

# International Family Law

## Newsline

Anglo-Egyptian Congress

Noordwijk Judicial Conference

Brussels IIbis Encore

Abduction Outcomes

The President's International Committee

## Features

Property and Support Claims Upon Termination of Non-Marital Relationships in the Non-United States

Immigration Rights for Cohabitees in New Zealand

The New Brussels II Regulation and the Hague Conventions of 1980 and 1996

Effects of Brussels IIbis on Child Protection and Youth Welfare Services

## Briefings

Recent Developments in EC Judicial Co-operation in the Field of Family Law

Medically Assisted Human Reproduction in Greece

Relocation in Italy

The Hague Children's Conventions: Recent Preparations for the Next Special Commissions

Too Big for its Own Clogs: Dutch Family Law Goes Dutch

New Zealand Brief



# Property and Support Claims Upon Termination of Non-Marital Relationships in the *Non-United States*

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*This article is based on a paper given to the International Bar Association September 2003 Conference, San Francisco.*

## The consequences of a federalised legal system

Unlike the unified legal systems that exist in many other countries, the rules of law in the US generally consist of several layers of separately legislated and independently administered local, regional, statewide and national legal regimes. Each system operates autonomously to a great extent within its own domain, with its own laws enacted by independent legislative bodies, enforced by independent government administrations and interpreted by independent courts. Broad constitutional principles apply nationally and there are certain areas that are pre-empted by federal law (such as immigration, interstate commerce, or certain welfare policies). However, to a great extent the layers of disparate jurisdictions operate wholly independent of each other.

Nowhere is this independence – or, as one might more accurately describe the situation, this legal disconnection – more apparent than marital law. The substantive and procedural aspects of marital law (known generally in the US and referred to in this article as ‘family law’) have traditionally been left entirely to the individual states, without any county or city jurisdiction. Apart from the role of marriage as a ‘status’ in the application of national rules regarding immigration, eligibility for federal benefits and federal taxation, the narrow range of federal law that applies in this important arena is mostly of only indirect relevance (ie enforcement of child support across state lines). All marriage licences are generally honoured from state to state, and for the most part it is the law of the state in which the couple resides at the time of a dissolution or death – not the state of marriage – that determines the property relations between the spouses, even where the couple owns property in another state.

In recent years, however, the potential impact on married couples resulting from this state-based scheme of family law has significantly diminished. The definition of marriage has, for the most part, been standardised nationwide, and the allocation of benefits and property burdens has, to a very great extent, been synchronised between the state and federal jurisdictions. Marriages formed in one state are generally recognised nationwide, and federal policies regarding taxation and immigration

are based on an agreed-upon definition of marriage. And, while the specific property rules and the details of the procedures of dissolution differ from state to state, the domicile of the parties at the time of dissolution generally determines the legal outcome. Thus, for most couples, the relocation of a couple during the course of their marriage rarely has significant legal impacts.

In the past few decades, even the substantive differences in state family law are diminishing, such that there are not great differences for most couples depending upon their state of residence. This remains the case, even though there is no uniform federal standard, leaving each state’s court to resolve multi-state jurisdictional conflicts in their own particular fashion. What is significant to note is that, even when a couple relocates from state to state, federal law generally does not apply, but rather, the particular conflicts-of-law provisions in the state where the couple resides at the time of a dissolution.

Historically, the dissolution rules of family law in the US have been characterised by two distinct approaches:

- (1) community property regimes, existing primarily in the western states and based on Spanish and Mexican law, where property acquired during marriage is generally divided equally (or, in some states, equitably) between the spouses regardless of contribution or need, and non-marital and pre-marital property is returned to its original owner; and
- (2) marital property regimes that allow great judicial discretion in the division of all property on an equitable basis, with less regard to the source of contribution, and sometimes including a division of non-marital property where need is unusually great.

However, in recent decades the distinction between these two systems has been blurred to a great extent, with most marital property states moving closer to a community property approach, and the community property regimes allowing for greater amounts of post-separation support based upon equitable factors and need. Thus, even the substantive state-law differences regarding property allocation are far less meaningful than had previously been the case.

The diversity of legal jurisdictions, however, has become especially problematic in the emerging domain of cohabitation law. There is no unified

national definition of domestic partnership, and the rules applying to unmarried cohabitants vary widely from place to place, both in terms of relevant legal doctrine and actual legal practice. In addition, there are stubbornly complex inconsistencies between many of the local and state rules within the same state, and little, if any, recognition at all of unmarried couples under federal law. In the San Francisco Bay area, for example, there are city-specific rules regulating the taxation of real property transfers between unmarried partners in the event of a dissolution or death. Some cities tax transfers between unmarried cohabitants and others do not. Some exempt only same-sex couples and not opposite-sex couples, with each providing different levels of taxation. Some cities allow all couples to register, some only allow same-sex couples. Some require a waiting period between registration and exemption, and others do not. Many cities have local domestic-partnership registries that provide limited citywide benefits to registered partners, but only if they live or work in that particular city. Rarely do these registries provide any property-related protections. There are countywide rules regarding real property taxation and the provision of certain countywide benefits that also apply to unmarried partners, but these rules follow different standards and distinct principles from the city-based rules.

Apart from these city and county rules, there are statewide regulations in California regarding real property transfers and statewide rules covering the taxation of financial asset transfers between unmarried partners. Recently, the state of California dramatically expanded its statewide domestic-partnership registration – one of the few states that has done so – although it is limited to same-sex couples (other than older opposite-sex couples who might lose certain social security benefits if they remarried). The statewide registry already provides a range of government benefits that are not provided by local city registries. However, as of January 2005, state-registered domestic partners will be subject to all of the community property allocation rules. In effect, these couples will be married when it comes to asset and debt allocation, similar to the system that exists for civil-union registrants in Vermont.

But, with very few exceptions, registering with a local city does not provide a couple with the benefits of the state registry, thereby requiring an eligible couple to register in both registries to obtain all possible benefits. Opposite-sex couples under the age of 62 cannot benefit at all from the state registry. And, most significantly, even though many of the registrations include a vague statement of the parties being jointly responsible for each other while they remain together, none of the local rules deal with property allocation or financial obligation between cohabitants. In addition, federal tax exemptions for transfers of property

upon relationship formation, dissolution or death probably will not apply to domestic partners, even when the state law mandates such transfers in the event of a dissolution.

Common law state precedents also regulate the property rights of cohabitants vis-à-vis each other, and state statutes regulate who can marry and who cannot, but without any coordination with local or state domestic-partnership registration. As discussed in greater detail below, California's common law imposes general rules about co-owned property and allows for property claims by unmarried cohabitants based upon oral or implied contracts. It is unclear whether the new option of domestic partner registration will vitiate the common law protections. Interestingly, most couples who have been together for many years will now be subject to two inconsistent set of rules: the non-marital rules for their pre-registration years; and the statutory scheme for their post-registration years.

But even so, these judicial policies and proposed statutes are limited to California and, while many states follow similar approaches to property claims by cohabitants, there is no uniformity of definition of cohabitation, nor any integrated provision of common law or statutory rights and obligations. Moreover, the legislation passed in California – similar to Vermont's civil-union status – remains a state law, not federal. Therefore, it is uncertain whether or not other states (or the federal government) would recognise these obligations and protections, just as it is uncertain whether Vermont's civil unions will ever be recognised by any other state.

Overlaying all of these levels of local and state regulation is the federal jurisdiction, which controls national issues such as immigration, some public benefits, some private employer benefits provisions and, perhaps most important of all to unmarried couples, the rules of federal taxation. Federal law exempts transfers between married spouses from any taxation, whereas transfers between unmarried partners are subject to significant tax consequences, either as gifts (taxable to the donor but with high minimum thresholds before the tax is imposed) or imputed income taxable to the recipient. Except under certain arcane (and probably unsuccessful) legal strategies, none of these regulations provides any exemptions for cohabitants. Therefore, unmarried partners are treated, in effect, as legal strangers to each other.

As a result of this layering of legal doctrine, the federal and local rules are often inconsistent. While, in some areas, federal law pre-empts state and local jurisdictions, there are many areas where local laws have been granted dominant status over federal legislation. Thus, in addition to the many uncertainties and changes regarding the legal trends in this arena, the problems caused by inconsistent rules between local and federal jurisdictions can create even greater confusion and conflict for unmarried couples.

Because of these overlapping and inconsistent levels of legal regulation, surveying the law of cohabitation is not a simple task. Over recent years, the various states seem to be heading in different directions. In certain cities (eg New York and San Francisco), local government authorities are attempting to make more aggressive use of local laws to provide greater benefits to unmarried partners, sometimes even in defiance of state and federal law. Some states are broadening protection for unmarried couples, while other states are moving in the opposite direction. State and federal courts are often at odds with each other on these issues, and there is tremendous uncertainty as to how these many inconsistencies and conflicts will be resolved in the future.

Further complicating the situation, except for narrow areas of local taxation and the provision of limited public and employee benefits (such as health insurance), very few codes have been enacted on any jurisdictional level involving unmarried couples, as state legislatures have been reluctant to enter into this politically sensitive field. Rather, existing property rights or obligations are, for the most part, a result of appellate law decisions, made in the various state courts. In a few limited instances, these appellate decisions have resulted in broad enunciations of basic legal principles, such as an allowance or a blanket disallowance of claims for post-separation support based on oral contract claims. For the most part, however, as is typical in a common law regime, the decisions are highly case-specific and do not readily lead to any clear articulation of legal doctrines.

### **The politics of cohabitation**

The status of cohabitation law in the US at this time is further complicated by the political history and social conflicts surrounding the legal dynamics of these issues. At the time these issues first arose, in the late 1970s, a small number of isolated heterosexual claimants sought financial compensation from their unmarried partners, mostly involving financially dependent women making claims against their high-asset boyfriends, such as occurred in the widely publicised Lee Marvin case in California (*Marvin v Marvin* (1976) 18 Cal 3d 660). Around the same time, a few adventurous gay men sought marriage licences, in unsuccessful bids in several states to legalise same-sex marriage. There was no focused political agenda in either dimension of this inchoate legal movement, however, since neither financial claims nor marital 'benefits' were of particular interest to the alternative family communities, either heterosexual or gay. There was even less interest from the ranks of the legal professionals or legislators.

Until recently, therefore, the rapidly growing social trends towards cohabitation were not mirrored by any overall movement for legal reform. Even in the last few decades, when the

social demography of cohabitants has become increasingly mainstream and propertied, there has been little discussion, until quite recently, among attorneys or legislatures on the need to modify existing law to protect these couples. Partly because of pre-existing precedents in many states allowing contractual claims by relatives and friends in settings analogous to unmarried couples, many state courts have simply allowed, in limited circumstances, contract-based relief for financial claims by unmarried partners. Unfortunately, however, few clearly stated legal standards for such financial entitlements are ever articulated to any degree in the appellate rulings, and very few legislators have devoted any attention to the issues. The gay marriage efforts, on the other hand, initially failed completely, not to be revived for more than 20 years.

At the same time that some individual claimants were winning limited relief from sympathetic courts based upon their contractual arguments – albeit in an inconsistent fashion – gay rights advocates in the early 1980s switched to a new strategy: winning employment and public benefits under the rubric of domestic partnership. This is a term that was first coined in Berkeley, California by a city employee seeking employer-paid health insurance coverage for his unemployed partner. Consistent with the community's political disinterest in the institution of marriage, domestic partnership was seen as a way of winning specific public and employee benefits, without having to take on the battle over legalising same-sex marriage.

In terms of the legal development of property rights for cohabitants, however, the focus of the domestic-partnership movement in the US was almost entirely on obtaining public and employee benefits, with almost no attention paid at all to property rights or post-separation support claims. For the most part, this occurred simply because the domestic-partnership fight was a local struggle, involving only local cities and private employers – none of who had any authority over the state-based property-allocation rules. But at the same time, these campaigns were framed by 'us against them' politics that viewed the struggle in terms of gay advocates seeking equal benefits from 'straight' employers and government officials. The notion of property claims by one partner against his or her lover would be out of sync with these politics and, perhaps, was seen as too tightly connected to the notion of a state-regulated marriage scheme – something that was of little interest to most political activists. Therefore, while a few individual cases for financial compensation continued to be brought in state courts, with mixed results, there was very little concentrated effort for generalised legal reform for cohabitants overall.

Even when the same-sex marriage campaigns were revived in the 1990s, the political focus once again was primarily on winning government protections and employment benefits for couples as

united partners, such as immigration rights, tax protections, or health insurance coverage, rather than on clarifying the rules for claims for resolving property disputes between the partners themselves in the event of a dissolution. For the most part, this occurred because of an oft-unstated desire to present the political campaign in the framework of a unified gay community seeking public recognition from a heterosexual government. Inter-se conflicts over property allocation upon the dissolution of the relationship would be at odds with a desire to present an image of happy couples united forever, and at odds with the claim that the 'couple', as such, was facing discrimination. From a 'public-relations' perspective, focusing on how one unmarried partner or one lesbian might make claims against his or her unmarried partner simply did not readily fit into this social movement's underlying political framework and self-image.

The evolving law of cohabitation in the US has also been marked by a noticeable lack of coordinated interest by opposite-sex couples in any sort of legal protection. Despite the existence of a few self-help legal books and many high-profile stories about unmarried cohabitants, opposite-sex couples lacked any real political voice or unity of identity. Most often, in the face of discriminatory government regulation, unmarried heterosexual couples experiencing property, immigration, or tax burdens simply opted into the legal marriage regime available to them. Many observers have noted that when opposite-sex couples in the US have children or acquire property to any significant degree, for the most part they tend simply to get married. Thus, they have little interest in legalising unmarried relationships or fighting for an end to legal discrimination against cohabiting couples.

Ironically, when domestic-partnership protection schemes have been enacted by local employers, the percentage of opposite-sex couples seeking such benefits (mostly health insurance coverage, in light of the lack of available government-funded health coverage) has greatly outnumbered gay couples. This is primarily a result of the greater number of straight couples over the number of gay couples, but may also be the result of a greater number of non-working heterosexual partners (especially women) needing health insurance coverage, in contrast to the more common dual-career partnerships in the gay community. As a result, therefore, many opposite-sex couples turned out to be the beneficiaries of the political struggles led by same-sex couples.

Further complicating the situation is that in recent years – and in ways that may seem quite archaic to those from other societies that are less dominated by religion – the debates over cohabitation law have been greatly overshadowed by the moral debates over homosexuality, and to a lesser extent, by a revival of concern over the morality of non-marital cohabitation. Religious points of view have frequently influenced the political debate and so, not surprisingly, the US

Congress recently enacted a 'Defence of Marriage Act' (110 US Stat. 2419 (1966)) that seeks to prohibit the recognition by federal authorities of any same-sex marriage. Similar laws have been enacted in more than half of the states. In some jurisdictions, the hostility to legalisation of same-sex marriage has actually resulted in a broadening of particular benefits to domestic partners – a kind of second-class harbour in which demands for legal equality can be accommodated. In other locales, however, such moral debates have frustrated the enactment of even the mildest of domestic-partnership protections. Residual disdain for cohabitation has also affected the expansion of laws protecting opposite-sex couples, as the strong bias in favour of traditional marriage has made it extremely difficult to enact legislation protecting any alternative forms of family.

As a result of these political and legal trends – and intermixed with ongoing efforts to legalise same-sex marriage in various states and struggles to gain recognition for foreign same-sex marriages – the legal landscape for cohabitants in the US is an incoherent, dynamic and inconsistent pattern of appellate decisions and limited legislative enactments. Couples face a patchwork of potential legal rules that are not refined in any detail, worsened by the prospect of uncertain litigation as they try to enforce local and statewide protections across jurisdictional boundaries.

### **Common law and statutory rules of co-ownership and contract**

Notwithstanding the inconsistencies and diversity of jurisdictions described above, there are certain general national legal trends that can be described. Accordingly, rather than attempt to survey the specific rules of each particular state, this article seeks to provide a general summary of the appellate and statutory law as it exists in most of the individual states, with a description of dissenting positions and some thoughts about future trends. Many of the legal conflicts faced by unmarried couples arise in factual settings where existing state common law and statutory law directly applies. The most typical of these situations involves co-ownership of real property or of a financial asset. For the most part, the law in this regard is very similar from state to state, and generally there are core civil statutes that establish that being named on a deed, a financial account statement, or a title registry creates a presumption that the named owner(s) is/are in fact the legal owner(s) of the property and that, in the absence of a statement on the deed or a written contract to the contrary, if there is more than one owner, the titled owners are presumed to be equal co-owners. These presumptions (or default rules) are, in most states, rebuttable presumptions and it is in the setting of the standards for overcoming the presumptions that states differ most widely.

As a result of these general legal principles, cohabitants' co-owned property is most often distributed equally to the titled owners. Excess contributors (owners who contributed more than their 50% share of capital contributions or ongoing property expenses, or who contributed more to a financial account) or non-titled claimants often receive little or no compensation in the absence of a written agreement or a voluntary settlement agreement between the parties. Post-separation income or assets acquired by either party after a dissolution are generally owned solely by the earning or titled owner, and gifts made during the relationship are rarely returned to the donor.

These results are very different from what the outcome would generally be if family law principles were applied to cohabitants. Under the family law of most states, property and assets acquired during marriage are shared equally. In non-community property states, property and assets acquired during marriage are available for distribution based upon equitable claims. This is the case regardless of title and of which spouse earned the income or made the financial contribution. Pre-marital property, meanwhile, is returned to its original owner, sometimes even when commingled with marital property. Claims for post-separation support are decided under applicable state-mandated guidelines, which focus almost entirely on the financial needs of the claimant rather than the source of the income or asset. Titling of an asset, therefore, is of relatively little consequence, as opposed to the source of the funds used to acquire the asset and the timing of the property or account acquisition.

Claims by cohabitants are generally analogised by courts to claims by other non-titled claimants (such as relatives, friends or business partners), allowing the courts to apply legal doctrines that were promulgated in response to similar claims that arose in the past decades. Most states have at least a few appellate decisions along these lines, and in many states there is a comprehensive body of decisional law (and a few statutes, in some states) establishing the standards for claims by non-legal owners. A 'good-faith contributor' who contributes funds reasonably, believing he or she is an owner, for example, can often win reimbursement for their contributions or, under equitable principles, can be awarded a percentage interest in the property.

Statutes-of-frauds requirements for written contracts where real property is involved would generally require proof of a written agreement in any dispute over real estate (which would create obstacles for claimants in the absence of a written contract). However, these doctrines typically contain common law exemptions when there has been written documentation, in instances of fraud, or – most relevant to cohabitants' claims – where a judge finds a breach of a fiduciary duty or the existence of a confidential or trust relationship,

thus enabling the court to overlook the titling of the deed and make an award to a non-owner based on general equitable principles. Thus, depending upon the particular rules of the relevant state, the harsh results of the general property rules are often far less harsh in application, especially in highly sympathetic cases.

In California, for example, there is a long history of appellate cases going back to the late nineteenth century where judges have set aside or reformed deeds and awarded an interest in real property to non-titled family members, friends, business partners, and even non-marital cohabitants, based upon convincing proof of a significant contribution by the claimant or strong evidence of an oral agreement presented by the non-titled claimant. Furthermore, where property is acquired with funds provided in part by a non-titled partner, general equitable rules of constructive trust in most states can be used by courts to protect the contributor from the 'severe injustice' that would result from a strict application of the statute of frauds. Courts have been remarkably open in some states to finding implied contracts or promissory reliance to support a claim by a non-owner, even when the claimant has not, in fact, made any significant financial contribution.

In addition to these substantive rules, most state statutes also provide procedural remedies and general guidelines for resolving co-ownership claims. Partition is the term generally given to the statutory process of seeking a court order forcing a sale of the disputed asset or property, with the proceeds of sale deposited with the court pending post-sale adjudication of any disputes over the allocation of the funds. The partition process is cumbersome and not particularly well suited to a domestic dissolution. It also lacks any of the appropriate procedures enacted in Family Court regulations for a family dissolution. However, it does provide claimants in most states with basic access to the civil courts to resolve disputes over particular assets. In most states, these procedures are available even when the claimant is not listed as a titled co-owner. Interestingly, these partition actions are generally decided solely by judges. Breach-of-contract claims (which are often inextricably linked to the partition claim), however, can be decided by a jury. This is in sharp contrast to marital dissolution claims, which generally cannot be presented to a jury.

In the face of an increasing number of claims for property allocation and post-separation support by unmarried partners, most state courts have simply applied these pre-existing general doctrines of constructive trust and contractual remedies to allow case-specific relief to particular claimants – often while strenuously asserting that the basic laws of the state have not been changed in any substantive manner. Thus, in more than 20 states, there are appellate decisions holding that non-marital partners can assert claims for property titled solely in the other partner's name or, as so



frequently is the case, claims for an excess percentage of ownership based upon excess contributions by the claimant.

For the most part, appellate courts ruling on these claims rely on contract theories to support the award, although it is, admittedly, a very tenuous sort of contractual basis. Not only are oral contracts sometimes established solely on the testimony of one party, but claims of implied contracts based solely upon the conduct of the parties have often been honoured – even with a concession by the claiming party that no express contract was ever formed. Claims for shared ownership of property acquired during the relationship have even been upheld where the claimant made no monetary contribution to the property's acquisition, based upon vague assertions of a general agreement to share 'all assets' of the partnership.

It is clear from the appellate rulings that courts are trying to help claimants perceived as victims of their former partners, or at least as victims of their own generosity. But because the underlying trial court decision is never published and the appellate court is only concerned with whether or not the state's general legal principles were followed, the language of most of the appellate cases makes it almost impossible to discern what factors motivated the judges or juries to rule as they did in any one particular case. One difficult professional consequence of this situation is that it is very hard to advise clients in particular cases as to whether or not they are likely to prevail in a trial of their particular claims. As a result of this situation, it can be very difficult to reach a settlement with an opposing party, whose attorney is similarly challenged to estimate the outcome of a contested matter.

The legal requirement of consideration (a bargained-for exchange often required by courts to justify the imposition of a contractual obligation) is often found in the provision of special personal or domestic services (other than sexual services, which would be considered illegal consideration), or in the detrimental reliance of the claimant in not purchasing his or her own residence or not pursuing more lucrative employment. As with appellate decisions overall, from an objective perspective there is little in the facts or posture of the cases to distinguish those outcomes regarding the finding of consideration that are honoured from those that are rejected. This suggests that subjective notions of fairness and general equitable principles are the determining factors. A casual review of the cases suggests that the strongest cases are those where the sacrifices of one partner (either financially, or in terms of domestic labour or assistance with a business) directly benefited the other partner, or where one partner demonstrably gave up a higher-earning job or sold an appreciating asset in reliance on promises (or reasonably based hopes) of a long-term commitment.

The seeming availability of the courts to resolve cohabitants' property disputes is, however, quite at odds with the real-life situation for most couples. Even though written contracts between cohabitants are honoured in all but two or three states (which continue to reject cohabitant's arrangements as immoral in nature), very few couples enter into written agreements. Thus, the legal principle that written contracts will be honoured is, in the end, of little benefit to most cohabitating couples. Also, anecdotal evidence from attorneys handling cohabitation disputes suggests that, while claims based upon oral and implied contracts are frequently honoured in principle by the appellate courts of many states, the requirement that the claimant meet a high evidentiary threshold to establish such a contract defeats most such claims.

In California, for example, there is a requirement of 'clear and convincing' evidence to overcome the presumption of a written deed or contract. Thus, it is, in fact, very difficult for claimants actually to prevail in these sorts of claims in the absence of a written agreement, even while the doors of the courts remain open to such claimants in theory. Making matters worse for most claimants, few states allow for recovery of attorneys' fees, even when the claim is successful, thus preventing all but the most financially capable from pursuing their claims, unless, as is rare, an attorney is willing to take on such a case on a contingency basis.

Except for registered civil union in Vermont or California's registered domestic partners after January 2005 (where state family law expressly applies to registered couples) and to a limited degree in Washington state (where appellate court holdings have established that marital law is presumptively the equitable standard to be applied to claims by cohabitants), unmarried partners fare even worse with regard to claims for post-separation support. Contract-based doctrines require proof of a contract in most instances and, again, while oral or implied contracts are legally sufficient in many states to present a claim, there have been only a limited number of awards for post-separation support, as the high evidentiary standards make such awards particularly difficult to obtain. In nearly every state, there is a presumption that neither partner has any ownership interest in his or her partner's separately acquired assets or post-separation earnings. Thus, unless there is clear evidence of a contribution by one partner to another partner's career or business, post-separation payments are unlikely to be ordered.

And so, while a court can more readily use general contract principles to order an allocation of proceeds of the sale of a house acquired during the relationship – especially where both parties contributed to the loan payments and renovation expenses – it is much harder to justify a claim for post-separation support where there was no demonstrable contribution of financial or labour resources by the non-titled claimant to the other

partner's business or earned income.

The pivotal case for establishing non-marital claims is the California case of *Marvin v Marvin*. Issued by the California Supreme Court in 1976, the ruling allowed the actor Lee Marvin's girlfriend (who had taken Marvin's last name despite the absence of any legal marriage) to proceed to trial on claims of oral and implied promises of post-separation support and a share of Lee Marvin's financial assets. The court listed multiple legal theories that the claimant could use to support her claim, including oral contract; implied-in-fact contracts (where the actions of the parties themselves demonstrate to the court that an unspoken contract was in the minds of the parties); implied-in-law contracts (where the court imposes contractual duties based upon equitable principles, even where the parties did not have a 'meeting of the minds' to any degree); constructive and resulting trusts; and general equitable principles. However, Lee Marvin's girlfriend did not actually recover anything from Mr Marvin, as even she could not meet the evidentiary standards that had been established as a result of her ground-breaking appeals.

Many states have followed the lead of the *Marvin* ruling. However, a few (Minnesota and Texas, to date) have responded to the vagueness and complexity of the post-*Marvin* legal developments by prohibiting any cohabitant claims based solely upon oral or implied claims, and have interpreted their statutes of frauds to require a written contract to support any cohabitant's claims. The state of New York has taken a middle ground, requiring proof of 'express contracts' but allowing claims based upon oral agreements. As discussed more fully below, as the statutory provisions for domestic partners extend into the property-rights arena and if there is greater recognition of same-sex marriage, it is likely that an increasing number of states will follow this same lead, and prohibit claims based upon oral-contract claims.

An interesting tension has arisen in academic and judicial discussions over whether the use of these contractual doctrines makes the most sense when adjudicating cohabitants' claims. A growing number of scholars and judges have noted that non-marital relationships are, for the most part, fundamentally not truly contractual in nature and, therefore, imposing a contract-law framework on such couples' relationships is not legally sound. Couples rarely discuss the possible dissolution of their relationships, and the generosity and sharing by each partner is part of a broader social interaction that typically is not linked – either expressly or implicitly – to specifically enunciated reciprocal arrangements.

A partner may help his or her lover with a business, join in the purchase and renovation of a house, or give up his or her own home to move across country with a partner, without articulating either mentally or verbally a particular reciprocal

exchange. There may be unconscious expectations or unexpressed conditions (which could be labelled 'strategic generosity'), and certainly there are hopes and dreams, but rarely are they so clearly felt or expressed as to meet the evidentiary standards of a contract-based analysis. There is an abundance of optimism that each party's generosity will lead to a lifetime – or at least many years – of happiness together. Asking a court to apply contractual principles to these sorts of romantic interactions is simply unrealistic and inappropriate.

Perhaps as a result of this sort of insight, and compounded by the difficulty courts are facing in adjudicating increasingly complex cohabitation claims, an increasing number of scholars and jurisdictions have moved closer to applying what are, fundamentally, common law marriage principles to unmarried couples. Common law marriage is a doctrine that was prevalent in the US in the nineteenth century, allowing courts to deem a couple married even when no marriage licence was obtained. The courts thus applied the rules of the status-based marriage system to these unmarried couples. While fewer than a dozen state statutes still allow the establishment by a court of a common law marriage (and the number is dropping each decade), the underlying notion of applying family law rules to couples who are not legally married may, ironically, increasingly displace the contract model for resolving cohabitation disputes.

Consistent with this trend, the American Law Institute – the most prestigious organisation of judges and scholars – has recently issued its model guidelines for family law (Matthew Bender, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (American Law Institute, 2002)). With regard to domestic partners, the Institute has proposed that the rules of family law be presumptively applied to domestic partners who live together a set number of years (perhaps 2 or 3 years, as set by each individual state), or who live together for a shorter duration as co-parents of a child adopted or born to the couple together. While not binding on any state, currently this proposal is likely to accelerate the trends towards a status-based approach to cohabitant property allocation, as opposed to a contract-based analysis that has previously been applied in most states.

Consistent with this approach, appellate courts in the state of Washington have ruled that the family law provisions are presumptively valid as equitable guidelines for the dissolution of non-marital partnerships. While these principles are not rigidly binding on unmarried couples (as they are for married couples), the invocation of family law rules as equitable guidelines for unmarried couples – in the absence of a strong evidentiary support for a finding to the contrary – will inevitably lead to the application of such rules to many couples, either through judicial decisions or settlements made in anticipation of such rulings.



The Vermont state legislature has established, in response to a favourable decision in a lawsuit seeking to legalise same-sex marriage, that couples that register their civil union (the Vermont equivalent of domestic partnership) will be bound by all of the family law rules of Vermont, as if they were legally married. The Massachusetts Supreme Judicial Court has recently ruled that the ban on same-sex marriage is unconstitutional and, while it appears likely that the state legislature will be forced to legalise same-sex marriage later this year, the final outcome is not yet known for certain. Depending on how the Massachusetts legislature responds to that ruling, a similar civil-union structure may be created there as well. Recent legislation in the state of California will similarly result in the imposition of the family law framework on registered domestic partners. In light of these developments, the trend towards applying marital law to 'unmarried' couples, rather than clarifying or codifying the contract-based approach, seems to be advancing at an increasingly rapid pace.

It is important to note, however, that in all of these states, registration is generally limited to same-sex couples, leaving opposite-sex couples with the same uncertainties and contract-based limitations on their particular disputes (that is, if they choose to remain unmarried). Moreover, to date no other state has honoured a Vermont civil union, and since Vermont (like Canada) has a residency requirement for the dissolution of a civil union or marriage (though no such requirement for its formation), it has been impossible for couples that registered out-of-state to dissolve their union legally or take advantage of these property rules and protections.

### **Summary of legal doctrines**

In summary, property disputes between cohabitants are subject to local regulations, state-based common law and, to a limited extent with regard to taxation, federal statutory rules. Claims are evaluated in a hierarchy of available theories and arguments, depending on the state in which the couple resides and the particular manner in which they have acquired property during the course of their relationship and, in a few jurisdictions, whether they have registered as a domestic partnership or civil union.

To a great extent, the partners' rights will be adjudicated along the following general rules:

- (1) The names on the deed or title or account create a presumption of equal ownership by the party/parties on title, with no award of compensation or ownership to the party not on the title, and no post-separation support is awarded to the lesser-earning partner, in the absence of a proven contract. None of the procedural or substantive rules of family law apply to unmarried couples, except in

Vermont or California (after January 2005) and, to a limited degree, in Washington state.

- (2) A written contract signed by the parties will generally be enforced in a civil action in the state court.
- (3) Except in a limited number of states, a non-titled claimant can seek judicial relief from the presumptions of title, based upon convincing evidence framed within state common law doctrines in support of an oral or implied contract, or in some states based upon broader equitable principles. While filing such a claim is generally allowed in most state courts, prevailing on such a claim in the absence of a written agreement will be difficult with regard to property acquired during the relationship, and even more difficult with regard to claims for post-separation support or for property acquired before or after the relationship.
- (4) If the couple resides in one of the few states where civil-union or domestic-partnership registration provides for property claim adjudication according to family law rules, and if the couple has in fact registered as such, or if the couple lives in Washington state, then, to some degree, family law rules, rather than cohabitation contract rules, will apply to the couple's dissolution.

### **Emerging trends and legal developments**

As has been described above, there is an emerging consensus – both within the legal community and increasingly so in the political communities – that the contract-based approach to resolving cohabitation property claims is neither an appropriate nor a workable solution. Too many dependent partners are left without any protection under this approach, given the absence of express contracts in most partnerships and the difficulty and cost of proving an implied contract. Applying contract rules to the informality of non-marital partnerships is extremely fact-intensive and difficult for courts to administer.

As a result of these concerns, it is likely – although not at all certain – that an increasing number of jurisdictions will begin to apply family law rules to clearly defined classes of unmarried partners and, correspondingly, deny relief altogether to other classes of claimants in the absence of a written contract or joint titling of a co-owned asset. For the most part, this is likely to result from an expansion of domestic-partnership/civil-union obligations to include the application of family law rules – such that, to the extent that such registries exist, couples who have not registered will be denied general equitable or common law protection – and a narrowing of the availability of contract-based remedies. While the American Law Institute proposal to apply family law doctrines to all cohabitants regardless of any

domestic-partnership registration is unlikely to be applied in the near future in any state jurisdiction, its underlying principles may take root in the form of expanded domestic-partnership/civil-union provisions.

Anecdotal evidence suggests that claimants in opposite-sex partnerships have frequently been less successful in their claims than same-sex couples. This is possibly because they have always had the option of being married, so the absence of marriage can be seen as evidence of a lack of commitment. And, because domestic-partnership registration is seen as a remedy in lieu of legal marriage in many jurisdictions, it is often limited to same-sex couples. Thus, opposite-sex couples for the most part will not benefit from domestic-partnership-based legal developments. Additionally, as same-sex couples are allowed to register or to marry (either by travelling to a state or country where same-sex marriage is allowed or by pressing for changes in the couple's particular domicile), courts are likely to be less sympathetic to claims in same-sex partnerships, where the couple had elected not to register legally or marry.

These developments will, therefore, leave two very large classes of unmarried claimants facing significant legal uncertainties and obstacles:

- (1) those claimants who could have registered or married (either in opposite-sex partnerships or, if same-sex marriage or comprehensive registration is legalised, those in same-sex partnerships) and yet did not enter into any formal legal contract regarding their assets and property; and
- (2) those same-sex claimants who live in states that prohibit same-sex marriage and yet lack any kind of domestic-partnership/civil-union registration that provides equivalent legal protections, but who, just as the other unprotected class of claimants, failed to enter into express written contracts.

These two classes of claimants will only be helped if courts continue to honour claims based upon oral or implied contract claims. In states where written contracts are required of all claimants, claimants in both of these two large groups will be utterly unprotected. And, as courts grow weary of the difficulty of adjudicating fact-based inquiries using often inappropriate contract doctrines, these claimants are likely to face growing difficulty in winning their claims. Thus, even though pre-existing appellate precedents in many states will still allow these claimants to 'have their day in court', to the extent that the registration alternatives expand and formal contract alternatives become more widely recognised, the already burdensome challenges faced by such claimants are likely to grow even more daunting.

As a result of these trends, and especially if same-sex marriage is legalised in any state, the number of unmarried same-sex couples covered to

some degree by family law regulations is likely to increase slowly, whereas opposite-sex couples who chose not to register or marry will probably enjoy less protection – especially as the push by gay couples to expand non-marital cohabitation rights will diminish in the face of expansion of same-sex marriage options. While most state courts will continue to honour cohabitants' claims in principle, the already-limited receptivity to these claims will probably diminish as the availability of contractual agreements and marriage alternatives increase.

## Policy issues and concerns

From the perspective of broad social policies and long-term legal reform, several critical issues will remain unresolved by these trends and developments. First, when is it fair for a society to impose obligations on parties who have deliberately attempted to avoid such obligations, as occurs when the law adopts a default rule that will apply in the absence of an agreement to the contrary? Heterosexual couples who chose not to marry often express a deliberate preference not to be bound by family law rules of forced sharing of assets or liability for post-separation support. Many such couples are unaware that, in the absence of a written ante-nuptial agreement, they still could be liable for such claims by their unmarried partner in many states. It is unclear when it is fair for society to impose such burdens in the absence of a formal voluntary assumption of marital obligations. To date, this issue has only affected opposite-sex couples but, if marriage is extended to gay couples or if the existing domestic-partnership regimes are expanded to include property rights and burdens (as has recently occurred in California), the same issues will apply to those couples as well. And, if imposing legal burdens in the absence of express consent or agreement is appropriate, what are the proper standards to use? At what point does a de facto dependency or a change in one party's circumstances justify a court's imposition of significant financial obligations on a partner that are inconsistent with that partner's original intentions? Should such burdens be imposed only when a court can discern an implied agreement for shared responsibilities and shared assets, or is the actual need by one partner sufficient justification to disregard the titling of an asset to provide protection and compensation for a dependent partner?

Secondly, if legal marriage becomes available to same-sex couples, or if civil registrations under state law increasingly provide for application of family law rules to registered couples, should the absence of a registration or marriage by a couple be taken as conclusive proof that the couple did not wish to be bound by the family law rules? As with the issue raised above, it could be argued that dependency is the natural consequence of an

intimate family relationship and, thus, the dependent partner should be protected. It could also be argued that, in light of the unrealistic optimism of most couples, any kind of contract requirement is inappropriate. Meanwhile, in the absence of legalised gay marriages, should the claims of gay partners be viewed more liberally, on the grounds that a legal marriage was not an option for that couple? At what point does the availability of contracts or a legal marriage weaken or even disqualify a cohabitant's claim based upon oral or implied contracts or equitable arguments?

Thirdly, it is likely that there will be decades of litigation in state and federal courts over the issue of recognition of out-of-state and foreign same-sex marriages, and the federal recognition of state-based domestic partner/civil-union registrations. The confusion and legal uncertainty on these issues will create enormous problems for many couples, both in terms of property rights and duties, but also with regard to government regulation, such as tax exemptions or immigration protections. How can particular couples minimise the damage to their own lives caused by this legal confusion, and how can attorneys best advise their clients during this volatile period? When is it appropriate for parties to become 'test cases', and how can attorneys guide couples through the uncertainties caused by these dramatic social and political changes?

Fourthly, and perhaps of greatest long-term

consequence to US society, to what extent is the fundamental premise for imposing the property and financial obligations of marriage based upon a gender-differentiated model, with a higher-earning male and a lesser-earning primary child-rearing female? For couples that are of the same gender or, for both same-sex and opposite-sex couples where there are no children in the home, do the underlying assumptions behind marital law make any sense at all?

The growing number of cohabiting couples, both straight and gay, presents a difficult challenge to a multi-jurisdictional legal system that has been slow to respond to the changing demographics of the American family. Transforming the legal system to provide the protections that dependent partners in non-marital partnerships deserve will require a re-evaluation of the underlying basis for family law rules. It will also require an integration of local, state and federal law in an arena that has traditionally been slow to respond to broad social developments.

Only time will tell whether a separate regime for unmarried couples and same-sex couples will continue to evolve, or whether the dominant marriage model will simply be extended to cover the great majority of unmarried partners. And only further evolution of the social and legal structure of family partnerships will reveal whether the US law system's attempts to provide legal structure to these new forms of family will be truly effective.