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“TIL EQUITY DO US PART”: EQUITABLE DISTRIBUTION OF PROPERTY IN MARITAL AND NON-MARITAL RELATIONSHIPS

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INTRODUCTION

The institution of marriage is one that is legally recognized by all 50 states; two individuals enter into a legally binding relationship that is governed by the laws of the situs of the marital jurisdiction. In essence, a marriage is a partnership where each partner is entitled to share in the property of the enterprise. However, in the instance where that partnership dissolves, the parties may turn to specific remedies in order to protect their individual interests.

Family courts are courts of both law and equity, where both legal and equitable remedies can be provided to the parties who seek division of the partnership assets. In certain states, like South Carolina, the doctrine of common-law marriage is recognized, requiring the courts to hear matters beyond just that of standard divorce proceedings. This paper will analyze the concept of common-law marriage and its effect on the concept of equitable distribution of property, as well as a discussion of alternate remedies available to cohabitating parties that have not formally entered into a marital relationship.

I. COMMON-LAW MARRIAGE

As cohabitation and modern lifestyles expand, so does the frequency of common-law marriage. Only nine states including Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Oklahoma, Texas and the District of Columbia actually recognize common-law marriages; but five other states allow common-law marriages that were established before a certain date. These include Georgia, Idaho, Ohio, Oklahoma and Pennsylvania. Finally, New Hampshire and Utah recognize common-law marriage in very particular and narrow

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2 Rose Kreider, Increase in Opposite-sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) (Housing and Household Economic Statistics Division Working Paper), available at http://www.census.gov/newsroom/releases/archives/families_households/2010-09-23_families_households.html (Increase in cohabiting couples from 6.7 million in 2009 to 7.5 million in 2010 and suggests that economic factors may have contributed to the increase.)
4 Id.
circumstances.\textsuperscript{5}

A. Common-Law Marriage in South Carolina

South Carolina generally requires individuals to obtain a license and a civil ceremony to have a valid and legal marriage.\textsuperscript{6} However, the South Carolina Code states in section 20-1-360, “[n]othing contained in this article shall render illegal any marriage contracted without the issuance of a license.” This latter section is where courts have derived the power to recognize common-law marriage. In 2005, the Supreme Court of South Carolina stated that the proper analysis for the determination of the existence of a common-law marriage is: whenever two parties contract to be married a common-law marriage, is formed, and this need not require an express contract.\textsuperscript{7}

South Carolina has established a two-prong analysis for proof of a common law marriage, (1) the parties’ capacity to marry (2) the parties’ intent to marry.\textsuperscript{8} The party trying to establish a common-law marriage must do so by a preponderance of evidence.\textsuperscript{9}

In Kirby, the lower court denied the existence of a common-law marriage, inter alia, declared the wife as the equitable owner of their house.\textsuperscript{10} On appeal the court stated that like an “equity action tried by the judge alone...this Court has jurisdiction to find facts in accordance with its own views of the preponderance of evidence.” Therefore, the party claiming common-law marriage must do so by a preponderance of the evidence.

The court looked at two elements of a parties’ relationship (1) the parties’ intent (2) their

\textsuperscript{5} Id.
\textsuperscript{6} S.C. CODE ANN. § 20-1-210 (Lexis 2011) (“It shall be unlawful for any persons to contract matrimony within this State without first procuring a license as is herein provided . . . .”).
\textsuperscript{7} Id. at 624 (citing Johnson v. Johnson, 235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960).
\textsuperscript{8} Kirby v. Kirby, 241 S.E.2d 415, 416-17 (S.C. 1978).
\textsuperscript{9} Id. at 416.
\textsuperscript{10} Id.
capacity to marry. The circumstances surrounding this case included the couple resided together for twenty years and during those twenty years the couple had four children. The couple consistently represented themselves to be married, engaged in several real estate transactions together, appeared as husband and wife on their children’s birth certificates, and filed joint tax returns. The court next examined the capacity to marry. That issue centered on the fact that when the couple first began their relationship, the husband was married to another woman. This obviously caused an impediment to his ability to marry. However, the court found that because the husband and his previous wife ultimately divorced, and he and his new wife continued to live as husband and wife, the impediment was removed. Once the impediment was removed, they again were capable of marriage. Therefore, because the court was able to establish the intent and capacity to marry, the lower court was reversed.

With such lenient standards for establishing common-law marriage, it is easy to see where disputes might arise over both relationship status and the division of assets upon the dissolution of such a relationship.

II. **EQUITABLE DISTRIBUTION OF MARITAL PROPERTY**

Whether a couple chose to be married in the traditional manner or find themselves in a common-law marriage, should they choose to legally end that marriage, it must be done through formal divorce proceedings. South Carolina family courts will have jurisdiction over all contracts relating to property involved in divorce proceeding, as well as construction and
enforcement of such.\textsuperscript{17} Like most courts, when a specific remedy is not provided under the law, family courts will utilize equity in distributing marital property.

South Carolina follows the doctrine of equitable distribution. As outlined in South Carolina Code 20-3-620, a court weighs many factors in distributing the marital property in the event of a divorce.\textsuperscript{18} These factors, such as duration of the marriage, misconduct on part of a spouse, valuation of marital property, contribution of such property, income of each spouse, as well as several more, are weighed as the court deems appropriate.\textsuperscript{19} The unambiguous language of the statute allows a court to use its discretion in coming to an appropriate distribution of the marital property.

The family court assesses the marital property as it is defined in section 20-3-630 of the South Carolina Code of Laws.\textsuperscript{20} Marital property is “all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing to end the marriage”, except for the types of property specified in section 20-3-630.\textsuperscript{21} These exceptions, such as inherited property, property acquired prior to marriage, and property excluded by written contract are considered non-marital property, and will not be distributed by the court.\textsuperscript{22} This does, however, leave the court a great deal of discretion in deciding what is an equitable distribution of the marital property.

Courts, in general, have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.\textsuperscript{23} As set out in section 20-3-660 of the South Carolina Code of Laws, “the court may utilize any other reasonable means to achieve

\textsuperscript{17} S.C. CODE ANN. § 20-3-690 (Lexis 2011).
\textsuperscript{18} S.C. CODE ANN. § 20-3-620 (Lexis 2011).
\textsuperscript{19} Id.
\textsuperscript{21} S.C. CODE ANN. § 20-3-630 (Lexis 2011).
\textsuperscript{22} Id.
equity between the parties." In exercising this authority, a judge may use equitable maxims to ensure the division of property is just and fair, and they have done just that. The Supreme Court of South Carolina awarded Wife a money judgment based on Husband’s disregard of a family court order. The court refused to allow Husband to gain financially from the mistreatment of Wife and failure to adhere to the family court’s order. Likewise, in a recent ruling by the South Carolina Supreme Court, the appellate court’s decision was reversed based on the grounds that the family court should be given near absolute authority in deciding how marital property should be distributed. The decision handed down by the family court should be approached with the presumption that the court acted within its broad discretion, and will only be reversed based on abuse of discretion. Whether the court decides that a 50%-50% split of marital assets is appropriate is credited to the court’s evaluation of the factors discussed above, not based on a trend in case law. In assessing the marital property, the court has very broad discretion in accepting either party’s valuation of such. While both parties are allowed to present evidence as to the valuation of the property, it is up to the court to decide who presents a more credible valuation.

Likewise, the court may exercise its discretion in assuring each party receives what is fair and equitable. While equity acts in personam, rather than in rem, the court may impose equitable remedies to coerce a party into obeying its order. While the family court may not impose an equitable lien over property outside of its jurisdiction during divorce proceedings, the court may

26 Id.
28 Id.
29 Id.
30 Pirri, supra. note 22 at 282.
31 Id.
exercise its equitable remedies by requiring the party to sell the property to fulfill an order. In _Murphy v. Murphy_, the family court judge issued such writ, sua sponte, in order to reach a proper accounting of marital property and enforce Mr. Murphy's compliance with a prior order. The Supreme Court affirmed this decision, citing the judge’s inherent power to protect the interest of the parties. While law governs divorce proceedings, the family court’s discretion in distributing marital property, among other duties of the court, is based on equitable remedies that are fair and just to both parties’ positions.

III. REMEDIES FOR UNMARRIED COHABITANTS

Although South Carolina continues to recognize common law marriage, those states that have abolished the concept are still faced with the issue of protecting the property interests of unmarried cohabitants when the relationship severs. Due to the absence of the legal remedies that are available when a marital severance occurs, non-marital severance often results in convoluted and complicated issues for the court. “Cohabitation is an ‘incomplete institution’ that lacks a consistent meaning both for those within such a relationship and those outside it.” In addressing the void left by the abolition of common law marriage, courts look to both contractual and equitable solutions.

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33 Id.
34 S.C. R. CIV. P. 70.
36 Id.
Unlike a common-law marriage, where once the couple enters a legally-binding union, and the dissolution of that relationship can only be accomplished through divorce, unmarried cohabitants do not have to endure such formal proceedings to sever the relationship. Yet, the same expectation interests regarding division of property still exists between the parties as if they were married, leaving the courts to remedy such matters. As an answer to this, many states have provided unmarried cohabitants with certain property rights following the termination of the relationship or the death of a partner. States may provide these remedies “[a]s an alternative to recognizing common-law marriage, or in addition to recognizing the doctrine...” Such remedies include express or implied contract remedies, as well as equitable remedies such as estoppel or unjust enrichment.

A. Contractual Remedies

With regard to contractual remedies for property division, the widely publicized case of Marvin v. Marvin held that express contracts between non-marital partners should be enforced except to the extent the contract is based on sexual services, which would violate public policy. The court in Marvin stated:

“The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a non-marital relationship when they entered into it.” While this court recognizes implied and express contract-based remedies for unmarried cohabitants, not all jurisdictions allow recovery under this theory. Many only allow such if there

39 Id. at 410.
40 Id.
42 Id. at 110.
is an express contract. Moreover, contract remedy often does not provide a viable solution, as most cohabitating parties do not begin a relationship foreseeing dissolution of that relationship. Therefore, the likelihood of the partners reducing the individual rights of the parties in the event of dissolution to an express agreement at the outset of the relationship is rare. Implicated contract recognition provides the same remedial inconsistencies; intent of the parties remains the centric issue in determination of the property rights thereby requiring the courts to adjudicate matters that are heavily factually laden. Hence, “the circumstances in which Marvin applies are rather limited, and it quite explicitly does not replace the protections afforded by the common law marriage doctrine.”

B. Equitable Remedies

While contractual remedies may not always provide an available remedy for protection of the interests of unmarried cohabitants, an alternative solution is an equitable remedy of either estoppel or unjust enrichment.

The estoppel principle holds that, “[t]he essential elements of equitable estoppel are lack of knowledge and of the means of knowledge of the truth as to the facts in question; some form of conduct or representation by the party against whom the estoppel is asserted; good faith reliance; and detrimental change of position.” Many states that do not recognize common law marriages turn to the doctrine of equitable estoppel to provide remedial assistance in adjudicating issues of dissolution between unmarried cohabitants. It has been argued that the equitable estoppel doctrine’s benefits are greater than those of common law marriage doctrine due to the objective manifestations of the parties in filing joint tax returns, owning other joint property, or

44 Id. at 570.
45 Id.
using marital names, as opposed to the subjective “meeting of the minds” aspect of the common law marriage doctrine.⁴⁸ In these scenarios, estoppel would protect those partners who have justifiably relied on their partners’ actions or representations, and would provide an advantageous alternative to the doctrine of common law marriage.

Moreover, in looking at the equitable maxim of “one who comes to equity must do so with clean hands,” the remedy of estoppel would not be allowed to a plaintiff who “deliberately avoided formal marriage proceedings to preserve a benefit and to grant relief to the individual who relied on mutual representations of marriage to his or her detriment.” ⁴⁹

Another alternative for relief is based on the theory of unjust enrichment. In those states not recognizing common-law marriage, the contributions made to the household by one of the unmarried cohabitants should not be disproportionately greater as to unjustly enrich one party over the other. In the case of Watts v. Watts, the court found that the plaintiff, Sue Ann Watts, as unmarried cohabitant of James Watts, stated a valid claim for unjust enrichment given the fact that throughout the parties’ relationship she had contributed services and property to the relationship. Because of those contributions the parties’ assets increased, yet she was never compensated accordingly.⁵⁰ The Court states, “unlike claims for breach of an express or implied in fact contract, a claim of unjust enrichment does not rise out of an agreement entered into by the parties. Rather, an action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.”⁵¹ While the court in Watts found that the defendant was unjustly enriched by the plaintiff’s contributions, not every contribution to a household will

⁴⁸ Garrison, supra, note 39 at 886.
⁴⁹ Id. at 888.
⁵⁰ See Watts v. Watts, 405 N.W. 2d 303, 313 (Wis. 1987).
⁵¹ Id.
allow for compensation. Equitable remedies seek to avoid unjust enrichment; therefore, courts will analyze the overall contributions throughout the relationship, as well as the expectation interest of the parties, in determining if relief is warranted.\textsuperscript{52} This is often a highly fact-intensive analysis that can be both costly and burdensome on the parties and the courts.\textsuperscript{53}

While the equitable remedies of estoppel and unjust enrichment are potentially viable alternatives to the doctrine of common-law marriage, they are not foolproof remedial measures.\textsuperscript{54} In South Carolina, based on case law, it is still unclear whether state courts “permit unmarried cohabitants to bring claims based in contract or equity.”\textsuperscript{55} Therefore, even with the doctrine of common law marriage in place, there is still the potential for courts to hear some of the same issues regarding other cohabitant relationships.\textsuperscript{56} The institution of marriage is not only a social institution, but a legal one as well. Courts have a longstanding history of adjudicating asset division following formal divorce proceedings. In states that recognize common law marriage, these divorce proceedings can follow even if there is no formal marriage ceremony. However, in states not recognizing common law marriage, courts have to turn to alternative solutions to provide remedy for the parties involved.

\textbf{CONCLUSION}

Family court, as a court of law and equity, has the discretion to apply equitable remedies to its proceedings. It may apply equity when determining the division of property in divorce proceedings of the married and common-law married. Further, the family court, in situations where the couple is not common-law married, will still have the discretion to use alternative equitable remedies for unmarried cohabitants.

\textsuperscript{52} Hedgcock, supra note 45, at 572.
\textsuperscript{53} Id.
\textsuperscript{54} Bowman, supra note 48, at 774.
\textsuperscript{55} Id.
\textsuperscript{56} Id.