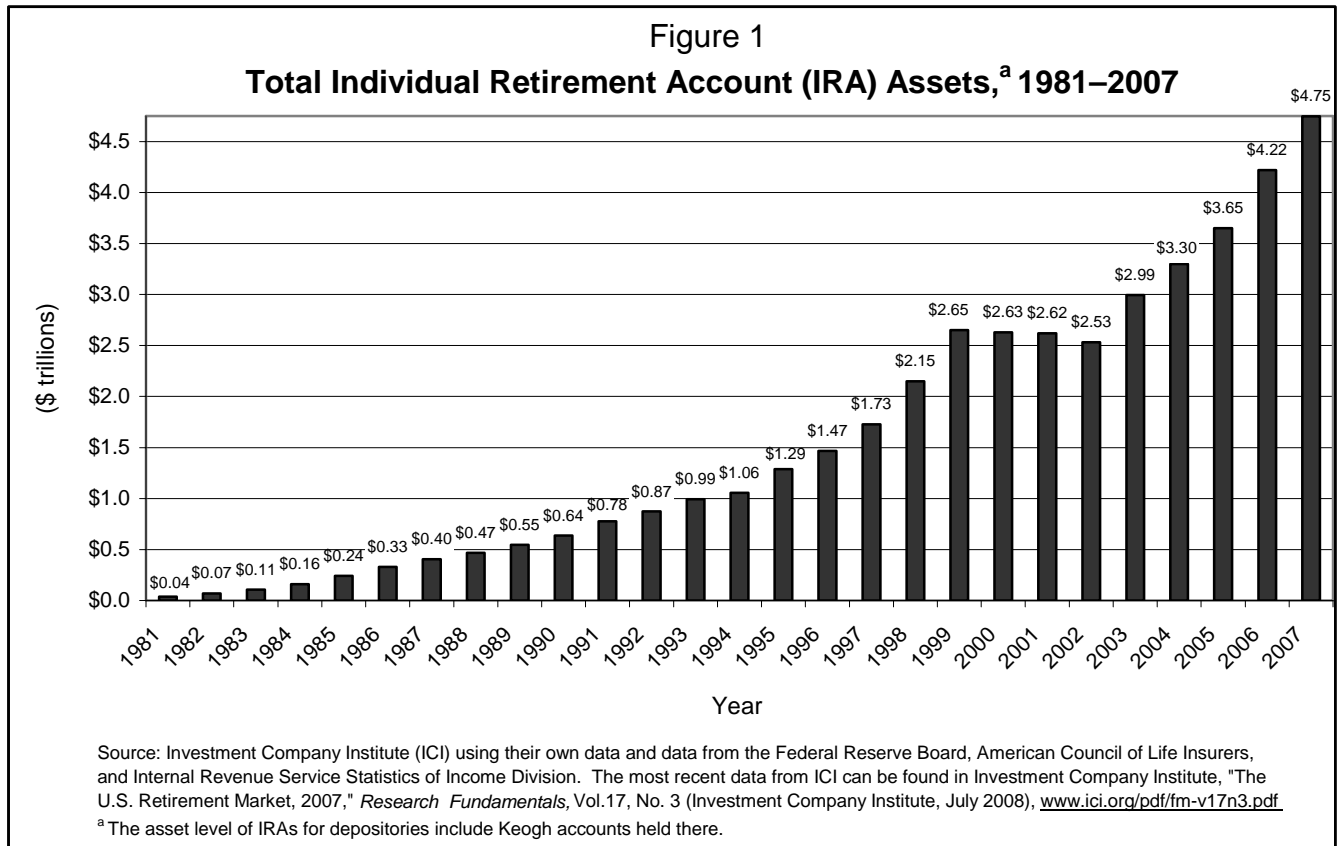
Introduction

Individual retirement accounts (IRAs) are an important vehicle both for building wealth and for storing wealth built up in employment-based retirement plans. IRAs account for a sizable portion of the assets held by Americans in tax-preferred plans designed for retirement, surpassing the assets held in either private-sector defined contribution (DC) plans (typically 401(k)-type plans) or defined benefit (DB) plans (traditional pensions). Furthermore, IRA assets have continued to grow in importance and are likely to become the single largest source of retirement assets outside of Social Security for private-sector workers in retirement.¹

This article examines the level of—and trends in—IRA assets. In addition, it includes the most recent Internal Revenue Service (IRS) data on the distribution of assets and contributions to IRAs by IRA type, thereby permitting analysis of the assets and contribution levels of traditional (deductible and nondeductible) IRAs, Roth IRAs (nondeductible contributions and tax-free withdrawals), and other IRAs (employment-based SEPs and SIMPLEs²).

Total Assets

IRA asset levels increased continuously from 1981 through 1999 before declining for three consecutive years from 2000 through 2002 (Figure 1).³ These assets peaked at \$2.65 trillion in 1999 before falling back to \$2.53 trillion in 2002. However, in 2003 the IRA asset level resumed its ascent, reaching \$2.99 trillion, and continued to increase to \$4.75 trillion in 2007. These data indicate that the significant growth trend that total IRA assets enjoyed for the past two decades was interrupted only by the stock market retrenchment from 2000–2002.



Growth rate: The average annual percentage increases in IRA assets during the 1990s amounted to 17.2 percent (calculated from Figure 2). After the retrenchment in assets from 2000–2002, the annual increases resumed their double-digit increases in 2003, amounting to 12.5 percent in 2007 after a 15.6 percent increase in 2006 (Figure 2).

Changing market share: This growth in IRA assets has occurred mostly in mutual funds and self-directed brokerage accounts. Mutual fund assets increased from \$1.043 trillion in 2002 to \$2.243 trillion in 2007, and assets in self-directed brokerage accounts increased from \$959 billion to \$1.827 trillion over the same period (Figure 2).⁴ By comparison, assets held in banks and thrifts and in life insurance annuities also increased, but by a much smaller amount. Consequently, the share of the total assets held in mutual funds grew by about 6 percentage points over the 2002–2007 period, pushing assets held in banks and thrifts to their lowest levels ever. Mutual funds accounted for the largest share of IRA assets in 2007. For comparison, in 1981, they held only the fourth-largest share of IRA assets, while banks and thrifts held the majority of the assets (Figure 3). In 2007, mutual funds' market share maintained its peak level from 2006 as it did in 1999 and 2000.

IRA and Private Retirement Plan Asset Comparison

Total IRA assets are larger than those accumulated in either private-sector DB plans or DC plans. In 2007, when IRAs held \$4.75 trillion dollars, DB plans held \$2.33 trillion and DC plans held \$3.49 trillion (Figure 4). The amount of assets in IRAs above the amount in DC and DB plans has increased each year since 2001, when IRAs held \$2.62 trillion, compared with \$2.24 trillion in DC plans and \$1.81 trillion in DB plans.

Aggregate Deductible Contributions

According to IRS data, tax-deductible contributions to traditional IRAs increased from \$7.407 billion in 2001 to \$12.003 billion in 2005 and to a preliminary estimate of \$12.768 billion in 2006—the highest amounts since before 1990 (Figure 5).^{5,6} From 1998 through 2001, a decline in the dollar value of annual IRA deductions occurred. However, after the increases in the contribution limits to IRAs enacted in the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001 took effect, the dollar value of these contributions increased, including an almost \$2 billion increase in 2005 from 2004.⁷

While the dollar amount of IRA contributions increased from 2002 to 2006, the number of returns claiming the deduction in 2005 was below the lowest level that it had reached in 2002 with a small preliminary estimated increase in 2006 (Figure 5). The number of returns claiming the deduction has been on a fairly steady decline (despite a slight increase in 1996), from 5.2 million in 1990 to 3.3 million in 2002. In 2003, the number of returns claiming the deduction increased for the first time since 1996, to 3.4 million. However, the number claiming the deduction decreased again in 2004 and 2005, falling below 3.3 million, before a slight rebound in 2006.

IRA Assets and Contributions by IRA Type

Of the \$3.3 trillion in IRAs in 2004, \$3.0 trillion were in traditional IRAs (Figure 6).⁸ This represents just under 90 percent of all IRA assets (Figure 7). Roth IRAs amounted to \$140.0 billion, and all other IRAs held \$202.7 billion in 2004 (Figure 6).⁹ Thus, Roths account for just over 4 percent of all IRA assets, while other IRAs account for slightly more than 6 percent (Figure 7).

In contrast, of the \$48.7 billion in IRA contributions in 2004, only \$12.6 billion went to traditional IRAs, both deductible and nondeductible (Figure 6). This accounts for 25.9 percent (20.6 percent in deductible and 5.3 percent in nondeductible) of all IRA contributions (Figure 8). Roth contributions represented 30.2 percent of the contributions, while other IRA contributions' share was 43.9 percent.¹⁰

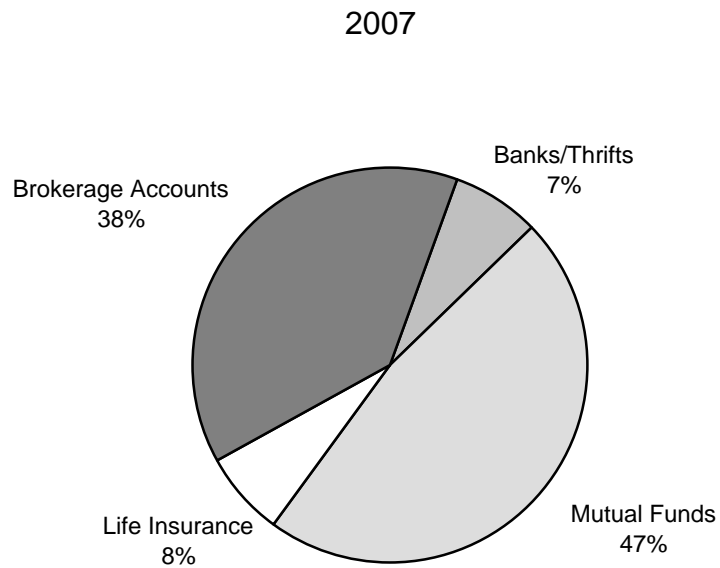
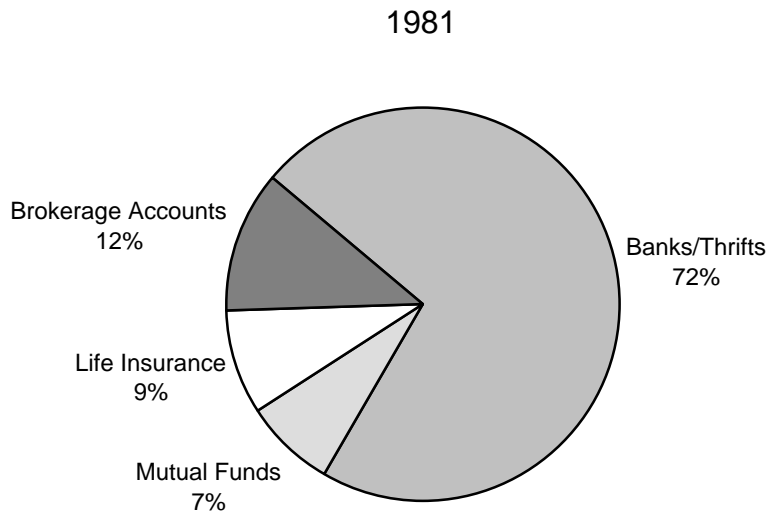
The factor that continues to drive the asset growth of traditional IRAs relative to the other types of IRAs is rollovers from other tax-preferred plans, as opposed to new contributions. In 2004, rollovers to traditional IRAs amounted to \$214.9 billion, following rollover amounts of \$225.6 billion in 2000, \$187.8 billion in 2001, and \$204.4 billion in 2002 (Figure 6).¹¹

**Figure 2
Distribution of Individual Retirement Account Assets,
by Financial Institution, 1981–2007**

Year	Total Assets	Bank and Thrift Deposits	Mutual Funds	Life Insurance	Brokerage Self-Directed Accounts	Annual Percentage Change
(billions)						
1981	\$38	\$27	\$3	\$3	\$4	
1985	241	140	33	17	52	51.6%
1986	329	171	57	22	79	36.5
1987	404	193	77	29	104	22.8
1988	468	217	92	38	120	15.8
1989	546	243	121	37	145	16.7
1990	637	266	138	40	192	16.7
1991	776	283	185	45	263	21.8
1992	874	275	233	50	316	12.6
1993	993	263	315	62	353	13.6
1994	1,056	255	342	70	390	6.3
1995	1,288	261	464	81	482	22.0
1996	1,467	259	582	92	534	13.9
1997	1,728	254	763	136	575	17.8
1998	2,150	249	961	157	783	24.4
1999	2,651	243	1,257	203	949	23.3
2000	2,629	250	1,231	203	945	-0.8
2001	2,619	255	1,166	211	987	-0.4
2002	2,533	263	1,043	268	959	-3.3
2003	2,993	268	1,309	285	1,131	18.2
2004	3,299	269	1,491	282	1,257	10.2
2005	3,652	278	1,664	308	1,402	10.7
2006	4,220	313	1,977	318	1,612	15.6
2007	4,747	340	2,243	336	1,827	12.5
(percentage of total assets)						
1981	100%	72%	7%	9%	12%	N/A
1985	100	58	14	7	22	
1986	100	52	17	7	24	
1987	100	48	19	7	26	
1988	100	46	20	8	26	
1989	100	45	22	7	27	
1990	100	42	22	6	30	
1991	100	36	24	6	34	
1992	100	31	27	6	36	
1993	100	26	32	6	36	
1994	100	24	32	7	37	
1995	100	20	36	6	37	
1996	100	18	40	6	36	
1997	100	15	44	8	33	
1998	100	12	45	7	36	
1999	100	9	47	8	36	
2000	100	10	47	8	36	
2001	100	10	45	8	38	
2002	100	10	41	11	38	
2003	100	9	44	10	38	
2004	100	8	45	9	38	
2005	100	8	46	8	38	
2006	100	7	47	8	38	
2007	100	7	47	7	38	

Source: Investment Company Institute (ICI) using their own data and data from the Federal Reserve Board, American Council of Life Insurers, and Internal Revenue Service Statistics of Income Division. The most recent data from ICI can be found in Investment Company Institute, "The U.S. Retirement Market, 2007," *Research Fundamentals*, Vol. 17, No. 3 (Investment Company Institute, July 2008), www.ici.org/pdf/fm-v17n3.pdf
See endnote 4 for information on each category.

**Figure 3
IRA Asset Market Share, 1981 and 2007**



Source: Investment Company Institute (ICI) using their own data and data from the Federal Reserve Board, American Council of Life Insurers, and Internal Revenue Service Statistics of Income Division. The most recent data from ICI can be found in Investment Company Institute, "The U.S. Retirement Market, 2007," *Research Fundamentals*, Vol.17, No. 3 (Investment Company Institute, July 2008), www.ici.org/pdf/fm-v17n3.pdf. See endnote 4 for information on each category.

Percentage Who Contribute and Average Contribution

The portion of eligible taxpayers who contributed to IRAs was near 10 percent for each year from 2000–2004, ranging from 9.5 percent to 10.6 percent (Figure 6). The average contribution for those contributing was approximately \$2,400 in both 2000 and 2001, before the contribution limits increased in 2002.¹² In 2002, the average contribution jumped to \$2,894, and in 2004 it rose to \$3,314.

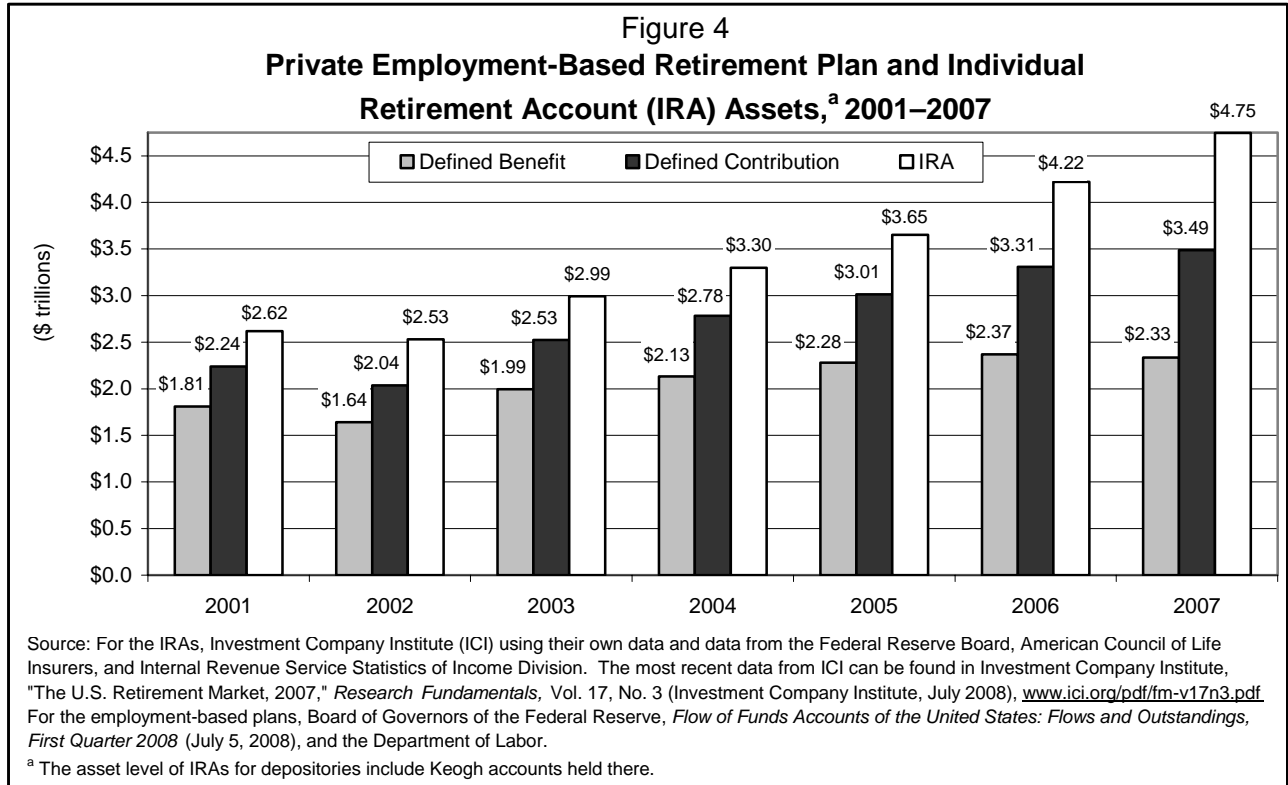


Figure 5
Traditional IRA Deductible Contributions, 1990–2006

Year	No. of Returns (in thousands)	Amount (in \$ billions)
1990	5,224	\$9.858
1991	4,666	9.030
1992	4,478	8.696
1993	4,385	8.527
1994	4,319	8.389
1995	4,301	8.338
1996	4,374	8.628
1997	4,069	8.663
1998	3,868	8.188
1999	3,687	7.883
2000	3,505	7.477
2001	3,448	7.407
2002	3,277	9.462
2003	3,418	10.007
2004	3,331	10.029
2005	3,256	12.003
2006 (p)	3,287	12.768

Source: Internal Revenue Service, *SOI Bulletin*, Historical Tables, various years.
(p) Preliminary data from the IRS.

Conclusions

IRA assets continued their double-digit percentage growth in 2007 for the fifth straight year. These assets reached a record high of \$4.75 trillion in 2007. Furthermore, the relative level of IRA assets, compared with the assets in private-sector defined contribution plans, increased over these four years, indicating that IRAs continue to gain in importance as a retirement asset for workers. In fact, IRAs appear likely to be the largest non-Social Security asset in retirement for many in the next generation of retirees (baby boomers and beyond).

This growth in IRAs is being fueled by *rollovers* from employment-based tax-qualified retirement plans, which amount to approximately \$200 billion annually. *Contributions* to IRAs, at the \$40 billion-plus level, pale in comparison. Furthermore, most IRA assets are in traditional IRAs, where rollovers are placed, but the largest share of contributions is going to Roth IRAs and other types of IRAs.

Despite the continued growth in IRA assets and much discussion of the importance of saving for retirement, only 10 percent of taxpayers eligible to contribute to an IRA actually do so. The increased limits that went into effect in 2002 did increase the size of the average contribution, but they did not attract a larger percentage of contributors. Therefore, most Americans are not using IRAs to save for retirement, but those who are doing so have taken a significant step toward retirement security.

The accumulation of these assets in individual retirement accounts raises important questions for the next step in retirement security—the distribution of the assets. Will retirees be able to manage these assets in a manner so as to not outlive them? Do individuals understand that life expectancy is an *average*, and not a definite number of years that any given person will live? Are individuals aware of and/or do they understand products such as annuities that insure against longevity risk? The answers to these questions, as well as others, will determine if the build-up of these assets in IRAs ultimately will be successful in providing Americans financial security in retirement. It is not just the *accumulation* of assets, but also the appropriate *spending* of the assets that will determine whether Americans with IRAs and other retirement savings will be able to afford to maintain a comfortable retirement.

Endnotes

¹ See Jack VanDerhei and Craig Copeland, “The Changing Face of Private Retirement Plans,” *EBRI Issue Brief*, no. 232 (Employee Benefit Research Institute, April 2001).

² SEPs are simplified employee pension plans and SIMPLEs are savings incentive match plans for employees, both of which are designed to reduce the administrative burden that discourages small businesses from offering their workers a retirement plan.

³ The total IRA assets and the breakdown of IRA assets by financial institution are directly derived from data from the Investment Company Institute (ICI) and data collected by ICI from the Federal Reserve Board, American Council of Life Insurers, and the Internal Revenue Service Statistics of Income Division. See Investment Company Institute, “The U.S. Retirement Market, 2007,” *Research Fundamentals*, Vol. 17, no. 3 (Investment Company Institute, July 2008), available at www.ici.org/pdf/fm-v17n3.pdf (last viewed Aug. 6, 2008) for their most recent results on IRA assets. For a comprehensive review of IRAs, see also Sarah Holden, Kathy Ireland, Vicky Leonard-Chambers, and Michael Bogdan, “The Individual Retirement Account at Age 30: A Retrospective,” *Investment Company Institute Perspective* (Investment Company Institute, February 2005), available at www.ici.org/pdf/per11-01.pdf (last viewed Aug. 6, 2008).

⁴ Bank and thrift deposits include funds held in banks and thrift institutions and Keogh account assets. Life insurance company IRA assets are annuities held by IRAs, excluding variable annuity mutual fund IRA assets, which are included in mutual funds. Securities held in brokerage accounts exclude mutual fund assets held through brokerage accounts, as these are included in mutual funds.

⁵ These contribution data only include tax-deductible contributions to traditional IRAs, not nondeductible contributions to traditional IRAs or Roth IRAs. The tabulations of nondeductible IRA contributions (traditional and Roth) by the Internal Revenue Service (IRS) are compiled at a later date than those of the deductible contributions and are presented in a later section of this article.

⁶ The IRS released a preliminary estimate of deductible contributions for 2006 in the Spring of 2008 and will provide a revised number by the end of 2008.

⁷ EGTRRA increased the contribution limit to \$3,000 for 2002 from the \$2,000 limit allowed in 2001. Furthermore, individuals age 50 and older were also allowed to make an additional \$500 contribution in 2002. For 2003, the

contribution limit remained at \$3,000 before increasing in 2005 to \$4,000. The additional \$500 contribution allowance for those age 50 or older remained in effect through 2005. The \$4,000 standard limit remained in place in 2006, but the catch-up contribution increased to \$1,000 in 2006. The same limits held for 2007, before the standard limit increased to \$5,000 in 2008.

⁸ The data for this section and the following section are from IRS research published in their *SOI Bulletin*. For further results, see Peter J. Sailer and Sarah E. Nutter, "Accumulation and Distribution of Individual Retirement Arrangements, 2000," *SOI Bulletin* (Spring 2004): 121–134; Victoria L. Bryant and Peter J. Sailer, "Accumulation and Distribution of Individual Retirement Arrangements, 2001–2002," *SOI Bulletin* (Spring 2006): 233–254; and Victoria L. Bryant, "Accumulation and Distribution of Individual Retirement Arrangements, 2004," *SOI Bulletin* (Spring 2008): 90–101.

⁹ Other IRAs include SEP and SIMPLE plans.

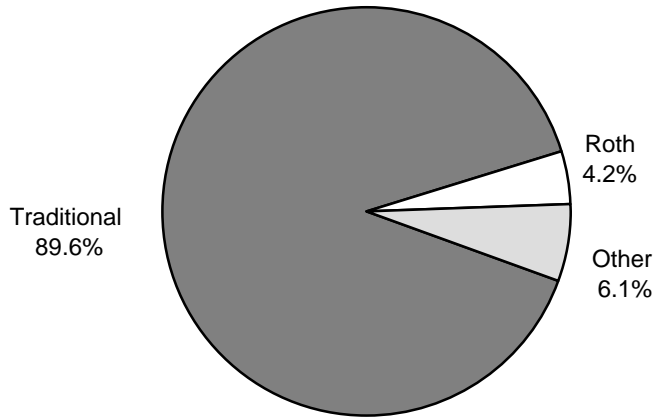
¹⁰ The Investment Company Institute has estimates for IRA assets by type through 2007 in Investment Company Institute, "The U.S. Retirement Market, 2007," *Research Fundamentals*, Vol. 17, no. 3 (Investment Company Institute, July 2008), available at www.ici.org/pdf/fm-v17n3.pdf (last viewed Aug. 6, 2008); and more detailed data on IRA holdings are available in Investment Company Institute, "Appendix: Additional Data on the U.S. Retirement Market, 2007," *Research Fundamentals*, Vol. 17, no. 3A (Investment Company Institute, July 2008), available at www.ici.org/pdf/fm-v17n3_appendix.pdf (last viewed Aug. 6, 2008).

¹¹ See Craig Copeland, "Individual Account Retirement Plans: An Analysis of the 2004 Survey of Consumer Finances," *EBRI Issue Brief*, no. 293 (Employee Benefit Research Institute, May 2006), for a breakdown of IRA assets into rollover and traditional (regular) assets, where between 25 percent and 50 percent of the IRA assets were found to be attributable to rollovers.

¹² See endnote 7, for details on the increases in the IRA contribution limits.

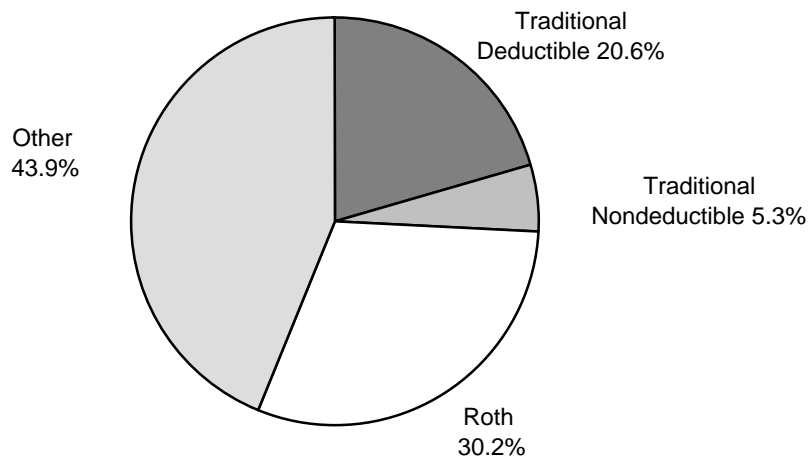
Figure 6 Distribution of IRA ^a Assets and Contributions, by IRA Type, 2000–2004				
	2000	2001	2002	2004
(in billions)				
End-of-Year Asset Levels				
All IRAs	\$2,629.309	\$2,619.376	\$2,532.724	\$3,299.300
Traditional IRAs	2,407.022	2,394.911	2,321.748	2,956.688
Roth IRAs	77.579	79.340	77.582	139.950
Other IRAs ^b	144.708	145.124	133.393	202.662
Contributions				
Total	36.484	35.747	42.297	48.729
Traditional IRAs	10.041	9.181	12.393	12.633
Deductible	7.477	7.407	9.462	10.029
Nondeductible	2.564	1.774	2.931	2.604
Roth IRAs	11.558	10.984	13.190	14.718
Other IRAs	14.885	15.582	16.714	21.378
Rollovers to Traditional IRAs	225.637	187.799	204.396	214.878
Percentage of Eligible Taxpayers				
Who Contribute	9.5%	10.6%	10.3%	10.1%
Average Contribution	\$2,412	\$2,348	\$2,894	\$3,314
Source: Peter J. Sailer and Sarah E. Nutter, "Accumulation and Distribution of Individual Retirement Arrangements, 2000," <i>SOI Bulletin</i> (Spring 2004): 121–134; Victoria L. Bryant and Peter J. Sailer, "Accumulation and Distribution of Individual Retirement Arrangements, 2001–2002," <i>SOI Bulletin</i> (Spring 2006): 233–254; and Victoria L. Bryant, "Accumulation and Distribution of Individual Retirement Arrangements, 2004," <i>SOI Bulletin</i> (Spring 2008): 90–101.				
^a Individual retirement arrangement (account).				
^b Other IRAs include SEP plans, SIMPLE plans, and educational IRA plans.				

Figure 7
Percentage of Total of IRA Assets,
by IRA Type, 2004



Source: Calculated from Figure 6.

Figure 8
Percentage of Annual IRA Contributions,
by IRA Type, 2004



Source: Calculated from Figure 6.

■ ***Domestic Partner Benefits: Facts and Background (September 2008 Update)***

By Ken McDonnell, EBRI

■ **What is a “domestic partnership” and what proof of the relationship is required?**

- Domestic partner benefits are benefits that an employer chooses to offer to an employee's unmarried partner, whether of the same or opposite sex.
- An employer wishing to implement a domestic partner program needs to create a definition of what an eligible domestic partner is. The most common definitions contain four or five core elements: 1) the partners must have attained a minimum age, usually 18; 2) Neither person is related by blood closer than permitted by state law for marriage; 3) The partners must share a committed relationship; 4) The relationship must be exclusive; 5) The partners must be financially interdependent.
- An employer also must decide whether the domestic partner program is to cover same-sex couples only or include opposite-sex couples.
- Documentation of proof of a domestic partner relationship can take many forms. It is up to the employer to determine what is appropriate. Some employers are satisfied with the partners signing a written statement of their relationship. Some employers may require proof of some financial relationship, such as a joint lease or mortgage. Whatever documentation is required must be germane to the issue of validating a domestic partnership, or it could lead to claims of invasion of privacy.

■ **What is included in domestic partner benefits and how many employers offer this benefit?**

- Most employers that offer domestic partner benefits to their workers offer a range of only low-cost benefits, such as family/bereavement/sick leave, relocation benefits, access to employer facilities, and attendance at employer functions. However, most public attention involving domestic partner benefits concerns employers that offer health insurance coverage to domestic partners.
- According to a 2007 survey by Hewitt Associates, 54 percent of surveyed firms offered coverage for domestic partners. Seventeen percent of firms offered domestic partner coverage to same-sex couples only; 1 percent of firms offered coverage to opposite-sex couples only; 32 percent of surveyed firms offered coverage for same or opposite-sex couples. According to a 2005 Hewitt Associates study, of those employers that offered domestic partner benefits, 83 percent offered the coverage to dependents of domestic partners. These numbers represent a significant increase since 2002, when 19 percent of surveyed firms offered domestic partner benefits.
- According to the Human Rights Campaign Fund, which describes itself as the largest national lesbian and gay political organization in the United States, as of Aug. 14, 2008, 9,374 employers offered domestic partner benefits. Of that number, 8,653 are private-sector companies, with 270 of the Fortune 500 companies offering domestic partner benefits. A listing of firms that offer full health insurance coverage to domestic partners is posted by the Human Rights Campaign at www.hrc.org/

■ **Why an employer offers domestic partner benefits:**

- *Market competition and diversity*—The attraction to employees of a comprehensive benefits package that offers health and retirement coverage is well-documented. Given the typically diverse contemporary work force, some employers try to design their benefits package to appeal to that diversity and maintain a recruitment edge. According to a 2005 Hewitt Associates study, the number-one reason for offering domestic partner benefits was to attract and retain employees (cited by 71 percent of organizations offering benefits to same-sex couples and 69 percent to opposite-sex couples).
- *Fairness*—Many employers believe that offering benefits to legally married partners of employees and not offering the same benefits to the partners of non-legally married employees discriminates on the basis of sexual orientation and/or marital status. Many employers have a formal policy against discrimination on the basis of sexual orientation, as the practice is illegal in some jurisdictions. The decision to offer domestic partner benefits communicates to employees that the employer is committed to its stated policy. According to a 2005 Hewitt Associate study, there was no statistical difference among organizations that

said offering domestic partner benefits to same-sex (65 percent) and opposite-sex (64 percent) couples was the fair/right thing to do.

■ **Costs of and enrollment in domestic partner benefits:**

- This is the primary concern for employers, especially with regard to health benefits, since extending coverage to more individuals increases the cost of health benefits. There are two components driving the cost issue: 1) How many new enrollees the plan can expect to receive; and 2) What risks are likely to be associated with those individuals. In 2005, Hewitt Associates found that in 88 percent of the organizations that offer domestic partner benefits, they comprise less than 2 percent of total benefit costs.
- In a 2005 study of domestic partner benefits, Hewitt Associates found that on average 1 percent of eligible employees offered domestic partner coverage in the health plan actually elected to take it. Many employers, in the planning stage, had anticipated an enrollment rate of 10 percent. In an earlier 1994 study, Hewitt found employers that allow only same-sex couples to enroll domestic partners in the health plan reported a lower enrollment rate, compared with those employers that allow opposite-sex couples to enroll. Overall, Hewitt found in 1994 that 67 percent of the couples electing domestic partner coverage were opposite-sex couples.
- Hewitt found, in 2000, that employers are no more at risk when adding domestic partners than when adding spouses. Experience has shown that the costs of domestic partner coverage to be lower than anticipated. There are several reasons why: The employees eligible for domestic partner coverage tend to be young, and, as a result, healthy; enrollment in domestic partner coverage is low, primarily due to the fact that most domestic partners already have coverage through their own employers; any increased risk of AIDS among male same-sex couples appears to be offset by a decreased risk among female same-sex couples; and same-sex domestic partners have a very low risk of pregnancy.
- Most recent estimates (1996) of the lifetime costs of treating a person with HIV disease range from \$71,143 to \$424,763. By way of comparison, the cost of a kidney transplant can be as high as \$200,000, and the cost of premature infant care can run from \$50,000 to \$100,000.

■ **Qualification for benefit privileges under current federal law:**

Tax Treatment

- The U.S. Internal Revenue Service (IRS) has addressed the issue of domestic partner coverage in several private letter rulings. According to those rulings, employment-based health benefits for domestic partners or nonspouse cohabitants are excludable from taxable income only if the recipients are legal spouses or legal dependents. The IRS also states that the relationship must not violate local laws in order to qualify for tax-favored treatment. See below for a discussion of the 1996 Defense of Marriage Act.
- The IRS leaves the determination of marital status to state law.
 - *Tax-Favored Treatment*—There are 11 states plus the District of Columbia that recognize common law marriages^a and all states recognize common law marriages legally contracted in those jurisdictions that permit them (see http://topics.law.cornell.edu/wex/table_marriage for more information). Couples in those jurisdictions that have a common law marriage do receive the tax favorable treatment in an employment-based plan for domestic partner coverage.
 - *No Tax-Favored Treatment*—See below for a discussion of the Supreme Judicial Court of Massachusetts ruling. Some cities (i.e., San Francisco and New York City) allow domestic partners to register their relationship with the city, but these registries do not provide legal status as marriage or common law marriage.
- The tax, for those who do not receive tax-favored status, is determined by assessing a fair market value for covering the domestic partner. This amount is then reported on the employee's W-2 form and is subjected to Social Security FICA and federal withholding taxes.

Sec. 125 Flexible Benefits and Spending Accounts

- Employee flex allowances that include extra money or credits toward providing coverage for a domestic partner are treated as taxable income.
- Flexible spending account benefits may not be provided to a domestic partner because such accounts can include only nontaxable income.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

- Under federal law, no requirement exists that a plan must extend COBRA rights to domestic partners who lose coverage due to what would otherwise be a qualifying event. An employer may choose to extend COBRA coverage to a domestic partner but is under no legal obligation to do so.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

- Domestic partners may not be considered as dependents. However, an employer that provides health insurance to domestic partners may want to include them in the certification procedure for documenting the partnership and apply the other HIPAA requirements for consistency in administration.

Defense of Marriage Act of 1996 (DOMA)

- For purposes of federal tax law and benefits, DOMA established federal definitions of (a) “marriage” as a legal union only between one man and one woman as husband and wife; and (b) “spouse” as a person only of the opposite sex who is a husband or wife. Because of DOMA’s provisions, if a state extends marriage to same-sex couples, same-sex partners would not be treated as spouses for federal tax and employee benefit purposes.
- Because marriages are granted through state law, DOMA also gives states the choice to recognize same-sex marriages legally performed in other states. The law does not specifically outlaw same-sex marriage, and states remain free to recognize same-sex marriage if they so choose. But by making one state’s recognition of another state’s legal acts optional in this instance, DOMA essentially creates an exception to the Full Faith and Credit Clause of the U.S. Constitution, thus raising constitutional questions concerning the validity of the law. Because Vermont created a parallel civil union rather than sanctioning same-sex marriage, the new law does not create an opportunity to challenge DOMA’s constitutionality. Since the enactment of DOMA in 1996, the issue has not come before the U.S. Supreme Court for a decision.
- Among the states that ban same-sex marriage, 16 states do so by law; eight do so by state constitution; and 18 states ban same-sex marriage and civil unions by state constitutions. See http://www.hrc.org/your_community/index.htm for more information.

■ State and local government actions affecting domestic partner benefits:

Benefits generally are regulated at the federal level by the Employee Retirement Income Security Act of 1974 (ERISA), and private employers that choose to offer domestic partner benefits must follow federal law (see section above). Most recent legal activity concerning domestic partner benefits has involved state and local governments acting in their capacity as employers, but subject to local political and legal circumstances. As a result, some jurisdictions have taken very different approaches to the issue, such as:

California Supreme Court, In re: Marriage Cases

- May 15, 2008, the California Supreme court ruled by 4–3 that marriages between people of the same sex are legal, thereby overturning an existing statutory ban on same-sex marriage. The ruling went into effect June 14, 2008. See <http://www.courtinfo.ca.gov/opinions/documents/S147999.PDF> for the decision.
- The “Limit on Marriage” proposed constitutional amendment is an initiative to put before the voters of California in November 2008 an amendment to the state constitution that would ban same-sex marriage, thereby overturning the state Supreme Court’s decision. Gov. Arnold Schwarzenegger is opposed to the proposed constitutional amendment.

Supreme Judicial Court of Massachusetts, Hillary Goodridge & others vs. Department of Public Health & another

- The Massachusetts Supreme Judicial Court held Nov. 18, 2003, that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” The court stayed the entry of judgment for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=ma&vol=sjcslip/sjcNov03c&invol=1>
- The Massachusetts State Senate asked the court for an advisory opinion as to whether legalized civil unions would be sufficient for same-sex couples. The court ruled on Feb. 6, 2004, that they would not, saying, “Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The history of our nation has demonstrated that separate is seldom, if ever, equal.”
- The state court’s decision providing state recognition of same-sex marriages went into effect on May 18, 2004. On March 29, 2004, the state legislature narrowly passed a state constitutional amendment ballot measure that would overturn Goodridge. The amendment must be approved a second time in the 2005–2006 session of the legislature. On June 14, 2007, the effort to ban same-sex marriage by amending the state constitution was defeated.

- At this point it is unknown what impact the Massachusetts action might have on the federal Defense of Marriage Act, although it is speculated that a challenge arising out of a Massachusetts same-sex marriage (if one occurs) ultimately will test the legality of DOMA before the U.S. Supreme Court. In November 2004, the U.S. Supreme Court refused to hear a case trying to overturn the Massachusetts decision.

San Francisco City Marriages

- On Feb. 12, 2004, San Francisco Mayor Gavin Newsom ordered the city to begin approving same-sex marriages, and since then city clerks have conducted hundreds of same-sex marriage ceremonies. While state law and a voter-approved referendum passed in 2000 (Proposition 22) define marriage as a union of a man and a woman, Newsom maintains that the state constitution's broad equal protection clause pre-empts those laws. Legal challenges to the city's action currently are underway.

Vermont's Civil Union Law for Same-Sex Couples, Effective July 1, 2000

- On April 26, 2000, Vermont's governor signed into law H. 847 (Act 91) establishing a system of civil unions for same-sex couples, effective July 1, 2000. Couples entering into a civil union in Vermont will have the same state-guaranteed rights and privileges (and obligations) as married couples, even though they will not be considered "married" under state law.
- The highly controversial law stemmed from a unanimous ruling Dec. 20, 1999, by the state Supreme Court (*Stan Baker et al., vs. State of Vermont et al.*), which held that there was no state constitutional reason for "denying the legal benefits and protections of marriage to same-sex couples." The case could not be appealed to a federal court because the ruling was based on Vermont's constitution, so federal law did not apply.
- The Vermont Supreme Court did not give permission for legalizing same-sex marriages, but instead ordered the state legislature to come up with some method for implementing its decision. Because the legislature created a domestic partnership equivalent to marriage, employers are expected to be able to retain more design flexibility over their benefit plans, and ERISA will shield self-funded employers from being forced to cover "domestic partners" of Vermont employees.

Benefit Provision

- Because ERISA pre-empts state law provisions that relate to employee benefit plans, private employers will not be required to recognize civil unions as marriages for the purposes of employee benefit plan design. The exception to this is with regard to state family leave benefits and workers compensation benefits, which are not ERISA-covered programs.
- Insurers in Vermont are required to offer coverage to parties in civil unions and their dependents if they offer such coverage to spouses and dependents. It appears that employers are not required to purchase such policies for their employees. The insurance provisions of the law took effect on Jan. 1, 2001.

Who Is Eligible for a Civil Union and What Are the Rights and Benefits?

- Civil unions are available to two unrelated persons of the same sex who:
 - 1) Are at least 18 years old.
 - 2) Are competent to enter a contract.
 - 3) Are not already married or in a civil union.
 - 4) Have a guardian's written permission if they are under a guardianship.

There is no residency requirement, but to dissolve a civil union the parties must follow the same procedures required for divorce.

- Parties to a civil union have exactly the same rights and obligations as married couples and are subject to the state domestic relations laws regarding support, custody, property division, and dissolution of the relationship.

Reciprocal Beneficiary Relationships

- Related persons who cannot marry or enter into a civil union (i.e., siblings) can now enter into a "reciprocal beneficiary" relationship. This relationship will entitle them to more limited spousal-type rights than civil unions. Generally, these rights relate to health care decisions, hospital visits, and durable power of attorney for health care (Hawaii has had a similar reciprocal beneficiary law since 1997).
- The following states have enacted civil union laws which provide all the same rights and responsibilities as marriage:
 - Connecticut (www.jud.ct.gov/lawlib/Notebooks/Pathfinders/CivilUnions.htm).
 - New Hampshire (www.gencourt.state.nh.us/legislation/2007/HB0437.html).
 - New Jersey (http://www.njleg.state.nj.us/2006/Bills/A4000/3787_11.PDF).

San Francisco Nondiscrimination in Contracts-Benefits Ordinance, Effective Jan. 1, 1997

- The Air Transport Association of America successfully sued the City of San Francisco, claiming airlines do not have to comply with the city's ordinance because the airlines' benefit packages are governed by federal law, specifically ERISA, which pre-empts state and local laws with regard to employee benefits. In an April 10, 1998, ruling, the U.S. District Court for the Northern District of California upheld the San Francisco ordinance *except* with regard to airlines. In her ruling, Judge Claudia Wilkens stated that the city acts as a "market participant" in dealing with city contractors—other than airlines—and the law therefore does not violate the ERISA pre-emption provisions. However, in the city's dealing with airlines at the city-owned airport, the city acts as a regulator, and not a market participant, so therefore the ordinance is pre-empted by ERISA with regard to the airlines, the judge ruled. The ruling applies the "market participant" standard to situations where the city wields no more power than an ordinary consumer in its contracting relationships.
- In November 1999, Los Angeles and Seattle joined San Francisco in enacting an ordinance that requires private employers that contract with the cities to provide benefits to the domestic partners of workers.

State and local governments as employers

Because state and local laws tend to vary significantly, there can be sharply different approaches by state and local governments—acting as employers—in the benefits they offer to their workers. For example:

- Virginia—In April 2000, the Virginia Supreme Court, in a unanimous ruling, struck down Arlington County's domestic partner benefits ordinance, holding that the county had exceeded its authority under state law.
- Oregon—A 1998 state appellate court ruling (*Tanner v. Oregon Health Sciences University*), held that the Oregon Constitution requires all state and local government agencies to offer equal benefits to gay and married employees.

For more information, contact Ken McDonnell, (202) 775-6367, or see EBRI's Web site at www.ebri.org

Sources: Melody A. Carlsen, "Domestic Partner Benefits: Employer Considerations," *Employee Benefit Practices*, International Foundation of Employee Benefit Plans (fourth quarter 1994); Hewitt Associates, *Domestic Partners and Employee Benefits: 1994*, Research Paper (Lincolnshire, IL: Hewitt Associates); Hewitt Associates, *Survey Findings: Domestic Partners 2000* (Lincolnshire, IL: Hewitt Associates, 2000); Hewitt Associates, *Survey Findings: Benefit Programs for Domestic Partner & Same-Sex Couples 2005* (Lincolnshire, IL: Hewitt Associates, 2005); Hewitt Associates, *SpecSummary: United States Salaried: 2007–2008* (Lincolnshire, IL: Hewitt Associates, 2007); Barry Newman, Paul Sullivan, RTS, and Michele Popper, *Domestic Partner Benefits: An Employer's Perspective* (Newburyport, MA: Alexander Consulting Group, June 1996); Washington Resource Group of William M. Mercer, Inc., "Vermont Enacts Civil Union Law for Same-Sex Couples," *GRIST Report* (May 15, 2000).

^a For a listing of states recognizing common law marriage, see *Common Law Marriage* from ExpertLaw (http://www.expertlaw.com/library/family_law/common_law.html).

^b The United States Constitution ordinarily requires every state to accord "Full Faith and Credit" to the laws of its sister states. Thus, a common law marriage that is validly contracted in a state where such marriages are legal will be valid even in states where such marriages cannot be contracted and may be contrary to public policy. Note: Under current law, this applies to common law marriages only; not all states permit common law marriages; and DOMA defines marriage as between a man and woman (see the section on DOMA above for application to same-sex marriages). For a discussion of the legal issues involved in *Common Law Marriage* from ExpertLaw (http://www.expertlaw.com/library/family_law/common_law.html).

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