

Date: October 11, 2017
To: Study Committee on Economic Rights of Unmarried Cohabitants
From: Barbara Atwood
Re: Overview of State Common Law

This short overview builds on the Joint Proposal submitted by the JEBUFL and JEBUTEA for a Study Committee on the Economic Rights of Unmarried Cohabitants. I've included a summary description of cohabitants' remedies for property and for support, with each section followed by some illustrative cases. For a comprehensive review, I recommend two ALR articles: one on the property rights of unmarried cohabitants,¹ and one on claims for support after termination of the cohabitation.² These resources, along with recent law review contributions on the topic,³ are available on the Study Committee Dropbox.

I. Property claims

In the classic case of *Marvin v. Marvin*, 134 Cal. Rptr. 815 (Cal. 1976), the California Supreme Court held that unmarried cohabitants may enter into enforceable contracts to share earnings or property or for support, notwithstanding the "illicit" nature of their cohabitation, so long as the parties' sexual relationship is not an inseparable part of the agreement. The court identified a broad range of possible remedies: express or implied contract (including partnership and joint venture) and a cluster of other doctrines: quantum meruit, constructive trust, resulting trust, unjust enrichment, equitable lien, and other equitable theories.

Post-*Marvin*, an overwhelming majority of states recognize rights between cohabitants arising from express contract and about half have endorsed claims based on implied-in-fact contract. States differ as to whether the cohabiting relationship itself can give rise to an implied contract claim absent clear showing of intent on the part of the parties. Most courts require evidence of an agreement, express or implied, to share earnings or property accumulated during the cohabitation, often a difficult requirement to satisfy. Valid consideration separate and apart from the sexual relationship is required. A few state courts refuse to accept domestic or household services as lawful consideration, reasoning that such services are inextricably intertwined with the sexual relationship and are typically provided without expectation of compensation when a couple shares a home.

¹ *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R.5th 219 (originally published in 1999)

² "*Palimony*" *Actions for Support Following Termination of Nonmarital Relationships*, 21 A.R.R.6th 351 (originally published in 2007).

³ See, e.g., June Carbone & Naomi Cahn, *Nonmarriage*, 76 Md. L. Rev. 55 (2016); Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. Rev. 1 (2017).

In Washington, a long-term marriage-like cohabitation with a sharing of finances and other indicia of an interdependent relationship can give rise to a presumptive application of community property principles, both at dissolution and at death. *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995). Although the parties' intent is a relevant factor under the Washington approach, the Washington courts do not require a claimant to prove that the couple specifically intended to be governed by community property law. The "conscriptive" nature of this approach has provoked criticism. A few other states seem willing to infer intent to share property and earnings based on the nature of the cohabitants' relationship, but no state has gone as far as Washington in this regard.

About half a dozen state courts have rejected implied contract as a basis for recovery between cohabitants, reasoning that reconstructing an intimate cohabitant relationship into a contractual arrangement after the fact is untenable. An even smaller minority of states reject contract theory altogether arising out of cohabitation, reasoning that any such remedies would be inconsistent with the abolition of common law marriage. The leading modern case in that regard is *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016). The courts that reject all contract claims arising from the nonmarital relationship note that the legislature is the appropriate forum for change.

Courts typically accept other equitable theories not based on contract as a potential basis for recovery, particularly quantum meruit and constructive trust/unjust enrichment. Equitable theories can sometimes provide a basis for relief even in states that have rejected remedies based on contract. In *Blumenthal*, for example, the Illinois Supreme Court acknowledged that theories such as constructive trust might be available if the basis for the claim is independent of the nonmarital relationship. *Id.* at 853-54 (citing *Spafford v. Coats*, 455 N.E.2d 241 (Ill. Ct. App. 1983) (upholding constructive trust claim where cohabitant wrongfully retained funds deposited by other cohabitant for purchase of vehicles).

The interpretation and application of these equitable doctrines are far from uniform. For example, in quantum meruit, a claimant must show that both parties had a reasonable expectation that services would be compensated, and any compensation must be reduced by benefits already received. Some courts seem more willing than others to infer an expectation of compensation. To succeed on an unjust enrichment claim, in turn, a few courts have a strict approach, requiring claimants to show (1) a promise of restitution, express or implied, (2) a transfer of property and reliance by a party, (3) a confidential relationship, and (4) unjust enrichment. Other courts have announced a less rigorous standard, holding that no agreement or promise is required and that the plaintiff need only show that the defendant received a benefit at plaintiff's expense and that it would be unfair for the defendant to retain the benefit under the circumstances.

II. Support

State courts (even in the state of Washington) agree that a long-term cohabitation in and of itself does not give rise to a claim for post-relationship support, often referred to as "palimony." Most states, according to the ALR survey cited above, do recognize such a claim when based on express or implied contract. The contractual nature of the claim, whether express

or implied, means that the terms of the support must be sufficiently specific to be enforceable, and the contract must rest on adequate consideration. In a few states, either as a matter of statutory law or court decision, such a claim must be based on express contract. For those states requiring an express contract, courts disagree about the application of the statute of frauds. Even where the statute of frauds clearly governs, a bar to the application of the statute may be available, such as partial performance or reliance and estoppel.

Some illustrative cases are below.

A. Express or implied contract

Alaska

Reed v. Parrish, 286 P.3d 1054 (Alaska 2012) (upholding implied contract claim where parties had cohabited for 12 years and exhibited intent to have property divided equally; court clarifies that determination of intent requires consideration of whether parties made joint financial arrangements, filed joint tax returns, held selves out as married, shared household expenses, contributed to maintenance and improvement of property, engaged in joint business ventures, and jointly raised children).

Arizona

Carroll v. Lee, 712 P.2d 923 (Ariz. 1986) (upholding implied partnership or joint venture between cohabitants to share property jointly acquired during cohabitation; court ordered equal partition of jointly-titled property after 14-year cohabitation; court endorsed *Marvin* but noted that partition of jointly-titled property was “not nearly as expansive” as *Marvin*’s equitable remedies and claim for lifetime support).

Colorado

Combs v. Tibbitts, 148 P.3d 430 (Col. Ct. App. 2006) (holding that general contract principles govern claims between nonmarital cohabitants, and mere fact of cohabitation doesn’t trigger marital rights; parties’ purported “separation agreement” at end of cohabitation was not enforceable under law governing separation agreements but should be analyzed as matter of contract).

Connecticut

Boland v. Catalano, 521 A.2d 142 (Conn. 1987) (endorsing *Marvin* approach, recognizing that cohabitants may assert claims based on express or implied contract, quantum meruit, equitable remedies).

Herring v. Daniels, 805 A.2d 718 (Conn. Ct. App. 2002) (holding that express and implied contract and unjust enrichment are available claims in context of nonmarital cohabitation if warranted based on parties’ conduct; emphasizing that determination is question of fact).

DiCerto v. Jones, 947 A.2d 409 (Conn. Ct. App. 2008) (holding that cohabitation alone does not give rise to rights but depends on parties’ conduct and intent).

Kansas

Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013) (upholding equitable division of property accumulated by cohabitants but only to extent that property was jointly acquired or acquired by either with intent that both should have interest in it).

Massachusetts

Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998) (holding that unmarried cohabitants may lawfully contract concerning property, financial, and other matters relevant to their relationship, and that such a contract may be enforced even if expressly made in contemplation of cohabitation, except to the extent that sexual services constitute the only, or dominant, consideration for the agreement, or that enforcement should be denied on some other public policy ground).

Nevada

Nevada Western States Construction v. Michoff, 840 P.2d 1220 (Nev. 1992) (recognizing implied agreement between cohabitants to hold property as though they were married, based on nature of relationship and joint efforts in couple's business, thereby justifying equal division of assets under community property principles).

Oregon

Beal v. Beal, 243 P.3d 110 (Ore. 1979) (holding that no presumption of equal contribution arises in nonmarital cohabitation, but primary consideration is whether parties expressly or impliedly intended to pool resources for common benefit).

West Virginia

Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990) (recognizing cause of action in express or implied contract and constructive trust arising out of long-term cohabitation: factors to be considered in ordering division of property may include purpose, duration, and stability of relationship and expectations of parties).

Wisconsin

Watts v. Watts, 405 N.W.2d 303 (Wis. 1987) (endorsing remedies recognized in *Marvin*)

B. Quantum meruit

California

Maglica v. Maglica, 66 Cal.4th 442 (Cal. Ct. App. 1998) (holding that claimant asserting quantum meruit claim to recover the reasonable value of services rendered (household, business or other legally-compensable services), less the reasonable value of support received, must show services were rendered "with the expectation of monetary reward.").

Nevada

Sack v. Tomlin, 871 P.2d 298 (Nev. 1994) (rejecting claim for quantum meruit between cohabitants, where claimant failed to show agreement to compensate household services;

doctrine generally requires oral promise on part of defendant to pay plaintiff as much as plaintiff reasonably deserves for labor in absence of agreed upon amount).

C. Constructive trust/unjust enrichment

Colorado

Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000) (holding unjust enrichment claim by nonmarital cohabitant not barred by public policy, doesn't require agreement or promise; is "implied in law" to avoid benefit to one party and unfair detriment to another; must prove that defendant received a benefit at plaintiff's expense and that would be unfair for the defendant to retain benefit under the circumstances).

Florida

Castetter v Henderson, 113 So.3d 153 (Fla. Ct. App. 2013) (holding constructive trust claim failed because of claimant's failure to show unjust enrichment; constructive trust claim between unmarried cohabitants must show (1) promise, express or implied, (2) transfer of property and reliance thereon, (3) confidential relationship, and (4) unjust enrichment).

Indiana

McMahel v. Deaton, 61 N.E.3d 336 (Ind. Ct. App. 2016) (recognizing claim for unjust enrichment between cohabitants).

Iowa

Shold v. Goro, 449 N.W.2d 372 (Iowa 1989) (recognizing claim for unjust enrichment based on loans made to cohabitant that were wrongfully retained; distinguished court decisions rejecting claims that rested on relationship itself).

Mississippi

Cates v. Swain, 215 So.3d 492 (Miss. 2013) (unjust enrichment claim permitted between same-sex cohabitants where claimant had contributed toward the purchase of one joint residence and the purchase and improvement of a second joint residence, which other cohabitant retained after the relationship ended; public policy against extending the rights of married persons to unmarried cohabitants recognized in *Davis v. Davis* (see below) did not apply when the claim was not based on the relationship itself, but on money contributed by one cohabitant toward assets retained by the other).

Wooldridge v. Wooldridge, 856 So.2d 446 (Miss. App. 2003) (despite court's opposition to recognizing cohabitants' remedies, court was receptive to recognizing property rights acquired during cohabitation following parties' divorce when ex-wife had second child and contributed to accumulation of property and parties held selves out as married).

Wyoming

Shaw v. Smith, 964 P.2d 428 (Wyo. 1998) (in recognizing claim for unjust enrichment by cohabitant, requiring proof that (1) valuable services were provided to the defendant, (2) which were used and enjoyed by the defendant, (3) under circumstances which reasonably notified the

defendant that the plaintiff expected payment, and (4) without payment the defendant would be unjustly enriched).

D. Equitable presumption of community property principles

Washington

Connell v. Francisco, 898 P.2d 831 (Wash. 1995) (applying equitable presumption of community property principles to parties who lived in marriage-like “meretricious relationship”).

In re Marriage of Pennington, 14 P.3d 764 (Wash. 2000) (holding under *Connell* that courts may divide cohabitants’ accumulated property consistent with state’s community property principles if parties have lived in meretricious relationship, based on consideration of continuity of cohabitation, duration of relationship, purpose of relationship, pooling of resources, and intent of parties).

Olver v. Fowler, 168 P3d 348 (Wash. 2007) (using terminology of “committed intimate relationship” rather than “meretricious relationship,” court applies *Connell’s* equitable presumption doctrine to situation where both partners were killed in car accident; presumption permitted equitable division between the decedents’ estates).

E. Express contracts only

Mississippi

Davis v. Davis, 643 So.2d 931 (Miss. 1994) (holding that legislature must act in realm of cohabitants’ rights, since common law marriage has been abolished and therefore no implied remedies can be recognized between cohabitants).

New York

Morone v. Morone, 413 N.E.2d 1154 (NY 1980) (holding that cohabitants are free to expressly contract between themselves and contract need not be in writing, but courts should not find implied contract based on provision of personal domestic services).

Dee v. Rakower, 976 N.Y.S.2d 470 (App. Div. 2013) (allowing same-sex partner in 18-year relationship with two children to sue for breach of oral partnership/joint venture).

F. Categorical rejection of express or implied remedies for nonmarital cohabitants arising out of relationship

Georgia

Rehak v. Mathis, 238 S.E.2d 81 (Ga. 1979) (refusing to recognize rights between cohabitants that rest on immoral consideration). This is an old precedent, not yet overruled.

Idaho

Gunderson v. Golden, 360 P.3d 353 (Idaho Ct. App. 2015) (rejecting claim for equitable distribution of property after 25-year cohabitation, based on public policy: “The elimination of

common-law marriage, supported by an explicit public policy justification, commands our courts to refrain from enforcing contracts in contravention of clearly declared public policy and from legally recognizing cohabitational relationships in general.”).

Illinois

Blumenthal v. Brewer, 69 N.E.3d 834 (Ill. 2016) (reaffirming *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill 1979)) (rejecting constructive trust and restitution claims by long-term same-sex cohabitant where claims arose from marriage-like relationship; court notes that parties may enter into contracts independent of their cohabiting relationship, but recognition of claims based on cohabiting relationship would be inconsistent with legislature’s abolition of common law marriage, and creation of remedies must come from legislative branch; “unmarried individuals may make express or implied contracts with one another, and such contracts will be enforceable if they are not based on a relationship indistinguishable from marriage.”).

Louisiana

Schwegmann v. Schwegmann, 441 So.2d 316 (La. Ct. App. 1983) (rejecting contract and quantum meruit claims brought by “concubine” of male cohabitant because claims were inextricably intertwined in provision of sexual services).

G. Unavailability of “palimony” as a remedy arising from cohabitation itself

Massachusetts

Davis v. Misiano, 366 N.E.2d 752 (Mass. 1977) (holding that woman had no right to support at end of cohabiting relationship, in view of extensive legislative involvement in providing awards of separate support and limony to married persons).

Nevada

Gilman v. Gilman, 956 P.2d 761 (Nev. 1998) (holding that statutory remedies of spousal support are limited to marital relationship).

West Virginia

Thomas v. LaRosa, 400 S.E.1d 809 (W. Va. 1990) (same).

H. Contract as basis for support

California

Marvin v. Marvin, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981) (after remand in *Marvin*, reversing “rehabilitative” award of support to plaintiff where evidence did not show express or implied agreement for lifetime support or any ground for claiming unjust enrichment or other equitable remedy).

Whorton v. Dillingham, 248 Cal. Rptr. 405 (Cal. Ct. app. 1988) (holding that plaintiff had stated a claim for support based on contract supported by adequate consideration in context of same-sex relationship in which plaintiff had served a chauffeur, bodyguard, secretary and business partner)

Bergen v. Wood, 14 Cal. App.4th 854 (Cal. Ct. app. 1993) (rejecting implied contract claim where female claimant had accompanied male on business trips but parties had not cohabited; court found failure of consideration, reasoning that cohabitation is not inherently an indispensable prerequisite to the enforcement of an express or implied agreement to provide financial support or share assets, but without cohabitation, the alleged agreement is likely to be unenforceable as lacking lawful consideration.).

Cochran v. Cochran, 89 Cal. App.4th 283 (Cal. Ct. App. 2001) (upholding cohabitant's implied contract claim based on promise to provide lifetime support where parties had cohabited intermittently but not continuously over 17-year period; court found contract was supported by valid consideration separate from sexual services).

Wyoming

Shaw v. Smith, 964 P.2d 428 (Wyo. 1998) (holding that claim based on oral promise by defendant to support plaintiff after end of cohabiting relationship was sufficient to survive motion for summary judgment where evidence showed defendant promised financial security in exchange for plaintiff's efforts in managing and maintaining a home, raising his children, and assisting in his business endeavors).

I. Applicability of statute of frauds

Note: Minnesota, New Jersey, and Texas have imposed writing requirements by statute: Minn. Stat. Ann. § 513.075 (agreement between cohabitants concerning property and financial relations must be in writing); N.J.S.A. § 25:1-5(h) (promise of support or other consideration by party to nonmarital personal relationship must be in writing on advice of counsel); Tex. Bus. & Com. Code Ann. § 26.01 (agreement made in consideration of nonmarital conjugal cohabitation must be in writing).

Florida

Posik v. Layton, 695 So.2d 759 (Fla. Ct. App. 1997) (recognizing claim based on express agreement to provide support at dissolution of same-sex cohabitation; holding, by analogy to contracts made in consideration of marriage, that Florida's statute of frauds should govern).

New Jersey

Maeker v. Ross, 99 A.3d 795 (N.J. 2014) (holding that lower court should not have dismissed claim based on oral palimony agreement where agreement was entered into before New Jersey's statute of frauds (see below) was amended; court found statute not to be retroactive).

J. Agreements for future support between nonmarital partners unenforceable

West Virginia

Thomas v. LaRosa, 400 S.E.2d 809 (W. Va. 1990) (answering certified question, court held that agreements, express or implied, between adult nonmarital partners for future support are unenforceable because they represent attempt to evade abolition of common law marriage).