

Legal Approaches to Protecting the Rights of Cohabiting Couples

by Stacy Emerson

THE MARRIAGE RATE IN America is steadily declining while the number of unmarried couples has quadrupled since 1970 to 2.2 million households.¹ Several reasons exist for couples who choose not to get married, not the least of which is that they are simply not ready for marriage. Economic disincentives may also discourage marriage, especially among the elderly who may lose certain benefits if they remarry or among two-wage-earner couples who may be thrust into a higher income bracket if they marry. Finally, for some couples, most notably homosexual couples, current law does not give them the option to marry.

Despite this social reality, the law has been slow to address the needs of couples, who for one reason or another do not get married and yet still desire to protect each other's rights. This article will address the various approaches the law has taken, including the new Austin City Council Domestic Partner Resolution, the problems that these approaches have not yet solved, and the reason why the law is still cautious about extending all the rights associated with marriage to nonmarried couples.

DEVELOPMENT OF PROTECTION

Historically, courts have addressed the problems arising

out of informal relationships by recognizing the rights of those who are legally married and denying all similar rights to those who are not.² Often, however, principles of equity have made such results seem harsh. As a result, certain legal fictions, such as common law marriages, were created that extended all the rights of marriage to these relationships.³ However, these fictions do not address the problems encountered by couples who do not wish to be married or, as in the case of same-sex couples, cannot be married.

In an attempt to address these problems, many courts are starting to adopt a more functional approach in which they look closely at the particular characteristics of a relationship and attempt to protect the reasonable expectations of the parties involved.⁴ Nevertheless, despite this promising trend, state statutes governing inheritance and property rights are designed to accommodate only the needs of the traditional family.

As one possible solution to this problem, the courts may apply a broader definition of "family," as long as such a definition still serves the purposes of the particular statutory scheme. This more functional approach was followed in the 1989 New York case of *Braschi v. Stahl Assocs. Co.*⁵ This case

involved a homosexual man whose recently deceased lover had a rent controlled apartment where the two men had lived for several years.⁶ Under a New York statute, families were protected from sudden eviction after the death of a family member.⁷ Unless Braschi fit within the category of family as defined in the statute, he would have been subject to sudden eviction.

In its opinion, the New York Court of Appeals said: "The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the realities of family life."⁸ To find that the couple was in fact a family for purposes of the statute the court looked to a number of factors including the "exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."⁹

Critics might fear that such a broadened definition of family will open the door for abuse; however, the method of considering the various factors laid out in the *Braschi* approach minimizes the potential for abuse. In light of these factors, the family interests of unmar-

ried couples should be considered identical to the interests of married couples, as denying equal protection perpetuates an inconsistent and unfair standard.

Some cities have attempted to remedy this inequality by passing domestic partnership ordinances which extend spousal benefits of city employees to domestic partners, many regardless of gender. Cities which have passed these ordinances include Seattle, Washington; Berkeley, California; and Austin, Texas. Most of these ordinances strongly resemble Austin's. Austin's Resolution, passed on September 2, 1993, provides city employees and their domestic partners with various benefits including sick and personal leave, leave in accordance with the Family and Medical Leave Act, and health, life, and dental insurance coverage.¹⁰ The Austin Resolution requires, as do other similar ordinances, that the employee and the domestic partner register with the city. These ordinances also require that the employee and the domestic partner must live together. When a partner terminates the domestic partnership, he or she must then file a statement of termination. Although these ordinances may provide certain privileges, they only apply to a small portion of the population.

While the legal effects of these ordinances are limited, they represent an important step towards the recognition of equal rights between married and nonmarried couples. If the state's interest in regulating

marriage is to promote stability and personal happiness, this goal should be the focus of domestic partnership legislation as well. Because these ordinances recognize nonmarried relationships, they help to promote stability and happiness for these couples by aiding them in defining their relationships and by giving them a better understanding of precisely what rights and obligations they possess.¹¹

However, these ordinances or resolutions stop far short of addressing all of the issues that nonmarried couples are destined to face, especially upon dissolution of such relationships. These issues include property rights, parenting rights, and support obligations to name just a few. While many of these issues are well beyond the power of municipalities to address, they should be kept in mind as states begin to consider similar legislation on a state-wide level.

JUDICIAL PROTECTION

Although beneficial in many respects, the limited municipal ordinances may induce false expectations of each partner's rights upon dissolution of the relationship. If a relationship is dissolved, the partner that is not employed by the city loses all benefits he or she was receiving. Under such ordinances either party can dissolve the arrangement simply by so declaring it with the proper city authority. Until legislation is enacted to address these inevitable problems, many courts are recognizing creative approaches utilized by some

couples in an attempt to ensure that their reasonable expectations in the relationship are equitably met.

For example, some nonmarried partners create express agreements describing the consequences to one another upon dissolution of the relationship. Most courts are willing to enforce such agreements as long as they do not rest explicitly and solely upon the "immoral and illicit consideration of meretricious sexual services."¹² However, merely enforcing express contracts between cohabitants provides no protection for the vast majority of unmarried couples who do not enter into such agreements.

As a result, a few courts have found that under certain circumstances an implied contract may exist between unmarried cohabitants. In *Marvin v. Marvin*, the California Supreme Court found that providing domestic services, giving companionship, foregoing a career, and similar sacrifices could be viewed as, consideration for purposes of finding an implied contract.¹³ Additionally, the *Marvin* court found a presumption in these cases that the parties intend to deal fairly with each other.¹⁴ In light of this presumption, a court must determine the reasonability of the parties' expectations in deciding whether or not an implied contract exists.¹⁵

Ultimately, Michelle Marvin was not allowed to recover because the court found that she had been compensated during the relationship with nice

clothes, trips, luxurious living arrangements, and other benefits and, because of this, her expectation of continued support was unreasonable. The *Marvin* holding therefore reemphasized the point that the parties may only recover what may be reasonably expected based on the circumstances of the cohabitation.

In the absence of an express or implied contract, courts have allowed recovery under various equitable doctrines. Unjust enrichment, for example, is not based on any agreement entered into by the parties, but on the concept that when one party to a transaction benefits at the other party's expense, the party deriving the benefit should compensate the other for any costs incurred. A partner relying on an unjust enrichment claim may not get half of the property, but he or she may be compensated for whatever services he or she rendered.

In the case of *Watts v. Watts*, the Wisconsin Supreme Court stated that an action for unjust enrichment may be brought if it is proven that: (1) a benefit was conferred on the defendant by the plaintiff; (2) the defendant appreciated or acknowledged the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to do so.¹⁶ The *Watts* court also recognized that an action to recover may be brought by a partner under the theory of constructive trust if sufficient facts exist to show both unjust enrichment and abuse of a confidential relation-

ship or some other form of unconscionable behavior.¹⁷ Finally, Wisconsin recognized the theory of joint partnership as a possible basis for recovery with the court considering whether the partners purchased property as husband and wife, whether they intended to share all the property acquired during the relationship, and what other contributions were made to their joint interests.¹⁸

Critics argue, however, that by allowing parties that are merely cohabiting the legal rights to property and support obligations, the courts are discouraging marriage. However, if cohabitants have no legally enforceable rights, then the cohabitant with more assets may opt out of marriage and continue to cohabit in an effort to avoid the legal consequences that automatically stem from marriage. On the other hand, if cohabitation and marriage are essentially the same with regard to the legal rights and obligations of the parties involved, then why marry? It seems that there must continue to be a distinction between marriage and cohabitation to preserve the interests the state has in maintaining the institution of marriage.

CONSIDERATIONS FOR PROTECTION

Perhaps the best place to start is to identify exactly what interests a state has in preserving marriage and whether marriage is the only means by which to protect those interests.

First, the state possesses an

interest in providing an appropriate atmosphere for children. However, while the traditional family is certainly appropriate, other less traditional families may be equally appropriate for this purpose.¹⁹

Second, the state also possesses an interest in reducing dependency on state services. Obviously, the support obligations attached to marriage relationships address this concern; it is less obvious that the same obligations cannot be implemented regarding certain cohabitation relationships. The idea of extending support obligations to cohabitants may seem particularly reasonable in light of the current trend in divorce reform away from the idea of life-long support obligations between previously married couples to the idea of transitional support.²⁰

Third, the state also has a legitimate interest in promoting stability. Stability may provide a healthier environment for children.²¹ Again, however, stability may also be promoted by protecting the reasonable expectations of cohabitants, allowing couples to spend more time concerned with each other and not with protecting their own individual interests.

Finally, a state may have an interest in maintaining traditional morality. While it is true that marriage has historically been the bedrock of society, society is changing, as are the ways in which people define their relationships. With the ever increasing number of couples who choose not to

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marry or who are legally unable to marry, the lack of protection given to these couples under the law is becoming painfully obvious. Despite the legal differences, similarities between married and unmarried couples and the level of commitment found in both types of relationships suggest that the interests in financial security and happiness of both types of couples are the same. Considering the desires and interests of unmarried couples, traditional morality may have become outdated as our society begins to accept and support these types of relationships. Thus, even this last state interest in preserving marriage does not persuasively explain why reasonable expectations of cohabitants should not be recognized.

Legitimate reasons do exist, however, for preserving the distinction between marriage and cohabitation. Many couples choose to cohabit rather than marry with the intent of avoiding all of the rights and obligations that go along with marriage. So where should the line be drawn? The interest in recognizing certain rights and obligations of nonmarried couples seems to be an equitable one. Theories of unjust enrichment, joint partnerships, and constructive trusts address the inequities of dissolved cohabitation relationships without blurring the distinction between marriage and cohabitation by allowing limited recovery of what one partner has invested in the relationship.

On the other hand, approaches based on contract theories and marriage-like circumstances tend to eliminate any distinction by extending all rights and obligations of marriage to the particular relationship if the requirements are met. However, preserving the distinction between marriage and cohabitation does not address the problems of same-sex couples who do want all of the rights and obligations that come with marriage but, by law, are denied them.

If states continue to refuse to allow same-sex couples to marry, perhaps an alternative solution would be a hybrid between the contract approach and the domestic partnership ordinances. By requiring couples to register with the city or state, there can be no dispute that the couple wants all the rights and obligations they can receive as a couple under the law. Additionally, by taking a contract approach, couples can either contract away or contract for additional rights and obligations they would or would not have received under the registration system. For example, this approach would allow couples to reject any obligation for economic support upon dissolution of the relationship, if the partners did not wish to be bound by such requirements. This approach would therefore provide limited equitable remedies for partners who choose not to register with the state, while allowing an opportunity for couples to pledge themselves to greater commitments if

desired.

Ultimately, the decision of how to address this issue rests with the cities, the states, and, in a piecemeal fashion, the courts. The best solution would need to recognize the new realities of social relationships while maintaining some distinction between marriage and cohabitation rights and obligations. However, such a distinction must, at a minimum, recognize the equitable rights of reasonable expectations for all partners. The domestic partnership ordinances and case law recognizing equitable theories provide a starting point and direction for the new treatment of cohabiting couples.

If the states can overcome historical notions of marriage being a sacred right which must be strictly guarded, then they should generate new legal formats to deal with a problem that has been growing for years and will inevitably continue to grow as society continues to redefine its relationships. ♦

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ENDNOTES

¹Statistical Abstract of the United States 1988, Table 62 (108th ed. 1988).

²Rebecca L. Melton, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. Fam. L. 497, 497 (1990/1991).