Chapter 35

DEVELOPMENTS IN NON-MARRIED PARTNER LITIGATION

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In 2008, the Colorado Supreme Court announced the case of *Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008), an unjust enrichment case that greatly expanded remedies available to non-married partners when their relationships end. The court held that when close family members or confidants act with a mutual purpose, unjust enrichment occurs when one party benefits from an action that is a significant deviation from that mutual purpose.

This chapter provides an overview of pre-*Lewis* remedies available to non-married partners in Colorado upon an ending of their relationship. It briefly outlines how other states and nations grapple with the termination of the relationships of non-married partners. It also discusses *Lewis* and its application to non-married partners.

§ 35.1 THE ISSUE

The lives of non-married life partners often look like those of married partners. They have children, they commingle assets, they take out joint debts, they make financial sacrifices for each other, they become economically interdependent, and they may choose to have one partner stay at home while the other is employed.

There are a great number of non-married partners in the United States, and the number is increasing. In 2015, there were an estimated 7 million non-married couples living together. U.S. Census Bureau News, *Unmarried-Partner Households*, http://factfinder.census.gov, click on Selected Social Characteristics (updated 2015). In Colorado, it was estimated that there were a total of 15,402 same-sex households in 2014. U.S. Census Bureau, *Characteristics of Same-Sex Couple Households: 2014*, www.census.gov/hhes/samesex (updated 2014). About 36 percent of those Colorado same-sex households are identified as same-sex spouses. *Id.* Nationally, it is now estimated that about one in four babies are born to non-married partners.[1]

Non-married partners who have become financially intertwined have the same issues when they terminate their relationships that married couples do: What do they do with the jointly owned house? How do they split the property that was purchased during the relationship? How should the jointly titled brokerage accounts be divided? Who pays off the debt? Do you compensate the partner who quit his or her job and moved for the benefit of the other partner, and if so, how? How do you address the fact that one partner has been staying at home with the kids, and has given up significant career opportunities?

Married couples and couples in civil unions have a statutory framework for answering these questions — the Uniform Dissolution of Marriage Act. C.R.S. §§ 14-10-101, *et seq*. When couples are not married or are not parties to a civil union, and cannot resolve their own disputes, the law offers little to give structure to how couples disentangle their relationships. Worse, the law is so uncertain that dissolving a partnership can be a very long, expensive, and uncertain endeavor.

§ 35.2 PRE-*LEWIS* CAUSES OF ACTION FOR NON-MARRIED PARTNERS

Colorado has no statutes governing rights or responsibilities of non-married partners, or the dissolution of these relationships. Before *Lewis* was decided, non-married partners had three basic common law avenues for addressing legal issues incident to a breakup:

1) A common law marriage claim;
2) An unjust enrichment claim under *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000); or
3) A suit made up of a hodgepodge of legal theories.

Law works well when it encourages the efficient, consistent, and clear resolution of disputes. None of the avenues above produce such resolutions.

§ 35.2.1—Common Law Marriage

Colorado is one of the few states that still recognize common law marriage.[1] A common law marriage occurs when two people who are eligible to be married agree between themselves that they are married and hold themselves out to the community as married. *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987). A claim that a common law marriage exists is a claim about a fact.

1. *See* www.cdc.gov/nchs/data/databriefs/db162.htm; www.childtrends.org/indicators/births-to-unmarried-women/#_edn16; Alexandra Sifferlin, "More Unwed Couples are Having Babies," *Time* (April 13, 2012), http://healthland.time.com/2012/04/13/more-unwed-couples-are-having-babies.

In the absence of an express agreement, the two most common factors used to find a common law marriage are cohabitation and a general reputation in the community as husband and wife. *Id.* If the factual claim can be proven, then the divorce statutes will apply to the termination of the relationship in the same fashion as for the dissolution of a ceremonial marriage.

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However, often when a lawsuit alleges a common law marriage, it is because one of the partners denies there was a marriage. It is difficult to prove a common law marriage where the issue is contested.

Common law marriage is not an equitable remedy. Consequently, common law marriage cannot be used to provide equitable relief to partners whose relationship had the "quality" of a marriage. Rather, it is a question of fact that, if answered in the affirmative, means that the Uniform Dissolution of Marriage Act statutes must be applied to the dissolution of the relationship.

Most states have abolished common law marriage through legislation, but Colorado remains one of eight states that still cling to this antiquated practice.[2] Common law marriage in the United States finds its roots in English common law. *In re Marriage of J.M.H.*, 143 P.3d 1116 (Colo. 1987). Without legislative modification, common law marriage remains defined by case law stretching back to England. *Id.* However, in light of the U.S. Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that the right to marry must be extended to same-sex couples, it is likely that common law marriage claims for same-sex couples will apply prospectively. For instance, in 2015, a Colorado district court judge sitting in probate granted relief to a woman claiming to be a common law spouse of her deceased same-sex partner. Barbara Cashman, "A Probate Judge Finds Same Sex Common Law Marriage in Colorado" (May 27, 2015), *available at* http://denverelderlaw.org/same-sex-common-law-marriage-ruling-in-colorado. The court held that a court may not deny the recognition of a common law marriage that is satisfied by state requirements based solely on the sex of persons in the marriage union. *Id.* On the other hand, whether there could be a valid determination that a same-sex couple was common law married before same-sex marriage was recognized in Colorado is a much thornier legal question.

§ 35.2.2—Unjust Enrichment Under *Salzman*

The second avenue available is to bring a claim under an unjust enrichment theory as outlined in *Salzman*, 996 P.2d 1263. *Salzman* involved an opposite-sex couple who shared a home. The male partner contributed approximately one-third of the total cost of a $521,000 new custom home, as well as his professional services during construction of the home. The female partner contributed approximately two-thirds of the cost of the home. *Id.* at 1265. The female partner held title to the home solely in her name. Eventually, the relationship ended and she expelled the male partner from the home. *Id.* at 1266. The court held that despite the fact that the parties were formerly cohabitating partners, the male partner could make a claim of unjust enrichment and was entitled to restitution. *Id.* The court stated an unjust enrichment claim is made if the plaintiff proves that (1) at the plaintiff's expense (2) the defendant received a benefit (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying. *Id.* at 1265-66.

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2. Those states are Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Oklahoma, and Texas. The District of Columbia also recognizes common law marriage. *See* www.ncsl.org/research/human-service/common-law-marriage.aspx. New Hampshire does not recognize common law marriage except to the limited extent provided by statute regarding probate issues. *In re Estate of Bourassa*, 949 A.2d 704 (N.H. 2008).

The main shortcoming of a *Salzman* claim is that under this iteration of unjust enrichment, the plaintiff has to show that a benefit was conferred upon the defendant. In order to recover, the plaintiff has to prove what the benefit was worth to the defendant. In *Salzman*, the showing was fairly straightforward — the plaintiff had contributed cash and professional services to a piece of real property. Therefore, the defendant benefited by the amount of the added equity in the home. When the contribution to a relationship is more in the nature of household services and sweat equity, a recovery based upon the value of contribution to the defendant is much more difficult to prove.

§ 35.2.3—Application of Other Civil Claims

Numerous civil claims exist that can be applied to non-married partners' financial entanglements. Some of the more straightforward are:

- Partition of real and personal property;
- Breach of express contract;
- Breach of implied contract;
- Joint venture;
- Constructive trust; and
- Resulting trust.

One of the primary methods of dividing both real and personal property for non-married partners is partition. A partition suit is an equitable claim under co-ownership principles in which the court severs the multiple interests in a property and reaches an equitable result by calculating the contributions of each person. C.R.S. §§ 38-28-101, *et seq.*; *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986); *Martinez v. Martinez*, 638 P.2d 834 (Colo. App. 1981); *see also* 68 C.J.S. *Partition*. One problem for many partners establishing a partition claim is that the claimant must hold title to the property. In many situations, one partner was never a title owner of the property in dispute. Another problem is that contributions that are credited to parties are often limited to monetary contributions to the property. An additional issue is that the court's remedy is limited to either a partition in kind (which is impossible for residential property), or a forced sale of the property and division of proceeds. C.R.S. § 38-28-107. Finally, while partition is helpful in dividing assets such as residential properties, financially interdependent couples usually have a broader range of financial disputes than simply who will get the house.

Contract claims are difficult because the machinations of intimate relationships are hard to break down into the elements of offer, acceptance, and consideration. Additionally, sufficiently specifying the terms of broken contracts is difficult in this context. Even though enforceable contracts need not be written, and may be implied, it is still difficult to discern whether the promises and actions of partners can be categorized as indicative of actual contracts or just how lovers in love behave. On the other hand, marriage is a contract whose specific terms most marrying people do not fully grasp until they divorce. Pillow talk and unselfish actions during a life partnership are no less indicative of a real contract than walking down the aisle with someone. Contract principles are obviously very helpful, however, when the couple entered into a written domestic partnership agreement.

A joint venture can be claimed if the following elements are present: "(1) [t]here must be joint interest in the property by the parties sought to be held as partners; (2) there must be agreements, express or implied, to share in the profits and losses of the venture; and (3) there must be actions and conduct showing co-operation in the project." *Sleeping Indian Ranch, Inc. v. West Ridge Group, LLC.*, 119 P.3d

1062, 1069 (Colo. 2005). Moreover, "the pooling of property, money, assets, skill, or knowledge does not create the relationship of joint venture in the absence of intent as manifested from the facts and circumstances involved in each particular case." *Id.* Joint venture claims may be promising, particularly in the context of a business run by the partners, but it can be difficult to prove intent of the parties regarding the sharing of profit and loss where there is a romantic relationship. Between romantic partners, there may be more than one motivation for contributing money or skill to an asset, and partners may behave in different ways through the term of the joint venture.

A constructive trust theory can be used when one of the partners holds title to specific property, but in fairness, the property should be transferred to the other partner. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). A constructive trust is applied to property when it would unjustly enrich the title holder to retain title to the property. Two of the elements required to find a constructive trust are (1) a fiduciary relationship, and (2) fraud or wrongdoing. *Id.* at 797-98; *see also Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266 (Colo. App. 2007). For instance, if partner A convinced partner B to let her manage all of partner B's investment accounts, and represented that the easiest way to accomplish that was a transfer of title on the accounts, and then partner A claimed the accounts as her own, a constructive trust might result. Practically, constructive trusts are of little benefit in the context of the dissolution of a relationship. Although parties may feel wary of each other after a breakup, claims of fraud between partners are rare.

A resulting trust theory can be applied where one person holds property for the benefit of another, but the person granting title did not intend the other person to have an equitable or beneficial interest in the property. *Page*, 592 P.2d at 797; *see also In re Marriage of Heinzman*, 596 P.2d 61 (Colo. 1979); Bogert, *Trusts* 287 (6th ed. 1987). In the context of non-married partners, this can be a very useful tool where a partner has transferred title to property as an inexpensive method of estate planning, yet never intended to grant an interest in the property during lifetime. Although this is a very common scenario with non-married partners, again, it addresses only one small part of a couple's financial interdependence.

Most of the claims above will require a showing that the plaintiff has contributed financially to the property at issue.

In July 2009, the Colorado Designated Beneficiary Act, C.R.S. §§ 15-22-101, *et seq.*, took effect. The law is available to heterosexual and same-sex partners. Under this statute, non-married partners can register as designated beneficiaries, and thereby opt into some rights and protections enjoyed by married couples, such as the right to an intestate share of the estate of a partner; the right to sue for wrongful death of a partner; the right to be a beneficiary of a pension plan; the right to a priority to be appointed a guardian, conservator, or personal representative; and the right to workers' compensation survivor benefits. *Id.* However, nothing in the Act addresses the rights and responsibilities of partners in the event of a dissolution of the relationship.[3]

§ 35.3 TREATMENT IN OTHER STATES

3. The Act does discuss the process by which the designated beneficiaries can terminate the designation: one files a revocation. Additionally, the designation is terminated by the marriage of one party to another person or upon a court's establishment of a common law marriage. C.R.S. § 15-22-111.

There are four basic means that other states employ to address the dissolution of the partnerships of non-married persons. They are (1) palimony claims, (2) application of meretricious relationship/marriage by analogy doctrines, (3) domestic partnership/civil union statutes, and (4) a hodgepodge of theories.

In 1976, the Supreme Court of California handed down the first "palimony" case — *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). The court applied the theory of implied contracts to non-married cohabitants to divide property, but also to an alleged agreement for ongoing support. The case was more of a social watershed than a legal one, as the contractual concepts were well established. Anna Laquer Estin, "Unmarried Partners and the Legacy of *Marvin v. Marvin*: Ordinary Cohabitation," 76 *Notre Dame L. Rev.* 1381, 1408 (2001). In the 1960s and 1970s, however, many states still would not enforce any contracts between non-married couples, under the theory that all such contracts were really a form of prostitution.

Under a palimony claim, a court may order support for the claiming party upon the termination of the relationship. *Marvin*, 557 P.2d 106; *Botis v. Estate of Kudrick*, 22 A.3d 975 (N.J. Super. Ct. App. Div. 2011). There must be a clear agreement, written or oral, by both partners regarding the extent of support in order for a judgment to be entered. *Marvin*, 557 P.2d 106. Palimony cases are determined in civil court as a contract matter, rather than in family court. Thus, these claims may be brought before juries. The support will be awarded in a lump sum, generally in an amount sufficient to support the claimant for an actuarial life term, reduced to a present value. *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979), *superseded by* N.J. Stat. § 25:1-5(h); *see Botis*, 22 A.3d 975.

Today, the majority of states will enforce agreements, express and implied, made between non-married parties regarding division of property. "Property rights arising from relationship of couple cohabitating without marriage," 69 A.L.R. 5th 219 (originally published in 1999). However, the extent of states' willingness to stretch contract theory to look like relief available in a divorce differs widely.

Washington has developed the doctrine of "meretricious relationships" or "committed intimate relationships" as one solution to disposition of property upon separation of non-married partners. *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995); *In re Marriage of Byerly and Cail*, 334 P.3d 108 (Wash. App. 2014). A committed intimate relationship is considered a marital-like relationship where both parties cohabit, fully aware that a lawful marriage between them does not exist. *Gormley v. Robertson*, 83 P.3d 1042, 1045 (Wash. App. 2004). Several non-exclusive factors used to establish such a relationship are "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties." *Id.* This doctrine enables the court to distribute property obtained during the relationship in a fashion similar to distribution of community property if the parties had been married. *Id.* Non-monetary contributions to property have been recognized. *Warden v. Warden*, 676 P.2d 1037 (Wash. App. 1984). The doctrine has been applied to same-sex partnerships. *Gormley*, 83 P.3d at 1045.

§ 35.4 THE CASE OF *LEWIS v. LEWIS*

In August 2008, the Colorado Supreme Court handed down its opinion in *Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008). The holding of the case was:

> [C]laims of unjust enrichment by close family members or confidants should be evaluated by considering the mutual purpose of the parties. To determine unjust enrichment in situations involving a failed gift or failed contract between close family members and confidants, trial courts must determine whether there existed a mutual purpose between the parties. If such a purpose did exist and one party profited from a significant deviation from this mutual purpose, that party is unjustly enriched.

Id. at 1136.

Under the *Lewis* holding, there is no requirement of a contribution from the plaintiff. There is, however, a requirement of an unjust "profit" or "benefit" to the defendant in deviating from the mutual purpose. *Id*. at 1143. The court may also look to whether the plaintiff detrimentally relied on the gift or agreement. The court is to consider the length of time that the parties acted in furtherance of the agreement. The court is also to use its equity powers to "fulfill [the] failed mutual purpose." *Id.*

This is a departure from previous unjust enrichment cases. The dominant unjust enrichment case prior to *Lewis* was *Salzman*, 996 P.2d 1263. In that case, a claimant had to prove that (1) at the plaintiff's expense (2) the defendant received a benefit (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying. *Id.* at 1265-66. As stated by the dissent in *Lewis*, the "mutual purpose" theory of unjust enrichment focuses on the intent of the parties and the benefit *received* by the defendant. Traditional unjust enrichment theory focuses on what the plaintiff *contributed* that is being unjustly retained by the defendant. *Lewis*, 189 P.3d at 1145-47.

Lewis was not a case about non-married partners. Rather, it involved a claim by Cassandra Lewis against Frank and Lucy Lewis, her mother- and father-in-law. Cassandra Lewis had been married to Sammy Lewis, who was Frank and Lucy's son. Cassandra and Sammy divorced. The marital home was actually titled to Frank and Lucy, but Cassandra and Sammy had made all payments on it for 14 years. Cassandra argued that the agreement between the four of them had always been that title to the home would be transferred to Cassandra and Sammy — that it was "their house." But the divorce changed that plan. The trial court ordered Frank and Lucy to pay to Cassandra the net proceeds from the sale of the house, minus what they had contributed as a down payment. In other words, Cassandra was put in the shoes of the seller.

Lewis is easily made applicable to non-married partners. Non-married life partners are confidants.[4] Often, they will have as their mutual purpose to "share and share alike," or to financially and otherwise support the unit, or to take care of each other for life, or to join their resources for the benefit of both parties. If one person in the partnership has all or most assets in his or her name, and upon a break-up excludes the other person from the benefit of those assets, and/or fails to support the other partner, it can be argued that such person has profited from a significant deviation from the mutual purpose.

One might argue that *Salzman*, being the case that directly involves non-married partners, is the case to apply to that class of claimants, while *Lewis* is for a different class of claimants. However, the

4. A confidential relationship exists where one party justifiably reposes confidence in another such that the parties drop their guard under the assumption that each side is acting fairly. *Id*. at 1142-43.

author does not believe that would be a correct interpretation of the interplay between *Salzman* and *Lewis*. First, the question on certiorari in *Salzman* was, "Whether a donor may recover funds contributed to a donee, in law or in equity, where the trial court found, based upon evidence at trial, that the transfer was in consideration, partially or entirely, for a cohabitation agreement." *Salzman*, 996 P.2d at 1264 n. 1. Although there was a discussion regarding the fact that the plaintiff appeared to have met the elements of an unjust enrichment claim, there was no new unjust enrichment law created by the case. The main holding of the case was that non-married cohabitants were not precluded from bringing these claims against each other just because they were "living in sin." Second, *Lewis* is clearly an expansion of unjust enrichment cases for persons in a special class, namely, close family members and confidants. One might be tempted to argue that a life partner is not necessarily a confidant, but if a mother-in-law qualifies, an intimate partner simply must qualify as well.

It is the author's opinion that *Lewis* brings Colorado closer to those states with "marriage by analogy" law for non-married partners. Within the *Lewis* framework, one can argue that if non-married partners agreed to treat their relationship as a marital relationship, and they acted in accordance with a marital relationship, upon a breakup, they should be put in the shoes of married persons. Consequently, *Lewis* is a very large, shiny arrow in the quiver of attorneys seeking relief for non-married partners.

§ 35.5 CONCLUSION

Aside from the protections afforded both married people and parties to civil unions, a Colorado practitioner representing a client who is a non-married partner seeking assistance with dissolving his or her relationship has a legal claim. Although the *Lewis* unjust enrichment claim falls short of some remedies available to non-married partners in other jurisdictions, it is another step toward the recognition of the need for legal framework for thousands of non-traditional families.

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