

# MARRIAGE

# Breaking up

# is hard to do

BY MUBARAK DAHIR

.... (excerpts)

With the exception of Vermont, where a same-sex couple wanting to dissolve its civil union can go through the same family court system as married couples wanting a divorce, there is precious little legal framework for same-sex couples who call it quits.

"At best," says Suzanne Goldberg, an assistant professor of law at Rutgers University in New Jersey and a family law expert, "the law treats a same-sex breakup as a business deal between two people about property. It's highly dependent on whatever separation agreement the couple may have. It's done without the complex background rules of divorce, which take into account the context of sacrifices and decisions two people make as a family unit. Divorce rules have evolved to ensure the partner in the weaker financial position is not left penniless. But when gay and lesbian couples separate, it boils down to who holds the purse strings."

The irony, of course, is that "one of the best arguments for gay people's freedom to marry is divorce," says Evan Wolfson, director of the Freedom to Marry Project in New York City [see Wolfson's commentary on page 34]

"When straight people marry, it's understood that they acquire certain property rights simply as part of the status of marriage," says Erica Bell, an out lesbian partner at the New York law firm Weiss, Buell, and Bell. "As long as gays and lesbians are denied the right to marry, we're denied those property rights as well. It's all about status—plainly put, we just don't have it." Just like in marriage law, she says, gay people are virtually invisible in divorce, legally speaking.

In only one state besides Vermont has there been significant legal recognition

for gays and lesbians who end their relationships. Leaning on a series of laws known as "equitable" or "fairness" doctrine, a Washington State appellate court ruled in the late 1990s that unmarried partners are presumed entitled to half of the couple's combined assets, even without a written or oral contract.

Based on that ruling, some Washington municipalities are applying family law principles to lesbian and gay couples, says Frederick Hertz, an Oakland, Calif., lawyer and one of the nation's leading experts on gay and lesbian divorce. However, he cautions, the Washington ruling involved an unmarried heterosexual couple, "so there is still fierce debate if it applies to gays or not."

Hertz is the author of *Legal Affairs: Essential Advice for Same-Sex Couples....* He says there are about five states in which gay people have absolutely no legal recourse when seeking redress during a separation. In at least three other states (Minnesota, Texas, and New York), any court claim must be based on the violation of a written agreement

In most states unmarried couples—straight or gay—can theoretically make claims on money or property, based on agreements that are written or verbal or can be proved by patterns of conduct. These claims are duked out in civil court rather than family court, and they must be based on the individual state's contract laws. "And that means that, every step of the way, the legal system favors the one with the power, the one with the assets," Hertz says.

Jerry Chasen, a principal with Miami law firm Chasen and Associates, agrees. "It's almost always the person without the money who seeks legal help" in a gay or lesbian breakup, and that person "is trying to assert his or her rights as if they were in a legally recognized union," he says. Unfortunately, he adds, "they often don't have a legal leg to stand on. The law just doesn't provide any

kind of recognition for this kind of relationship—and thus no recognition when the relationships fall apart. An intimate [same-sex] relationship doesn't mean squat to the law."

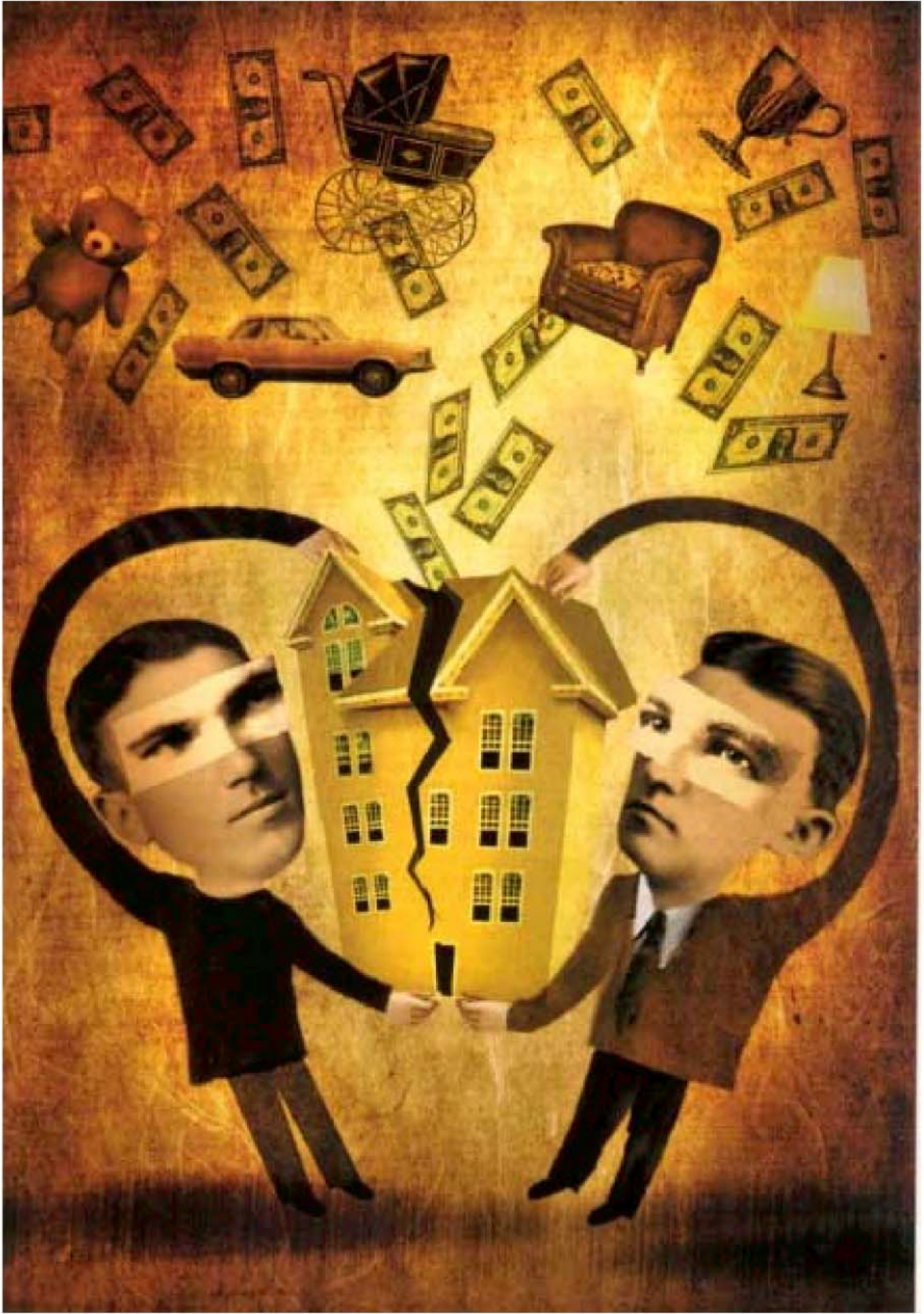
Though the rules vary widely from state to state, Hertz says that, in general, "divorce law is the most enlightened law in America." Women, typically at an economic disadvantage in heterosexual marriages, are no longer at the mercy of their husbands, he says. But when gays and lesbians sever their relationships, "the weakest one gets screwed. The absence of marriage leaves us vulnerable."

Vulnerable is exactly how "Ben" (who asked that his real name not be used) says he felt when he found himself in the midst of an acrid breakup with his partner of 10 years. The couple's \$350,000 home in a wealthy Philadelphia suburb was in both their names, and the pair had a verbal agreement that they would divide the sale of the house down the middle should they ever go their separate ways. But Ben says that during the breakup, his partner said several times that he thought he deserved the lion's share from the house's sale.

When Ben and his partner first moved in together, both men earned roughly equal incomes. Within their first year as a couple they purchased their first house. Ben footed the entire \$80,000 down payment, and the two split the mortgage payments 50-50.

A year and a half later, Ben's partner inherited \$750,000 and a paid-off family home. Using the proceeds from the sale of the family home plus the profit from the sale of the house they lived in, the couple upgraded to a larger place. Again, they split the mortgage payments equally. Ben's partner did pay a higher percentage of the utilities and upkeep, but Ben says he himself was the handyman who kept the place in shape.

Ben was troubled when he says his ex began making noises about getting more than half the value of their shared property. "We never had a written agreement. I was worried he was going



to show up at the settlement table and demand 75% of the profits, and I knew a judge wasn't going to look at two men the same way he would a married couple."

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To protect himself, Ben hired a lawyer who basically threatened to out Ben's partner at work if he tried to claim more than his fair share. "It was essentially blackmail," Ben

says. "But I couldn't depend on the laws, and this was fair if I didn't do something to protect myself, I might have been ripped off."

Today, Ben and his current partner share a home in Delaware. Because Ben's partner has a spotty credit history, the couple decided to put the house solely in Ben's name. However, Ben insisted they draw up legal documents spelling out that they each own a 50% share. "I wanted my partner to feel a sense of ownership even though his name isn't on the mortgage," Ben says. "And I didn't ever want him to feel the way I had."

But Ben and his partner are the exception

rather than the rule, most legal experts agree. "It's easy to understand why so few gay and lesbian couples avoid the topic," Goldberg says. "No one wants to think about the possibility of breaking up when they are in love." Furthermore, as Chasen points out, even if a couple manages to broach the subject, there's no guarantee that the person in the weaker financial position will get a fair deal.

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*Dahir also writes for Self, Business Traveler, and Good Housekeeping.*