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UNMARRIED PARTNERS AND THE LEGACY OF *MARVIN v. MARVIN*

INTRODUCTION

J. Thomas Oldham

United States policies toward unmarried partners have changed very little during the past two decades. Two legislatures have recently adopted new approaches toward gay couples, with significant prodding from their respective supreme courts. Many other Western jurisdictions, however, have recently been quite active. This symposium issue was intended to inform the U.S. audience of these developments and to enliven the U.S. dialogue about various possible approaches toward the regulation of unmarried partners. I hope readers agree with my assessment that the symposium accomplishes both goals.

Contributors were invited, if they chose, to begin their analysis by evaluating the case of *Marvin v. Marvin*,¹ its legacy, and the continuing viability of this approach toward unmarried partners.

As many contributors to this issue note, unmarried cohabitation has become increasingly common. A few decades ago, this trend forced a reexamination of legal rules that had been applied to such relationships in the United States. *Marvin* was a celebrated case in the 1970s that abandoned the accepted rule that a cohabitant was barred by the illegality doctrine from bringing suit against a partner when the relationship ended, a rule then applicable in many American states.

Marvin also promulgated a new set of remedies for cohabitants at dissolution. These remedies primarily were grounded in contract principles. (In a famous footnote, the court did reserve for another day whether a status remedy would be accepted.²) A number of contributors to this issue address the wisdom of this judgment. Professor Estin surveys in great detail how American courts have dealt with cohabitation disputes since *Marvin* and notes how cohabitation (and cohabitants) have changed during the last twenty-five years.

1 557 P.2d 106 (Cal. 1976).

2 *Id.* at 123 n.25.

Professors Blumberg and Ellman both criticize the *Marvin* contract-based approach to determine the rights of cohabitants *inter se*. They strongly prefer a status approach. These two commentators, both Reporters of the ALI *Principles of the Law of Family Dissolution* project, discuss the provisions of that document which address unmarried partners and discuss why they chose a status-based approach. Professor Blumberg speculates about why American states have adopted rules applicable to unmarried partners that are very different from those that have been adopted in other countries similar culturally to the United States, such as Australia and Canada. Professor Ellman also discusses why he believes that significant limits should be imposed upon the enforceability of premarital contracts and summarizes the ALI provisions that set forth such limits.

Professor Westfall is critical of much of what Professors Blumberg and Ellman advocate. He objects to the ALI approach of treating some unmarried partners like spouses (for purposes of rights at dissolution). He also expresses concern about ALI's equitable limits placed on the ability of cohabitants and spouses to change by contract their financial rights and obligations at dissolution. Westfall also notes that, because the ALI does not allow proxy voting and because the quorum rules are quite minimal, if a document received "ALI approval," this may not mean that a majority of ALI members support it.

Professor Regan argues that unmarried partners should not be treated like spouses for all purposes, due to society's legitimate interest in promoting committed relationships. He proceeds to consider in what instances unmarried partners should be treated like spouses.

In my article, I survey recent developments internationally regarding gay and straight unmarried couples. I propose a status-based remedy for unmarried straight couples, if they have cohabited for a certain minimum period and one suffered career damage due to the relationship. The remedy I propose, however, unlike the ALI approach, is to give the cohabitant only a post-dissolution support remedy (not both a support remedy and a property division remedy, like the ALI). This resembles the approach currently in effect in many Australian states and Canadian provinces. I also propose a "registered partnership" option for straight couples, a status election that would have minimal effect on the parties' property rights and support obligations.

Professor Chambers outlines in much greater detail the potential advantages of making a status other than marriage available. He proposes a "reciprocal beneficiary" status that would be available to friends or to gay or straight couples. Few financial rights would arise

from such an election (other than intestate succession rights), unless the parties had a common child.

Professor Brinig compares marriage to cohabitation in a number of ways. For example, she wonders why men seem to benefit from marriage more than cohabitation, and why women benefit less from marriage. She emphasizes that women continue to do the lion's share of domestic work, even when both partners are full-time members of the work force outside the home. She offers various approaches that could offer the potential of making marriage benefit both men and women.

