Property Rights of Unmarried Cohabitants — Nothing New under the Sun

by
Alexander C. Morey* and Dixie Grossman**

I. Introduction

The ownership and exclusive right to possess property are fundamental concepts learned early in life. A two year old knows which tricycle is his, which cookies his mother sent in his lunch, and which building blocks he is playing with. If anyone tries to ride his bike, take his blocks, or eat his cookies, the toddler will shriek "You can't have them — they're mine!" Similar words are commonly spewed when a couple, whether married or unmarried breaks up. "I earn the money. I paid for it, it's mine." That was my grandmother's, you can't have it."

Because dueling is no longer an accepted method of dispute resolution, all states have laws regulating the ownership, possession and distribution of various choate and inchoate property rights and interests.[1] All states also have laws governing ownership and distribution of property accumulated by spouses during marriage — marital property laws.[2] No state has a statutory

* Alexander C. Morey, is an associate with the firm, Silverman, Decaria & Kattelman, Chtd., and practices family law in Reno, Nevada.

** Dixie Grossman, is an associate with the firm, Silverman, Decaria & Kattelman, Chtd., and practices family law in Reno, Nevada.

1 For example, laws governing property owned at death — inheritance law; laws governing the transfer of homes and land — real property law; laws governing ownership of corporations, LLCs, partnerships, etc. — business association laws.

2 When a marriage ends, the spouses have two general claims against each other: a claim for division of their real and personal property, and a claim for future support. Claims for future support — alimony (or the misnomer "spousal support") — are technically not property claims because a right to alimony is not property. *See, e.g., In re Mitchem*, 309 B.R. 574 (Bankr. W.D. Mo. 2004). Nonetheless, claims for future support function to divide future earnings between ex-spouses; so, this article includes them in "marital property rights."

scheme specifically addressing the rights and obligations of unmarried cohabitants, thus leaving the property disputes of couples living together without benefit of marriage, or other legally recognized civil union, to the common law of the state in which they reside.

There is little new under the sun[3] in the approaches states follow when determining the property rights of unmarried cohabitants[4] living in the United States upon the breakup of their relationship. The law essentially has not changed since *Marvin v. Marvin*[5] was decided in 1976. This article begins in Part II with a brief history of unmarried cohabitation in America. In Part III, we review the intersection of changing societal norms and the law of cohabitation culminating in *Marvin*, which remains the seminal cohabitation case thirty-five years later. In Part IV, we look at the various approaches states follow when assessing unmarried cohabitants' property claims.

II. A Brief History of Cohabitation in America

Early America was a land of puritans who traveled to the new world in search of religious tolerance, yet accepted only those who obeyed their strict moral code. For example, being alone in the presence of a member of the opposite sex was considered taboo.[6] Sex outside of marriage and unmarried cohabitation were crimes in some states until well into the twentieth century and remain crimes in others.[7]

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3 What has been will be again, what has been done will be done again; there is nothing new under the sun. *Ecclesiastes* 1:9 (NIV)

4 This article addresses only a specific subset of unmarried cohabitants — people in heterosexual intimate relationships. A full discussion of the property rights of "unmarried cohabitants" in general — including non-intimate relationships (e.g., roommates) and same-sex couples — is beyond the scope of this article.

5 134 Cal. Rptr. 815 (1976).

6 *E.g.*, NATHANIEL HAWTHORNE, THE SCARLET LETTER (Bantam Classics 2003).

7 *See* Sharon Jason, *Cohabitating Americans in 7 States Run Afoul of the Law*, USA TODAY, July 17, 2005, http://www.usatoday.com/life/lifestyle/2005-07-17-state-law_x.htm# (last visited July 11, 2011). Laws still on the books: adultery: COLO. STAT. ANN. § 18-6-501 (2009); GA. CODE ANN. § 16-6-9 (2011); ILL. COMP. STAT. ANN. Chpt. 720, sec. 5/11-35 (2011); cohabitation: VA. CODE ANN. § 18.2-345 (2011); MICH. COMP. LAWS § 750.335 (2011).

To this day, "lewd and lascivious cohabitation" is a crime in Michigan.[8]

The feminist movement, the "free love" era of the 1960s, and other philosophical doctrines emphasizing independence such as "selfish altruism" famously embodied by John Galt and Dagny Taggart in Ayn Rand's *Atlas Shrugged*, chipped away at the bedrock of American Puritanism and moved unmarried cohabitation from a scandalous condition to a socially accepted situation.[9]

By 1976, when the California Supreme Court addressed whether Michelle Marvin had a cause of action against Lee Marvin after the breakup of their relationship, the court noted that

> the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.
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> The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.[10]

In the 35 years since *Marvin*, the number of unmarried cohabitants has steadily increased. The U.S. Census Bureau estimates the "number of cohabiting households increased from 1.1 million in 1977 to 4.9 million 20 years later in 1997."[11] The number of unmarried couples cohabiting with one another continues to increase. In 2008, Marsha Garrison noted that

> cohabitation is now a multifaceted and multigenerational phenomenon. It includes young men and women who are sharing living space

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8 MICH. COMP. LAWS SERV. § 750.335 (Lexis Nexis 2011).

9 See the discussion of the rise of unmarried cohabitation in Marsha Garrison's article, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309 (2008).

10 *Marvin*, 134 Cal. Rptr. at 831.

11 *See* Lynne M. Casper, Philip N. Cohen & Tavia Simmons, *How Does POSSLQ Measure Up? Historical Estimates of Cohabitation* (U.S. Census Bureau Population Division Working Paper No. 36, May 1999).

> with a dating partner in order to save money, more committed couples who are testing the strength of their relationship, engaged couples who are planning to marry, committed couples who view their relationship as marital but have chosen to avoid marriage for practical reasons such as potential loss of alimony or a surviving-spouse entitlement, and many couples whose motives are mixed or who disagree about the nature of their relationship.[12]

Acceptance of non-marital cohabitation continues to grow. Data shows a recent, unusually large increase in the number of unmarried cohabitants. Between 2009 and 2010 there was a 13 percent increase in the number of opposite sex couples cohabitating. In that short period of time, the number of unmarried couples living together grew to 7.5 million.[13]

III. *Marvin v. Marvin*: A Catalogue of Property Claims for Unmarried Cohabitants

By now, *Marvin v. Marvin* and the resulting framework for distribution of property acquired during non-marital cohabitation are familiar to most family law practitioners; but in December 1976 the case initiated a nationwide dialogue in courts, legal publications, law schools, and the press. Since entry of the decision, *Marvin* has been cited in at least 364 decisions, more than 400 law review articles, numerous statutes, and several other secondary authorities, including but not limited to the *Second Restatement of Contracts*.[14]

Prior to 1976, non-marital partner claims, although rare, were not unheard of. Unmarried cohabitants were socially and legally stigmatized. As a result, the law generally limited recovery for distribution of property acquired by non-marital partners to situations in which the parties mistakenly believed themselves to be in a legally valid marriage; where the parties each contributed to the accumulation of property during the relationship; or

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12 Garrison, *supra* note 9, at 313.

13 *See* Rose M. Krieder *Increase in Opposite-sex Cohabitating Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS)*, Housing and Household Economic Statistics Division Working Paper, Sept. 15, 2010. The 13 percent increase from 2009 to 2010, increased the number of oppose sex couples cohabiting from 6.7 million in 2009 to 7.5 million in 2010.

14 RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 124, 179, 189.

where the parties lawfully contracted with one another regarding property acquired during their relationship to the extent the contract "did not explicitly rest upon the immoral and illicit consideration of meretricious sexual services".[15]

The causes of action identified in *Marvin* were not new. For example, in New York, unmarried cohabitants could recover on theories of quantum meruit and implied contract for lifetime support, as long as the consideration was based upon household services and companionship,[16] and not upon sex.[17] Yet *Marvin* and changing societal norms brought the evolution of unmarried cohabitant rights to the public eye. The California Supreme Court gathered and adopted existing legal theories upon which cohabitant property rights could be established, and raised the prominence of contract theories in the analysis.

Although *Marvin* is routinely cited in appellate decisions around the country and nonmarital cohabitation is now a societal norm, cohabitant property claims appear infrequently litigated compared to the number of unmarried cohabitants in the U.S. population, at least at the appellate level.[18] And, true to Ecclesiastes, "nothing is new under the sun" — the legal analysis has not evolved since *Marvin*.[19]

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15 *See* Marvin v. Marvin, 134 Cal. Rptr. 815, 821 (Cal. 1976). *See also* Vallera v. Vallera, 21 Cal. 2d 681 (Cal. 1943) (citing Feig v. Bank of Italy etc. Assn., 21 P.2d 421 (Cal. 1933)); Flanagan v. Capital Nat'l Bank, 3 P.2d 307 (Cal. 1931); Figoni v. Figoni, 295 P.339 (Cal. 1931); Schneider v. Schneider, 183 Cal. 335 (1920); Coats v. Coats, 118 P. 441 (Cal. 1911); Bacon v. Bacon, 69 P.2d 884 (Cal. Ct. App. 1937); Bracken v. Bracken, 217 N.W. 192 (S.D. 1927); Hayworth v. Williams, 116 S.W. 43 (Tex. 1909) *superseded by statute as stated in* Batchelor v. Batchelor, 634 S.W.2d 71 (Tex. Ct. App. 1982).

16 *See* Morone v. Morone, 50 N.Y.2d 481, 486 (N.Y. Ct. App. 1980) (citing early New York cases discussing contracts between unmarried cohabitants).

17 *Id.*

18 *See* Garrison, *supra* note 9, at 320–21.

19 Although at times, *Marvin*'s expansive legal theories have been broadly applied: see, for example, *Western States Construction, Inc. v. Michoff*, 840 P.2d 1220 (Nev.1992), where the state's community property laws were applied to a cohabiting couple based upon a finding that they impliedly agreed to hold property as though they were married.

IV. A Review of Legal Theories Recognized as Viable in Unmarried Cohabitant Property Rights Cases

After *Marvin*, courts and litigants had a catalogue of legal theories on which unmarried cohabitants could claim property rights between one another. The *Marvin* theories, including implied contract, implied agreement of partnership or joint venture, or some other tacit understanding between the parties, constructive trust and resulting trust, quantum meruit, and other unspecified equitable remedies where other existing remedies proved inadequate,[20] are discussed in this section.

A. *Contracting Into the Marital Property System*

1. *Quantum Meruit Recovery*

In the unmarried cohabitant context, quantum meruit recovery is a remedy by which an unmarried cohabitant who provides services to the other cohabitant (and possibly the relationship as a whole) may receive the value of the services upon dissolution of the relationship.[21] The theory has significant disadvantages and is a difficult route to recovery. First, the amount of recovery is limited to the value of the services *less the value of support received*.[22] This raises significant problems of proof. A homemaking unmarried cohabitant must prove the value of the services rendered and the value of the support received from the other cohabitant. It is not impossible to prove either value, but the law carries an implicit presumption that homemaking services are of equal value to the support rendered by the other party who provided money for the home, clothes, food, gifts, cars, etc.[23] Second, the unmarried cohabitant seeking quantum meruit recovery must show they rendered their services "with the expectation of monetary reward."[24] Because the supposition at the time of breakup that a sexual partner in a committed relationship performed homemaking services in expectation of mon-

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20 *See Marvin* at 831–32.

21 *See Marvin* at 831–32.

22 *Id.*

23 *Id.*

24 *Marvin*, 134 Cal. Rptr. at 832.

etary reward may smack of opportunism, the law carries a general presumption that such services are offered gratis.[25]

2. *Express Contracts*

Given the difficulty of proving an interest in property acquired during cohabitation on one hand and the possibility of proving such an interest on the other, it is surprising more couples do not create express written agreements defining their property and financial rights and obligations, if any, during cohabitation. Express written contracts are the most flexible and effective means of securing a defined set of rules governing economic relations between unmarried cohabitants in states recognizing the agreements.[26]

Express contracts also may be created by verbal promises between parties.[27] Verbal contracts between intimate partners are difficult to prove since idle talk of future plans based on mutual love and companionship is frequently indistinguishable from actual promises to share property. Nevertheless, express verbal contracts for future support are some of the oldest forms of agreement recognized between unmarried cohabitants.[28]

3. *Implied Contracts*

Implied contracts exist in two distinct forms: first, implied in fact contracts — i.e. where the parties' actions demonstrate a contract between them — and second, implied in law contracts.[29] Many states recognize implied contracts to divide property ac-

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25 *Id.* at 827.

26 Georgia, Illinois, and Louisiana do not permit express contracts regarding property and support unless the contract is entirely collateral to the intimate relationship. *See* Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994); Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Schwegmann v. Schwegmann, 441 So.2d 316 (La. Ct. App. 1983).

27 *See*, *e.g.*, *Marvin*, 134 Cal. Rptr. 815; Hay v. Hay, 678 P.2d 672 (Nev. 1984).

28 *See Morone*, 50 N.Y.2d at 486 (citing early New York cases discussing contracts between unmarried cohabitants). *See also Vallera*, 21 Cal. 2d at 684.

29 Contracts implied in law give rise to quantum meruit recovery where the law supplies a promise to pay for services to avoid unjust enrichment. *See* Mantiply v. Mantiply, 951 So.2d 638, 656 (Ala. 2006).

quired during an unmarried cohabitation relationship as though the parties to the relationship were married.[30]

Contracts into the marital property system are difficult to prove, and have been criticized as akin to common law marriage.[31] Without a doubt, the proof problems that lead legislatures to abolish common law marriage are central features of implied contracts to share property.[32] A party seeking to show an implied contract to hold property as though married must generally show the parties acted as though they were married, pooled their earnings, held property in joint names, perhaps even represented to third parties that they were husband and wife.[33] This style of proof is, for all intents and purposes, common law marriage.[34]

However, despite the difficulties of proof, implied in fact contracts remain available as an avenue to seek division of property by unmarried cohabitants in at least 22 states.[35]

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30 *See*, *e.g.*, Tolan v. Kimball, 33 P.3d 1152 (Alaska 2001); *Marvin*, 134 Cal. Rptr. 815 (1976); Loughlin v. Loughlin, 910 A.2d 963 (Conn. 2006). *See also* Bright v. Kuehl, 650 N.E.2d 311, 318 (Ind. 1995) (identifying cases recognizing implied contract as a remedy for unmarried cohabitants).

31 *See* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (declining to recognize claims by unmarried cohabitants in part on the basis that they contravened the legislature's abolition of common law marriage).

32 *See* Jennifer Thomas, Comment, *Common Law Marriage,* 22 J. AM. ACAD. MATRIM. LAW. 151 (2009).

33 *See*, David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 TENN. L. REV. 537, 556-557 (1982) (discussing the similarity between unmarried cohabitation and common law marriage).

34 *Id. See also Hewitt*, 394 N.E.2d at 1211. West Virginia, in fact, requires the cohabitants to hold themselves out and consider themselves husband and wife to prove a claim. Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990).

35 *See*, *e.g.*, Wood v. Collins, 812 P.2d 951, 956 (Alaska 1991); Carol v. Lee, 712 P.2d 923, 927 (Ariz. 1986); *Marvin*, 134 Cal. Rptr. 815, 831 (Cal. 1976); Boland v. Catalano, 521 A.2d 142, 146 (Conn. 1987); Hustin v. Holmes, 508 So. 2d 535, 537 (Fla. Dist. Ct. App. 1987); Maria v. Freitas, 832 P.2d 259, 73 Haw. 266, 271 (Haw. 1992); Bright v. Kuehl, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995); Kerkove v. Thompson, 487 N.W.2d 693, 696 (Iowa Ct. App. 1992); Ellis v. Berry, 867 P.2d 1063, 1066 (Kan. Ct. App. 1993); Attorney Grievance Comm'n v. Ficker, 572 A.2d 501, 509 (Md. 1990); Hudson v. DeLonjay, 732 S.W.2d 922, 926–27 (Mo. Ct. App. 1987); Kinkenon v. Hue, 301 N.W.2d 77, 80 (Neb. 1981); Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984); Crowe v. DeGioia, 495 A.2d 889, 896 (N.J. Super. Ct. App. Div. 1985); Suggs v. Norris, 364 S.E.2d 159, 161 (N.C.

4. *Presumed Contracts*

The American Law Institute ("ALI") promulgated the *Principles of the Law of Family Dissolution: Analysis and Recommendations* (the "ALI Principles") in 2002. The ALI Principles adopted a conscription model for property rights between unmarried cohabitants.[36] Under the ALI Principles, the property of unmarried cohabitants "should be divided according to the principles set forth for the division of marital property."[37] At the time of this writing, only one state — the State of Washington — has adopted legal rules approaching the ALI model for unmarried cohabitants' property rights.[38]

The presumed contract approach gives a measure of certainty as to what the law provides unmarried cohabitants, so that people shacking up would know specific consequences which may arise from their relationship, both advantageous and disadvantageous. At the heart of the presumed contract approach is a judgment that it is unfair or unwise for society to allow people to live together without imposing restrictions on the financial advantages they may take of each other. Thus, the ALI stated the primary objective of their principles on the dissolution of unmarried cohabitation relationships is the "fair distribution of the economic gains and losses incident to termination of the relationship of domestic partners."[39]

Ct. App. 1988); Beal v. Beal, 577 P.2d 507, 510 (Or. 1978); Knauer v. Knauer, 470 A.2d 553, 564-65 (Pa. Super. Ct. 1983); Harmon v. Rogers, 510 A.2d 161, 165 (Vt. 1986); Connel v. Francisco, 898 P.2d 831 (Wash. 1995); Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303, 313 (Wis. 1987); Kinnison v. Kinnison, 627 P.2d 594, 595–96 (Wyo. 1981). Washington recognizes a version of an implied contract discussed later. Washington recognizes "long-term meretricious" relationships. *Connel v. Francisco*, 898 P.2d 831, 836 (Wash. 1995).

36 *See* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (the "ALI Principles") §§ 6.01 – 6.06 (2002).

37 *Id.* § 6.05. The ALI Principles provide for equal division of the marital estate except in limited circumstances like financial misconduct. *Id.* §§ 4.09 & 4.10.

38 *See* Connell v. Francisco, 898 P.2d 831, 834-35 (Wash. 1995) (summarizing case law and stating that Washington law requires a just and equitable distribution of property post-meretricious relationship).

39 *ALI Principles*, *supra* note 36, § 6.02(1).

B. *Domestic Partnerships and Gay Marriage*

Same-sex unions have not been adopted without skirmishes along the way. California's recent back and forth between the legislature, the courts, and the voters over the legality of same-sex marriage is well chronicled.[40] Because legally recognized same-sex and heterosexual unions are typically accompanied by legislated rules for the division of property on the termination of the union, they are distinct from the common law governed unmarried cohabitation arena. This section provides a very brief overview.

As same-sex partnerships become common and socially acceptable, states are moving towards permitting formal recognition of such relationships.[41] States take a variety of approaches along the spectrum of acceptance. On one extreme, some states recognize same sex marriage and thus allow same-sex couples access to all the rights, protections, and consequences of marriage.[42] On the other extreme lies the federal Defense of

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40 *See* National Center for Lesbian Rights, The Evolution of California's Marriage and Domestic Partnership Law: A Timeline, Aug. 2010, *available at* http://www.nclrights.org/site/DocServer/CA_Marriage__Domestic_Partner_Law_Timeline_Aug2010.pdf?docID=1265. *See also* Jennie Croyle, Recent Development, Perry v. Schwarzenegger, *Proposition 8, and the Fight for Same-Sex Marriage*, 19 AM. U.J. GENDER SOC. POL'Y & L. 425 (2011).

41 Of course, domestic partnerships may apply to heterosexual as well as same sex couples. *See*, *e.g.*, CAL. FAM. CODE. § 297 (2009); §§ NEV. REV. STAT. 122A.010-122A.510 (2009).

42 Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont recognize same-sex marriage. N.H. REV. STAT. ANN. § 457:1-a (2010); N.Y. DOM. REL. LAW § 10-a(1) (2011) (effective July 24, 2011); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009 Vt. Acts & Resolves No. 3, § 115 (Sept. 1, 2009); Kerrigan v. Comm. of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Other states recognize only domestic partnerships between same sex couples. *See, e.g.,* California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified as amended at CAL. FAM. CODE §§ 297-99 (West 2008)) (granting same-sex couples, and heterosexual couples meeting an age requirement, the "same rights, protections, and benefits, and . . . the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses"); An Act Relating to Domestic Relations, 2009 Nev. Stat. 2183-87, codified as NEV. REV. STAT. §§ 122A.010-122A.510 (2009); An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 72 (codified as amended at VT. STAT. ANN. tit. 15, §§1201-07 (2008)) (granting same-sex

Marriage Act which prohibits the federal government from recognizing such unions.[43] Many states fall somewhere in the middle — Nevada, for example, allows same-sex and heterosexual couples to register as domestic partners and receive the same protections, benefits, and consequences married couples have under the laws of Nevada.[44]

C. *Economic Cohabitation, Constructive Trusts, Joint Ventures, and Partition Actions*

Although unmarried cohabitants have the ability in many states to contract (explicitly or implicitly) into a marital property system, the claims are often difficult to win because of the high evidentiary burdens placed on litigants. To combat the proof problem, many cases filed by unmarried cohabitants turn to tried and true equitable remedies from areas of law other than marital property. Specifically, the equitable remedy of a constructive trust and the business law remedies of implied partnerships and joint ventures.

A constructive trust is an equitable remedy by which a court recognizes a person's equitable right to property when that person has no legal title and the person with legal title obtained it through fraud, duress, undue influence, or other unconscionable conduct.[45] A classic example is of a son who takes advantage of his elderly mother and uses her money to purchase property for himself and takes title in his name alone. If the mother sues her son, a court may recognize the mother's equitable right to the property and impose a constructive trust.

A constructive trust is well suited to the unmarried cohabitant situation where both parties provide money to maintain a

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couples the "same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage"); Act effective July 22, 2007, ch. 156, 2007 Wash. Legis. Serv. 496 (West) (codified as amended at WASH. REV. CODE ANN. § 26.60.010 to .090 (West 2008) (legally acknowledging domestic partnerships for same-sex couples and those over the age of sixty-two to "provide a legal framework for such mutually supportive relationships").

43 28 U.S.C. § 1738C (2006).

44 NEV. REV. STAT. §§ 122A.010-122A.510 (2009).

45 *See* Klein v. Bratt, 2009 Conn. Super. LEXIS 3216 (Conn. Super. Ct. Nov. 25, 2009).

home titled in only one name.[46] However, such trusts do have their limits, since the remedies generally require a cohabitant to contribute to the purchase price of an asset.[47] It is also unlikely a court would impose a constructive trust where a party claims his or her assistance in paying rent allowed the other to contribute more money to a retirement plan.[48] This need for a direct connection between payment and property is the major weakness of the constructive trust remedy, and its major distinction from a marital property division.

A second theory under which an unmarried cohabitant may seek an interest in property held by the other cohabitant is through recognition of a joint venture.[49] This theory is born of the common law of business associations and centers on the ability of people to join together for economic gain. A joint venture analogy may be all the more appropriate under the difficult economic climate of 2011 and the desire of many couples to reduce total living expenses. As Rose M. Kreider concluded in her paper for the U.S. Bureau of the Census, Housing and Household Economic Statistics Division, "[t]aken together, the ways in which newly formed couples in 2010 differed from existing couples suggest that economic situations such as longer-term unemployment may have contributed to the increase in opposite-sex cohabitating couples between 2009 and 2010."[50]

Implied partnerships and joint ventures may exist where "two or more parties combine property, money, efforts, skills and/or knowledge to seek a profit in some common undertaking,

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46 *See* Tolan v. Kimball, 33 P.3d 1152 (Alaska 2001); Lester v. Zimmer, 147 A.D.2d 340 (N.Y. App. Div. 1989).

47 *Id.*

48 *See* Mechura v. McQuillan, 419 N.W.2d 855, 858–59 (Minn. Ct. App. 1988); *but see* Ellis v. Wenz, 1999 Minn. App. LEXIS 1243, at *9–*13 (unpublished) (dissent) (noting the inequity in the rule announced in *Mechura*). *See also* Brooks v. Kunz, 637 S.W.2d 135, 139 (Mo. Ct. App. 1982) ("We think that logic and fairness requires the application of the Anderson approach and allow HN5a credit to each co-tenant for one-half of the mortgage amount financed, but allow contribution if one co-tenant pays more than his proportionate share.")

49 See, *e.g.*, Harmon v. Rogers, 510 A.2d 161 (Vt. 1986); Western States Constr. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992).

50 Krieder, *supra* note 13.

without any actual partnership or corporate designation."[51] Joint ventures may be established by express agreements[52] or by implication.[53] As Kreider's paper suggests, cohabitation may occur for primarily economic reasons: to reduce costs, to own a home rather than rent, to provide a safety net in case of job loss, or simply to live a more affluent lifestyle. The joint venture model could work well in many property disputes between unmarried cohabitants provided evidence exists that the couple shared a common goal to enhance their economic position.

Besides the fact that economic partnership theories of recovery are readily comparable to the economic relationship of unmarried cohabitants, these theories are appealing because they may be easier to prove than an implied contract. And in states such as Illinois and Georgia, which do not recognize implied contracts between unmarried cohabitants based on an intimate relationship a contract to form an economic partnership, independent of and collateral to any intimate relationship, they may be the only theory under which an unmarried cohabitant may have a chance of recovery.

Partition, or its common law sister, contribution,[54] may be another theory by which an unmarried cohabitant may receive reimbursement for contributions made to, or for the benefit of the other cohabitant's real property during the relationship. Although partition existed as an action in the English Common Law, it was limited to coparceners. The right was expanded to co-owners with fee simple title by statute in 1539 and to co-owners with estates for life or a term of years in 1540.[55] In America today, partition actions are creatures of statute and allow a per-

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51 Klein v. Bratt, 2009 Conn. Super. LEXIS 3216, at *21 (unreported decision) (citing Lesser v. Smith, 160 A. 302 (Conn. 1932)).

52 *E.g.,* Bucacci v. Boudin, 933 So.2d 580 (Fla. Dist. Ct. App. 2006).

53 *Marvin*, 134 Cal. Rptr. 815, 827 (1976).

54 *See* Sack v. Tomlin, 871 P.2d 298 (Nev. 1994) (applying the doctrine of contribution to provide co-tenant cohabitants interest in property pro rata according to their contributions).

55 Law Reform Commission of Saskatchewan, Proposals for a New Partition and Sales Act (2001), http://sklr.sasktelwebhosting.com/PaperPartitionSale.htm.

son with an interest in land to bring an action to divide the property between all parties with an interest in the land.[56]

In cases where cohabitants own a home together, but one partner claims to have paid a greater share of the expenses, a partition action *may* protect the cohabitant with the greater investment by allowing the cohabitant to seek an accounting of each party's contribution to the home.[57] If, however, cohabitants own a home as joint tenants or a court finds an express or implied agreement to share property equally exists, an accounting of exact contributions may be avoided and the property shared equally regardless of unequal contributions.[58]

In other cases, the remedy of partition may be attractive because a person with only equitable title to property may petition a court for relief and establish both legal title and right to a partition in one action.[59] A jilted unmarried cohabitant may, therefore, establish legal title to property held by the other party to the relationship and seek division of the property, or in an appropriate case, sale of the property. This device may be particularly effective and fitting in cases where an unmarried cohabitant makes payments on the mortgage of a home owned by his or her partner.[60]

> Using partition actions as a method to apportion interests in property when cohabitants end their relationship is not without its critics. In *Beal v. Beal*, the Oregon Supreme Court stated its opinion on using

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56 *See*, *e.g.*, CAL. CODE CIV. PROC. § 872.210 (2010); CONN. GEN. STAT. § 52-495 (2009); NEV. REV. STAT. § 39.010 (2009).

57 *See*, *e.g.*, Beal v. Beal, 577 P.2d 507, 509–10 (Or. 1978) (discussing the mechanics of a partition action between cotenants).

58 Millan v. De Leon, 226 Cal. Rptr. 831, 835–39 (Cal. Ct. App. 1986). *But see* DiCerto v. Jones, 947 A.2d 409, 411-13 (Conn. App. Ct. 2008) (stating that partition actions are equitable in nature and affirming the trial court's reimbursement of the defendant's down payment on a home held in joint tenancy and equal division of the remaining proceeds).

59 *See*, *e.g.*, Campbell v. Hodge, 34 So. 2d 210 (Ala. 1948); Watson v. Sutro, 25 P. 64 (Cal. 1890); Woogen v. Hamilton, 2003 Del. Super. LEXIS 311 (Del. Super. Ct. Sept. 3, 2011); Camp Phosphate Co. v. Anderson, 37 So. 722 (Fla. 1904); McArthur v. Ryals, 134 S.E. 76 (Ga. 1926); Koloa Sugar Co. v. Smith, 10 Haw. 487 (1896); Harriss v. Ingleside Bldg. Corp., 19 N.E.2d 585 (Ill. 1939).

60 *See* Maree v. Phillips, 525 S.E.2d 94 (Ga. 2000). In *Maree*, the court upheld the partition of property in accordance with an agreement the parties executed to control distribution at partition. *Id.* at 96–97

> "the rules of cotenancy":The difficulty with the application of the rules of cotenancy is that their mechanical operation does not consider the nature of the relationship of the parties. While this may be appropriate for commercial investments, a mechanistic application of these rules will not often accurately reflect the expectations of the parties.[61]

Of course, under the rule announced in *Beal*, if a party can prove an express or implied agreement to partition the property on the breakup of a cohabitation relationship, then the partition rules can apply as the "expectation of the parties."

V. Conclusion

In 1976 we knew not the horrors of 9/11, America's seemingly endless wars in Afghanistan and Iraq, nor the collapse of financial institutions "too big to fail." To the average American, smart phones, personal computers, the internet, and flat screen TV's were matters of science fiction. Jackie O, Princess Diana and Kurt Cobain have been replaced by Michelle Obama, Kate Middleton and Lady GaGa. Although the world has vastly changed since 1976, the legal analysis for determining property rights of unmarried cohabitants has not. *Marvin* and its progeny remain the standard bearers. When it comes to property rights of unmarried cohabitants, nothing is new under the sun.

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61 *Beal*, 577 P.2d at 510.