A NEW APPROACH FOR GAY AND LESBIAN DOMESTIC PARTNERS: LEGAL ACCEPTANCE THROUGH RELATIONAL PROPERTY THEORY

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In the past twenty years, the number of couples living together on a long-term basis without marrying has dramatically increased.[1] With the increase in domestic partnerships[2] has come new litigation in which one scorned domestic partner sues the other, claiming a right to property procured during the relationship. Often, one partner brought more present or future financial resources to the relationship than the other. The wealthier partner may have placed some or all of the property acquired during the relationship in her name only for a variety of seemingly innocuous reasons (e.g., business expertise, tax benefits, facilitation of financial management); nonetheless, the result is that one partner has title to the assets while the other partner has nothing. In fact, such a situation is similar to marriage, where one spouse typically enters the union with more assets, business expertise, or earning potential than the other. As this Note argues, the key difference between spouses and domestic partners, however, is that marital dissolution statutes protect spouses. Domestic partners must rely on scattered judicial decisions which often do not agree on the proper theory a domestic partner should advance in order to state a claim.

The problems a domestic partner faces are compounded when the plaintiff making the property claim is gay or lesbian. Homosexuals are not a protected class, which means that they can be discriminated against as long as there is a rational basis for the statutory distinction and a legitimate government interest.[3] In contrast to most opposite sex domestic partners, gays and lesbians do not have the option to marry and thus cannot place themselves under the purview of marital dissolution statutes. Society's scorn and legal disabilities combine to produce a hostile atmosphere from which the gay community needs protection. Arguably, the best protection is acceptance, but acceptance will not occur until the law extends the same level of recognition to gay and lesbian relationships as it does to opposite sex relationships.

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1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES: 1993 (113th ed.) 54, Table No. 62 (increasing from 523,000 in 1970 to 3,308,000 in 1992). *See also* Marvin v. Marvin, 557 P.2d 106, 109 (Cal. 1976) (discussing the increase from 1950 to 1970).

2. Domestic partnership refers to either opposite or same sex couples who cohabit but are not married.

3. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

This Note argues that gay and lesbian domestic partners deserve the same level of protection in property distribution after dissolution of a relationship that opposite sex partners receive. This is not to say that gays and lesbians living together should fall under marital distribution statutes, or that the privilege to marry should necessarily be extended to gays and lesbians. Rather, this Note argues that courts should allow gays and lesbians to advance a theory of relational property when making a property claim against a former domestic partner. By allowing a relational property claim, courts would acknowledge that gays and lesbians, like heterosexuals, have a legitimate interest in property acquired during a relationship.

I. MARITAL DISTRIBUTION STATUTES

At common law, most states did not permit courts to distribute property between spouses upon divorce.[4] Instead, courts required the husband to continue to financially support his wife by paying alimony. A court's award of alimony did not alter title to property; a piece of property in the husband's name remained his property, even if the wife had contributed funds toward its acquisition.[5] Even at common law, however, some states did not follow the "title" rule. Instead, these states derived their law from French and Spanish civil law concepts of community property.[6]

The community property system recognizes marriage as an economic partnership of equals.[7] Since the parties are equal, property acquired during the marriage (community property) should be distributed equally.[8] However, not all community property jurisdictions distribute community property equally. About half of the jurisdictions require courts to distribute property equitably.[9]

The policy of community property is equality:

> The husband and wife are accorded the status of equals, because of the actual contribution each makes to the marriage—because of their status as partners in a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of marriage.[10]

Whatever is acquired by the joint efforts of the husband and wife is their common property because the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity.[11]

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4. 1 ANN OLDFATHER ET. AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY §3.02 (1984).
5. *Id.*
6. *Id.*
7. *Id.* §3.02[2].
8. *Id.*
9. *Id.*
10. WILLIAM A. REPPY, JR. & WILLIAM Q. DEFUNIAK, COMMUNITY PROPERTY IN THE U.S. 13 (1975).
11. *Id.* at 4.

Today, almost every state divides marital property upon divorce according to either the principles of community property or equitable distribution.[12] Equitable distribution is based on principles similar to those underlying community property,[13] and recognizes that marriage is an economic partnership of equals and not the union of a male dominant provider and a dependant female.[14]

Equitable distribution assumes that assets acquired by the parties while the partnership lasted were obtained by the joint effort of both parties, and thus should be distributed equitably upon dissolution.[15] Assets acquired before marriage, or those acquired without any effort by either party (e.g., a gift or inheritance received by one party only) do not represent the fruit of their joint efforts.[16] Most states exclude these assets from equitable distribution and label them the separate property of the recipient spouse.[17]

Today, state statutes govern the distribution of property upon divorce. For the purposes of this discussion, it does not matter whether a state adopts equitable distribution or community property, because both systems are based on the same principles. Statutory schemes for the distribution of marital property recognize that marriage is a partnership of two individuals who each contribute to the partnership's prosperity; assets acquired by the effort of either spouse during the marriage are considered marital property. The relationship—the marriage—essentially creates an entirely new category of property: marital property. By grouping particular assets and placing a label on them, legislators formally recognize that traditional notions of title ownership do not apply when distributing property among individuals in a marital relationship. Instead, legislators use the relationship itself to govern the distribution of property. It is the relationship that leads legislators to ignore conventional theories of property, and instead, create a new concept which I shall term "relational property."[18] This Note argues that relational property is an appropriate theory to apply to property claims arising from the dissolution of gay and lesbian domestic partnerships.

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12. OLDFATHER, *supra* note 4, §3.02[1]-[3].

13. A community property jurisdiction that distributes property equitably should not be confused with an equitable distribution jurisdiction. Community property jurisdictions govern the disposition of community property throughout the marriage, while equitable distribution jurisdictions do not distinguish separate property from marital property until the parties seek dissolution. Thus, a spouse in a community property jurisdiction that distributes property equitably cannot will more than half her share of the community property, even if more than half the community property is titled in her name. *See* OLDFATHER ET AL., *supra* note 4, §20.05[2]. Equitable distribution jurisdictions have no such restrictions. *Id.*

14. *Id.* §3.02[1].

15. *Id.*

16. *Id.*

17. *Id.*

18. This term has been used by Professor Laura Underkuffler, of Duke University School of Law, to describe the kinds of interests that courts have recognized in cases which involve relationships between people—interests that do not appear to be otherwise captured by conventional theories such as contract, trust, unjust enrichment, or quantum meruit.

II. RELATIONAL PROPERTY THEORY

Relational property describes the situation in which the existence of a relationship between people creates a new and distinct category of property. Each party to the relationship has an ownership interest in any property placed in this new category; the extent of ownership is determined by the nature of the relationship. Unlike a court awarding property in a contract or fraud case, a court invoking relational property does not take property labeled in Jane's name and give it to John. Rather, the court takes property titled in the name of one person and recasts the property as an asset of the relationship, in which both parties have an interest. Marital distribution statutes formally recognize the concept of relational property by stating that property acquired by one spouse, and titled in the name of that spouse, is really a marital asset in which both parties have an interest.

Marital distribution statutes are not commonly regarded as legally recognizing a new form of property interest. The statutes are simply seen as a state legislature's answer to the tricky ordeal of doling out the goods of defunct families. The mechanisms under which marital distribution statutes operate, however, support the argument that the statutes represent legislative recognition of relational property.[19] As previously stated, current distribution schemes are based on the idea that the husband and wife are partners in a marital partnership, and both are equally devoting their lives to furthering the material and spiritual success of the marriage.[20] It is the relationship that fuels the desire to increase the material wealth of the marital community. The laws assume that during the marriage, each spouse is working for the community and thus any profits are community profits. However, assets acquired during the marriage that did not require the effort of either spouse are not considered marital property because there was no effort expended on behalf of the relationship. Likewise, assets acquired before the marriage are also not labeled marital property. Since no legally recognized community existed at the time the assets were acquired, the effort expended to produce those assets could not have been effort on behalf of the community. Thus, marital distribution statutes will not label property

19. One could argue that statutory marital disposition schemes do not recognize relational property, but merely protect the interests of the weaker spouse. In other words, by permitting one spouse to claim an interest in property acquired during the marriage, the legislature shields a homemaker spouse from economic disaster upon divorce, while simultaneously protecting the state's interest in keeping citizens off the welfare rolls. This argument, however, fails to explain why certain property is excluded from distribution under marital dissolution statutes. If protection is the goal of these statutes, why not include gifts or inheritance acquired after the marriage? Further, many distribution schemes do not protect spouses in marriages of short duration or marriages between retired individuals because in both circumstances little property is acquired during the marriage. Thus, there are few assets available for distribution to the homemaker spouse. Certainly, protecting a spouse from economic disaster is a consideration for legislatures when adopting a distribution scheme. However, the protection theory cannot offer an explanation nearly as coherent as relational property theory.

20. REPPY, *supra* note 10, at 13.

marital property unless there was a relationship at the time the property was acquired to create the property interest.

Courts have also used the concept of relational property when faced with a novel claim in the "outer-bounds" of recognized property. One common example is when one spouse claims an interest in the advanced degree of the other soon to be ex-spouse. Typically, it is the wife who works to put her husband through a graduate program, such as medical school or law school. Either shortly before or shortly after graduation, the couple separates. The student spouse leaves the relationship with his advanced degree and increased earning potential, while the working spouse leaves with little money or property, having spent her earnings and energy supporting the family. The pivotal issue in these cases is whether the working spouse can claim a property interest in the advanced degree of the student spouse.

Although several courts have held that an advanced degree is not property,[21] these same courts have used their equity powers to compensate the working spouse for her educational contributions.[22] Several courts have reasoned that, in some circumstances, an advanced degree is a marital asset, acquired by the joint sacrifice and effort of both spouses:[23]

> In the instant case, these assets (medical degree and license) were produced by the combined efforts of the husband, by his application of his abilities and diligence, and by the contributions of the wife as homemaker and mother as well as [eighty percent] of the income during the period these assets were acquired.[24]

Other courts have been even more explicit in defining when a student spouse's professional degree will be characterized as a marital asset. Specifically, the court in *Postema v. Postema*[25] held that an advanced degree would be considered a marital asset, subject to distribution, if the degree was the end product of a concerted family effort.[26] The court explained:

> [I]t is not the existence of an advanced degree itself that gives rise to an equitable claim for compensation, but rather the fact of the degree being the end product of the mutual sacrifice, effort, and contribution of both parties

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21. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 608-09 (2d ed. 1988). *But see* O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985) (holding that a license to practice medicine is property subject to equitable distribution).

22. Lovett v. Lovett, 688 S.W.2d 329, 333 (Ky. 1985) (holding that a professional degree is a relevant factor to be considered in determining the standard of living established during the marriage); De La Rosa v. De La Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (awarding wife money for contributions made to husband's education); Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982) (holding that wife should receive reimbursement alimony to cover all financial contributions towards her husband's education).

23. Lovett, 688 S.W.2d at 332; Postema v. Postema, 471 N.W.2d 912, 915 (Mich. Ct. App. 1991).

24. Lovett, 688 S.W.2d at 332.

25. 471 N.W.2d 912 (Mich. Ct. App. 1991).

26. *Id.* at 918.

> as part of a larger, long-range plan intended to benefit the family as a whole.[27]

The import of the court's language in *Lovett* and *Postema* is that the conduct of the parties in a marital relationship determines whether an advanced degree is characterized as the educational achievement of the student spouse, or as the product of both spouses. Thus, it is the relationship between the individuals that has the power to transform a graduate school diploma into a marital asset.

III. CURRENT APPROACH TO DOMESTIC PARTNER PROPERTY CLAIMS

Legislatures and courts have applied a relational based property approach to the problems of married couples, but have not taken such an enlightened view when faced with the problems of domestic partners. Although many courts permit domestic partners to make property claims against former partners, in order to succeed, claimants must prove the existence of an express or implied contract. Thus, courts frame relationships between unmarried cohabitants not as "all for one and one for all," but instead as a barter exchange system where services are rendered only because money is promised in return.

Marvin v. Marvin[28] is the seminal case in the area of property claims by a domestic partner. *Marvin* established that a domestic partner may claim a property interest in assets held by the other partner provided the claimant can show first, that an express or implied agreement existed, and second, that the rendering of sexual services did not form an inseparable part of their agreement.[29] Michelle, the plaintiff in *Marvin*, claimed she had an oral agreement with her partner, actor Lee Marvin, that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined."[30] They further agreed that Michelle would render her services as companion, homemaker, housekeeper, and cook to defendant. In return, Lee agreed to financially support Michelle for the rest of her life.[31]

These two portions of Michelle and Lee's oral agreement reflect crucially different approaches to property distribution in a relationship. The former portion, discussing joint effort and sharing, combines contract theory with a relational based property approach. The couple agrees to individually strive to accumulate property that will be shared by the whole. In other words, assets acquired by either party during the relationship become the property of both parties. The latter portion of the agreement, however, embodies a traditional contractual approach where one party promises services and the other party promises money. The Supreme Court of

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27. *Id.* at 915.
28. 557 P.2d 106 (Cal. 1976).
29. *See id.* at 114.
30. *Id.* at 110.
31. *Id.*

California had both claims before it and could have adopted either approach. The court chose the more traditional contractual approach and stressed that domestic partners may make express or implied contracts for the distribution of property upon dissolution.[32]

Marvin also established that a plaintiff may recover in quantum meruit for the reasonable value of household services rendered.[33] Quantum meruit is arguably the theory farthest removed from relational property; in quantum meruit it is not the relationship which allows the plaintiff to make a claim, rather it is the services rendered. When a plaintiff makes a quantum meruit claim, courts treat the plaintiff no differently than any other general contractor. For example, a plaintiff alleges that she rendered household services worth $5,000 and expected to be paid, while the defendant accepted the services expecting to pay for them. The court may find that by supporting the plaintiff, the defendant has already paid her $3,000, and, therefore, owes the plaintiff $2,000. The point is that the existence of the domestic partnership is inconsequential to the application of quantum meruit.

Although *Marvin* involved a heterosexual couple, the principle has been extended to situations involving gay and lesbian couples, albeit inconsistently.[34] While the court in *Marvin* permitted Michelle's claim, which included services clearly intertwined with cohabitation, such as homemaking and cooking,[35] lower courts have rejected claims by gays and lesbians where the services rendered were not separate from cohabitation.[36] In *Jones v. Daly*,[37] the parties had an agreement whereby Daly gave the plaintiff a monthly allowance and the plaintiff rendered services as a lover, companion, homemaker, housekeeper, and cook.[38] The court attached itself to the term "lover" and refused the plaintiff's claim, reasoning that sexual services to Daly comprised an inseparable part of the consideration for the cohabitation agreement.[39] Though the court in *Jones* mentions *Marvin*, the court does not distinguish *Marvin* because it cannot. Michelle promised to be Lee's companion, homemaker, housekeeper, and cook. Jones promised to be Daly's lover, companion, homemaker, traveling companion, housekeeper, and cook. Michelle gave up her modeling career; Jones gave up his. Both were promised financial support for the rest of their lives. The only significant difference between the two laundry lists of promises is the word "lover." Perhaps the judge in *Jones* could not grasp the idea that a man would render household services for another man and expect monetary support in

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32. *See id.* at 122.
33. *Id.* at 122-123.
34. Kristin Bullock, Comment, *Applying* Marvin v. Marvin *To Same Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029, 1045 (1992).
35. 557 P.2d at 110.
36. *See* Jones v. Daly, 122 Cal. App. 3d 500, 508 (1981).
37. *Id.*
38. *Id.* at 505.
39. *Id.* at 508.

return. Compare *Whorton v. Dillingham*,[40] where the court did allow a gay cohabitant to make a claim against his former partner even though the plaintiff promised to be the defendant's lover. In *Whorton*, however, the plaintiff also promised to be the defendant's bodyguard, chauffeur, social and business secretary, partner and counselor in real estate investments, and constant companion—services unrelated to the cohabitation.[41]

The real problem with the *Jones* decision is not that the court fished out the word "lover" from the cohabitation agreement. The problem is that domestic partnerships are framed as economic barter systems. The message that *Marvin*, *Jones*, and *Whorton* send to gay and lesbian cohabitants is that if you are the financially dependent partner and you anticipate filing a property claim against your partner in the future, you need to prepare a laundry list of services that correspond with contemporary gender roles.

Following *Marvin*, litigants and courts latched on to traditional contractual arrangements in which the plaintiff argues, "I rendered services in return for a promised monetary reward."[42] One reason litigants have adopted this approach may be the portion of the *Marvin* decision which held that a plaintiff can recover based on a quantum meruit theory. It is easier to establish that services were rendered for which one expected compensation and was not compensated, than to argue the existence of a contract. A quantum meruit claim is easier to prove, but assertion of such a theory inherently denigrates the relationship; the plaintiff necessarily must argue that the relationship was no more than a barter exchange system. Thus love and sharing are not the bases of a gay or lesbian domestic partnership, instead one partner renders household services only in return for monetary gratification.

Not all gay and lesbian plaintiffs with property claims against former partners have resorted to the barter exchange argument seen in *Jones* and *Whorton*. Some plaintiffs have argued that the partners agreed to share all property accumulated during their relationship. Typically, these are plaintiffs who contributed money toward a large asset, such as a house.[43] The argument is essentially that a contract existed, and the contract itself relies on the character of the relationship. In other words, the contract and resulting status of the relevant property is based on notions of relational property. The parties agree at the outset that the relationship creates a new form of property that is owned jointly; the parties agree to share the joint property equally.[44] This type of contractual agreement parallels marital

40. 202 Cal. App. 3d 447 (Ct. App. 1988).

41. *Id.* at 450.

42. *See supra* note 36 and accompanying text; Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

43. *See* Ireland v. Flanagan, 627 P.2d 496 (Or. App. 1981) (plaintiff contributed $2,000 towards the $7,000 down payment on a house); Small v. Harper, 638 S.W.2d 24 (Tex. Ct. App. 1982) (plaintiff alleged that she and her partner shared the transaction costs of the residence they purchased).

44. This argument parallels Michelle's first argument in *Marvin*. *See supra* text accompanying note 30.

dissolution statutes in that both require former partners to share property accumulated during the relationship, regardless of who holds legal title.

In *Ireland v. Flanagan*,[45] the plaintiff asserted that she and her lesbian lover had an express oral agreement to pool all their assets for their joint benefit. The parties testified that they maintained a joint checking account, joint savings account, a safety deposit box, joint loans, and joint credit cards.[46] The court found that the parties did intend to pool their resources for their mutual benefit and therefore also intended joint ownership of the house purchased during their relationship, even though the house was titled in the defendant's name only.[47]

One could argue that the *Ireland* court's approach truly benefits gay and lesbian domestic partners. The plaintiff's property claim was based on the theory that the couple agreed to work together for the community and to share equally in the property acquired during their relationship. Thus, the court permitted a lesbian domestic partner to advance a property claim based on a cross between contract and relational property theory. In addition, the court's remedy, awarding joint ownership of the house, is strikingly similar to the remedy that would occur under a marital distribution statute. The only difference here is that a plaintiff must show that the couple had previously contracted to conduct themselves in accordance with the relational property notions that underlie marital distribution statutes. *Ireland* is problematic because it tells gay and lesbian cohabitants that they must explicitly contract in advance if they want to be protected—mere commitment to the relationship will not be sufficient.

By requiring parties to contract in advance, courts ignore the simple realities of love and relationships. First, couples in love generally do not exercise the best judgment and are unlikely to exercise clear foresight. Second, even couples thinking with clear heads will not want to consider the possibility of breaking up. In fact, the mere act of contracting for possible dissolution could cause otherwise happy couples to break up during contract negotiations. Third, and most important, the party who needs the law's protection is most likely the party without the knowledge, resources, or power to obtain the requisite contractual agreement. The domestic partner who files a property claim against his or her ex-partner is uniformly the partner who came to the relationship with substantially fewer financial resources and presumably less business expertise. *Ireland* requires the less sophisticated and financially dependent partner to get an agreement from the individual in command of the purse strings. Ultimately, *Ireland* is not helpful for gay and lesbian domestic partners because it erects a practically insurmountable barrier in front of the party who most needs the court's protection.

Contrast the above scenario with marital distribution statutes—as previously explained, equitable distribution and community property protect economically dependent spouses. The party at financial risk is thus the

45. 627 P.2d 496, 497 (Or. App. 1981).
46. *Id.* at 498.
47. *Id.* at 500.

individual who brings more money to the marriage. For example, suppose a wealthy woman with two children intends to marry a middle class man. The woman wants her children to inherit her fortune. Here, it is the wealthy woman who is most at risk because, under marital dissolution statutes, her new husband may gain rights to a substantial amount of her property. Thus, if she wants to protect her assets, she must get a prenuptial agreement from her fiancée. The marital dissolution statutes make sense because they protect dependent spouses automatically; the more economically stable individual is placed at risk, but this individual is also the one more likely to have the knowledge and resources to protect herself.

Ireland's requirement that parties contract in advance also does not seem logical when contrasted with the advanced degree cases. The lesbian couple in *Ireland* purchased a home using both of their assets, and titled the home in the name of one partner.[48] In the advanced degree cases, the working spouse uses her assets to support both parties, while the student spouse obtains a professional degree. In both cases, you have individuals who used their financial resources to help obtain a material benefit for the relationship. And, in both cases, the plaintiff claims that this material benefit, titled in the name of her ex-spouse/partner, is really a common asset. Courts in the advanced degree cases do not require a working spouse to establish that she had a contract with the student spouse in which she promised to support him if he promised to share the fruits of his degree. Instead, courts look at the conduct of the spouses, infer that both parties were working to benefit the family, and as a result, label the advanced degree a marital asset. The situation in *Ireland* is no different than the advanced degree cases, and is arguably more compelling. An advanced degree, at best, lies at the "outer-bounds" of property. It cannot be sold or transferred, and it terminates upon the death of the holder.[49] Houses, on the other hand, fit squarely within the basic principles of property, and it is common practice for more than one person to have a property interest in a home, especially among couples. A finding that someone who supports a student's education has a property interest in the student's degree represents a substantially more drastic alteration of conventional property notions than does a recognition that two people intended joint ownership of a house. It does not make sense for a court to be so wary of a joint ownership claim in the context of a same sex relationship that it requires evidence of an affirmative contract, yet in the context of a marital relationship be willing to grant a plaintiff an interest in something as intangible as a diploma, based solely upon the behavior of the parties in the relationship.

IV. A NEW APPROACH FOR GAY AND LESBIAN DOMESTIC PARTNERS

As discussed above, a few courts have been willing to entertain property claims when one partner alleges that the couple contracted to share the property accumulated during the relationship in accordance with

48. *Id.* at 498.
49. Mahoney, 453 A.2d at 531.

relational property theory. Even courts allowing such claims, however, have not bestowed upon gay and lesbian relationships the same level of legal acceptance granted to heterosexual couples. In other words, a court does not permit the property claim because it sees the gay or lesbian domestic partnership as the type of relationship which creates property rights. Instead, courts merely acknowledge the existence of the relationship and allow a property claim only where an affirmative contract existed to govern the disposition of property acquired during the relationship. If courts truly acknowledged that a gay or lesbian relationship itself created property rights, then courts would not force plaintiffs to prove the existence of such a contract. Until the law recognizes that gay and lesbian relationships can create relational property, same sex couples will not posses the same legal interest in their relationships as opposite sex couples; gays and lesbians will continue to be barred from bringing any claim based on participation in a relationship. One example is the fact that gay and lesbian domestic partners are barred from bringing a loss of consortium claim.

A loss of consortium claim usually arises when one spouse is injured by a tortfeasor, and the healthy spouse sues the tortfeasor for the loss of "love, companionship, affection, society, sexual relations, solace, and more."[50] The claim originated at common law, in which the law regarded a wife as the chattel of her husband. An individual who injured a married woman essentially injured the property of the husband. Thus, the husband could sue the tortfeasor, claiming an injury to property. Later, courts extended the claim so that a wife could sue for loss of consortium if a tortfeasor injured her husband.[51] By extending the loss of consortium claim to women, courts abandoned the notion that the suit was based on a pure property theory. The modern view is that consortium is a package of relational interests.[52]

Loss of consortium is a true relational property claim; the marital relationship allows a spouse to sue someone who interferes with particular assets of the marriage: love, companionship, emotional support, and sexual relations. As opposed to common law loss of consortium, in the modern action the property interfered with is not the spouse, instead it is the relationship and the attributes that flow from the relationship. Generally, a plaintiff cannot state a claim for loss of consortium unless the plaintiff was married to the injured party at the time of the injury.[53] There has been only one case, *Butcher v. Superior Court of Orange County*,[54] in which a court specifically held that a domestic partner could sue for loss of consortium, and that case was later overturned by the California Supreme Court.[55]

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50. Briggs v. Butterfield Memorial Hosp., 104 A.D.2d 626 (N.Y. App. Div. 1984).

51. *See* Butcher v. Superior Court of Orange County, 139 Cal. App. 3d 58, 60 (1983), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988).

52. Elden, 758 P.2d at 592 (Broussard, J., dissenting).

53. CLARK, *supra* note 21, at 393. *See also* Elden, 758 P.2d at 589.

54. 139 Cal. App. 3d at 70.

55. Elden, 758 P.2d at 589.

In *Butcher*, Cindy Forte, the plaintiff, lived with the injured Paul Forte for eleven and a half years.[56] The couple never legally married, but they considered themselves married and referred to each other as husband and wife.[57] They had two children together, filed joint tax returns, and maintained joint bank accounts.[58] The California Court of Appeals held that a cohabitant may state a claim for loss of consortium if the plaintiff can show that the relationship is both stable and significant.[59] A plaintiff can demonstrate stability and significance with the following factors: the duration of the relationship, a mutual contract, the degree of economic cooperation and entanglement, exclusivity of sexual relations, and whether there are other elements of a family relationship.[60] The key here is establishing that the parties' relationship is parallel to a marital relationship.[61]

The *Butcher* decision percolated in the California lower courts for five years until the California Supreme Court overruled it in *Elden v. Sheldon*.[62] In *Elden*, the court explicitly refused to allow loss of consortium to domestic partners. The reasons cited by the court included: desire for a narrowly circumscribed cause of action, concern over the number of plaintiffs who could sue for a loved one, state interest in promoting the responsibility of marriage, and the difficulty in assessing a cohabitant relationship to determine if it was the equivalent of a marriage.[63] The court specifically stated that its decision was not based on a value judgment regarding the morality of unmarried cohabitants.[64]

The dissent argued that the majority was wrong not to extend loss of consortium to cohabitants. The dissent stressed that a valid legal marriage should not be a prerequisite because loss of consortium is no longer based on a husband's proprietary interest in his wife.[65] Consortium is a package of relational interests including love, companionship, emotional support, and sexual relations.[66] "The marital status of the plaintiff has no more bearing on his or her standing to claim injury to these interests than does age or socioeconomic status."[67] Thus, even though a bright line rule such as no marriage—no recovery is clear and convenient, it fails because it is arbitrary and unrelated to the relational basis of loss of consortium.[68]

The *Elden* majority stated that their decision to restrict loss of consortium to spouses did not reflect a value judgment regarding the morality of domestic partnerships.[69] However, the very fact that the court

56. 139 Cal. App. 3d at 60.
57. *Id.*
58. *Id.*
59. *Id.* at 71.
60. *Id.*
61. *Id.*
62. 758 P.2d 582 (Cal. 1988).
63. *Id.* at 586-588.
64. *Id.* at 587.
65. *Id.* at 594.
66. *Id.*
67. *Id.*
68. *See id.* at 588.
69. *Id.*

refused to acknowledge that unmarried individuals can possess the same level of interest in their relationships as married couples is evidence of a biased value judgment against domestic partnerships. The *Elden* decision tells heterosexual domestic partners that they have no interest in love and companionship unless they get married. And what is even worse is the message the *Elden* decision sends to gays and lesbians. Since same sex marriage is not legal, gays and lesbians can never have an interest in the love and companionship of a partner, regardless of the circumstances surrounding the relationship. Rationales such as judicial economy and the desire to limit the scope of a claim cannot support a decision that takes one class of people and wholly invalidates their interest in a significant relationship. Courts should, as in *Butcher*, look at the relationship, and how the parties conduct themselves, both socially and financially. The claim arises solely from the relationship, so let each relationship dictate the result.

Butcher's approach to loss of consortium claims applies equally well to property claims by former domestic partners. If a plaintiff wants to claim that property titled in the name of her ex-partner really belongs to the community, then let the plaintiff prove that their relationship was the type of relationship that created joint property. Essentially, the plaintiff would argue that the domestic partnership was a significant-established[70] relationship that paralleled a marriage.[71] Thus, a plaintiff alleging that the partnership was a significant-established relationship would point to first, the duration of the relationship; second, the degree of economic cooperation and entanglement; and third, whether the couple held themselves out as a family-like entity. A plaintiff who met the threshold burden of showing a significant-established relationship could then argue that property acquired during the relationship belonged to both partners. Of course, a plaintiff would still be free to argue that the parties contracted to share property or that they agreed one party would render services in return for monetary compensation.

Those who argue that an examination of this sort is too difficult or too time consuming for courts ignore the reality of divorce litigation. Even though marital dissolution statutes outline a general distribution scheme for marital property, courts still must examine the intricacies of the marital

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70. The *Butcher* court used the phrase "stable and significant", but since a plaintiff here would be arguing about a defunct relationship, the word "stable" is probably not the most appropriate terminology. Instead a plaintiff could argue that the dissolved domestic partnership was a significant-established relationship. Whatever terminology courts and litigants adopt, the factors listed by *Butcher* to identify a stable and significant relationship would remain. *Butcher*, 139 Cal. App. 3d at 70.

71. This is not to say that marital conduct is a prerequisite for the creation of relational property. A couple may not act like a typical married couple, and yet, each person may build expectations based on the relationship that merits the protection afforded by relational property theory. The reality, however, is that courts dislike expanding the scope of protected property interests for fear that litigants will stampede the courthouse. Marriage provides the courts with an excellent example of a relationship that creates the type of reliance courts strive to protect. Further, courts are exceedingly familiar with the concept of marriage and might be more likely to entertain relational property claims if an integral part of the legal analysis involves a concept with which courts are well acquainted.

relationship from the first day to D-day. It is simply impossible to divide property equitably without knowing who brought what to the marriage; family law is messy and courts engage in intensely factual examinations all the time. In fact, many of these factual examinations are considerably more time consuming than deciding whether a relationship meets the significant-established threshold. To deny gay and lesbian relationships acceptance on the basis that courts will be required to make difficult decisions is no different than denying all men custody of their children because custody decisions are too factually intensive for judges.