

Comment,
WILL YOU “CONTRACTUALLY” MARRY
ME?

I. Introduction:

Marriage is an ever-changing relationship. The definition of marriage has changed through the centuries and today it is evolving at an even more rapid pace. It is an institution most people aspire to enter. Now, certain communities of people, such as those who are gay and lesbian, who have never had access to marriage are demanding it while parties who are able to enter into marriage are delaying or rejecting it altogether.¹ Cohabitation is not marriage nor does it pretend to be, a status discrepancy that some courts have made abundantly clear.² Upon marriage, the state and federal governments automatically provide rights to couples such as property division, support and custody of children. In contrast, without an agreement or contract, cohabitants are in legal limbo with respect to all of the rights and obligations married people have with respect to one another. Cohabitation agreements are no different from other contracts in that intent is the most important aspect in determining how the end of the relationship should be handled. Cohabitation agreements, whether between opposite or same-sex couples, should be enforced when a court is able to determine the facts, circumstances and intent of the parties who entered into the agreement.

Part II of this Comment offers statistics concerning the changing marital landscape. Part III will discuss the difference between statutory and contractual marriage. Part IV will discuss the history and future of the courts’ enforcement of cohabitation agreements. Parts V and VI will discuss opposite sex and same-sex cohabitation respectively.

¹ Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. KY. L. REV. 125, 125 (2005).

² Brief of Plaintiffs, *Lewis v. Harris*, 2010 N.J.S. Ct. Motions 58, 21-22 (2010) (“As presented in Plaintiffs’ briefs and the briefs of fellow amici, by creating a separate system of rights and by injecting language and titles not understood or easily incorporated into existing real-life events and transactions, the Civil Unions Law has failed to fulfill its promise of equality.”), available at <http://www.aclu-nj.org/downloads/050310LewisBrief.pdf>.

II. Statistics on Changing Marital Relationships

In 1960 there were fewer than 500,000 opposite sex cohabitating couples. This number grew to 3.2 million in 1990³ and according to the 2000 census this number had increased to nearly 5.5 million couples.⁴ This is an increase in cohabitation of about 1,000 percent over the past four decades.⁵ The 2000 Census also revealed that of 105.5 million households reporting, fifty-two percent of all households are “coupled” or have two people living together who qualify themselves as in a relationship with one another.⁶ A majority of the cohabitating couples consist of opposite sex couples though one in nine had a same-sex partner.⁷ While marriage is typically still seen as the best option when joining two lives, unmarried cohabitation is accepted now more than ever. It is estimated that over sixty percent of couples now cohabit prior to marriage as opposed to eleven percent in 1970.⁸ Cohabitation, it seems, “is now the ‘normal’ way to initiate unions.”⁹

Many commentators have hypothesized as to what has caused such a significant change in the marital relationship. The reasons vary from the increase in marital age to economic insecurity, education level and family history.¹⁰ A major factor is the increase in median age of first marriages. This has risen for both men and women. In 1966, the median age at first marriage was twenty-three for men and twenty for women as compared to twenty-seven and twenty-five respectively in 2003.¹¹ While some positive consequences result from this increase, such as a lower risk of divorce and a higher level of education of the parties en-

³ U.S. Census Bureau, Married-Couple and Unmarried-Partner Households: 2000, at 1 (2003), available at www.census.gov/prod/2003pubs/censr-5.pdf.

⁴ *Id.*

⁵ Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & FAM. STUD. 1, 7 (2007).

⁶ U.S. Census Bureau, *supra* note 3, at 1.

⁷ *Id.* at 9-10.

⁸ Michael Svarer, *Is Your Love in Vain? Another Look at Premarital Cohabitation and Divorce*, 39 J. HUM. RESOURCES 523, 531 (2004).

⁹ Bowman, *supra* note 5, at 8.

¹⁰ *Id.* at 9-10.

¹¹ *Id.* at 8.

tering marriage, the later age of marriage increases the likelihood of non-married cohabitation prior to marrying.¹²

Cohabitation occurs among distinct groups. The most likely group to cohabit consists of persons with low income and economic status.¹³ A cohabitation-type relationship is referred to as a “poor man’s marriage.”¹⁴ Economic security is a significant factor regarding whether a couple will decide to marry or cohabit. In many lower-income communities marriage is still respected and valued, though when the couple’s economic situation is not secure marriage is not viewed as appropriate until their situation improves which usually means being able to purchase a home.¹⁵ In contrast, some cohabitating couples are more secure economically than married couples. The parties to a cohabitation-type relationship typically contribute to the household income equally and this is more likely to continue throughout the relationship unlike the situation in a typical marriage where the parties may have specific economic or earning roles.¹⁶ Interestingly, evidence suggests that cohabitants are more likely to marry following cohabitation when the “male partner’s earnings and education are higher.”¹⁷

Another significant group of cohabitants is people over the age of sixty. In the last two decades there has been a significant increase in the number of elderly cohabitants.¹⁸ This group is only expected to expand and increase as younger people with past cohabitation experience enter their golden years.¹⁹ Cohabitation has a different meaning and connotation for this group of people. Many in this age group take advantage of cohabitation because it prevents a potential loss of alimony or social security benefits from a prior spouse. In 2001, the size and power of this group of cohabitants was instrumental in the passage of the Do-

¹² *Id.* at 9.

¹³ Bowman, *supra* note 5, at 10.

¹⁴ *Id.* at 11.

¹⁵ *Id.*

¹⁶ Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1388 (2001).

¹⁷ *Id.*

¹⁸ Bowman, *supra* note 5, at 14. (Finding that six percent of cohabitants in 1990 were over the age of sixty, which is increased from almost zero in 1960).

¹⁹ *Id.*

mestic Partnership Act in California.²⁰ Originally the Act was drafted to protect the rights of same-sex couples, but as is currently the concern with many same-sex issues, the public perception at the time of the drafting of the domestic partnership act was that gay and lesbian couples were getting special rights and statutory protections. In order to assure passage of the Act, and put concerns to rest, the author of the legislation expanded the Act to include senior citizen opposite sex couples over the age of sixty-two.²¹

This was also the situation in Washington. In 2008, Washington passed Referendum 71, also known as the “everything but marriage” law.²² By approving Referendum 71, voters allowed the domestic partnership laws, which gives registered couples the same rights and responsibilities as married couples, that were already in existence to continue and allow enforcement through statute. Similar to the domestic partnership act in California, this law applies to both same-sex couples as well as elderly couples. This law allows cohabitation, recognized as a domestic partnership, to be given nearly the same legal weight as marriage. This means that in the situation of dissolution of the relationship, the courts are able to clearly identify the relationship of the parties, their intent, and distribute assets as they would in the event of a divorcing couple.²³

Cohabitation has become a central method of establishing familial relationships and the parties who engage in cohabitation continue to increase including young, old, opposite and same-sex couples. As the number of cohabitating couples has increased over the past decades, society has also increased its approval of these couples. The law should recognize this change and examine ways to protect the couples involved in cohabitation.

²⁰ Megan E. Callan, Comment, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 SAN DIEGO L. REV. 427, 453-54 (2003).

²¹ *Id.* at 454 (discussing a telephone interview with an aide to Midgen, the author of the Act).

²² Washington Marriage/Relationship Recognition Law, available at http://www.hrc.org/your_community/1164.htm.

²³ *Id.*

III. Statutory Marriage v. Contractual Marriage

Marriage is an institution that is created, governed and dissolved by statutes. The statutes usually require a marriage license and a government official to officiate the ceremony. Once married, a couple enters into an arrangement in which they traditionally have had very little control over their rights during the marriage and in certain cases its dissolution.²⁴ Both the federal and state governments treat marriage as a legal status that confers rights and benefits on the parties.²⁵ A cohabitation agreement or contractual marriage does not bestow the same rights, benefits and obligations on the parties as does marriage.

The idea and approach to marriage has changed drastically over the last few decades. In the 1970's it was expected that a marrying couple would be married for life and under the fault divorce system this was an accurate expectation as divorce was not a possibility for most couples.²⁶ Fault divorce had the capacity to lock people in marriages they would otherwise want to end because the financial cost was too high.²⁷ For example, a man could not financially afford to support two separate families and women at the time “were unlikely to be able to support a family at all.”²⁸ In recent decades the laws governing marriage and more importantly divorce have changed drastically. The grounds for divorce have shifted to no-fault in virtually every state, meaning that parties to the marriage have the ability to dissolve the marriage unilaterally.²⁹ This also means the financial arrangements at divorce shifted from fault to equitable division and in some cases very limited spousal support.³⁰ Usually the financial outcomes are inadequate compensation for spouses who have limited or altogether sacrificed their careers or higher education for the benefit of their partners or families.³¹

The Government Accountability Office has found that the word “marriage” confers approximately 1,138 rights and benefits

²⁴ Parkman, *supra* note 1, at 127.

²⁵ *Id.* at 131.

²⁶ *Id.* at 138.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 138-39.

³⁰ *Id.* at 139.

³¹ *Id.*

to people qualified with the legal status of married.³² These rights and benefits are something neither cohabitation nor contractual marriage offers to the participating partners. Cohabiting couples must prepare extensive documents to protect themselves and their interests in situations that would normally be protected by statutes for legally married couples. While it offers less legal protection, contractual marriage does provide flexibility and predictability not available to couples entering a recognized statutory marriage.

Contractual marriage, a marriage contract for a cohabiting couple, is established and controlled by contractual principles rather than family law.³³ A contractual marriage or cohabitation agreement can be viewed as a relational contract that is vague about the performance or responsibilities of the parties required for satisfaction of the contract as opposed to “normal” or typical contracts. For example, consideration in many cohabitation agreements may include household services though many times when that is the only performance or consideration required for satisfaction, courts will not enforce the contracts. Therefore much of the language in a cohabitation agreement is vague as to what is considered performance. Courts are clear that contracting for sexual services or an illicit relationship are void as against public policy. Also marriage contracts for cohabitants usually are pertinent only at dissolution of the relationship. Clauses in the agreement may provide for transfers during the relationship and potential damages to compensate one of the partners for educational and career sacrifices incurred during the relationship. The goal of a contract for marriage or cohabitation agreement, similar to most commercial contracts, is to ensure performance of the parties to the contract. The goal is not to determine how much of the finances or property will be transferred if the relationship is dissolved but rather to provide an incentive arrangement that encourages a long-term relationship.

³² Defense of Marriage Act: Update to Prior Report, GAO-04-353R January 23, 2004, available at <http://www.gao.gov/products/GAO-04-353R>

³³ Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 255.

IV. Enforcement of Cohabitation Agreements

While there is a preference in the law for marriage, this does not mean that cohabitation agreements should altogether be rejected or viewed as unenforceable. Traditionally, courts viewed agreements that attempted to create a relationship legally similar to statutory marriage as unenforceable.³⁴ The recent trend has been for courts to enforce these cohabitation agreements under contract law principles, especially when the parties have an express written agreement. In the case of cohabitation plus an express agreement, there is no reason for the court not to enforce the agreement as it is usually straightforward. Intent is an important factor the courts will consider when deciding whether to enforce a cohabitation agreement or not. In the case of an express, written agreement, the written and executed agreement demonstrates clear intent on behalf of the parties to the agreement. Courts have found that cohabitating couples are able to contract with one another and may do so legally.³⁵ The clear exception, articulated by several jurisdictions, is when the agreement is based solely upon an unlawful meretricious³⁶ or sexual relationship.³⁷

Oral and implied agreements cause courts to investigate the details and examine the agreement more closely. Sometimes when a writing does not exist but there is significant evidence of an agreement between the parties as to division of property, finances or support, courts will recognize and enforce the agreement. When there is no express writing, the burden is on the party claiming an agreement existed to show that the parties had an implied agreement, which can be determined by examining

³⁴ Parkman, *supra* note 1, at 148.

³⁵ See Salzman v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000) (Citing Cook v. Cook, 691 P.2d 664 (Ariz. 1984); Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987)).

³⁶ See *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984) (defining a meretricious relationship as a marital-like relationship where both parties knowingly cohabit without a lawful marriage existing between them).

³⁷ See, e.g., Salzman v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000) (Citing Boland v. Catalano, 521 A.2d 142 (Conn. 1987); Collins v. Davis, 315 S.E.2d 759 (N.C. Ct. App. 1984); Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983)).

the conduct of the parties.³⁸ Court decisions have been mixed considering an implied agreement. Pursuing a claim of support or equitable property division when no express agreement exists is a risk, financially and otherwise, for both parties to the agreement. Generally, courts will find an enforceable implied contract existed if the conduct by the parties is promissory and it is clear the parties understood that an obligation existed between them.³⁹ But even in cases where cohabitating couples have held themselves out as a married couple for numerous years, courts have found that there was no meeting of the minds and that the provisions of the contract are not sufficiently specific to find an enforceable agreement.⁴⁰ Courts are more willing to and have recognized that implied agreements existed when the cohabitating partners acquired property together.

In several jurisdictions, courts have held both express and implied agreements to be enforceable. There are states at each end of the spectrum of enforcement and the degree of enforcement varies from jurisdiction to jurisdiction. Courts in both Michigan⁴¹ and New York⁴² will enforce an express contract between cohabitating partners but will not enforce implied contracts. In these jurisdictions, courts have held that recognizing implied contracts between cohabitating partners could be viewed as restoring common-law marriages, which were previously abolished by the legislature. Courts in Alaska,⁴³ Arizona,⁴⁴ Connecticut,⁴⁵ Indiana,⁴⁶ Illinois,⁴⁷ Oregon,⁴⁸ Maryland,⁴⁹ Nevada,⁵⁰

³⁸ Scott, *supra* note 32, at 256.

³⁹ *Id.*

⁴⁰ See, e.g., *Salzman v. Bachrach*, 996 P.2d 1263, 1268 (Colo. 2000) (Citing *Tarry v. Stewart*, 649 N.E.2d 1 (Ohio Ct. App. 1994); *Wilbur v. DeLapp*, 850 P.2d 1151 (Or. Ct. App. 1993).

⁴¹ *Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. Ct. App. 1981).

⁴² *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980).

⁴³ *Bishop v. Clark*, 54 P.3d 804 (Alaska 2002) (finding that the couple had an enforceable implied agreement to live together and “to share in the fruits of their relationship as though they were married.” The court evaluated the circumstances surrounding the cohabitation and found the couple lived together, had joint financial accounts and had two children together.).

⁴⁴ *Cook v. Cook*, 691 P.2d 664 (Ariz. 1984).

⁴⁵ *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987).

⁴⁶ *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. 1980).

⁴⁷ *Spafford v. Coats*, 455 N.E.2d 241 (Ill. App. Ct. 1983).

⁴⁸ *Beal v. Beal*, 577 P.2d 507 (Or. 1978).

Washington,⁵¹ Washington D.C.,⁵² and Wisconsin,⁵³ enforce both express and implied agreements. These jurisdictions have begun examining not only the cohabitation agreements but also the factual circumstances surrounding the cohabitants and their agreement. Courts that enforce cohabitation agreements, express and implied, find that the couple held themselves out as married, committed a significant amount of time to one another,⁵⁴ intended to cohabit with one another and agreed to hold and share all property jointly as “marital” property. These courts do not agree that implied agreements are against public policy and will enforce them if enough evidence exists that the couple had an agreement. An increasing number of jurisdictions are enforcing both express and implied agreements.

Florida is a state that provides examples of the potential use of both implied and express agreements between cohabitating partners both for opposite and same-sex couples. In *Crossen v. Feldman*,⁵⁵ Randy Feldman and Cynthia Crossen, did not have an express written agreement but rather an oral agreement that Feldman would support Crossen while she was pregnant so long as she quit her job.⁵⁶ Crossen proceeded to quit her job and then sued Feldman when he refused to support her. Feldman attempted to use the statute of frauds and palimony as defenses.⁵⁷ The court, to avoid defining palimony, rejected the defense stating the case was instead about, “whether these parties entered into a contract for support, which is something they are legally capable of doing.”⁵⁸

⁴⁹ *Donovan v. Scuderi*, 443 A.2d 121 (Md. Ct. Spec. App. 1982).

⁵⁰ *Western States Constr., Inc. v. Michoff*, 840 P.2d 1220 (Nev. 1992).

⁵¹ *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995).

⁵² *Mason v. Rostad*, 476 A.2d 662 (D.C. 1984).

⁵³ *Matter of Estate of Steffes*, 290 N.W.2d 697 (Wisc. 1980).

⁵⁴ *See In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984) (Where the court held that while the amount of time is not a specific, required number of years, which would be impractical, length of the relationship can and will be considered by some courts as proof of intent.).

⁵⁵ 673 So. 2d 903 (Fla. Dist. Ct. App. 1996).

⁵⁶ *Id.* at 903.

⁵⁷ Palimony is “a court’s award of post-relationship support or compensation for services, money and goods contributed during a long-term nonmarital relationship. *Black’s Law Dictionary* 1219 (9th ed., 2009). The term originated in *Marvin v. Marvin*, 557 P.2d 106 (Cal 1976).

⁵⁸ *Crossen*, 673 So. 2d at 903.

Crossen was later cited and explained by the subsequent case *Posik v. Layton*.⁵⁹ *Posik* involved same-sex cohabitating partners Nancy Layton, a doctor, and Emma Posik, a nurse. Layton decided she wanted to move her medical practice to a different county and wanted Posik to move with her and live with her, “for the remainder of [her] life to maintain and care for the home.” Posik agreed so long as the couple had a contract similar to a pre-nuptial agreement. The two entered into an agreement that Posik would quit her job and move with Layton and Layton would provide essentially all support for the two of them and furthermore, Layton would leave her entire estate to Posik. Also, Layton promised to maintain bank accounts and other investments in Posik’s name.⁶⁰ The agreement also stated that Posik could discontinue residing with Layton,

if Layton failed to provide adequate support, if she requested in writing that Ms. Posik leave for any reason, if she brought a third person into the home for a period greater than four weeks without Ms. Posik’s consent, or if her abuse, harassment or abnormal behavior made Ms. Posik’s continued residence intolerable.⁶¹

In the contract, one clause was for liquidated damages of \$2,500 per month for the remainder of Posik’s life if the above-mentioned events occurred.⁶² The agreement was written by an attorney and executed by the parties. Four years after executing the cohabitation agreement, Layton met another woman and told Posik she would like to have her live in the home. Posik did not approve so Layton moved to another home to live with the woman. Following her move, Layton served Posik with an eviction notice and Posik proceeded to sue Layton to enforce their cohabitation agreement.⁶³ The trial court found that because Posik’s losses were reasonably ascertainable, the liquidated damages payment of \$2,500 per month was a penalty and therefore the agreement was unenforceable.⁶⁴ On appeal the court found that while this was a personal services contract, the parties in-

⁵⁹ 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

⁶⁰ *Id.* at 760.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Posik*, 695 So. 2d at 760.

⁶⁴ *Id.*

tended for it to be more than that.⁶⁵ The court found “it was a nuptial agreement entered into by two parties the state prohibits from marrying.”⁶⁶ The court seemingly gave weight to the fact that the couple, being of the same-sex, did not have an opportunity to legally marry one another. Therefore the agreement between the same-sex cohabitating partners should be given the same significance as a nuptial agreement would have over a couple allowed to legally marry. The court found that the parties had a valid and enforceable agreement as long as the consideration was not sexual services.⁶⁷ This is a common requirement for both opposite and same-sex couples. For agreements, made upon consideration of marriage, to be valid they must be in writing to meet the statute of frauds requirement.⁶⁸ This same requirement applies to “non-marital, nuptial-like agreements,” like the agreement in this case.⁶⁹ The court recognized that while the agreement was favorable to Posik, there had been no fraud or misrepresentation on her part. The court also reprimanded Layton stating

[c]ontracts can be dangerous to one’s well-being. That is why they are kept away from children. Perhaps warning labels should be attached. In any event, contracts should be taken seriously. Dr. Layton’s comment that she considered the agreement a sham and never intended to be bound by it shows that she did not take it seriously. That is regrettable.⁷⁰

Two landmark cases set the stage for enforcement of cohabitation agreements, *Marvin v. Marvin* and *Hewitt v. Hewitt*. In *Marvin v. Marvin*,⁷¹ the couple, Michelle Triola and Lee Marvin, had cohabitated for seven years when Lee “compelled” Michelle to leave their home. Triola sued Marvin claiming they had an oral agreement to combine and share all earnings and property. Following the trial court’s dismissal of Triola’s complaint, the appeals court reversed holding “[a]dults who voluntarily live together and engage in sexual relations are nonetheless as com-

⁶⁵ *Id.* at 761.

⁶⁶ *Id.*

⁶⁷ *Id.* at 762.

⁶⁸ *Id.*

⁶⁹ *Posik*, 695 So. 2d at 762.

⁷⁰ *Id.* at 763.

⁷¹ 557 P.2d 106 (Cal. 1976).

petent as any other persons to contract respecting their earnings and property rights.”⁷²

The court further held that courts should enforce express contracts between unmarried cohabitants so long as the consideration or basis for the contract is not meretricious sexual services. The court also determined that “in the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract.” *Marvin* was the first case to hold that agreements between cohabitating partners would be enforced in court even if the only or primary form of consideration was household services.⁷³

In contrast to the *Marvin* court, which analyzed the cohabitation agreement based on implied contract theory, in *Hewitt v. Hewitt*⁷⁴ the court refused to recognize the validity of such an agreement. The couple in *Hewitt* had lived together in Illinois for fifteen years, where common-law marriage had been abolished legislatively, and had three children together. Victoria Hewitt filed for divorce but later during a hearing admitted that they had not been legally married. Following this admission, she amended her complaint stating that the parties had an implied agreement and that the defendant had promised to share his earnings and property with her. She also claimed that she had relied, to her detriment, on Dr. Hewitt’s assertion that she was his wife, she had devoted her life to him and therefore she should be granted a trust because he was unjustly enriched.⁷⁵ On appeal, the court held that because “the parties had outwardly lived a conventional married life, plaintiff’s conduct had not so ‘af-fronted public policy that she should be denied any and all relief.’”⁷⁶ The Illinois Supreme Court later held that express agreements or contracts between cohabitants are “unenforceable because they contravene public policy.”⁷⁷ The court expressed concern that by recognizing cohabitation agreements it could

⁷² *Id.* at 116.

⁷³ Parkman, *supra* note 1, at 149.

⁷⁴ 394 N.E.2d 1204 (Ill. 1979).

⁷⁵ *Id.* at 1205.

⁷⁶ *Id.* at 1206, *citing* *Hewitt v. Hewitt*, 380 N.E.2d 454, 460 (Ill. App. Ct. 1978).

⁷⁷ *Id.* at 1211 (The court found that the act disfavored giving “enforceable property rights to knowingly unmarried cohabitants.”).

lead to reinstating common-law marriage. The court also expressed fear that by recognizing cohabitation relationships or agreements it could “weaken marriage as the foundation of the family-based society.”⁷⁸

Illinois and Georgia are the only two jurisdictions where cohabitation agreements are not recognized and courts refuse recovery of any sort on public policy grounds. As was discussed previously, *Hewitt* is still the law in Illinois. In Georgia in *Rehak v. Mathis*,⁷⁹ an unmarried couple, Hazel Rehak and Archie Mathis, lived together for eighteen years in a home they had jointly purchased. When the relationship ended, Mathis moved out and demanded that Rehak also vacate the home. Rehak sued for compensation for her time and the services devoted to Mathis and also exclusive title to the home because she had contributed more than half of the purchase price.⁸⁰ The trial court granted appellant’s motion to dismiss and summary judgment was granted on appeal, because the cohabitation agreement was based on a meretricious relationship, which is immoral consideration.⁸¹

Couples entering into a cohabitation agreement or a “contractual marriage” should be aware of the law of the state where they are drafting the agreement. The law as to enforcement of cohabitation agreements is unclear and unreliable from state to state. To have the contract enforceable it is best practice to have a written, express cohabitation agreement to make sure the parties know what they are entering into and also to satisfy the statute of frauds requirement.

V. Heterosexual Cohabitation

Marriage has long been regarded as a vitally important social, cultural, religious and legal institution. In contrast, unmarried cohabitation is not a legally recognized status and therefore the rights, benefits and obligations usually conferred upon a marital relationship, do not protect the parties involved in the cohab-

⁷⁸ *Hewitt*, 394 N.E.2d at 1207.

⁷⁹ 238 S.E.2d 81 (Ga. 1977).

⁸⁰ *Id.* at 81.

⁸¹ *Id.*

itation.⁸² For some this is the desired result, but for some, usually one partner to the cohabitation, non-recognition can be detrimental and can create significant hardship. In the situation of husband, wife, parent and child a legal status exists to protect these relationships, the family unit, and impose rights and responsibilities. This is in contrast to cohabitating relationships where opposite sex cohabitating couples are not given any legal status. In fact, historically cohabitation has had a negative connotation both socially and legally.⁸³

Conferring legal status upon opposite sex cohabitating couples leads to its opponents fearing that establishment of a legal status for cohabitating couples who are otherwise eligible to marry will undermine the institution of marriage. While times are changing, marriage is still regarded as the most certain and stable method for creating families. This was seen in the California case of *Elden v. Sheldon*.⁸⁴ In this case the plaintiff, Richard Elden, and his cohabitating partner, Lisa Ebeling, were in an auto accident caused by defendant Sheldon's negligence.⁸⁵ The plaintiff suffered serious injuries and his partner, Lisa, died from her injuries.⁸⁶ Elden filed an action seeking recovery for his own injuries, negligent infliction of emotional distress for having witnessed the injury of his "de facto spouse" and loss of consortium. The court held that, "[f]ormally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage." The court also held that "the state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited."⁸⁷

Because marriage is so revered by society and lawmakers alike, recognition of unmarried cohabitation has been slow to non-existent. Assuming that recognition of cohabitation would encourage couples to forego marriage is speculative at best.

⁸² Margaret Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. FAM. STUD. 135 (2005).

⁸³ *Id.*

⁸⁴ 758 P.2d 582 (Cal. 1988).

⁸⁵ *Id.*

⁸⁶ *Id.* at 582-583.

⁸⁷ *Id.*

Consideration of the rate of increase of cohabitating couples from 1970 to now, even in the face of denial of benefits, leads to a conclusion that there is no correlation between the two. One commentator summarized this position stating that “[i]t is hard to be certain whether recognizing cohabitation as a status would discourage marriage.”⁸⁸

VI. Same-Sex Cohabitation

Same-sex couples differ from opposite sex couples because they do not have the choice of legal marriage in the majority of states so their decision whether to marry or cohabit is made for them by the state and federal governments.⁸⁹ Almost all states have recognized the right of couples to enter into enforceable cohabitation agreements or contractual marriage, which is particularly important for same-sex couples who are precluded from marrying or entering into statutory marriage in a majority of states. Same-sex couples should be treated differently than their heterosexual counterparts with respect to agreements and contracts into which they enter because no other option exists for these couples. Currently only five states⁹⁰ allow gay marriage and the federal government does not recognize same-sex marriage at all.⁹¹

Private contracts are an option to obtain some benefits between cohabitants though they are not state sanctioned. Some jurisdictions in the U.S. have made domestic partnerships a legally recognized status. The positive outcome is obvious in that by giving cohabitating couples a legal status the parties in the relationship are more protected; but because other states do not recognize domestic partnerships the protection may not extend

⁸⁸ J. Thomas Oldham, *Unmarried Partners and the Legacy of Marvin v. Marvin: Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitation or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1425 (2001).

⁸⁹ Bowman, *supra* note 5, at 2.

⁹⁰ The five states are Massachusetts, Iowa, Connecticut, Vermont, New Hampshire. Washington D.C. also recognizes same-sex marriage.

⁹¹ 1 U.S.C. § 7 (2000). Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), § 7, 110 Stat. 2419, 2419 (1996) and 28 U.S.C. § 1738C (2000). Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), § 1738, 110 Stat. 2419, 2419 (1996).

across state lines.⁹² The result of this creates a confusing legal situation where cohabitants may have essentially no rights to the other extreme where cohabitants may be treated as if they were married.⁹³ Because no federalization of domestic partnerships or cohabitation exists, the laws begin to look very similar to marriage when imposed statewide which is, ironically, the central argument against recognizing cohabitation or domestic partnerships. An odd paradox has been created because while same-sex marriages are not recognized except for five states and the District of Columbia,⁹⁴ more states have given same-sex couples a legally recognized status equivalent to spousal or marriage rights by creating domestic partnership laws.⁹⁵

In *Hewitt*, the court refused to recognize and enforce the couple's oral agreement because recognizing property rights of "knowingly unmarried cohabitants," would undermine the purpose of the Illinois Marriage and Dissolution of Marriage Act and would violate the strong "pro-marriage" policy of the State of Illinois.⁹⁶ Because same-sex couples are unable to marry, an argument that by enforcing an agreement or contract between a cohabitating same-sex couple would undermine "marriage" is implausible. In fact, quite the opposite is true. Agreements be-

⁹² Washington, Vermont, Massachusetts, Hawaii, New Jersey, California and Iowa do not recognize domestic partnerships. Lynne Marie Kohm & Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U.L. REV. 261, 267 (2005).

⁹³ *Id.* at 267.

⁹⁴ Connecticut (2008), District of Columbia (2010), Iowa (2009), Massachusetts (2004), New Hampshire (2010) and Vermont (2009). Two states, Maryland and New York, recognize same-sex marriages legally entered into in other jurisdictions. Marriage Equality & Other Relationship Recognition Laws, *available at* http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

⁹⁵ California (1999, later expanded in 2005) also allowed same-sex marriage from June 16, 2008 and November 4, 2008. All marriages during this time are still legally recognized as well as any same-sex marriage performed legally in other jurisdictions during this time period. Nevada (2009), New Jersey (2007), Oregon (2008) and Washington (2007–2009). At the time of this comment the Hawaii legislature had approved civil unions but it had yet to be signed or vetoed by the governor. Marriage Equality & Other Relationship Recognition Laws, *available at* http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

⁹⁶ *Hewitt*, 394 N.E. 2d at 1211.

tween gay and lesbian couples should be upheld and enforced as a result of the legislative enactments, lack of legal protections for these couples and social changes since the *Hewitt* decision. One of the main concerns expressed by the court in *Hewitt* was that couples able to marry would choose not to marry and instead rely on contractual marriage. This is of course what same-sex couples must rely upon because marriage is not an option in many states in the United States and the federal government does not recognize any relationship between same-sex couples.

One question that looms is whether or not states in which same-sex marriage is not permitted will invalidate cohabitation agreements between same-sex couples because the agreement may be viewed as an attempt to recreate marriage.⁹⁷ No cases exist as of yet, and it seems unlikely that a court would invalidate an express, written agreement based on the grounds that it constituted a same-sex marriage.

There are numerous reasons why a gay or lesbian couple should enter a cohabitation agreement despite some uncertainty. For same-sex couples it is far better to have an agreement in place than to defer to nonexistent legislative and statutory protections. There is less likelihood of a dispute when couples have clearly defined and expressed intentions and agreements beforehand.

Conclusion

Cohabitation agreements can be as narrow or as broad as the couple wishes and it is always best to have an express written agreement to avoid confusion during the cohabitation period and should dissolution happen. Because intent is the most important part of the contract, a written agreement allows for the court to clearly determine intent. As with typical contracts, the cohabitation agreement should always provide for some type of consideration between the parties. The consideration, which has been

⁹⁷ Thirty-nine states have statutes defining marriage as between one man and one woman. Thirty of these states also have constitutional language defining marriage. Furthermore, the federal government enacted DOMA in 1996, which bars the federal government from recognizing same-sex marriage. National Conference of State Legislatures, Same-Sex Marriage, Civil Unions and Domestic Partnerships, *available at* <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx>

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made clear, may in some cases be household services but must be something other than a sexual relationship. Furthermore, the agreement should be clear as to what the parties have agreed to share, including property and income, what they agree should happen with property and finances upon dissolution and whether either party should be responsible for supporting the other upon dissolution.

Courts will recognize implied or oral agreements but a patchwork of enforcement exists throughout the different jurisdictions. While some jurisdictions will examine the conduct, behavior and factual circumstances surrounding the parties to the cohabitation, other jurisdictions refuse to enforce both express, written and implied or oral agreements. It is always best practice to have an express written agreement.

Couples should always consult with the law of the state in which they reside. Every state has different laws and different views of enforcement of cohabitation agreements. It is not always certain that a cohabitation agreement will be enforced which may lead to one party to the agreement being left out in the cold, quite literally.

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