HOW COHABITATION AFFECTS DIVORCE

SETTLEMENTS TELECLASS

With Carol Ann Wilson, CFP

I. Classical notions of marriage

A. Majority marital or community measuring periods

1. Start with marriage ceremony

2. End: Separation, Filing, Trial/Decree

B. Minority "Hotchpot" theory

1. "With all my worldly goods I thee endow."

2. Real world variations

II. The *Marvin* Revolution

A. Express contract

B. Implied contract

C. Two concepts of "palimony"

1. Property law

2. Support agreements

D. Partnership/Joint Venture model

1. Core holding: "***courts will protect their reasonable expectations with respect to transactions concerning property rights***."

2. Not critical whether the parties lived together full time, or apparently for any particular time at all.[1] Holdings have concluded that a part-time relationship

[1] *Gilman v. Gilman*, 114 Nev. 416, 427, 956 P.2d 761, 767 (1998) (explaining *Michoff* and noting that the basis of that decision was implied contract, pooling of assets, holding out as husband and wife, treating assets as community property, and building a business together, and finally concluding: "neither cohabitation nor a romantic relationship is the real basis for the *Michoff* holding").

between parties that planned to marry at a future date can be the basis for a palimony award.[2]

E. Public policy

1. As the Nevada Family Law Practice Manual notes, in appropriate circumstances, all assets acquired during a couple's relationship should be equally divided, because courts of equity would determine that "any possible alternative to that rule would be worse."[3]

F. Going beyond both contracts & technical elements

1. Tolan v. Kimball, 33 P.3d 1152 (Alaska 2001) ("In summary, we hold that courts, when dealing with the property disputes of a man and a woman who have been living together in a nonmarital domestic relationship, should distribute the property based upon the express or implied intent of those parties.")

a. "[W]e affirm under Wood and Beal, which ask what the parties intended, not whether they formed a contract."

G. The Concept of the "Common Economic Unit"

III. Matters of Timing

A. Through a process that has come to be known as "tacking," property accrued during a period of premarital cohabitation may be divided between the cohabiting parties after they later marry, and still later, divorce.[4]

B. Ditto for cohabiting parties when the time-line is reversed. Where parties marry, divorce, and then live together in a meretricious relationship, the property accrued by either of them during the period is to be equally divided when the relationship ends.[5]

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[2] *See Sullivan v. Rooney*, 404 Mass. 160, 533 N.E.2d 1372 (1989) (where parties had a relationship of approximately 14 years, during 7 of which they lived together, were engaged to be married at some "indefinite future date," female cohabitant, who gave up her career and maintained a home for herself and the male cohabitant, was entitled to an imposition of a constructive trust on the property, allotting her a one–half interest in the residence).

[3] Nevada Family Law Practice Manual, 2008 Edition § 1.269.

[4] *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989).

[5] *Hay v. Hay*, 100 Nev. 196, 199, 678 P.2d 672, 674 (1984).

C. The same applies when two parties think that they are married, but they are not by reason of a legal impediment making any attempted marriage between them void.[6]

D. And the same result occurs when there is no marriage at all, but the parties have either an express or implied agreement to accrue property together, which becomes community property by analogy.[7]

E. Courts throughout the country have reviewed cases in which assets were accrued before, during, or after cohabitation relationships that did or did not include marriage, and involving marriages before or after cohabitation.[8]

F. Washington State appears to have the most robust line of case authority in this area. Standards that have evolved for palimony cases are distinct.

IV. Impacts on Property Distributions

A. Appreciation of real estate

B. Increases in values of retirement benefits

C. *Pereira/Van Camp* analyses

V. Impacts on Alimony/Palimony Awards

A. Tacking to increase length

B. NJ

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[6] *Williams v. Williams,* 120 Nev. 559, 97 P.3d 1124 (2004).

[7] *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

[8] In deciding *In re Rolf*, 16 P.3d 345 (Mont. 2000), the court discussed parties who had cohabited for almost three years, and then married, only to divorce less than two more years later. On appeal, the trial court's holdings were affirmed, including that it was proper to consider the premarital cohabitation of the parties in ruling on the fairness of the eventual property distribution, and that "it would be wholly inequitable for the Court to disregard the relationship of the parties as it existed from [the date they began cohabitation]." 16 P.3d at ¶¶ 33-37.

Similarly, in *Meyer v. Meyer*, 606 N.W.2d 184 (Wis. 2000), the court found that the wife's "very significant and substantial" contributions to the husband's "status and earning capacity," both ***before*** and during marriage, were properly considered in determining a proper award of alimony. The facts showed that the parties cohabited for seven years, while the future-husband completed college and much of medical school. They married in 1993, and the marriage fell apart in 1997, just as the husband completed residency and was beginning his medical career.

Utah law holds similarly. In *Layton v. Layton*, 777 P.2d 504, 505-506 (Utah App. 1989) the court stated "an equitable division of property accumulated by unmarried cohabitants has been sustained upon finding a partnership, contract for services, and/or a trust." (footnotes omitted).

1. In *Kozlowski v. Kozlowski*,[9] the Court recognized that unmarried adult partners, even those who may be married to others, have the right to choose to cohabit together in a marital-like relationship, and that if one of those partners is induced to do so by a promise of support given her by the other, that promise will be enforced by the court. The Court held that the palimony contract may be oral and usually is because "[p]arties entering this type of relationship usually do not record their understanding in specific legalese . . . ." The contract may be express or implied. Consequently, the existence of the contract and its terms are ordinarily determinable not merely by what was said but "primarily by the parties' acts and conduct in light of . . . [their] subject matter and the surrounding circumstances."

2. New Jersey courts provided a fair description of what palimony suits are, at essence, all about, stating that marital-type relationships are reasonably defined as "the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able."[10] As noted there,"[t]he issue is . . . one of economic inequality, and the relevant question is whether the promisee is self-sufficient enough to provide for herself with a reasonable degree of economic comfort appropriate in the circumstances."

3. A plaintiff seeking to make out a prima facie case for such is required to present competent evidence conclusively showing: (1) that the parties cohabited; (2) in a marriage-type relationship; (3) that, during this period of cohabitation, defendant promised plaintiff that he/she would support him/her for life; and (4) that this promise was made in exchange for valid consideration.[11]

C. The law nationally has been quite consistent on that point – there is no measurable "consideration" required for enforcement of a promise to support, and the fact that the parties had a sexual relationship is no kind of bar to enforcement of such promises.[12]

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[9] 80 N.J. 378, 403 A.2d 902 (1979).

[10] *In re Estate of Roccamonte*, 174 N.J. 381, 808 A.2d 838 (2002).

[11] *See Levine v. Konvitz*, 890 A.2d 354 (N.J. Super., App. Div. 2006).

[12] *See*, *e.g.*, *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987), *appeal after remand*, 448 N.W.2d 292 (Ct. App. 1989) (money, property, or services, including housekeeping or child–rearing, may constitute adequate consideration independent of the parties' sexual relationship to support an agreement to share or transfer property); *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983) (plaintiff's claim to one–half of the residence was based upon the agreement between the cohabiting couple to join in the purchase of a home; although they lived together "out of wedlock" and "in contemplation of sexual relations," their sexual relationship did not provide the sole consideration for the agreement).

VI. Division of Debt

A. Susan R. v. Donald R., 697 SE 2d 634 (SC Ct. App. 2010).

VII. Cohabitation Agreements

A. Re-shoe-horning into the law of contracts

B. Deal with both reimbursement for support rendered and compensation for any joint venture property accruals

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