

2013

Not So Common (Law) Marriage: Notes from a Blue State

Tom Andrews

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Recommended Citation

Tom Andrews, *Not So Common (Law) Marriage: Notes from a Blue State*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 1 (2013), <https://digitalcommons.law.uw.edu/faculty-articles/579>

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NOT SO COMMON (LAW) MARRIAGE: NOTES FROM A BLUE STATE

by Tom Andrews*

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I. INTRODUCTION

One of the continuing challenges for American marital property law in the twenty-first century, broadly understood, is what to do about property disputes between domestic partners who are not married.¹ More precisely, the challenge is determining what to do when there are property disputes between unmarried intimate partners, whether heterosexual or homosexual.² From what I can tell, this is as much of a challenge in Texas as it is in the rest of the country.³

In the northwest corner of the country, we have a set of attitudes that, like many social and cultural norms, have found their way into our common law. These northwestern attitudes might not be so common, or at least so commonly understood, in Texas. Thus, the purpose of this article is to describe how my Blue State of Washington handles property disputes between domestic partners, as well as to discuss what Texas might be able to take from a Blue State approach.⁴

* Professor of Law, University of Washington School of Law.

1. See, e.g., C. Luke Gunnstaks, *21st Century Issues Dealing with Nontraditional Relationships: Dividing Property Between Unmarried Persons*, ST. B. TEX., 33RD ANNUAL ADVANCED FAMILY LAW COURSE (Aug. 6–9, 2007), <http://www.texasbarcle.com/Materials/Events/6367/38738.htm>; Mary Bonauto et al., *Property Division Issues in Non-Marital Relationships*, GLAD, <http://www.glad.org/rights/publications/c/relationships> (last updated Dec. 1, 2008); Andy Sirkin, *Home Ownership for Domestic Partners and Unmarried Couples*, SIRKINLAW (Oct. 3, 2011), <http://www.andysirkin.com/HTMLArticle.cfm?Article=4>.

2. See Gunnstaks, *supra* note 1; Bonauto et al., *supra* note 1.

3. See Gunnstaks, *supra* note 1; Bonauto et al., *supra* note 1; see also *About Domestic Partnerships*, LAW OFFICE OF ERIC L. FREDRICKSON, <http://www.houstondivorcelawfirm.com/Divorce/Domestic-Partnerships.aspx> (last visited Jan. 7, 2013).

4. See Bonauto et al., *supra* note 1. If there are any readers not familiar with the distinction between blue states and red states, it narrowly denotes a distinction between Democratic (blue states) and Republican (red states) voting patterns. See, e.g., *Red States and Blue States*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Red_States_and_blue-states (last visited Feb. 11, 2014).

II. TEXAS AND UNMARRIED INTIMATE PARTNERS

I begin, with some diffidence, by describing what I take to be the Texas law regarding disputes over property held by parties in committed intimate relationships—diffident because I am writing for a Texas readership, who will quickly see the shortcomings in my attempt to understand their state’s legal turf. To forestall any immediate sense of outrage on the part of my readers, let me begin by quoting from § 21.5 of the Texas Practice Series on Marital Property and Homesteads, which, at least in part, states as follows:

In a meretricious relationship, each party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition. Parties to a meretricious relationship are entitled to the share of the property contributed by them as a “partner” or contributor to the enterprise, but not because of the relationship.⁵

Section 21.5 goes on to explain that the parties to a meretricious relationship can evade the foregoing result by trying to establish that they were informally married, pursuant to a common law marriage.⁶ Thus, before addressing relationships that do not qualify as informal marriages, it is necessary to briefly discuss common law marriage in Texas.⁷

Texas is distinct because it is the only community property state that still allows common law marriages.⁸ The Texas Family Code states that, to enter into such a marriage, it is only necessary that “the man and woman agreed to be married[,] and after the agreement[,] they lived together in this state as husband and wife and there represented to others that they were married.”⁹ But the Texas Practice Series on Marital Property and Homesteads makes clear that there is a lot implicit in the term “only.”¹⁰ “Proving an informal marriage is extremely difficult.”¹¹ The Texas Family Code sets out different requirements to establish such marriage, and parties must satisfy each for their informal marriage to be

5. 39 ALOYSIUS A. LEOPOLD, *TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS* § 21.5 (1993 & Gerry W. Beyer, Supp. 2013) [hereinafter LEOPOLD].

6. *See id.*

7. *See infra* notes 8–18 and accompanying text.

8. *See* TEX. FAM. CODE ANN. § 2.401 (West 2006); 52 AM. JUR. 2D *Marriage* § 43 (West 2013). The statement in the text needs to be qualified to this extent: Idaho was the last of the remaining community property states to abolish common law marriage and did so in 1995, effective in 1996. But Idaho continues to respect common law marriages that were validly contracted before that date: “The provisions of subsection (1) of . . . section [32-201] requiring the issuance of a license and a solemnization shall not invalidate any marriage contract in effect prior to January 1, 1996, created by consenting parties through a mutual assumption of marital rights, duties or obligations.” IDAHO CODE ANN. § 32-201(2) (West 2006). It should also be noted that states that do not, themselves, allow common law marriages will still respect these marriages if they are validly contracted elsewhere. *See, e.g., In re Gallagher’s Estate*, 213 P.2d 621, 623 (Wash. 1950) (citing *Willey v. Willey*, 60 P. 145, 146 (Wash. 1990)).

9. TEX. FAM. CODE ANN. § 2.401(a)(2).

10. *See* LEOPOLD, *supra* note 5.

11. *Id.*

lawfully recognized.¹² First, in Texas, to have a valid common law marriage, the couple must consist of a man and a woman, thus ruling out common law marriage between gay partners, of which there may be almost 50,000 living in Texas.¹³ Next, the couple must have agreed to be married.¹⁴ Today, many intimate couples are quite certain that, even if one partner wants to get married, both partners have not actually agreed to be married; as such, the couple would fail to meet the first element of this requirement.¹⁵ Additionally, even if a couple agrees to be married and lives together “as husband and wife,” if others do not recognize the partners as married, then there is no common law marriage.¹⁶ For example, in *Small v. McMaster*, the court rejected a claim to establish a common law marriage because the couple had not sufficiently represented to others that they were married:

Whether the evidence is sufficient to establish that a couple held themselves out as husband and wife turns on whether the couple had a *reputation in the community* for being married. . . .

. . . .

. . . [S]tanding alone, *occasional references* to each other as “husband” and “wife” and the like *are insufficient* to establish an informal marriage. Further, the element of presenting to others requires *both parties to have represented themselves as married*.¹⁷

Thus, while the availability of common law marriage in Texas may provide some property relief for couples who have not had a ceremonial marriage, it does not go so far as to address the growing phenomenon of intimate partners who knowingly choose to live together outside the institution of marriage, let alone the plight of gay couples who have no choice but to live outside the institution of marriage in the State of Texas.¹⁸

12. See TEX. FAM. CODE ANN. § 2.401; see also *infra* notes 13–16 and accompanying text.

13. See TEX. FAM. CODE ANN. § 2.401; see also ADAM P. ROMERO ET AL., WILLIAMS INST., CENSUS SNAPSHOT: TEXAS 1 (2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TexasCensus2000Snapshot.pdf> (indicating that the number 50,000 is based on data from the U.S. Census Bureau). This requirement of the informal marriage statute is, of course, mandated by the Texas Constitution, and it is also in accord with other statutes. TEX. CONST. art. I, § 32; see also e.g., TEX. FAM. CODE ANN. § 6.204. According to the U.S. Census Bureau figures, by 2005, there were “almost 50,000 same-sex couples living in Texas. . . . [and] 20% of [these] same-sex couples . . . [were] raising children.” ROMERO ET AL., *supra*.

14. See TEX. FAM. CODE ANN. § 2.401(a)(2); see also LEOPOLD, *supra* note 5. “To establish this element of common-law marriage, the evidence must show the parties intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be husband and wife.” *Eris v. Phares*, 39 S.W.3d 708, 714 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

15. See LEOPOLD, *supra* note 5.

16. See *id.*; see also TEX. FAM. CODE ANN. § 2.401.

17. *Small v. McMaster*, 352 S.W.3d 280, 285 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (emphasis added) (citations omitted); see also *Eris*, 39 S.W.3d at 716–17 (finding sufficient evidence of an agreement to marry, but insufficient evidence of holding out); *Knight v. Volkart-Knight*, No. 13-00-514-CV, 2001 WL 892250, at *2–3 (Tex. App.—Corpus Christi July 19, 2001, no pet.) (not designated for publication) (finding insufficient evidence of holding out).

18. See *supra* notes 8–17 and accompanying text.

Returning to the language of § 21.5 of the Texas Practice Series on Marital Property and Homesteads, it is important to reiterate that property can be shared between unmarried partners “in proportion to the value that his or her labor contributed to its acquisition. Parties to a meretricious relationship are entitled to the share of the property contributed by them as a ‘partner’ or contributor to the enterprise, but not because of the relationship.”¹⁹ Before going any further, however, to adopt consistent terminology and to rid ourselves of the adjective “meretricious,” I will use the phrase “committed intimate relationship” (CIR) to refer to these relationships throughout the remainder of this article.²⁰ Hopefully, this change in terminology will not lead me too far astray in understanding Texas law—perhaps it might even encourage Texas to change its terminology.²¹

The first, and quite possibly the most intriguing, thing stated in § 21.5 of the Texas Practice Series on Marital Property and Homesteads is that property acquired during a CIR can be divided “in proportion to the value that his or her labor contributed to its acquisition.”²² Interestingly, the only Texas case cited for this proposition is a 1909 case, *Hayworth v. Williams*.²³ According to the facts of the case, “[i]n 1859[,] Thomas Jefferson, . . . a married man[,] . . . living in the state of Pennsylvania, entered into a marriage, in form, with Margreth Williams, who, at the time, knew that Jefferson was” still lawfully married to another woman.²⁴ Jefferson and Williams moved to Louisiana and then, in 1880, they moved to Texas, where Jefferson purchased a piece of land with cash.²⁵ While Jefferson did not stay around long—he eventually moved back to Louisiana—he would return from time to time, for brief visits.²⁶ Margreth stayed in Texas with their children until 1905.²⁷ At that point, Jefferson apparently grew nervous about his title to the land, so he brought suit to quiet title; Margreth, on the other hand, seemed to think she acquired the land by adverse possession.²⁸ Before the suit was completed, however, Jefferson died.²⁹ While Margreth ultimately lost her adverse possession claim, she had an alternative theory: she argued that she was “entitled to an interest in

19. LEOPOLD, *supra* note 5.

20. The term “meretricious” is an adjective that derives from the Latin word for prostitute (meretrix) and offends many committed partners. In Washington, the term has been replaced with the phrase adopted in this article: committed intimate relationship. See *Olver v. Fowler*, 168 P.3d 348, 350 n.1 (Wash. 2007) (“While this court has previously referred to such relationships as ‘meretricious,’ we, like the Court of Appeals, recognize the term’s negative connotation. Accordingly, we too substitute the term ‘committed intimate relationship,’ which accurately describes the status of the parties and is less derogatory.”).

21. See *supra* text accompanying note 20.

22. LEOPOLD, *supra* note 5.

23. *Hayworth v. Williams*, 116 S.W. 43, 46 (Tex. 1909).

24. *Id.* at 44.

25. See *id.*

26. See *id.* at 45.

27. See *id.*

28. See *id.*

29. See *id.*

the property because she [had] contributed to its acquisition.”³⁰ The court found as follows:

The records show that in 1880 the land in suit was conveyed by deed regularly executed to Thomas Jefferson for a recited cash consideration, acknowledged to have been paid by him at the time. Margreth Williams’ right in this property is a question of fact to be submitted to the jury under proper instructions. *If Margreth Williams can show that the money with which the land was purchased was acquired in whole or in part by her labor in connection with Thomas Jefferson before the time when the land was purchased, then she would be entitled to a share in the land in the proportion that her labor contributed in producing the purchase money. Nothing which she did contributing to the improvement of the property or otherwise in connection with Thomas Jefferson after the deed was made and the land paid for can affect the title.* Her right must have existed in the fund which purchased the land, and no trust in favor of Margreth Williams will arise out of the dealings between her and Jefferson after the title had vested in him.

*It is not necessary that Margreth Williams should prove that she produced by her labor a part of the very money that was used in purchasing the land. If she and Thomas Jefferson were working together to a common purpose, and the proceeds of labor performed by them became the joint property of the two, then she would occupy the position that a man would have occupied in relation to Thomas Jefferson under the same circumstances; each would own the property acquired in proportion to the value of his labor contributed to the acquisition of it.*³¹

The right to an interest, if any, arose not from Margreth’s status as Jefferson’s domestic partner, but from actual labor contributed to its acquisition.³² The court sounds a very promising note when it says that Margreth need not show “that she produced by her labor a part of the very money . . . used in purchasing the land[,]” so long as she can show they “were working together to a common purpose, and the proceeds of labor performed by them became the joint property of the two[.]”³³ But unfortunately, the court does not elaborate on what it might mean by this statement.³⁴

As might be supposed, the *Hayworth* case has seen some action since it was decided in 1909.³⁵ In a 1954 case, *Hyman v. Hyman*, the appellate court relied on the general principle in *Hayworth* and determined that “[t]he trial court’s finding that appellant did not enter into the marriage with appellee in

30. *Id.*

31. *Id.* at 45–46 (emphasis added) (citations omitted).

32. *See id.*

33. *Id.* at 46. The court notes that Margreth would have the same rights “that a man would have occupied in relation to Thomas Jefferson under the same circumstances[.]” which is also promising for same-sex partners. *Id.*

34. *See id.*

35. *See infra* notes 36–68 and accompanying text.

good faith [was] not conclusive as to her rights in and to the property acquired during the relationship of the parties.”³⁶ The court in *Hyman* also drew support from a 1943 case, *Cluck v. Sheets*, a case in which the Supreme Court of Texas found that the evidence supported the finding of an express trust for the division of land.³⁷ The *Hyman* court remanded the case for a trial on the question of an express agreement, noting that the pleadings and the evidence “raise[d] the issue of an agreement between the parties as to the joint accumulation of property and that appellee held all property so accumulated in trust for appellant as to her interest therein.”³⁸

Hayworth, however, had almost no traction in *Meador v. Ivy*, a 1965 case decided by the appellate court in San Antonio.³⁹ In *Meador*, the evidence indicated that Meador and Ivy did not have any assets when they began living together; that they spent their years together buying, refurbishing, and selling second-hand mobile homes; and that Ivy had actively done “much of the actual painting and repairing of the . . . trailers, particularly in the last few years when Meador’s health declined.”⁴⁰ Nonetheless, the court denied Ivy any share of the assets accumulated in Meador’s name because not only had Ivy not alleged or presented evidence of an actual agreement between she and Meador to be partners, but Ivy had also not alleged or presented evidence to support an express trust; additionally, Ivy admitted that she and Meador knew they were not in a putative marriage relationship.⁴¹ The court in *Meador* stated as follows:

The distinction between the rights of a putative wife and a ‘pretended’ wife is set forth in *Lawson v. Lawson*[.] The Court recognized the rights of a putative wife to share in the property accumulated by the couple during th[e] relationship [but] said: ‘ . . . the rule does not apply to cases such as this, and now the courts refuse to award anything to a pretended wife, who, by reason of her knowledge of the illicit relation, occupies the position of an adulteress and a breaker of the laws. In such cases the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reason of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy.’⁴²

In *Meador*, the *Hayworth* decision merited only a “cf.” for the proposition that Ivy had conceded she and Meador were not in a putative marriage relationship.⁴³ While the *Meador* court could have looked to *Hayworth*, a 1909

36. *Hyman v. Hyman*, 275 S.W.2d 149, 151 (Tex. Civ. App.—Amarillo 1954, writ ref’d n.r.e.).

37. *See id.*; *see also Cluck v. Sheets*, 171 S.W.2d 860, 862 (Tex. 1943).

38. *Hyman*, 275 S.W.2d at 151.

39. *See Meador v. Ivy*, 390 S.W.2d 391, 391–94 (Tex. Civ. App.—San Antonio 1965, no writ).

40. *Id.* at 393.

41. *See id.* at 393–94.

42. *Id.* at 394 (quoting *Lawson v. Lawson*, 69 S.W. 246, 247 (Galveston 1902, writ ref’d)).

43. *See id.* “Cf.” is used to indicate that “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, ‘cf.’ means ‘compare.’” THE

Supreme Court of Texas case, as potential support of a property award based on actual proof that Ivy had contributed directly to the acquisition of the assets in question, the court in *Meador* neither mentioned nor discussed this possibility; instead, the court gave deference to *Lawson*, a 1902 court of civil appeals case, which dealt with a putative marriage rather than a non-putative marriage.⁴⁴

In *Faglie v. Williams*, a case decided in 1978, the court of appeals, in relying on the foregoing cases, noted the following:

The courts of this state have invoked the doctrines of express and resulting trusts in vesting title to property in a woman who lived with a man and accumulated real property in conjunction with him when there was neither a ceremonial nor a common law marriage, nor a putative marriage.⁴⁵

But *Faglie* went on to conclude that the evidence presented at trial did not support any of these legal theories:

No rights in the property flow from appellant's meretricious relationship with Mike Williams, without proof of an express trust, or a resulting trust in her favor, or existence of a partnership. In the absence of proof of one of these three theories, the courts refuse to award anything to a pretended wife who knows the nature of the relationship.⁴⁶

Perhaps more to the point, in 1982, in *Small v. Harper*, the court of appeals relied upon *Hayworth* and *Cluck* and reversed the trial court's granting of summary judgment against Small, when she attempted to secure a portion of the lands she acquired with Harper.⁴⁷ Small presented evidence that they had been in a lesbian relationship for at least twelve years and alleged theories of oral partnership, joint venture, resulting trust, and constructive trust.⁴⁸

While the lesbian relationship of the parties, if such it be as described by the appellant, could present this court with a novel question—i.e. the property rights of heterosexuals vis-a-vis the property rights of homosexuals—it is our opinion that such question is not controlling in the instant case because of the way contributions of work and capital were made and because of the way properties were jointly acquired, generally, but not always, in the names of

BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

44. See *Meador*, 390 S.W.2d at 394. In Texas, a putative marriage is one in which partners marry one another, in ignorance of the fact that one of the partners is not legally entitled to marry and so believe, in good faith, that they are legally married. See LEOPOLD, *supra* note 5, § 21.2. "[W]e think it should be taken as the settled doctrine in this state that, in case of a marriage of the character of that in controversy, the putative wife, so long as she acts innocently, has, as to the property acquired during that time, the rights of a lawful wife." *Barkley v. Dumke*, 87 S.W. 1147, 1148 (Tex. 1905).

45. *Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

46. *Id.* (citing *Lawson*, 69 S.W. at 247).

47. See *Small v. Harper*, 638 S.W.2d 24, 25 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

48. See *id.* at 25–27.

both of the parties. We come now as squarely to grips with the homosexual and/or lesbian aspects of this case as our judicial needs require.

....

Based on . . . explanations [found in *Hayworth* and *Cluck*], we hold that there are no public policy considerations of the State of Texas that would prevent the appellant from recovering on the claims she has made.⁴⁹

Although not a same-sex marriage case, *Harrington v. Harrington* adds additional support to the possibility of an oral partnership.⁵⁰ In *Harrington*, a divorce proceeding, the wife argued that the house she and her husband acquired two years prior to their marriage was their joint property.⁵¹ The trial court found as follows:

[T]he parties agreed that title to the property would be taken in the appellant's name, at appellant's suggestion, for credit purposes and convenience only, but intended the residence to be owned, used, and enjoyed jointly. The parties expended labor and money in improvements to the home and planned to use the appellee's separate property funds to remodel the home. . . .

The trial court concluded that the parties entered into an oral partnership/joint venture to own and occupy the home . . . jointly; that they took title to the home in appellant's name for convenience and credit purposes only; and that the parties owned the home as tenants in common.⁵²

The court of appeals affirmed, concluding that the evidence was sufficient to support the verdict of the trial court.⁵³

A 2005 case, *Kitchen v. Frusher*, brought another legal theory forward.⁵⁴ In this case, Kitchen moved in with Frusher in 2000, and three months later, they were engaged.⁵⁵ Frusher opened a Curves health club the following spring.⁵⁶ For the next two years, both Frusher and Kitchen managed the club.⁵⁷ At times, however, while Frusher was out of town, Kitchen would manage the club alone.⁵⁸ During this time, Kitchen was not paid a salary, but both Kitchen and Frusher paid their personal expenses out of the club's operating account.⁵⁹ There was no limit placed on Kitchen's withdrawals.⁶⁰ In June 2003, their relationship ended, and Frusher kicked Kitchen out of his house and removed

49. *Id.* at 27–28; see also *In re Marriage of Braddock*, 64 S.W.3d 581, 587 (Tex. App.—Texarkana 2001, no pet.) (finding a constructive trust between partners who were unmarried at the time).

50. See *Harrington v. Harrington*, 742 S.W.2d 722, 724 (Tex. App.—Houston [1st Dist.] 1987, no writ).

51. *Id.* at 723.

52. *Id.* at 723–24.

53. *Id.* at 725.

54. See *Kitchen v. Frusher*, 181 S.W.3d 467, 472 (Tex. App.—Fort Worth 2005, no pet.).

55. *Id.* at 470–71.

56. *Id.* at 471.

57. *Id.*

58. *Id.* at 471–72.

59. *Id.* at 471.

60. *Id.*

her from the business.⁶¹ Kitchen sued Frusher, alleging “that the business was a partnership and that Frusher breached the agreement by excluding her from the business. Alternatively, Kitchen alleged a claim for quantum meruit for the value of her services working at the club”; before trial, however, Kitchen dropped the partnership theory.⁶² At trial, the jury concluded that, while Kitchen had performed compensable labor at the club, the value of that labor was zero.⁶³ On appeal, the court concluded that the jury’s zero value finding for Kitchen’s services was without a factual foundation and remanded the case for a new trial.⁶⁴ This case is just another indication that there may still be life in the *Hayworth* case, in the form of a quantum meruit claim.⁶⁵ Interestingly, however, the court in *Kitchen* did not cite to, or rely upon, the *Hayworth* decision or any of the other cases mentioned above, for any purpose.⁶⁶ Furthermore, the *Kitchen* court was quite careful to distinguish this case from those cases involving household-related services:

Frusher asserts that the fact that persons are living in the same household creates a presumption that services are gratuitous[.] . . . These cases involve household-related services, not running an outside business. Further, . . . “where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation.”⁶⁷

The foregoing cases, when read with other cases, suggest that, in Texas, the following legal theories are available to partners in CIRs who want a share of the assets accumulated during their relationship: (a) tracing of the partner’s labor to the extent that it, or its proceeds, contributed to the purchase price; (b) an express trust; (c) a resulting trust; (d) a constructive trust; (e) a partnership; (f) a joint venture; (g) an express agreement; and (h) quantum meruit.⁶⁸ There is no doubt that several of these theories are interconnected,

61. *Id.* at 472.

62. *Id.*

63. *Id.*

64. *Id.* at 476, 478.

65. *See id.* at 476–77; *see also supra* notes 23–34 and accompanying text (discussing *Hayworth*).

66. *See Kitchen*, 181 S.W.3d at 476–77. The court did, however, distinguish between cases of express agreements and those involving quantum meruit claims, in the absence of express agreements. *See id.*

67. *Id.* at 477–78 (quoting *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 638 (Tex. App.—Dallas 2003, no pet.)); *see also Zaremba v. Cliburn*, 949 S.W.2d 822, 825–26 (Tex. App.—Fort Worth 1997, writ denied); *infra* text accompanying notes 73–76.

68. *Cluck v. Sheets*, 171 S.W.2d 860, 862 (Tex. 1943) (finding the existence of an express trust); *Hayworth v. Williams*, 116 S.W. 43, 46 (Tex. 1909) (considering whether a partner had an interest in property, based on proceeds from labor contributed to the purchase price); *Hyman v. Hyman*, 275 S.W.2d 149, 151 (Tex. Civ. App.—Amarillo 1954, writ ref’d n.r.e.) (contemplating an express agreement); *Kitchen*, 181 S.W.3d at 476–77 (evaluating a quantum meruit claim); *In re Marriage of Braddock*, 64 S.W.3d 581, 586–87 (Tex. App.—Texarkana 2001, no pet.) (considering whether a constructive trust existed); *Harrington v. Harrington*, 742 S.W.2d 722, 724 (Tex. App.—Houston [1st Dist.] 1987, no writ) (discussing partnerships and joint ventures); *Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. Civ. App.—Austin 1978, writ ref’d n.r.e.)

and many of them seem to rest on some kind of express agreement.⁶⁹ One would suppose, for example, that express trusts, partnerships, and joint ventures are all based on some type of agreement between partners.⁷⁰ Even in *Kitchen*—ostensibly a quantum meruit case—the court placed quite a bit of weight on *Kitchen*'s understanding that the amount she was to be compensated was greater than the amount she had been allowed to withdraw from the club's account.⁷¹

Unfortunately, because the Texas legislature has tightened the statute of frauds to combat palimony suits, establishing an express agreement is much more difficult.⁷² In *Zaremba v. Cliburn*, the famous pianist, Van Cliburn, prevailed over *Zaremba*'s claim that he moved in with Van Cliburn in 1977 and “agreed to provide services like shopping, doing the mail, paying the bills, drafting checks, dealing with accountants, creditors and real estate agents, and co-managing the household in exchange for a share in Cliburn's income.”⁷³ Cliburn relied on a 1987 amendment to the statute of frauds, requiring “agreement[s] made on consideration of . . . nonmarital conjugal cohabitation” to be in writing.⁷⁴ *Zaremba* argued that the court should not apply the amendment retroactively, but the court effectively did so by holding that the amendment “bars all unwritten palimonial agreements concerning relationships that continued past the amendment's effective date.”⁷⁵ *Zaremba*, himself, “allege[d] that his relationship with Cliburn continued until 1994,” which was after the statute of frauds amendment; according to the court, “If Cliburn and *Zaremba* had intended this purported agreement to be enforced, they had seven years after the amendment of the statute of frauds to memorialize it in writing.”⁷⁶

The difficulties encountered in *Zaremba* are further illustrated in *In re Marriage of Sanger*, an unpublished court of appeals decision, rendered two years after the *Zaremba* case was dismissed.⁷⁷ The court noted as follows:

[W]hen a meretricious relationship ends, a party only has an interest in the property that he separately purchased and that he acquired an interest in through an express trust, a resulting trust, or the existence of a partnership

(discussing express trusts, resulting trusts, and partnerships). *But see* 6 TEXAS FAMILY LAW SERVICE § 40:44 (Speer 6th ed. 1988) noting that one could argue that, without “a written agreement, disputes regarding property and custody issues between unmarried couples cannot be resolved under theories such as quantum meruit, constructive trust, or breach of partnership agreement. However, since the Texas Supreme Court has not yet spoken to the issue, the possibility is not foreclosed.”)

69. See cases cited *supra* note 68.

70. See cases cited *supra* note 68.

71. *Kitchen*, 181 S.W.3d at 476–77.

72. See *Zaremba*, 949 S.W.2d at 825–27.

73. *Id.* at 826.

74. *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (West 2009)).

75. *Zaremba*, 949 S.W.2d at 827.

76. *Id.*

77. *In re Marriage of Sanger*, No. 06-99-00039-CV, 1999 WL 742607 (Tex. App.—Texarkana Sept. 24, 1999, no pet.) (not designated for publication).

. . . Normally, in meretricious relationships, “the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reason of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy.”⁷⁸

The court then considered each of these possible theories of recovery, despite the fact that none of them were actually alleged, and found that the evidence presented was insufficient to support any of them.⁷⁹

On the other hand, in *O’Farrill Avila v. Gonzalez*, which was decided only a year after *Zaremba*, the court was willing to enforce two agreements between unmarried domestic partners, based on the partial performance exception:

When there is strong evidence of a contract and application of the Statute of Frauds would injure the person relying on the contract and allow the other party unearned benefit, partial performance will allow a remedy. Further, where one party has fully performed under a contract, the Statute of Frauds may be unavailable to the other party if he knowingly accepts the benefits and partly performs.⁸⁰

But again, the *O’Farrill Avila* case turned expressly on proof of any actual agreement, so it offers little hope for a partner that cannot prove such agreement.⁸¹

Thus, the promise that *Hayworth* presented more than one hundred years ago has not endured.⁸² While, in theory, a party to a CIR may be entitled to a share of property accumulated during the relationship, based on contributions to the acquisition of property, in practice, parties to CIRs have difficulty proving this right.⁸³ This is partly because agreements are seldom, if ever, formalized and partly because contributions to property acquisition, such as those contemplated in community property systems (i.e., pooling of labor, whether compensated or not), are simply not recognized in Texas case law when it comes to CIRs.⁸⁴ In the last several decades, however, states such as Washington have taken a very different path.⁸⁵

78. *Id.* at *3 (citations omitted) (quoting *Lawson v. Lawson*, 69 S.W. 246, 247 (Galveston 1902, writ ref’d)).

79. *Id.* at *2, *4.

80. *O’Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 246 (Tex. App.—San Antonio 1998, no pet.).

81. *See id.* at 244–46.

82. *Hayworth v. Williams*, 116 S.W. 43, 45–46 (Tex. 1909).

83. *See id.* *But see, e.g., Zaremba v. Cilburn*, 949 S.W.2d 822 (Tex. App.—Fort Worth 1997, writ denied).

84. *See, e.g., Zaremba*, 949 S.W.2d at 824–27, 830; *see also Small v. Harper*, 638 S.W.2d 24, 25, 27–28 (Tex. App.—Houston [1st Dist.] 1982, writ ref’d n.r.e.).

85. *See discussion infra* Part III.

III. WASHINGTON'S EXPERIENCE WITH NON-MARITAL COMMITTED INTIMATE RELATIONSHIPS

Washington adopted a community property system in 1869—twenty years prior to statehood.⁸⁶ Unlike Texas, however, Washington abolished common law marriage quite early.⁸⁷ Since then, to receive the advantages of community property laws, Washington couples must either formally solemnize their marital relationship or enter into a valid common law marriage in another state.⁸⁸

Accompanying the foregoing requirements for the formal establishment of a community property regime, a presumption developed—the “*Creasman* presumption”—which held “that property acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and, in the absence of some trust relation, belongs to the one in whose name the legal title to the property stands.”⁸⁹ Nonetheless, some common law property workarounds existed.⁹⁰ Over the years, Washington courts have avoided using the *Creasman* presumption by locating alternative legal bases for shared property, under theories similar to those recognized in Texas: tracing, partnership, constructive trust, co-tenancy, and contract.⁹¹

Then, in 1984, in *In re Marriage of Lindsey*, the Washington Supreme Court overturned the *Creasman* presumption and ushered in a new equitable doctrine for adjudicating property disputes between unmarried cohabitants.⁹² In its place, the court established a new approach: “[W]e adopt the rule that courts must ‘examine the [committed intimate] relationship and the property accumulations and make a just and equitable disposition of the property.’”⁹³ Because the parties in *In re Marriage of Lindsey* did not dispute the existence of a long-term, marriage-like relationship, the court did not provide much guidance for the lower courts to exercise their new equitable powers, except to say that “we do not believe [the various criteria offered] should be adopted as a

86. Act of Dec. 2, 1869, 1869 Wash. Sess. Laws 319; see also Kelly M. Cannon, *Beyond the “Black Hole”—A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 GONZ. L. REV. 7, 8 (2003). For purposes of this article, we can ignore some of the nuances that troubled the Washington Territorial Legislature. See Cannon *supra* at 12–16 (citing Cyril Hill, *Early Washington Marital Property Statutes*, 14 WASH. L. REV. 118 (1939)).

87. See *In re McLaughlin’s Estate*, 30 P. 651, 657–58 (Wash. 1892).

88. See *In re Gallagher’s Estate*, 213 P.2d 621, 623 (Wash. 1950).

89. *Creasman v. Boyle*, 196 P.2d 835, 838 (1948), *overruled by In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984).

90. Jennifer L. King, Comment, *First Comes Love, Then Comes Marriage? Applying Washington’s Community Property Marriage Statutes to Cohabitational Relationships*, 20 SEATTLE U. L. REV. 543, 548–49 (1997) (explaining that, after the *Creasman* presumption was established, at the Washington appellate and supreme court levels, courts only used it as a basis for one decision and in other decisions, they only cited to it to draw distinctions and to show the presumption’s inapplicability).

91. See *In re Marriage of Lindsey*, 678 P.2d at 330–31 (citing WASHINGTON COMMUNITY PROPERTY DESKBOOK §§ 2.8–12 (Thomas R. Andrews et al. eds., 3d ed. 2003)) (listing the most common means of avoidance, which characterize property relationships among non-marital cohabitants).

92. See *id.* at 331 (abandoning and overruling the *Creasman* presumption).

93. *Id.* (citations omitted) (quoting Latham v. Hennessey, 554 P.2d 1057, 1059 (Wash. 1976)).

rigid set of requirements but rather that courts should examine each case on its facts.”⁹⁴ Fairly quickly, *In re Marriage of Lindsey* gave rise to a number of lower court cases concerning the equitable division of property acquired during non-marital relationships of this kind.⁹⁵

Before too long, however, the Washington Supreme Court felt a need to clarify; in 1995, in *Connell v. Francisco*, the court explained that “[r]elevant factors establishing a [committed intimate] relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”⁹⁶ But more importantly, the court stated: “The critical focus is on property that would have been characterized as community property had the parties been married. This property is properly before a trial court and is subject to a just and equitable distribution.”⁹⁷ Bringing this new common law even further into the orbit of community property law, the court went on to explain the following:

Therefore, all property acquired during a [committed intimate] relationship is presumed to be owned by both parties. This presumption can be rebutted. All property considered to be owned by both parties is before the court and is subject to a just and equitable distribution. The fact title has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership.

For the purpose of dividing property at the end of a [committed intimate] relationship, the definitions of “separate” and “community” property found in [Washington’s community property statutes] are useful[,] and we apply them by analogy. Therefore, property owned by one of the parties prior to the [committed intimate] relationship and property acquired during the [committed intimate] relationship by gift, bequest, devise, or descent with the rents, issues and profits thereof, is not before the court for division. All other property acquired during the relationship would be presumed to be owned by both of the parties. Furthermore, when the funds or services owned by both parties are used to increase the equity or to maintain or increase the value of property that would have been separate property had the couple been married, there may arise a right of reimbursement in the “community.” A court may offset the “community’s” right of reimbursement against any reciprocal

94. *Id.*

95. *See, e.g.*, *Zion Constr., Inc. v. Gilmore*, 895 P.2d 864, 867 (Wash. Ct. App. 1995); *In re Marriage of Pearson-Maines*, 855 P.2d 1210, 1213–16 (Wash. Ct. App. 1993); *In re Marriage of Hurd*, 848 P.2d 185, 195 (Wash. Ct. App. 1993); *Foster v. Thilges*, 812 P.2d 523, 526–27 (Wash. Ct. App. 1991); *In re Marriage of DeHollander*, 770 P.2d 638, 641 (Wash. Ct. App. 1989); *W. Cmty. Bank v. Helmer*, 740 P.2d 359, 360 (Wash. Ct. App. 1987); *see also* *Warden v. Warden*, 676 P.2d 1037 (Wash. Ct. App. 1984) (failing to consider *In re Marriage of Lindsey*, despite being decided shortly thereafter).

96. *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (citations omitted).

97. *Id.* at 836.

benefit received by the “community” for its use and enjoyment of the individually owned property.⁹⁸

After reflecting on the discussion in this article thus far, one might ask as follows: How does this new committed intimate relationship regime differ from common law marriage?⁹⁹ Not surprisingly, the same question confronted the *Connell* court.¹⁰⁰ Here was the court’s answer:

Until the Legislature, as a matter of public policy, concludes [committed intimate] relationships are the legal equivalent to marriages, we limit the distribution of property following a [committed intimate] relationship to property that would have been characterized as community property had the parties been married. This will allow the trial court to justly divide property the couple has earned during the relationship through their efforts without creating a common law marriage or making a decision for a couple which they have declined to make for themselves. Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal obligations are assumed; and disregards the explicit intent of the Legislature that [§ 26.09.080 of the Revised Code of Washington] apply to property distributions following a marriage.¹⁰¹

How does this distinction between what would have been community property and what would have been separate property prevent this new CIR doctrine from being the functional equivalent of common law marriage?¹⁰² The key here is to understand how Washington courts are supposed to divide a married couple’s property at divorce.¹⁰³ According to § 26.09.080 of the Revised Code of Washington, after considering what is community property and what is separate property in the dissolution of a marriage, among other factors, the court is instructed to divide all of the property as shall appear just and equitable.¹⁰⁴ Stated more bluntly: at divorce, Washington divorce courts

98. *Id.* at 836–37 (citations omitted); *see also* WASH. REV. CODE ANN. § 26.16.010 (West Supp. 2014) (explaining that in Washington, unlike Texas, rents, issues, and profits from separate property are separate property).

99. In Washington, common law marriage was abolished in 1892. *See In re McLaughlin’s Estate*, 30 P. 651, 657–58 (Wash. 1892).

100. *Connell*, 898 P.2d at 835–36.

101. *Id.* at 836.

102. *See id.*

103. *See id.* at 836–37.

104. WASH. REV. CODE ANN. § 26.09.080 (West 2013).

[I]n a proceeding for disposition of property following dissolution of the marriage . . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to: (1) [t]he nature and extent of the community property; (2) [t]he nature and extent of the separate property; (3) [t]he duration of the marriage or domestic partnership; and (4) [t]he economic circumstances of each spouse.

may, and do, divide both community *and separate* property equitably.¹⁰⁵ However, at the end of a CIR, courts may not divide separate property, unless there is a separate legal theory on the basis of which a party can claim a share of what would not have been community property had the couple been married.¹⁰⁶ That is the difference.

This may not seem like much of a difference, especially if, as is commonly believed, Washington divorce courts do not divide up separate property, but instead, they leave it with the separate property owner.¹⁰⁷ Yet, that is the rule, and the legislature has not seen fit to disturb this common law development, which was first set in motion over twenty-five years ago.¹⁰⁸ Indeed, as is probably well known, most recently, Washington's legislature has been more concerned with broadening the legal rights of same-sex couples than with the legal rights of couples who choose not to take advantage of formal status opportunities.¹⁰⁹ Thus, in 2008, Washington formally recognized "registered domestic partnerships" (RDPs) between same-sex couples and between couples with partners who are sixty-two years of age or older and gave them the same property rights as married couples.¹¹⁰ In 2012, the Washington legislature took the next step and legalized same-sex marriage.¹¹¹ Even though that legislation was tested in Washington's referendum process, the people of the state of Washington voted to sustain the legislature's same-sex marriage statute.¹¹²

Given that the legislature has not overturned Washington's common law CIR doctrine, how has it fared in the courts? You be the judge. First, this doctrine has given rise to five other Washington Supreme Court decisions of note.¹¹³

105. *See id.*

106. *See id.*

107. *See, e.g.,* Amanda DuBois, *What's Considered Separate Property in a Washington Divorce?*, DUBOIS CARY LAW GRP. (Sept. 5, 2013), <http://www.duboislaw.net/blog/2013/09/whats-considered-separate-property-in-a-washington-divorce.shtml>. Until 1949, there seems to have been a legal doctrine in Washington to the following effect: "[S]ituations which warrant an award of one spouse's separate property to the other spouse are [only done in] 'exceptional'" circumstances. *Konzen v. Konzen*, 693 P.2d 97, 101 (Wash. 1985) (citing *Bodine v. Bodine*, 207 P.2d 1213, 1214 (Wash. 1949)). But the Washington Supreme Court has suggested that this is no longer the rule, despite what the property's status may have been earlier. *See id.*

108. *See generally* WASH. REV. CODE ANN. § 26.09.080; *Connell*, 898 P.2d at 836 (explaining that, until the legislature says differently, the division of property following a CIR is limited).

109. *See, e.g.,* WASH. REV. CODE ANN. § 26.16.030.

110. Act effective Jan. 1, 2009, ch. 6, §§ 601–23, 2008 Wash. Sess. Laws 53–60 (codified at WASH. REV. CODE ANN. § 26.16.030). Among the rights thus bestowed on RDPs was, of course, community property rights. *See id.*

111. Act Effective Dec. 6, 2012, ch. 3, § 1, 2012 Wash. Sess. Laws 199–200 (codified at WASH. REV. CODE ANN. § 26.04.010).

112. *See November 06, 2012 General Election Results: Referendum Measure No. 74 Concerns Marriage for Same-Sex Couples*, WASH. SEC'Y OF STATE, <http://vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-Marriage-for-Same-Sex-Couples.html> (last updated Nov. 27, 2012, 4:55 PM).

113. *See* *Olver v. Fowler*, 168 P.3d 348 (Wash. 2007); *Soltero v. Wimer*, 150 P.3d 552 (Wash. 2007); *Vasquez v. Hawthorne*, 33 P.3d 735 (Wash. 2001); *In re Marriage of Pennington*, 14 P.3d 764 (Wash. 2000); *Peffley-Warner v. Bowen*, 778 P.2d 1022 (Wash. 1989). One additional Washington Supreme Court case, decided in 2005, relied on the CIR doctrine when mandating that the trial court, on remand, reconsider both the property acquired during the CIR relationship and the marital property that the trial court had erroneously

In 1986, Peffley-Warner, a surviving partner of a CIR, filed an appeal in the U.S. District Court for the Eastern District of Washington after being denied social security survivor's benefits by the Social Security Administration.¹¹⁴ The U.S. District Court for the Eastern District of Washington dismissed Peffley-Warner's claim, and Peffley-Warner filed an appeal in the U.S. Court of Appeals for the Ninth Circuit.¹¹⁵ In 1988, the Ninth Circuit entered an order certifying the issue—whether the surviving partner of a CIR would have the same rights as a surviving spouse under Washington's law of intestate succession—to the Washington Supreme Court.¹¹⁶ The Washington Supreme Court answered this question in the negative, holding that “a surviving partner in a [committed intimate] relationship does not have the status of a widow with respect to intestate devolution of the deceased partner's personal property. The division of property following termination of an unmarried cohabiting relationship is based on equity, contract or trust, and not on inheritance.”¹¹⁷

In 2000, two alleged CIR cases came before the Washington Supreme Court; after granting review of both cases, the court consolidated the two matters into *In re Marriage of Pennington*.¹¹⁸ In both of these cases, one of the partners challenged the finding of the appellate court, regarding the existence of a CIR.¹¹⁹ The court explained that, in determining whether a CIR existed between the partners in each of these cases, the appellate courts should have applied the five factors enumerated in *Connell*—“continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”¹²⁰ According to the court, “[t]hese characteristic factors are neither exclusive nor hypertechnical. Rather, these factors are meant to reach all relevant evidence helpful in establishing whether a [committed intimate] relationship exists.”¹²¹ Interestingly, the court concluded that neither of the contested relationships qualified as a CIR:

The first relationship was between Clark Pennington and Evelyn Van Pevenage. When they met, they were married to other people. Van Pevenage divorced her husband shortly after she met Pennington, but Pennington stayed married to his wife during the first five years of his relationship with Van Pevenage. Van Pevenage wanted to get married but Pennington consistently refused. They cohabitated in homes owned by Pennington, but there were

considered the wife's. *In re Marriage of Muhammad*, 108 P.3d 779, 785 (Wash. 2005). However, the doctrine did not play a significant enough role in the case to merit further discussion. *See id.*

114. *Peffley-Warner*, 778 P.2d at 1023–24.

115. *Id.* at 1024.

116. *Id.* at 1023–24.

117. *Id.* at 1027 (citing *In re Marriage of Lindsey*, 678 P.2d 328, 330–31 (Wash. 1984)).

118. *In re Marriage of Pennington*, 14 P.3d at 767–69.

119. *Id.*

120. *Id.* at 769–72 (quoting *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995)).

121. *Id.* at 770.

periods where they broke up and lived apart. Van Pevenage at some point lived with another man for a brief period. Van Pevenage contributed to some of the living expenses, but the court found no significant pooling of resources. Viewed as a whole, the facts did not indicate a committed intimate relationship. The second relationship was between James Nash and Diana Chesterfield. They lived together for four years, followed by two years of separation and reconciliation until the relationship finally ended. The court found that the duration of the relationship could support a finding of a committed intimate relationship. However, Chesterfield was married to another man for the first several years that she knew Nash, they did not hold themselves out as married, they owned no property jointly, and they kept their finances separate. The court found that the evidence regarding their mutual intent to be in a marital-like relationship was “equivocal,” and the lack of pooling their time and efforts did not justify an equitable division of assets.¹²²

The following year, in *Vasquez v. Hawthorne*, the Washington Supreme Court considered whether the trial court had correctly granted summary judgment in favor of a surviving partner in an alleged homosexual relationship, on the grounds that the partners had a CIR to which the equitable division theory applied.¹²³ The court concluded that the trial court’s grant of summary judgment was improper because there were factual disputes regarding the partners’ personal and business relationships.¹²⁴ The court also vacated the appellate court’s decision, a decision in which the appellate court held that, because CIRs are marital-like and these two men could not legally be married, the CIR doctrine could not apply.¹²⁵ The supreme court said that “[e]quitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties.”¹²⁶ As explained in more detail below, the *Vasquez* decision signaled, even if it did not squarely hold, that gay partners could take advantage of the CIR doctrine.¹²⁷

Notably, the *Vasquez* court, though it did not spend significant time discussing the issue, found nothing inappropriate about applying the CIR doctrine at the death of a partner, as opposed to a separation of two living partners.¹²⁸ However, in 2007, this question came squarely before the

122. WASHINGTON COMMUNITY PROPERTY DESKBOOK (Thomas R. Andrews et al. eds., 4th ed. forthcoming) (unpublished manuscript at ch. 2-11).

123. *Vasquez v. Hawthorne*, 33 P.3d 735, 736 (Wash. 2001).

124. *Id.* at 737.

125. *Id.* at 736.

126. *Id.* at 737. One justice wrote separately to state that he thought the couple’s inability to marry was fatal to the application of the doctrine, and another justice thought the question should be left to another day. *Id.* at 738–41 (Alexander, C.J., concurring) (Sanders, J., concurring).

127. *See id.* at 737; *see infra* notes 194–99 and accompanying text.

128. *Id.* at 736–38. Two of the justices were of the view that the CIR doctrine should not apply at death. *Id.* at 738, 741 (Alexander, C.J., concurring) (Sanders, J., concurring). Had the majority of the court agreed with them, it is likely that the court would have explained that to the trial court on remand, but it did not. As it happened, this case was settled on remand, so there was no further illumination on appeal.

Washington Supreme Court.¹²⁹ In *Olver v. Fowler*, intimate partners, Cung Ho and Thuy Nguyen Ho, who had been in a committed relationship for fourteen years, were tragically and simultaneously killed in an automobile accident.¹³⁰ A surviving passenger, whose mother had been killed in the accident and who had filed a tort claim against Cung, protested the trial court's determination that one half the couple's assets should be disbursed into Thuy's estate.¹³¹ The Washington Supreme Court affirmed, and in doing so, it traced the trajectory of its cases that laid the foundation for the CIR doctrine over the past ninety years:

By analogy to community property law, Thuy had an undivided interest in the couple's jointly acquired property, even though it was titled in Cung's name. The death of one or both partners does not extinguish that right; Thuy's estate merely steps into her shoes. . . . Cung's heirs should have no better rights than Cung would have, were he still alive.¹³²

Notice that, given the workings of the Simultaneous Death Act, this case effectively holds that a partner to a CIR can capture a share of the CIR property, titled in the name of the survivor.¹³³ For purposes of the Simultaneous Death Act, Cung's property was disposed of as if he had survived Thuy, while Thuy's estate was held to contain half of their CIR property.¹³⁴

Finally, in 2007, in *Soltero v. Wimer*, the Washington Supreme Court had occasion to reaffirm that its CIR doctrine only allowed equitable division of what would have been community property.¹³⁵ In *Soltero*, after being in a CIR for nine years, Wimer and Soltero broke up, and "the trial court ordered Wimer to pay Soltero \$135,000" for the value of her services, "including . . . running the household and business/social matters."¹³⁶ The supreme court said the problem was that the trial court failed to identify any CIR property from which this amount was to come.¹³⁷ Because the trial court's ruling amounted to an

129. See *Olver v. Fowler*, 168 P.3d 348, 350 (Wash. 2007).

130. *Id.*

131. *Id.* at 352.

132. *Id.* at 356. On the other hand, the court declined to answer another important question in the case: Whether all of the joint property of partners in a CIR is subject to a community tort claim. *Id.* at 357. Prior to *Olver*, appellate courts had already applied the CIR doctrine in the context of decedents' estates. See *Niemela v. Adderley*, No. 57900-2-I, 2007 WL 1181007, at *1 (Wash. Ct. App. Apr. 23, 2007); *In re Estate of Anderson*, No. 14572-7-III, 1997 WL 6984, at *1 (Wash. Ct. App. Jan. 9, 1997); see also John E. Wallace, Comment, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem*, 29 SEATTLE U. L. REV. 243 (2005) (advocating for the application of the CIR doctrine at death). Here, it is worth noting that, because the relationship between Cung and Thuy ended by simultaneous death, the court effectively answered whether the CIR doctrine applies, regardless of who dies first. *Olver*, 168 P.3d at 356-57. In a simultaneous death, each partner's property is disposed of as if that partner survived the other. *Id.*

133. *Olver*, 168 P.3d at 356-57.

134. See *id.*

135. See *Soltero v. Wimer*, 150 P.3d 552, 555 (Wash. 2007).

136. *Id.* at 554.

137. *Id.* at 556.

order that Wimer pay some of his separate property to Soltero, it was error and had to be reversed.¹³⁸

In the development of its CIR doctrine, these cases are the milestones set up by the Washington Supreme Court.¹³⁹ The lower courts have not been shy about following those milestones; as of January 2013, a Westlaw search pulled up over seventy CIR cases in Washington appellate courts that either applied or interpreted *Connell* (this figure excludes those cases that gave rise to the supreme court decisions already discussed).¹⁴⁰ Of these, only a small handful of the opinions were published; this is, perhaps, the strongest indication that the CIR doctrine has become settled law in Washington.¹⁴¹

A review of the cases shows that the appellate courts have accepted the CIR doctrine and have run with it.¹⁴² Of the published decisions, two have squarely applied the CIR doctrine to same-sex cases.¹⁴³ Two have applied established community property remedies to deal with the commingling of CIR property and labor with a separate property business during the relationship.¹⁴⁴ One appeals court addressed and explained when a cause of action for equitable division under the CIR doctrine accrues; it held that a cause of action accrues

138. *Id.* This conclusion could be a result of imprecision or a misunderstanding by the trial court. The trial court discovered that, during the nine-year CIR, Wimer's earnings totaled \$378,000 and Soltero's earnings totaled \$162,000. *Id.* at 554. But as to this indisputably CIR property, the trial court stated: "An equitable split is Mr. Wimer 70%, Ms. Soltero 30%, therefore, their individual earnings is a push." *Id.* This gave the impression—perhaps accurately—that the court had already decided what the equitable split of the CIR property should be. *See id.* But if this was not what the trial court meant, and had the trial court, instead, ordered Wimer to pay another \$135,000 to Soltero from his CIR earnings (in addition to her \$162,000 in earnings) as an equitable share of all of the CIR property, the Washington Supreme Court might have affirmed the trial court or might have never taken the case in the first place. Had the trial court done so, Soltero's own earnings of \$162,000, plus \$135,000 of Wimer's, would have given her 55% of all of the CIR property earned during their relationship (\$540,000)—a plausible equitable split of all of the CIR property, especially given Wimer's greater economic prospects at the end of the relationship. *See id.* But whether Wimer had \$135,000 left from his CIR earnings is not clear from the decision. *See id.*

139. *See cases cited supra* notes 89–138.

140. *See, e.g.,* Van Allen v. Weber, No. 42169-1-II, 2012 WL 6017690 (Wash. Ct. App. Dec. 4, 2012); Ross v. Hamilton, No. 39887-7-II, 2011 WL 1376767 (Wash. Ct. App. Apr. 12, 2011); Niemela v. Adderley, No. 57900-2-I, 2007 WL 1181007 (Wash. Ct. App. Apr. 23, 2007); Fenn & Lockwood, No. 33595-6-II, 2006 WL 3629147 (Wash. Ct. App. Dec. 12, 2006); *In re* Marriage of Bostain, No. 30450-3-II, 2005 WL 1177586 (Wash. Ct. App. May 17, 2005); Vo v. Tran, No. 30007-9-II, 2003 WL 22847074 (Wash. Ct. App. Dec. 2, 2003); Gower v. Shinstrom, No. 49775-8-I, 2003 WL 352880 (Wash. App. Div. 1 Feb. 18, 2003); Cunningham v. Burns, No. 47868-1-I, 2002 WL 1609045 (Wash. Ct. App. July 22, 2002); Rota v. Vandver, No. 25039-0-II, 2001 WL 1521996 (Wash. Ct. App. Nov. 30, 2001); *In re* Estate of Anderson, No. 14572-7-III, 1997 WL 6984 (Wash. Ct. App. Jan. 9, 1997); Fletcher v. Olmstead, No. 19319-1-II, 1996 WL 734263 (Wash. Ct. App. Dec. 20, 1996).

141. *See cases cited supra* note 140.

142. *See cases cited supra* note 140.

143. *See In re* Long & Fregeau, 244 P.3d 26 (Wash. Ct. App. 2010); Gormley v. Robertson, 83 P.3d 1042 (Wash. Ct. App. 2004). Another case worth noting is *In re* Goodale, which adjudicated a bankruptcy filed by a partner who had previously been in a same-sex CIR. *In re* Goodale, 298 B.R. 886 (Bankr. W.D. Wash. 2003). The decision makes clear that the lower court treated the couple as being in a CIR and equitably divided their property. *Id.* at 888–89.

144. *See* Koher v. Morgan, 968 P.2d 920 (Wash. Ct. App. 1998); Lindemann v. Lindemann, 960 P.2d 966 (Wash. Ct. App. 1998).

when the CIR ends and that the action must be brought within three years from that time: “The three-year statute of limitations applies to actions ‘upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.’”¹⁴⁵ In another opinion, the appellate court applied the CIR doctrine at the death of one of the parties to the CIR and in doing so, rejected the estate’s contention that an equitable CIR claim was subject to Washington’s four-month non-claims statute that governs creditors’ claims.¹⁴⁶ The court held that a CIR property claim was not a debt owed by the estate, but rather, it was more akin to a claim by a spouse or a tenant in common that property to which they were entitled should not be included in the estate’s inventory.¹⁴⁷ Another appellate court opinion determined that “[p]artners in a committed intimate relationship, like spouses, may change the status of their community-like property to separate property by entering into mutual agreements. These agreements may be oral or written.”¹⁴⁸ After deciding that there was an oral agreement between the partners to the CIR, the court then enforced the agreement, based on the fact that the couple had abided by this agreement throughout their relationship.¹⁴⁹ The court also held that, because it takes mutual intent to establish a CIR, “when a party to a committed intimate relationship expresses the unequivocal intent to end the relationship, that relationship ends.”¹⁵⁰ Other cases simply apply community property principles to resolve CIR issues; one case held that where a CIR interest in a state pension plan could not be divided under a qualified domestic relations order (QDRO) (because the parties were not married), the court was entitled to award a sum certain to the non-employee representing his CIR share.¹⁵¹ Another case affirmed an award of 36% of the CIR property to one of the partners, noting that equitable distribution (the standard for distributing property at the dissolution of a married couple and at the end of a CIR) does not mean equal division.¹⁵²

145. *In re Kelly & Moesslang*, 287 P.3d 12, 18 (Wash. Ct. App. 2012) (quoting WASH. REV. CODE ANN. § 4.16.080(3) (West 2005 & Supp. 2014)).

146. *Witt v. Young*, 275 P.3d 1218, 1221–22 (Wash. Ct. App. 2012).

147. *Id.* at 1222 (“Witt’s claim is better characterized as challenging the inclusion of her property in the estate’s inventory. An interested party may challenge an estate’s inventory at any point of the probate proceedings.”).

148. *In re G.W.-F.*, 285 P.3d 208, 212 (Wash. Ct. App. 2012) (citations omitted).

149. *Id.* at 212–15.

150. *Id.* at 217.

151. *In re P’ship of Rhone & Butcher*, 166 P.3d 1230, 1233–34 (Wash. Ct. App. 2007). While it is unclear from the opinion why the parties and the court concluded that the pension could not be divided under a QDRO, if it was based on a concern that federal law does not permit a QDRO to divide non-marital CIR property, that conclusion seems inconsistent with *Owens v. Automotive Machinists Pension Trust*. See *id.*; see also *Owens v. Auto. Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009); *infra* note 193 and accompanying text.

152. *In re Sutton & Widner*, 933 P.2d 1069, 1071–72 (Wash. Ct. App. 1997). Interestingly, however, the court also affirmed the trial court’s reduction of Ms. Sutton’s share by the rental value of the couple’s home because she exclusively occupied it after the CIR ended—in this regard, this distinguishes a CIR from a marriage. *Id.*

As noted, there have been a number of unpublished Washington appellate court decisions applying the CIR doctrine.¹⁵³ In many of these cases, the courts simply apply the CIR standards and rules previously announced by the Washington Supreme Court.¹⁵⁴ Some of the unpublished decisions, however, have dealt with unanswered or incompletely answered questions relating to CIRs.¹⁵⁵ While these decisions may not be cited as precedent in Washington, they are described to show the variety of issues that arise and the penetration of the *Connell* doctrine into Washington's common law.¹⁵⁶

May a CIR be formed even though one partner remains married and is therefore legally unable to marry anyone else? In principle, this question was addressed in the *Vasquez* case, in dictum, when the court stated that the CIR doctrine is "not dependent on the 'legality' of the relationship between the parties."¹⁵⁷ That principle was applied in *Fleming v. Spencer*, a case in which the court of appeals affirmed the trial court's finding of a CIR, notwithstanding the fact that one of the parties was still married when the CIR commenced.¹⁵⁸

Will a Washington court apply the CIR doctrine to a CIR that began and was maintained in another state before the couple moved to Washington?

153. See cases cited *supra* note 140.

154. See, e.g., *Van Allen*, 2012 WL 6017690, at *1, *5 (affirming characterization and division of CIR property); *Ross*, 2011 WL 1376767, at *7-9 (holding CIR properly found and property division was within trial court's discretion); *Niemela*, 2007 WL 1181007, at *1-2 (affirming determination that no CIR existed, but presupposing that such a claim was viable where the matter was tried after the death of a partner); *Fenn & Lockwood*, 2006 WL 3629147, at *7-8 (holding that CIR was properly found but an item that was not CIR property should not have been divided); *In re Marriage of Bostain*, 2005 WL 1177586, at *1 (affirming determination that a CIR existed for seven years prior to a three-year marriage and affirming determination that alleged non-marital agreement was unenforceable); *Vo*, 2003 WL 22847074, at *1 (finding of a CIR prior to marriage was proper, as was property characterization and division); *Gower*, 2003 WL 352880, at *1-3 (finding of a CIR was proper and characterization of CIR property affirmed, based on commingling doctrine); *Cunningham*, 2002 WL 1609045, at *1-6 (affirming property division in a CIR, including court's determination that a \$40,000 down payment on a key piece of CIR property was the separate property of one of the parties); *Rota*, 2001 WL 1521996, at *1-3 (holding that CIR was property found and noting that the five-factor test in *Connell* "requires the court to consider such factors as whether the parties have been faithful to each other," which would not be taken into consideration in the dissolution of a marriage); *In re Estate of Anderson*, 1997 WL 6984, at *2-7 (finding a CIR and that survivor was entitled to a share of enhanced value resulting from CIR labor, but finding an abuse of discretion in valuation of CIR right of reimbursement, for value added to one partner's separate property); *Fletcher*, 1996 WL 734263, at *1 (affirming denial of a CIR and in the process, the \$3.5 million award to only one of the cohabitants from a winning lottery ticket purchased during the relationship).

155. See, e.g., *Fleming v. Spencer*, No. 47872-9-I, 2002 WL 171249 (Wash. Ct. App. Feb. 4, 2002); *In re Marriage of McCarthy*, No. 30029-3-III, 2012 WL 3580059 (Wash. Ct. App. Aug. 21, 2012); *Seven v. Stoel Rives, LLP*, No. 64117-4-I, 2010 WL 5477191 (Wash. Ct. App. Dec. 20, 2010); *Moseley v. Mattila*, No. 53497-1-I, 2005 WL 1178063 (Wash. Ct. App. May 16, 2005); *Rota*, 2001 WL 1521996; *In re Black*, No. 64903-5-I, 2010 WL 2994049 (Wash. Ct. App. Aug. 2, 2010); *Hobbs v. Bates*, No. 51463-6-I, 2004 WL 1465949 (Wash. Ct. App. June 28, 2004); *Meretricious Relationship of Moran v. Taylor*, No. 43242-7-I, 2000 WL 291143 (Wash. Ct. App. Mar. 13, 2000); *Fletcher*, 1996 WL 734263.

156. See cases cited *supra* note 155; see also WASH. GENERAL RULE 14.1 (West 2007) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.").

157. *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001).

158. *Fleming*, 2002 WL 171249, at *1-3.

Apparently, yes.¹⁵⁹ In *In re Marriage of McCarthy*, the court of appeals concluded that, in 1992, a couple entered into a CIR in Louisiana and maintained it there for almost ten years, before moving to Washington and getting married in 2002.¹⁶⁰ The court applied the CIR doctrine and did not even raise the conflict of laws issue.¹⁶¹

Must litigants who claim that they were in a CIR satisfy all five of the *Connell* factors to establish the validity of their CIR? Yes, according to the appellate court in *Seven v. Stoel Rives, LLP*: “[C]ontinuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties . . . are the minimum requirements.”¹⁶²

How will a court handle debts incurred during a CIR? Washington follows a “community debt” system, and under this system, obligations are classified as either separate or community from the outset of a marriage.¹⁶³ It appears that Washington courts are generally applying the same rules to CIRs.¹⁶⁴ For example, in *Moseley v. Mattila*, the court noted that “[d]ebt incurred during a relationship for community-like purposes is considered community-like debt.”¹⁶⁵ Similarly, in *Rota v. Vandver*, the court held that, when a couple purchased property during their CIR, in part with one partner’s inheritance and in part with a bank loan acquired during their CIR, the portion of the property they purchased with the loan was presumed to be CIR property: “The parties covered the balance of the home with a loan acquired during the relationship; we presume this is jointly owned property.”¹⁶⁶ On the other hand, in *In re Black*, following the termination of the CIR, Einstein purchased eighty acres in Washington and borrowed funds to pay off the purchase price.¹⁶⁷ “Black contributed no portion of the purchase price nor did he obligate himself on the loan.”¹⁶⁸ The court concluded that the property was entirely Einstein’s separate property, but when it divided up their CIR assets, it required Black to share the debt.¹⁶⁹ In reaching its determination, the court did not discuss the

159. See *In re Marriage of McCarthy*, 2012 WL 3580059, at *1–3.

160. See *id.*

161. See *id.*

162. *Seven v. Stoel Rives, LLP*, No. 64117-4-I, 2010 WL 5477191, at *6 (Wash. Ct. App. Dec. 20, 2010).

163. WASH. REV. CODE ANN. § 26.16.030 (West Supp. 2014).

164. See, e.g., *Moseley v. Mattila*, No. 53497-1-I, 2005 WL 1178063, at *10 (Wash. Ct. App. May 16, 2005).

165. *Id.* The *Moseley* court also applied the “*Hurd* presumption,” which developed in community property cases; under the *Hurd* presumption, “[a] spouse’s use of his or her separate funds to purchase property in the name of the other spouse, absent any other explanation, permits a presumption that the transaction was intended as a gift.” *Id.* (quoting *In re Marriage of Hurd*, 848 P.2d 185, 194 (Wash. Ct. App. 1993)). However, the Washington Supreme Court has since overruled this presumption. See *In re Estate of Borghi*, 219 P.3d 932, 938 (Wash. 2009).

166. *Rota v. Vandver*, No. 25039-0-II, 2001 WL 1521996, at *4 (Wash. Ct. App. Nov. 30, 2001).

167. *In re Black*, No. 64903-5-I, 2010 WL 2994049, at *1, *3 (Wash. Ct. App. Aug. 2, 2010).

168. *Id.* at *3.

169. *Id.* at *3–4.

community debt doctrine; however, the court reasoned that Black should be liable for a portion of this debt because he continued to reside on the property, rent-free, after the couple's CIR terminated.¹⁷⁰

If a couple has children together and they co-parent them, should this be conclusive evidence of a CIR? In *Hobbs v. Bates*, Hobbs argued that the court should follow the recommendations of the American Law Institute (ALI) in § 6.03 of its guidelines on domestic partners and hold this to be conclusive evidence of a CIR.¹⁷¹ But the court declined to do so, finding the five-factor test from *Connell* sufficient, without making child rearing a litmus test.¹⁷² Indeed, the court went on to conclude that Hobbs and Bates had not formed a CIR because they had not pooled their resources and functioned as an economic unit:

Because the nature of the common law claim of [committed intimate] relationship operates primarily as a property claim, pooling of economic resources and functioning as an economic unit is an important factor in determining whether the parties ever intended to create a [committed intimate] relationship whereby each party would have an interest in property acquired during the relationship.¹⁷³

Are attorney's fees available in a CIR case? Apparently not, unless some common law fee-shifting doctrine, unrelated to CIRs, is triggered.¹⁷⁴ In *Meretricious Relationship of Moran*, the appellate court relied on two pre-*Connell* cases and on *Connell*, itself, and determined that the statutory authority for awarding attorney's fees in the dissolution of a marriage could not be extended by analogy and was not applicable to CIRs.¹⁷⁵

Might failure to properly advise a client on the implications of the CIR doctrine give rise to legal malpractice claims? Clearly, yes, although, to date, it seems as though none of the malpractice cases that have reached the court of appeals have been successful.¹⁷⁶ In *Taylor*, a case decided shortly after *Connell*, Taylor's lawyers advised him to settle his lawsuit with Moran, his former CIR partner, when she sought an accounting for her share of assets in

170. *Id.* at *4. While this kind of result might have been justifiable under the broad equitable powers of Washington courts at the end of a true marriage, it is arguably inconsistent with the mandate in *Connell*—at the end of a CIR, separate property is not subject to division. *See Connell v. Francisco*, 898 P.2d 831, 836–37 (Wash. 1995). If separate property is not equitably divisible, it is hard to see why separate debt should be. *See id.* On the other hand, the result of *In re Black* may be justified based on the theory that Black owed Einstein reimbursement for living on her separate land, rent-free. *In re Black*, 2010 WL 2994049, at *4.

171. *Hobbs v. Bates*, No. 51463-6-I, 2004 WL 1465949, at *8 (Wash. Ct. App. June 28, 2004).

172. *Id.* at *8–9.

173. *Id.* at *12 (suggesting that this factor—pooling resources and functioning as an economic unit—is more important than other factors).

174. *See, e.g., Meretricious Relationship of Moran v. Taylor*, No. 43242-7-I, 2000 WL 291143, at *5 (Wash. Ct. App. Mar. 13, 2000).

175. *Id.* (citing *Connell*, 898 P.2d at 835–36; *Foster v. Thilges*, 812 P.2d 523, 527 (Wash. Ct. App. 1991); *W. Cmty. Bank v. Helmer*, 740 P.2d 359, 361–62 (Wash. Ct. App. 1987)).

176. *See, e.g., Taylor v. Goddard*, No. 49164-4-I, 2002 WL 31058539 (Wash. Ct. App. Sept. 16, 2002).

his several companies, based on their CIR.¹⁷⁷ On his lawyers' advice, "Taylor agreed to pay [Moran] \$750,000, of which \$600,000 would be tax free to her, to settle the case."¹⁷⁸ When the tax liability on top of this \$750,000 grew to \$396,233, including approximately \$162,000 in "tax on tax," Taylor sued his lawyers for malpractice.¹⁷⁹ Taylor's malpractice claim was thrown out on summary judgment for failure to show breach of duty and failure to establish proximate cause.¹⁸⁰ Similarly, in *Seven v. Stoel Rives, LLP*, Seven sued Stoel Rives for malpractice, on the theory that they failed to advise her of the CIR doctrine when her partner died, thus depriving her of the chance to claim an equitable share of his estate.¹⁸¹ But again, the court affirmed the trial court's grant of summary judgment in favor of Stoel Rives because Seven failed to show a triable issue with regard to all of the *Connell* factors.¹⁸²

Absent the establishment of a CIR, do other legal theories for property sharing remain viable in Washington? Presumably they do, although each must be examined and evaluated based on its distinctive elements.¹⁸³ For example, in *Fletcher v. Olmstead*, three years into his five-year relationship with Fletcher, Olmstead won \$3.5 million in the lottery.¹⁸⁴ After the termination of their CIR, Fletcher sought a share of the winnings; she relied on theories of CIR, constructive trust, implied partnership, implied contract, and misrepresentation.¹⁸⁵ Unfortunately, Fletcher failed to offer sufficient evidence to support any of her theories, and she was denied any portion of the winnings.¹⁸⁶

Federal courts presiding over Washington disputes have also recognized the CIR doctrine in several interesting contexts.¹⁸⁷ In *Owens v. Automotive Machinists Pension Trust*, a Washington state court issued a QDRO requiring the administrators of the Automotive Machinists Pension Trust (Automotive Trust) to equally divide the pension benefits between the parties to a thirty-year CIR.¹⁸⁸ Automotive Trust argued that this was not a valid QDRO because the parties were never legally married.¹⁸⁹ But the federal district court and the

177. *Id.* at *1.

178. *Id.*

179. *Id.* at *2; see also *Meretricious Relationship of Moran*, 2000 WL 291143, at *1, *3-5 (enforcing the agreement between Taylor and Moran).

180. See *Taylor*, 2002 WL 31058539, at *3-8.

181. *Seven v. Stoel Rives, LLP*, No. 64117-4-I, 2010 WL 5477191, at *1 (Wash. Ct. App. Dec. 20, 2010).

182. *Id.* at *2.

183. See *id.* at *5.

184. *Fletcher v. Olmstead*, No. 19319-1-II, 1996 WL 734263, at *1 (Wash. Ct. App. Dec. 20, 1996).

185. *Id.* at *1-4.

186. *Id.*

187. See *infra* notes 188-202 and accompanying text.

188. *Owens v. Auto. Machinists Pension Trust*, 551 F.3d 1138, 1139 (9th Cir. 2009). The Ninth Circuit used the term "quasi-marital relationship," apparently unaware that the Washington Supreme Court had adopted the new expression, CIR. See *id.*

189. *Id.* at 1143.

Ninth Circuit both disagreed.¹⁹⁰ Because the order arose out of Washington's domestic relations law and was related to marital property rights, it qualified.¹⁹¹ Moreover, the non-employee partner, as a dependent, qualified as an "alternate payee" under the Employment Retirement Income Security Act.¹⁹² The court rejected Automotive Trust's contention that the Defense of Marriage Act (DOMA) precluded this result; in doing so, the court emphasized the fact that this case did not involve a same-sex relationship.¹⁹³

In *In re Goodale*, a Washington state court divided property acquired by a same-sex couple who had been in a CIR for almost twenty years.¹⁹⁴ In doing so, the state court awarded one of the parties, Foshay, \$78,793.58 "for [his] community property interest in a pension and a 401k fund in [Goodale's] name."¹⁹⁵ With regard to this award, the court stated the following:

[T]he court hereby clarifies for any bankruptcy court, that the . . . award is also necessary for [Mr. Foshay's] support and care and further reflects [Mr. Foshay's] joint interest in the 401k and pension titled in Respondent's [Mr. Foshay's] name, but accrued jointly under Washington law. As such, the court intends such debt to be nondischargeable in bankruptcy.¹⁹⁶

Notwithstanding the state court's intent, after Goodale declared bankruptcy, he sought to avoid the lien against his property in the bankruptcy court.¹⁹⁷ Because a lien is only exempt from the bankruptcy if it secures a debt for alimony, maintenance, or support for a spouse or former spouse, Goodale

190. *Id.* at 1142, 1147.

191. *Id.* at 1146.

192. *Id.* at 1146–47.

193. *Id.* at 1144. Judge Noonan dissented from the court's conclusion on the narrow ground that the non-employee partner was a former dependent, rather than a current one, and therefore, she did not qualify as an alternate payee. *Id.* at 1147–48 (Noonan, J., dissenting). Two other Washington appellate court decisions involved similar issues. See *In re P'ship of Rhone & Butcher*, 166 P.3d 1230 (Wash. Ct. App. 2007); *In re Rinaldi v. Bailey*, No. 66029-2-I, 2012 WL 5292816 (Wash. Ct. App. Oct. 29, 2012). In *In re Partnership of Rhone & Butcher*, the appellate court affirmed the trial court's award of a lump sum, in lieu of a QDRO, because the court believed that, even in a CIR involving a heterosexual couple, a QDRO was not available. See *In re P'ship of Rhone & Butcher*, 166 P.3d at 1234. In *Rinaldi*, the court of appeals affirmed the trial court's award of a lump sum to a non-employee, same-sex CIR partner, in lieu of a QDRO, because of the trial court's concern that the Ninth Circuit's decision in *Owens* might not cover a same-sex couple's CIR in light of DOMA. See *In re Rinaldi*, 2012 WL 5292816, at *1, *9. It is quite possible, however, that the decision in *In re Partnership of Rhone & Butcher* has been superseded by *Owens*. See *Owens*, 551 F.3d at 1146–47.

194. See *In re Goodale*, 298 B.R. 886, 888 (Bankr. W.D. Wash. 2003).

195. *Id.*

196. *Id.* at 888–89 (quoting Decree, at 6) ("Although the [s]tate [c]ourt refers in this paragraph to the 401k [fund] as being titled in Mr. Foshay's name, the findings of fact indicate that the 401k was actually titled in [Goodale's] name.").

197. *Id.* at 889.

succeeded.¹⁹⁸ Additionally, since the couple never legally married, the exemption provision did not apply.¹⁹⁹

In *In re Andrus*, the bankruptcy court concluded that the debtor and her partner had been in a CIR for nine years, but their CIR did not entitle the partner to a share of the real estate that the debtor acquired before their relationship commenced.²⁰⁰ The partner's theory was that, during the CIR, the debtor had executed a quitclaim deed conveying "half of the [p]roperty to him as a gift."²⁰¹ But the court concluded that this partner had exercised undue influence to induce the debtor to execute the deed and that the debtor had only intended to make a gift to him if they got married, which they never did.²⁰²

Finally, it is worth noting that the ALI has not only noticed the development of the CIR doctrine in Washington, but it has also seemed to have been heavily influenced by it in formulating its recommendations for dealing with property division at the end of a non-marital domestic partnership.²⁰³ The reporter's notes to § 6.03 of the Principles of the Law of Family Dissolution, which the ALI adopted in 2000, states as follows: "A few American jurisdictions take a status approach similar to that adopted in this section. Washington, which has the most developed law, applies its community-property law at the termination of stable nonmarital relationships."²⁰⁴ Section 6.03 defines when a domestic partnership has been established.²⁰⁵ Like *Connell*, § 6.03 adopts a multifactor test.²⁰⁶ More pertinent, however, is § 6.04(1), which states, "Except as provided in Paragraph (3) of this section, property is domestic-partnership property [and therefore divisible] if it would be marital property under Chapter 4, had the domestic partners been married to one another during the domestic-partnership period."²⁰⁷ Section 6.04 goes on to explain that, although separate property acquired during a formal, long-term marriage may be recharacterized at the end of the marriage as marital property, domestic-partnership property is treated differently.²⁰⁸ At the end of a domestic

198. *Id.*

199. *Id.* at 893. The bankruptcy court reasoned that Foshay could not qualify as a former spouse because of DOMA. *Id.* But since Foshay and Goodale seem to have never married, DOMA is probably beside the point. *See id.* Thus, the Supreme Court's invalidation of DOMA in June 2013 should not affect this decision. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013) (holding DOMA's definition of marriage unconstitutional).

200. *LeSurre v. Andrus (In re Andrus)*, Ch. 7 Case No. 09-13123, Adv. No. 09-01264, slip op. at 4-6 (W.D. Wash. Aug. 13, 2010).

201. *Id.* at 2.

202. *Id.* at 3.

203. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 reporter's notes, cmt. b (2002) [hereinafter ALI PRINCIPLES].

204. *Id.* ("[A]t the dissolution of [committed intimate] relationships, the court should rely on the community-property laws to divide between the partners all property that would have been community property had they been married." (citing *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995))).

205. *See id.* § 6.03.

206. *See id.*

207. *Id.* § 6.04(1).

208. *See* §§ 4.12, 6.04(3).

partnership, only domestic-partnership property is to be divided.²⁰⁹ It therefore appears that the ALI has adopted the *Connell* rule, verbatim, for characterizing and allowing division of CIR property.²¹⁰ Finally, according to the ALI, absent the presence of certain factors such as improper gifts, intentional misconduct, or negligence by one partner or spouse, courts should divide marital property (and therefore domestic-partnership property) *equally*.²¹¹ Thus, the only aspect of the *Connell* rule from which the ALI has departed is the mandate that courts divide the CIR property equitably rather than equally.²¹²

In sum, the CIR doctrine, as recognized in 1995 in *Connell*, is deeply rooted in Washington's common law.²¹³ Given that a 2013 search indicated that the CIR doctrine has been applied in over seventy appellate court decisions since 1995, one must suppose that, since that same time, this doctrine has been applied in well over one hundred trial court decisions.²¹⁴ If one were to relate the CIR doctrine back to the seminal case, *In re Marriage of Lindsey*, which was decided 1984, it would not be surprising to find hundreds of decisions where courts have applied this doctrine.²¹⁵ While courts have applied the CIR doctrine for quite some time, there are still a number of important, unanswered questions about this doctrine:

For example, does the . . . doctrine create a present inchoate property interest in the non-title-holding partner? Does a non-title-holding [committed intimate relationship] partner have management rights over property jointly-acquired? Does a tort claim against the non-title-holding partner create a third party creditor's interest in the property of the title-holding partner that was jointly-acquired?²¹⁶

Additionally, what happens if one of the partners to a CIR dies while the CIR is otherwise ongoing and stable?²¹⁷ At death, how will the equitable principles

209. *See id.*

210. *See id.*; *see also* *Connell v. Francisco*, 898 P.2d 831, 834–37 (Wash. 1995).

211. *See* ALI PRINCIPLES, *supra* note 203, §§ 4.09–.10, 6.05.

212. *See id.*; *see also* *Connell*, 898 P.2d at 835.

213. *See* *Connell*, 898 P.2d at 836; *see also* *Wallace*, *supra* note 132, at 253–54.

214. *See, e.g.*, *supra* notes 140–42 and accompanying text.

215. *See In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984).

216. *Wallace*, *supra* note 132, at 244.

217. As discussed earlier, in *Olver v. Fowler*, the partners to a CIR died simultaneously, and the court awarded each deceased partner half of all of the property that the couple accumulated during their CIR. *Olver v. Fowler*, 168 P.3d 348, 356 (2007); *see also supra* text accompanying notes 129–34. On appeal, the court clearly established that CIR principles apply at death, but it provided little clarity as to what happens at the first partner's death. *See Olver*, 168 P.3d at 356–57. A “vested” equitable property right in each partner to the CIR, including the estate of the first partner who dies, seems to be logically implicit in the holding of *Olver*, as it relates to simultaneous death. *See id.* Moreover, thus far, the principles announced by the court seem to support such a property right, but this has not been clearly resolved. *See id.*; *see also* *Wallace*, *supra* note 132, at 244. It remains possible that the court will adopt a “support” rationale and only allow an equitable share for a surviving partner. *See Wallace*, *supra* note 132, at 244. Moreover, the following

that support the CIR doctrine play out, as to the size of any share awarded?²¹⁸ But there is every reason to suppose that these questions will be answered through the further development of Washington's law.²¹⁹ While the CIR doctrine could be abolished by the Washington legislature overnight, there is no indication of any initiative seeking to do that.²²⁰

IV. DOES WASHINGTON'S COMMITTED INTIMATE RELATIONSHIP DOCTRINE HAVE ANYTHING TO OFFER TEXAS?

Notwithstanding the court's protestations to the contrary in *Connell*, Washington's CIR doctrine might seem like a reintroduction of common law marriage in Washington.²²¹ To a Texas reader, this might seem to be the case, especially because, in Texas, separate property is not divisible at divorce.²²² Consequently, it could be argued that, in Washington, partners to a CIR are in much the same posture as partners to an informal marriage in Texas.²²³ Appearances here, however, could be deceptive. Even if one were to concede that, in Washington, once a CIR is established, property is divisible in much the same way as property is divisible upon divorce in Texas, this only tells part of the story.²²⁴ There are many legal implications of marriage in both Washington and Texas that do not apply to CIRs.²²⁵ First, following a CIR, there is no right to support, as there is at divorce in both Texas and Washington.²²⁶ Second, in Texas, as in Washington, surviving spouses have intestate succession rights; surviving partners in a CIR do not.²²⁷ Third, in both Texas and Washington, surviving spouses already own half the community property; surviving partners

question still remains open: at death, does an equitable share always mean half, or is it subject to the application of various equitable factors? *See id.*

218. *See generally Olver*, 168 P.3d at 356–57 (awarding each deceased partner to the CIR half of all of the property acquired during their CIR but failing to discuss whether equity might have justified a different award had only one of the partners died).

219. *See supra* notes 216–18 and accompanying text; *see also* 21 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW WITH FORMS § 57.15 (1997).

220. *See Bills Passed in the Legislature*, WASH. ST. LEGISLATURE, LEGISLATIVE INFO. CTR., http://www.leg.wa.gov/LIC/Documents/Statistical%20Reports/2013_Bills_passed_the_Legislature.pdf (last updated Nov. 19, 2013).

221. *See discussion supra* Part III. Professor Goldberg seems to think so. *See* Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 528–29 (2007).

222. *See* LEOPOLD, *supra* note 5, § 20.11.

223. *See* Kathryn Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation of Abolition of Common-Law Marriage?*, 28 HOUS. L. REV. 1131, 1150 (1991).

224. *See id.* at 1161; *see also discussion supra* Parts II–III.

225. *See discussion supra* Parts II–III; *see also* Vaughn, *supra* note 223.

226. *See discussion supra* Parts II–III; *see also* Vaughn, *supra* note 223, at 1161–62.

227. *See discussion supra* Parts II–III. It clearly follows from *Peffley-Warner v. Bowen*, that surviving CIR partners are not entitled to social security survivors' benefits. *Peffley-Warner v. Bowen*, 778 P.2d 1022 (Wash. 1989). Indeed, this was the impetus for certification of the question answered in the case. *See id.* It seems also to follow that survivors of a CIR also would not be eligible for state homestead rights, because these turn on marriage or parentage. *See id.*

to a CIR, however, only have an equitable claim to a share of the decedent's property.²²⁸ Fourth, there are many non-property related rights and duties associated with marriage, which are not present in a CIR.²²⁹

It is also clear that the test for a CIR is quite different—less demanding and less formalistic—than the test for a common law marriage.²³⁰ To prove the existence of a CIR, a couple need not show an agreement to marry or hold itself out as married, as would be required for a Texas common law marriage.²³¹ Indeed, this is one of the appeals of the CIR doctrine because it accommodates the fact that many couples in this day and age have deliberately chosen not to marry, even while agreeing explicitly or implicitly to share acquisitions.²³² As noted earlier, whether all the *Connell* factors must be satisfied remains an open question; but even if they do, the *Connell* factors are more flexible and nuanced than those required in Texas (and other places) to establish a common-law marriage.²³³ Additionally, the CIR doctrine does not require an express agreement to share property.²³⁴ Although the factors that are dispositive (continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties) may go a long way towards establishing the foundation for an “implied” agreement, the court has not made that a prerequisite.²³⁵

This is not to say that the showing required to establish the existence of a CIR is necessarily straightforward or easily met. In *Pennington*, the court noted that, in evaluating whether a CIR exists, the five factors for consideration “are neither exclusive nor hypertechnical. Rather, these factors are meant to reach all relevant evidence helpful in establishing whether a [committed intimate] relationship exists.”²³⁶ But the court went on to reject the contention that a CIR had been established in either of the two cases before it—signaling that sloppy factual determinations and questionable CIRs would not be tolerated.²³⁷ Heightened judicial scrutiny may weed out frivolous cases, but it will also increase legal costs.²³⁸ Indeed, the factual determinations required by *Connell*'s five-factor test have induced at least one commentator to conclude that the test

228. In *Olver v. Fowler*, the court awarded half of the property accumulated during the CIR to each deceased partner, but the question remains open whether this would always be the equitable share at the death of the first partner. *Olver v. Fowler*, 168 P.3d 348, 356–57 (Wash. 2007). As noted earlier, it also remains open whether the estate of the first CIR partner to die will capture an equitable portion of the property onerously accumulated during the relationship, as would happen with regard to community property. *Id.*

229. See, e.g., *Peffley-Warner*, 778 P.2d at 1027.

230. TEX. FAM. CODE ANN. § 2.401 (West 2006); see also Goldberg, *supra* note 221.

231. TEX. FAM. CODE ANN. § 2.401; see also Goldberg, *supra* note 221.

232. John M. Yarwood, *Breaking Up Is Hard To Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1364 (2009).

233. Compare *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) with TEX. FAM. CODE ANN. § 2.401 (noting difference in level of flexibility).

234. See *infra* text accompanying notes 257–67.

235. See, e.g., *Connell*, 898 P.2d at 834.

236. *In re Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000).

237. *Id.* at 770–73.

238. See, e.g., *id.*

“creates a high degree of uncertainty for parties contemplating or currently cohabiting, for attorneys advising those parties, and for trial judges applying the concept.”²³⁹ The same commentator argues that the test may well be inequitable in result, especially for couples who do not meet the requirements.²⁴⁰

Nonetheless, it appears that there is room for the CIR doctrine in Texas. As in Washington, the traditional doctrines available to unmarried intimate partners in Texas—contract, partnership, trusts (express, constructive, and resulting), and co-tenancy—have not really shown themselves to be up to the task of doing justice for many modern intimate partners.²⁴¹ Reasonable people may take the position that partners who want to share property rights have the following options available to them: marrying (in states like Texas, if they are not gay); contracting in such a way as to clarify their intention and eliminate the need for the expenditure of scarce judicial resources in fighting over the nature of their relationship; or making enforceable gifts inter vivos, in trust, or by will.²⁴² Moreover, traditional property doctrines provide for the deliberate acquisition of joint property.²⁴³ Nevertheless, I am not satisfied that any of these responses is adequate to deal with the social and psychological reality of many CIRs today.

The core insight of the community property system, as I see it, is that the marital relationship carries with it the inherent right to share labor and earnings without regard to which partner is in the labor force at any particular time. Labor in support of the relationship comes in many different forms; only some types of labor carry with them compensation in the marketplace.²⁴⁴ There is an opportunity cost when one partner stays home to raise children, does the shopping, cooks meals, cleans the house, entertains guests, and adds value to property either through repairs or by improvements. The couple can purchase this kind of labor in the market, and the partner who does it could, instead, have a job to pay for this kind of service.²⁴⁵ But the community property system recognizes that doing this kind of uncompensated labor could contribute as much, if not more, to the economic and psychological health of the marital

239. Gavin M. Parr, Comment, *What is a “Meretricious Relationship”? An Analysis of Cohabitant Property Rights Under Connell v. Francisco*, 74 WASH. L. REV. 1243, 1264 (1999). Professor Goldberg has also advocated for a much more “streamlined version of the Washington criteria for determining whether that committed intimate relationship exists: (1) Intimate Relationship: The length and type of relationship [and] (2) Committed Relationship: The intertwining of financial affairs.” Goldberg, *supra* note 221, at 536.

240. Parr, *supra* note 239, at 1267–68.

241. See Bonauto et al., *supra* note 1, at 8; see also generally *In re Marriage of Pennington*, 14 P.3d 764 (noting limitations on doctrines available to intimate partners). Here, I concede that justice may be in the eye of the beholder.

242. See generally Judith T. Younger, *Lovers’ Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349 (2007) (describing imbalances between the options).

243. See *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995).

244. See *id.* at 833.

245. See Cynthia Lee Starns, *Mothers, Myths, and the Law of Divorce: One More Feminist Cast for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 204–05 (2006).

partnership than having a job outside the home and bringing home a wage that must then be expended for such services.²⁴⁶ The community property system also recognizes that there are frequently power imbalances in marital partnerships that, absent the economic-sharing principle embedded in community property rights, will lead to economic and psychological victimization of one partner by the other.²⁴⁷

Very little of the foregoing economic, social, and psychological reality vanishes just because a partners are not married in the eyes of the law.²⁴⁸ It is the nature of the CIR that gives rises to the need for recognition of this kind of shared economic enterprise, not the label “married.”²⁴⁹ Indeed, sometimes the power imbalances are more severe when the partners in a CIR are not married.²⁵⁰ One partner may lead the other on with promises of marriage or promises of formal property sharing and never fulfill such promises.²⁵¹ One can look at this reality and say that the victimized partner only has himself to blame, but life is more complicated than that.²⁵² Blame is a double-edged sword; for every victim who is to blame, there are people who have taken advantage of the victim who are also blameworthy.²⁵³ *In failing to protect the victims, we are necessarily protecting their oppressors.*

In this country, we are very attached to freedom of contract—perhaps nowhere more strongly than in the law of domestic relations.²⁵⁴ But the actual dynamics of CIRs seem to illustrate serious flaws in the contract theory.²⁵⁵ Many of these relationships do not involve an express agreement, other than an agreement to live together, and even there, partners often drift into cohabitation rather than expressly decide to do so.²⁵⁶ What does often happen is that promises are made and reliance on those promises is taken without any express agreement.²⁵⁷ Promissory estoppel, which is expanded upon in § 90 of the Second Restatement of Contracts, is an available theory of recovery when express promises are made.²⁵⁸ But again, the evidence required to show even an enforceable promise that induced reasonable reliance may be beyond the

246. See *Connell*, 898 P.2d at 834.

247. See *Younger*, *supra* note 242.

248. See *Goldberg*, *supra* note 221, at 514.

249. See *id.* at 515.

250. See *Younger*, *supra* note 242.

251. See *id.*

252. See generally *Goldberg*, *supra* note 221, at 493 (describing complications of cohabitant life).

253. See *id.*

254. See *Younger*, *supra* note 242, at 349–51.

255. See generally *Goldberg*, *supra* note 221, at 507 (entailing flaws in the particular contract marriage).

256. See *id.* at 517–18.

257. See *Younger*, *supra* note 242, at 349.

258. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

ability of many partners to a CIR.²⁵⁹ Reliance on conduct and relationships often happens, even absent express promises.²⁶⁰

It is this kind of social reality that the Washington CIR doctrine intends to address, and from what I can tell, the social reality is as much a part of the Texas landscape as it is in Washington.²⁶¹ Because of this landscape, I encourage the Texas courts to consider expanding their equitable jurisprudence to embrace the doctrine.²⁶²

Perhaps the social reality is even more severe in Texas than in Washington because of the state's position on same-sex relationships.²⁶³ As noted earlier, it remains possible for same-sex couples to enter into written property sharing agreements, to create trusts, and to execute wills.²⁶⁴ But what about situations—common in both heterosexual and homosexual relationships—where partners are not sophisticated enough to understand the need for express agreements and written documents? What if they are sophisticated enough to understand, but they are not powerful enough to insist on them? The CIR doctrine seems to be a good vehicle for addressing these social realities.²⁶⁵

V. CONCLUSION

Recognition of an equitable remedy such as the CIR doctrine in Texas will not be easy.²⁶⁶ Indeed, in the context of same-sex relationships, it may be impossible—a gay partner tried it in *Ross v. Goldstein* but was singularly unsuccessful.²⁶⁷ The court stated the following:

In his final request for relief, Ross urges us to adopt the “marriage-like relationship” doctrine. Arguing it is an equitable remedy not against the public policy of the State, Ross contends this doctrine will aid the courts in addressing the growing reality of same-sex relationships. We disagree with Ross's position. Texas has determined that same-sex couples must address their particular desires through other legal vehicles such as contracts or testamentary transfers.

Ross does not argue that he is constitutionally entitled to the remedy he seeks. He does argue, however, that his proposed equitable remedy is proper to address a reality of life for same-sex couples, and that it is not against this

259. See TEX. FAM. CODE ANN. § 4.001 (West 2006); see also *Zaremba v. Cliburn*, 949 S.W.2d 822, 825 (Tex. App.—Fort Worth 1997, writ denied) (showing difficulties of proving reliance in a conjugal setting).

260. See Younger, *supra* note 242, at 349–51.

261. See, e.g., *Zaremba*, 949 S.W.2d at 825.

262. See discussion *supra* Part II.

263. See TEX. CONST. art. I, § 32 (stating that marriage is only between one man and one woman).

264. See, e.g., *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (affirming a property sharing agreement); cf. *Zaremba*, 949 S.W.2d at 827 (implying that if the contract were written it would have been valid).

265. See Goldberg, *supra* note 221, at 537.

266. See, e.g., *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

267. See *id.*

State's public policy. There are two democratically approved statements of Texas's public policy to guide our course on this question. The first is Texas Family Code *section 6.204*, which states that it is contrary to the State's public policy to recognize or give effect to a same-sex marriage or civil union. The second, and weightier, is Article 1, section 32 of the Texas Constitution, which states that marriage is between one man and one woman only and *no state or political subdivision of this State may create or recognize any legal status identical or similar to marriage*. Our State's public policy is unambiguous, clear, and controlling on the question of creating a new equitable remedy akin to marriage: we may not create such a remedy.²⁶⁸

The Texas statute is easier to deal with than the Texas Constitution. The CIR doctrine is not the same as the civil union doctrine, as it has been statutorily adopted in other states.²⁶⁹ Other states have enacted domestic registered partnership statutes, rather than civil union statutes, but I mean to make no distinction between these.²⁷⁰ Indeed, no state has adopted a civil union or domestic registered partnership doctrine judicially; legislatures create the status, and to enjoy the status, couples simply need to register their relationship as either a civil union or a domestic partnership.²⁷¹ Arguably, that is all the Texas statute intends to preclude, not the equitable jurisprudence of the court.²⁷²

The Texas Constitution, however, goes even further and outlaws the "creat[ion] or recogni[tion] of any legal status identical or similar to marriage."²⁷³ To argue that the CIR doctrine does not recognize a status similar to marriage, one would need to make a two-prong argument.²⁷⁴ First, one would argue that the only thing the Texas Constitution intends to preclude is the kind of legislative status represented by civil union or domestic partnership statutes—that is, the very kind of formal status change addressed in the statute—using the statute as evidence of the intent of the constitutional amendment.²⁷⁵ Second, one would argue that the CIR doctrine is a judicially crafted, equitable remedy and not a recognition of a legal status.²⁷⁶ While the *Ross* court clearly rejected this kind of argument, the Texas Supreme Court has

268. *Id.* (emphasis added) (citing TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 6.204 (West 2006)).

"This state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage."

See id. (quoting H.R.J. Res. 6, 79th Leg., Reg. Sess. (Tex. 2005)).

269. *See infra* notes 270–71 and accompanying text.

270. *See* discussion *supra* Part III.

271. *See, e.g.*, TEX. FAM. CODE ANN. § 6.204.

272. *See id.*

273. TEX. CONST. art. I, § 32(b).

274. *See infra* notes 275–76 and accompanying text.

275. *See* TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 6.204.

276. *See* discussion *supra* Part IV.

not yet resolved this issue.²⁷⁷ Success of one or both of these arguments does not seem impossible.

Regardless of whether the CIR doctrine could be made applicable to same-sex relationships, it could still be applied to a heterosexual relationship; in Texas, such application would be progress.²⁷⁸ In particular, it would provide a tool for doing justice in those relationships that do not meet the strict requirements for common-law marriage or for other intentional property sharing arrangements, but which nonetheless cry out for some kind of shared property rights.²⁷⁹ I think that this might be quite welcome in Texas.

277. *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

278. *See* discussion *supra* Parts III–IV.

279. *See* discussion *supra* Part IV.