WHAT DO YOU DO WHEN THEY DON'T SAY "I DO"?
COHABITANT RELATIONSHIPS AND COMMUNITY PROPERTY[1]

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I. STATUTES OR CASES THAT APPLY COMMUNITY PROPERTY STATUTES OR PRINCIPLES WHEN COHABITANT RELATIONSHIPS FAIL

Nevada has no statutes, and few cases, that have explicitly looked to community property law when dealing with the property owned by unmarried cohabitants. The matter has been raised, however, for purposes of distinction and illustration in several cases other than the ones directly addressing the subject.

The first good hint came in *Warren v. Warren*, 94 Nev. 309, 579 309, 579 P.2d 772 (1978). There, a woman had filed in the alternative an action for divorce or "dissolution of partnership and declaratory relief," following the collapse of the parties' 8½ year relationship, in which they traveled and worked together as entertainers. The district court found against the woman, and the Nevada Supreme Court affirmed. On appeal, the court rather dispassionately noted the then-recent holding of the California Supreme Court in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), but deferred to the factual findings of the trial judge, who had examined the credibility of the parties and found on conflicting evidence that there was no express or implied contract to pool funds, or to form an implied partnership.

The court was a bit more receptive by the time of *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984). There, the parties had been married between 1949 and 1957, but they resumed cohabitation "almost immediately after their divorce," and remained together until they separated in 1981. Some real estate was owned by the parties in the form "husband and wife as joint tenants." Some real estate was in the man's sole name, and most of the vehicles were titled in "or" form. The woman sought a restraining order prohibiting disposal of the property, declaratory relief stating that she was the owner of half of it, and an equitable distribution. By the time the lower court entered a temporary restraining order, the man had switched all the vehicles to his name alone.

The district court had dismissed the woman's complaint, but the Nevada Supreme Court reversed, finding that in a notice-pleading state, an allegation of an agreement to pool income or contract to hold property is enforceable, again citing *Marvin*. The Court held:

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> We agree that the remedies set forth in *Marvin* are available to unmarried cohabitants. Unmarried persons who are living together have the same rights to lawfully contract with each other regarding their property as do other unmarried individuals. Their agreement may be express or implied . . . from the conduct of the parties. Although they may not, of course, contract for meretricious sexual services, they may expect that courts will protect their reasonable expectations with respect to transactions concerning property rights. Each case should be assessed on its own merits with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties. *See* Omer v. Omer, 523 P.2d 957, 930-961 (Wash. App. 1974). Where it is alleged . . . and proven that there was an agreement to acquire and hold property as if the couple was married, the community property laws of the state will apply by analogy.

Hay, 100 Nev. at 199.

In remanding, the court broadly hinted that relief should be granted to the woman in the case, while making a point to "hasten to point out that Nevada does not recognize common law marriage." The Court found that the public policy of encouraging legal marriage would not be "well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions."

The court was no longer united on the topic, however, by the time of *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992). The case involved a nine year cohabitant who brought a declaratory action for equal division of property accumulated during cohabitation. The woman changed her last name to that of the man, and actively participated in his business, with both as co-signors and corporate owners, and the woman as the license holder. The man held the woman out as his wife, and had her sign a "spousal consent form" to a contract he entered. They filed joint tax returns as husband and wife, designating the corporate profits as community property.

On this evidence, the trial court found both express and implied agreement between the parties to acquire and hold property as if they were married, found that community property laws applied by analogy, and granted judgment against the man and the corporation for half of their net assets.

On appeal, the Nevada Supreme Court affirmed, repeating the holdings recited above from *Hay*, and again approving the holding in *Marvin*, taking the opportunity to adopt its holding that:

> adults who voluntarily live together "may agree to pool their earnings and to hold all property acquired during the relationship *in accord with the law governing community property*."

Michoff at 938, citing *Marvin*, 557 P.2d at 116 (emphasis in original).

Going on, the court held that where it is proven that there has been conduct demonstrating an *implied* contract for partnership or joint venture, the contract is to be given effect. Specifically, parties

> may agree to hold all property acquired during the relationship in accord with the law governing community property. . . unmarried couples are not precluded from holding their property as though they were married . . . . In such a case, the community property law can apply by analogy.

The appellate court reiterated that it "by no means seeks to encourage, nor does this opinion suggest, that couples should avoid marriage. Quite the contrary, we reaffirm this state's strong public policy interest in encouraging legally consummated marriages." *Id.* at 937. The Court then went on to reaffirm its decision in *Hay*, declaring that "must protect the reasonable expectations of unmarried cohabitants with respect to transactions concerning their property rights. We therefore adopted, in *Hay*, the rule that unmarried cohabitants will not be denied access to the courts to make property claims against each other merely because they were not married." *Id*.

The court reversed the lower court's finding of express contract for lack of evidence, however, and further reversed the judgment against the corporation since it was not a party to the contract and so could not breach it.

The dissenting judge would have the court declare that unmarried cohabitants "cannot own community property, by analogy or otherwise." The majority, however, reasoned that unmarried couples are not precluded from holding their property *as though* they were married, and reiterated that where such intent is proven to have been express or implied, unmarried cohabiting adults may agree to hold property that they acquire as though it were community property. *Id*. at 938.

These cases are united by the fact – or at least the allegation – that the parties held themselves out as husband and wife during the course of cohabitation. The analysis of these cases, and their holdings, are very distinct from those cases (discussed below) where there was no such holding out. Since the court seemed to put so much weight not on what the parties ***did***, but what they ***said*** they were doing, one must at least pause to consider whether the dissenting judge in *Michoff* was correct in asserting that the court was disregarding a contract focus for a focus upon status, and thus reimposing common law marriage.[2]

II. RECOGNITION OF COMMON LAW MARRIAGES PURPORTEDLY ENTERED INTO IN NEVADA

By statute, there is an explicit non-recognition of common law marriages purportedly entered into in Nevada after March 29, 1943:

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[2] In a particularly infamous footnote, the dissenting justice noted the majority's lack of any restriction on the "number or gender" of the persons who could be parties to such an action, and stated that "the thought of a band of unmarried cohabiting adults suing each other under our Marriage and Dissolution chapter is not a pretty one. I can envision roommates Larry, Moe and Curly, unmarried cohabiting adults, deeply involved in divorce litigation . . ."

> Consent will not constitute marriage; it must be followed by solemnization as authorized and provided by this chapter.

NRS 122.010(1).

III. RECOGNITION OF COMMON LAW MARRIAGES ENTERED INTO ELSEWHERE

This issue has apparently never been addressed by our Supreme Court. However, under *Braddock v. Braddock*, 91 Nev. 735, 740, 542 P.2d 1060 (1975): "The nature and rights of married persons in personal property acquired during marriage is determined by the laws of that state which is the matrimonial domicile of the parties at the time the property is acquired." *Citing Choate v. Ransom*, 74 Nev. 100, 104, 323 P.2d 700, 702 (1958).

The circularity of the question seems pretty clear, since it would presumably be up to the Nevada divorce court to determine whether or not the parties were "married persons." Still, in the absence of a clear public policy finding common law marriage repugnant to public health or safety (and there does not appear to be any such public policy), it seems reasonable to conclude that Nevada would have to recognize common-law marriages legalized in other states as a matter of full faith and credit.

IV. APPLICATION OF COMMUNITY PROPERTY STATUTES OR PRINCIPLES TO UNMARRIED PERSONS WHO HAVE COHABITED TOGETHER AND LATER TERMINATE THEIR RELATIONSHIP AND COHABITATION

As discussed above, the cases that do explicitly consider community property principles and consider applying them are those in which at least one party has alleged that there has been a holding out as husband and wife. *See Warren v. Warren*, 94 Nev. 309, 579 309, 579 P.2d 772 (1978); *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984); *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

This is a good point to note the distinction between those cases, on the one hand, and those in which the court found that there was ***no*** reasonable assertion of a holding out as husband and wife.

Sack v. Tomlin, 110 Nev. 204, 871 P.2d 298 (1994), involved a woman who obtained the former marital residence in her divorce, but had to refinance the house to pay off community property interest of the former husband, and ended up holding the new title after refinance with her boyfriend as tenants in common. Later, the boyfriend moved out, and the woman made payments on her own for five months, and then sold the house.

The appellate court made a point of noting that the parties to the resulting action (the woman and her now-former boyfriend) were neither married nor holding themselves out to be so, there was

no community property, and the house was deliberately held in the form of "tenants in common." The court spent a lot of time discussing what legal theories did ***not*** apply. For example, the court noted that under its holdings in *Hay* and *Michoff*, the property rights of unmarried cohabitants can be determined under the doctrine of quantum meruit, specifically measured by means of the following test: an interest of the untitled party in property can be established by reason of "quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward." However, the court then immediately found that in this case, there was no agreement for household services at issue, so the doctrine of quantum meruit did not apply.

Finally, the court declared that the case involved the "doctrine of contribution," where the man asserted that the parties had "pooled" income, but the woman asserted that he paid rent and a fair share toward joint expenses.

Having settled on the applicable test, the court held that where tenants contribute unequally to the purchase of real estate, there is a presumption that they intend to share ownership in proportion to the amounts they contributed. Further, the court held that in the absence of an agreement between two unmarried parties living together to pool their incomes and share equally in joint accumulations, each party is entitled to share in the property jointly accumulated in the proportion that his or her funds contributed to the acquisition.

Looking to a 1961 case from California (*Kershman v. Kershman*, 13 Cal Rptr. 290 (Ct. App. 1961)), the court found a way of determining relative property interests where the factual record did not show money going into the asset, but only funds deposited into the account from which mortgage was paid. The court found that "the only logical way to determine" contributions is to look to amount of debt acquired by the new mortgage and to the market value of the house on the date of the conveyance to the boyfriend. The formula declared was: sale price, less selling expenses, to get net proceeds. The woman's share was her equity before re-finance plus half the new mortgage; the boyfriend's share was half the new mortgage.

Perhaps most relevant here is the court's casual finding that there is "no offset for cohabitation" where both parties benefitted. Here, application of the announced formula gave virtually all interest in the house to the woman.

The boyfriend asserted that he gained half an interest in whatever equity existed, by virtue of the woman's quitclaim to herself and to him as tenants in common. It is worth noting that this ***would have been*** the result if the parties had been married. *See Kerley v. Kerley*, 112 Nev. ___, ___ P.2d ___(Adv. Opn. No. 6, Jan. 31, 1996).

The Nevada Supreme Court acknowledged that under NRS 47.250(2), "it is a disputable presumption that a person intends the ordinary consequences of his voluntary act." The court further acknowledged that the woman's transfer of the house to herself and the boyfriend as tenants in common has "the ordinary consequence" of creating equal interests.

For these unmarried cohabitants not holding themselves out as married, however, the court declined to find that equal interests in the equity had been created by the quitclaim deed. First, the court found that the woman was not "estopped" from claiming for herself the equity existing on the date of the deed to herself and the boyfriend, since the land-transfer statute does not ***require*** a grantor to convey equal interests.

The court then found that the presumption (that equal interests are created by such a deed) can be rebutted where there are unequal contributions toward acquisition of property by cotenants who are not related and show no donative intent. On conflicting evidence, the appellate court sustained the lower court's finding that the woman did not intend to make a gift to the boyfriend of half of the accumulated equity in the house. Finding that her contributions exceeded his by some $100,000.00, the court held that the presumption of equal ownership was overcome, and the presumption of unequal ownership by unequal contribution controlled.

As an interesting aside, the court looked to the mortgage payments that the woman paid alone after the boyfriend moved out, and held that where one cotenant is in sole but not adverse possession, the other cotenants are liable for their percentage of mortgage payments, and the remaining cotenant not liable for use of the premises, citing *Laniger v. Arden*, 85 Nev. 79, 450 P.2d 148 (1969). Since in this case there had been no "ouster," the boyfriend was held liable for half of the five mortgage payments made entirely by the woman after he moved out. There was no agreement that the woman pay rent after the boyfriend left the house, and the court refused to create such an obligation.

Sack makes it clear that evidence of intent has become critical in Nevada cohabitation cases; if there is adequate evidence of an intention to "pool" resources or treat property as if it was community property, the law of community property can apply by analogy and half of the property accrued during cohabitation can be found to belong to each party. If there is no (or inadequate) evidence of any such agreement, however, only the actual monetary contributions of each party will count for anything.

This conclusion is strengthened by the next cohabitation case, *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995). There, the parties lived together, unmarried, from 1991 to 1993. They purchased four parcels, three in joint tenancy and one in "joint names," with the man paying for the land, and the woman "finding the deals." One of them was the lot for the woman's own mobile home, on which the man paid off the woman's mother (the co-owner) and the woman put the man's name on title. The man also named the parties joint beneficiaries of a trust deed from the house he sold to move in with the woman.

Obviously, things did not work out, and the parties became adversarial. The trial court awarded the man the trust deed proceeds, awarded the woman's home to her, and changed title from joint tenancy to tenants in common on the other three parcels.

On appeal, the Nevada Supreme Court interpreted *Sack* to hold that the "proper approach" is for the respective ownership interests (equal or otherwise) to be determined, and for the proceeds

to be so distributed upon sale, with any claims by one party against the other deducted and increased accordingly. It should be noted that both the lower and appellate court made a point of finding that there was no "pooling agreement," no holding out as husband and wife, or indication of intent to treat property as community property, and "there was no agreement or understanding that the parties would share disproportionately to the amount contributed toward the purchase price of property." In passing, the court found that the fact that the property was held in joint tenancy rather than tenants in common did not distinguish this case from *Sack*.

Expanding on *Sack*, the court held that since the man had paid for all of two of the parcels, the lower court should have awarded them to him outright. Since the third parcel had not yet been fully paid for, the percentage of ownership was ordered to be determined in accordance with the contributions made by each party as of the time of sale, or when all payments had been made. The effect of this ruling was to make the joint tenancy deeds essentially useless for any legal purpose.

As to the woman's house, the court found that the record was insufficient to show how much she had paid previously, and who would make future payments, so the matter was remanded for a determination upon sale or "such other disposition as the district court determines to be fair and consistent with the principles set forth in this opinion."

The "bottom line" to these cases is that the unmarried cohabitant in the weaker economic position (i.e., the party not paying for acquisition of property) can never obtain greater benefits than if married. In fact, the best case possible for such a person is to attain a legal position equal to what a married person would have obtained. And to attain that position, Nevada law appears to require some holding out as married, or a clear intention (beyond the terms of a deed) to gift equity, or to own property equally.

V. APPLICATION OF COMMUNITY PROPERTY STATUTES OR PRINCIPLES TO UNMARRIED PERSONS OF THE SAME SEX

The matter has not been the subject of any majority holding in Nevada. There is only the footnote by the dissenting justice in *Michoff* anticipating litigation among "Larry, Moe and Curly" as a hint that at least some members of the court would be adverse to any such expansion of the case law. On the other hand, the clear hostility of the court to the property claims where there is no holding out as married, in *Sack* and in *Langevin*, indicates that same-sex claims might not get very far, at least in the absence of some provable "quantum meruit for the reasonable value of [non-sexual] household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward."

There have been no significant family law cases in Nevada dealing with homosexuality in the recent past, but the states highest court has not traditionally been especially liberal in reviewing non-traditional sex roles. *See*, *e.g.*, *Daly v. Daly*, 102 Nev. 66, 715 P.2d 56 (1986) (affirming termination of parental rights of transsexual for protection of child).

Given the dichotomy of Nevada case law, with *Hay* and *Michoff* on one side, and *Sack* and *Langevin* on the other, it will be interesting to see how the matter of "homosexual marriage" plays itself out. If the ceremony becomes legal (in Hawaii or elsewhere), or even if it remains legally ineffective but continues to be performed in some churches throughout the country, it would certainly seem that there could be same-sex couples "holding themselves out" as married, and thus creating "community property by analogy" within the meaning of *Michoff*. In other words, Nevada might have already created a species of homosexual marriage within the bounds of existing case law.

VI. CONSIDERATION OF THE PERIOD OF COHABITATION WHEN DIVIDING PROPERTY WHEN PARTIES COHABIT, MARRY, AND THEN DIVORCE

There is no direct statutory guidance on this question in Nevada, although a provision dating back to at least 1888 allows a trial court to "set apart the separate property of the husband for the wife's support and support of their children." *See Power v. Campbell*, 20 Nev. 232, 20 Pac. 156 (1888). The question is whether the mere acquisition of property during premarital cohabitation is enough to trigger such "setting apart."

The only appellate decision directly addressing the issue of property acquired during premarital cohabitation did not discuss in any substantive way the merits of the legal theory. In *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989), the Nevada Supreme Court noted only that a "question of fact remained on whether the wife acquired property rights in the husband's pre-marital property acquired during cohabitation," where the wife alleged that during the period of cohabitation, the husband promised to support her for the rest of her life, and the husband allegedly referred to "our" businesses in referring to businesses acquired before the marriage. There was some question as to whether an implied-in-fact contract existed, which was remanded for trial.

In considering the question of where Nevada law will go on the question of property acquired during premarital cohabitation, it seems significant to recall that until 1993, Nevada law called for the "fair and equitable" division of community property, rather than its presumptively equal division as now required. *See* NRS 125.150(1)(b). Still, Nevada divorce courts consider themselves primarily courts of equity, and have been quite willing to find equitable grounds supporting unequal distributions of property. *See Lofgren v. Lofgren*, 112 Nev. ___, 926 P.2d 296 (Adv. Opn. No. 156, Nov. 7, 1996); *Wheeler v. Upton-Wheeler*, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 133, Oct. 1, 1997) (trial court effort to use statute to punish an abusive spouse for domestic violence reversed on appeal).

At the trial court level, Nevada judges have explicitly divided property accrued by one or the other of two parties who later married, essentially following the reasoning of the line of Washington state case law dealing with meretricious relationships. There, the term has been defined as a term of art by the Washington Supreme Court:

> A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.

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

There does not appear to be any formal authority in Nevada going as far as the Washington courts, which have held that all property acquired during such relationships is to be divided precisely as if the couple was married, since any possible alternative to that rule would be worse as a matter of public policy. *Id.; In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984) (once a trial court determines that a meretricious relationship exists, the court (1) evaluates the interest each party has in the property acquired during the relationship, and (2) makes a just and equitable distribution of the property). However, the trial courts do seem to agree in appropriate circumstances that such is the rule to follow, apparently because, as courts of equity, "any possible alternative to that rule would be worse."

Carr-Bricken is not much of a forceful mandate requiring trial court division of property acquired during cohabitation, except where an "implied-in-fact contract" is in issue. Since there is no clear rule, it seems most likely that there will be variance from one judge to another until there has been further appellate authority on the subject. Still, based upon the case law to date, it seems probably that the trial courts are allowed, if not required, to divide property acquired during cohabitation that precedes marriage.

VII. CHALLENGES AND ETHICAL ISSUES

It seems clear that courts facing cohabitation cases feel a tension between justice for the individuals before them, on the one hand, and faith to public policy favoring lawful marriage, on the other. Given that the morals of the country have evolved since 1965, it is less and less acceptable to abandon individuals seeking fairness in the name of serving societal standards essentially grounded in religious convention. More and more, courts have been willing to conclude that the public policy of encouraging legal marriage would not be "well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions." *See Hay*, *supra*.

Thus, the most logical thing to expect would be a continuing evolution of what expectations between parties will be deemed "reasonable" and thus enforceable in the absence of a marital relationship. The most likely result would appear to be exactly what the courts have stated that they are not doing – a return to the law of "common-law marriage," at least as it creates property ownership. In a long-enough view, what might separate a "stable, marriage-like" relationship from a marriage *per se* is the availability of alimony, rather than distinctions relating to ownership of property. In terms of substantial justice to the persons affected, this is probably a good thing.

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