

INTRODUCTION TO COHABITATION ISSUE

*J. Thomas Oldham**

INTRODUCTION

At the beginning of the twentieth century, it was possible for a heterosexual couple to establish a “common law marriage” in many states of the United States, if they lived together and held themselves out to the community as married.¹ Common law spouses had the same rights as couples who had ceremonially married.² During the twentieth century, a large number of states abolished common law marriage.³ Now only a small number of states continue to recognize such marriages.⁴

In contrast, if a couple lived together and proclaimed to the community that they were not married, in the United States, they historically had no rights when the relationship ended.⁵ This potentially changed in the U.S. when the California Supreme Court announced the *Marvin* decision in 1976, which endorsed various economic claims that could be made when an unmarried cohabitation relationship ended.⁶ Among other things, the

*Professor Oldham joined the University of Houston Law Center faculty in 1980. He has taught family law and Texas marital property rights for more than 30 years and authored three textbooks and numerous articles in those fields. His work has been cited in more than 50 appellate case opinions, including the U.S. Supreme Court and the supreme courts of 14 states.

1. See HARRY KRAUSE, LINDA ELROD & J. THOMAS OLDHAM, FAMILY LAW CASES, COMMENTS AND QUESTIONS 154—155 (8th ed. 2017) (citing *In re Estate of Fisher*, 176 N.W.2d 801, 804—805 (Iowa 1970)).

2. *Id.* at 154.

3. *Id.*

4. *Id.*

5. *Id.* at 154—155.

6. See generally *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

Marvin approach clarified that written contracts between cohabitants should generally be enforced when the relationship ends.⁷ Within a short period after *Marvin* was decided, a number of U. S. states generally endorsed its approach.⁸

Marvin was decided almost 50 years ago. In the interim, as will be summarized below, some have argued that the *Marvin* approach is inadequate and that a new set of rules is needed to determine the economic rights of parties when an unmarried cohabitation relationship ends.⁹ As Professors Atwood and Cahn outline in their article, the Uniform Law Commission has created a drafting committee to consider whether a uniform law regarding the rights of unmarried cohabitants would be appropriate, and, if so, what rules should govern their rights when a relationship ends.¹⁰

Because of this initiative, and because other states may want to reevaluate whether to continue to apply the *Marvin* approach, the editors of this journal thought it would be useful to publish a survey of how various English-speaking jurisdictions are now regulating unmarried cohabitation. They asked me to solicit contributions from commentators in Canada, Australia and Scotland, and also to ask a contributor to summarize current views regarding the regulation of the rights of unmarried partners under U.S. law. I am delighted to report that, as the reader can see, distinguished commentators agreed to participate. Professor Parkinson offers his commentary on current Australian law, Professor Bala describes current regulation of unmarried cohabitation in English-speaking Canada, Dean Leckey summarizes the significantly different approach in Quebec to unmarried cohabitants, and Professor Brown describes recent developments in Scotland. Professors Atwood and Cahn summarize current issues in the U.S. relating to cohabitants.

7. *Marvin*, 18 Cal.3d at 678.

8. See generally KRAUSE, ELROD & OLDHAM, *supra* 1 at 285—290.

9. E.g., Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211 (2004).

10. Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: the U.S. Approach*, 44 HOUS. J. INT'L L. 191 (2022).

II. ISSUES THAT MAY NEED TO BE ADDRESSED WHEN PROMULGATING RULES RELATING TO COHABITANTS

I will summarize below some of the various issues that must be addressed when determining the rights of cohabitants.

A. *Should Cohabitants Have Status-Based Rights?*

In most U.S. states today, cohabitants do not have status-based rights.¹¹ Under *Marvin*, a party must satisfy the elements of some recognized cause of action between unrelated parties, such as contract, unjust enrichment or partnership.¹² In contrast, as Professors Bala, Parkinson and Brown write in their respective articles, some status-based claim can be made in most of Canada¹³ (except Quebec), Australia and Scotland when a cohabitation relationship ends.¹⁴

Some U.S. commentators have argued that the *Marvin* set of remedies is too restrictive and needs to be replaced with another regulatory approach.¹⁵ Others have disagreed.¹⁶

One possible compromise in this matter could be to continue to endorse *Marvin*, but to expand the unjust enrichment remedy and the constructive trust remedy, as Canada has done.¹⁷

11. See generally J. T. OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY 1-7—1-13 (2021).

12. *Marvin*, 18 Cal.3d at 675. The State of Washington is the only outlier in this regard. See KRAUSE, ELROD & OLDHAM, *supra* 1 at 295 (citing *Gormley v. Robertson*, 83 P.3d 1042 (Wash. App. 2004)) The State of Washington is the only outlier in this regard. *Id.*

13. Nicholas Bala, *Common Law Marriage in Common Law Canada: Legislatures and Courts Recognize “Marriage-Like” Relationships*, 44 HOUS. J. INT’L L. 287 (2022).

14. Patrick Parkinson, *When All Roads Lead to Rome: The Problem of Treating De Facto Relationships as Marriages in Australia*, 44 HOUS. J. INT’L L. 253 (2022); Alan Brown, *The Legal Regulation of Cohabitation in Scotland: A Failed Attempt at Compromise*, 44 HOUS. J. INT’L L. 221 (2022).

15. See Ira M. Ellman, *Contract Thinking Was Marvin’s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001).

16. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 820-21 (2005).

17. See Bala, *supra* 13 at 297-305; Robert Leckey, *Cohabitation Law in Quebec: Confusing, Incoherent, Unjust*, 44 HOUS. J. INT’L L. 331 (2022).

B. *If a Status-Based Claim Is to be Created, What Are the Options?*

1. Give Cohabitants Some Economic Rights, But Fewer Than Spouses Have

Professor Bala notes that, in some Canadian provinces, cohabitants have the right to claim spousal support when the relationship ends, as long as the relationship lasted at least a certain specified minimum period.¹⁸ The award of spousal support, if any, would be guided by the Canadian spousal support guidelines.¹⁹

As Professor Brown writes, Scotland also attempted to establish a status-based remedy that was less robust than the remedies available to a married couple at the end of the relationship.²⁰ Courts are instructed to provide a “fair” remedy in light of the economic advantages and disadvantages experienced by each party during the relationship.²¹

The most recent draft of the Uniform Law Commission drafting committee regarding the regulation of cohabitants appears to be attempting to implement a similar remedy. Section 7 of the current draft authorizes a court to provide an equitable remedy to one party based on the relative contributions by the parties to the relationship.²²

2. Treat Some or All Cohabitants Like Spouses

As can be seen from the articles written by Professors Parkinson and Bala, some provinces in Canada and most of Australia treat cohabitants like spouses as long as the relationship duration satisfied the specified minimum time.²³

18. See Bala, *supra* 13 at 308.

19. Bala notes that a party could also make a claim for unjust enrichment or constructive trust. Bala, *supra* 13 at 312.

20. Brown, *supra* 14 at 223-224.

21. *Id.* at 229.

22. See UNIF. COHABITANTS' ECON. REMEDIES ACT, (UNIF. LAW COMM'N, Draft for Approval 2021).

23. See Parkinson, *supra* 14 at 264; Bala, *supra* 13 at 308.

a. What Are the Standards for Determining Which Cohabitants Have Status-Based Rights?

If some cohabitants are to be given status-based rights, which “cohabitants” qualify? Professor Parkinson notes that Australia does not require parties to be sharing a common residence to be cohabitants. In addition, it may be a surprise to some (as it was to me) to learn that an Australian can have two de facto relationships at the same time. Similarly, a married person living with his or her spouse can establish a de facto relationship with a third party. Do these policies make sense? Or does some mechanism need to be added so that a person can have only one committed relationship at a time?

If some cohabitants are to be given the rights of spouses, how should such cohabitation relationships be described? Should all cohabitation relationships that exceed a minimum specified duration be included? In Canada and Australia, the minimum specified duration is quite short—one to three years.²⁴ Is this sensible, or should a longer duration be required? A related and quite important point is whether the couple should begin to accrue status-based rights only *after* the minimum duration has been met, or whether in such a situation the rights should begin to accrue from when the relationship began. Alternatively, should status-based rights be limited to those couples who are raising a common child?

b. If Status-Based Rights Are Created for Some Cohabitants, What Standards Should Govern Whether to Enforce an Agreement to Waive Their Economic Rights?

Most American jurisdictions have been quite willing to enforce premarital agreements that waive some or all economic rights at divorce.²⁵ For example, few U.S. states require each party to have consulted with a lawyer.²⁶ One would therefore

24. See Bala, *supra* 13 at 308; Leckey, *supra* 17 at 337; Parkinson, *supra* 14 at 264.

25. See generally KRAUSE, ELROD & OLDHAM, *supra* 1 at 217–274.

26. *Id.* at 234. . .

assume that U. S. jurisdictions would be willing to enforce similar agreements by cohabitants.

However, in the U.S., premarital agreements generally need to be written.²⁷ Would a U.S. court enforce an oral waiver agreement? Conversely, should a court enforce oral or implied agreement to confer certain economic rights? In addition, a number of states are reluctant to enforce a premarital agreement if it would be unconscionable to do so.²⁸ Should a limit of this type be applied to whether a cohabitation agreement should be enforced? Similarly, states do not enforce a premarital agreement if it was involuntarily signed.²⁹ This concern may not readily apply to cohabitation agreements. Duress in the execution of a premarital agreement has been found customarily when a party presents a premarital agreement shortly before the wedding and threatens to call off the wedding if the agreement is not signed.³⁰ Such a situation seems unlikely to arise if people are cohabiting and not planning a ceremonial marriage.

III. CONCLUSION

Marvin was decided when cohabitation was beginning to become somewhat accepted in the United States.³¹ From this author's experience, it was more common at that time among younger couples living on both coasts. Now, it is much more popular among different age groups and across the country.³² Still, some argue that cohabitation differs in some important ways from marriage. First, of course, the parties have not agreed to marry. For some couples (or at least one party), this might be quite significant. In addition, compared to married couples, cohabitants may generally have less commitment to the relationship and may be less inclined to commingle their finances. Are these adequate reasons to treat cohabitants differently from

27. See e.g., Tex. Fam. Code § 4.002.

28. See KRAUSE, ELROD & OLDHAM, *supra* 1 at 236 (citing RESTATEMENT (SECOND) OF CONTRACTS § 190 (AM. L. INST. 1981)).

29. OLDHAM, *supra* 11 at 4-15—4-20.

30. *Id.* at 2-4.

31. *Marvin*, 18 Cal.3d at 665 n.1.

32. Gary R. Lee & Krista K. Payne, *Changing Marriage Patterns Since 1970: What's Going On, and Why?*, 41 J. COMP. FAM. STUD. 537, 537 (2010).

spouses when the relationship ends? As the contributors to this issue indicate, different English-speaking countries (and Quebec) have answered this question quite differently.

