Palimony, or "Community Property by Analogy" in Cohabitation Cases

(1) Statutes and Court Rules

There are no statutes directly applicable to this section. *But see* discussion below of EDCR 5.02 under "local rules."

(2) Cases

In *Warren v. Warren*, 94 Nev. 309, 579 P.2d 772 (1978), 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.

The Nevada Supreme Court affirmed, rather dispassionately noting the then-recent holding of the California Supreme Court in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), but deferring 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 to the subject by the time of *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984). There, the parties had been married from 1949 to 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:

> 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, 960-961 (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. The Court approvingly quoted from *Marvin v. Marvin*, 557 P.2d 106 (Cal.

1976):

> The courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on consideration of meretricious sexual services. . . . 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, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of *quantum meruit*, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

Hay, 100 Nev. at 199.

In remanding, the court broadly hinted that relief should be granted the woman in the case, while "hasten[ing] to point out that Nevada does not recognize common law marriage." The Court found, however, 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 only Nevada appellate decision mentioning the issue of property acquired during premarital cohabitation by parties who later married did not discuss the legal theories in any substantive way. 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," in a case in which 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. The question of whether an implied-in-fact contract existed was remanded for trial.

Carr-Bricken therefore stands for the proposition that a trial court ***may*** consider the value of property acquired during premarital cohabitation when determining the distribution of property upon divorce, although the Court did not give much guidance as to the standards to be applied.

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 an express and an 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, and "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." *Id*.

The appellate court reiterated that it "by no means seeks to encourage, nor does this opinion suggest, that couples should avoid marriage. Quite to 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 courts "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 had 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.

Hay and *Michoff* analyze very differently from those cases involving cohabitants in which the courts found that there was ***no*** reasonable assertion of a holding out as husband and wife, or as partners.

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 the 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, that 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.

Citing the California case of *Kershman v. Kershman*, 192 Cal. App. 2d 23, 13 Cal. Rptr. 290 (Ct. App. 1961), the Court adopted the following approach to situations in which cotenants contribute unequally to the purchase price of real property:

> The proper approach would be to first determine the respective ownership interests of the parties whether equal or otherwise. Upon sale of the property there should be a determination of the share of each in the net proceeds according to those interests. Then any claims that one party may have against the other should be deducted from the share of the party to be charged and that of the other party should be increased accordingly.

Sack, 110 Nev. At 211, 871 P.2d at 303, quoting *Kershman*, 13 Cal. Rptr. at 294.

Sack was further complicated by the fact that the record reflected only the amounts of money contributed by each party into an account which was used for both the mortgage on the house and the parties' living expenses while they were together. The Court found that "the only logical way to determine" what each party actually contributed to the house was 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. Here, application of the announced formula gave virtually all interest in the house to the woman. The Court further found that there is "no offset for cohabitation" where both parties benefitted.

The boyfriend had 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. The Court acknowledged that under NRS 47.250(2), "it is a disputable presumption that a person intends the ordinary consequences of his voluntary act," and 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.[1]

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. Based on the existence of conflicting evidence, the 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 is 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.

The next cohabitation case, *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995), emphasized the points made in *Sack*. 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 the title. The man also named the parties joint beneficiaries of a trust deed from the house he sold to move in with the woman.

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

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[1] It is worth noting that this ***would have been*** the result if the parties had been married, *see Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996) (on rehearing; "a spouse to spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence"), and perhaps would have been the result if the woman and her boyfriend had simply held themselves out as married, under *Michoff*.

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, and no indication of an 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 irrespective of title. 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. 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."

(3) Discussion

The *Hay* and *Michoff* decisions, on the one hand, and *Sack* and *Langevin* on the other, are not easily reconciled. The first two decisions sent a strong message to all unmarried couples living together that if they treat each other as husband and wife, they may be bound by the community property laws of the State of Nevada.

Sack, however, 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 evidence (or inadequate evidence) of any such agreement, however, only the actual monetary contributions of each party will count for anything. *Langevin*, expanding on *Sack*, went even further, making the joint tenancy deeds executed by the parties essentially useless for any legal purpose.

This dichotomy between the approaches of the two sets of cases, and the stress on intent rather than documentary evidence of ownership title, was reaffirmed by the mention in *Gilman v. Gilman*, 114 Nev. 416, 956 P.2d 761 (1998) (discussed in greater detail in Section E(6)(b) above), that the Court considered "the cohabitation element of the relationship . . . virtually incidental" in its decision of *Western States Construction v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992). *Gilman*, 114 Nev. at 427, 956 P.2d at 767.

The cases, collectively, emphasize the importance of 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 the *Hay*/*Michoff* holdings is very distinct from the *Sack*/*Langevin* holdings, where there was no such holding out. Since the Nevada Supreme 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]

Looking at the matter economically, 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.

For parties who cohabit, and later marry, the picture may be clearer, since that marriage certifies the question of the parties' intent. *Carr-Bricken* did not make a substantive holding, but it apparently provided an adequate basis for a number of Nevada courts, at the trial level, to explicitly divide property accrued during cohabitation 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 is no formal authority in Nevada, at this time, 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 of Nevada do seem to agree that in appropriate circumstances such is the rule to follow, apparently because as courts of equity, "any possible alternative to that rule would be worse."

(4) Local Rules

In approving the Eighth Judicial District Court Rules, the Nevada Supreme Court already, if subtlety, acknowledged that the Family Division has jurisdiction over cases involving meretricious relationships, and division of the property acquired during such relationships. *See* EDCR 5.02 ("In any contested action for divorce, annulment, separate maintenance, breach of contract or ***partition based upon a meretricious relationship***. . . the court must, upon demand of either party, direct that the trial . . . be private. . . ." (Emphasis added.) This would appear to incorporate not only the

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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. . . ."

finding that the Family Division (and not the Civil/Criminal Division) should hear these cases, but that the cases are contemplated in the first instance as legitimate actions. However, NRS 3.223, which defines the jurisdiction of the family courts, makes no mention of cases involving meretricious relationships in its listing of proceedings over which the family courts have original, exclusive jurisdiction.