44289-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

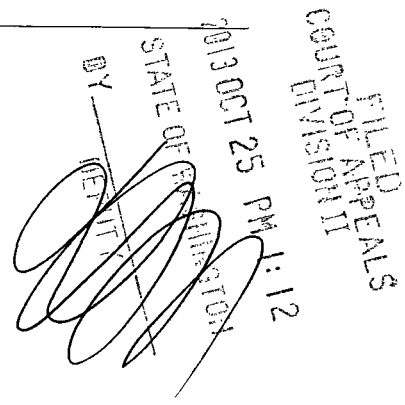
JEAN M. WALSH,

Appellant,

v.

KATHRYN L. REYNOLDS,

Respondent.



APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

WASHINGTON

STATUTES

OTHER AUTHORITIES

WASHINGTON

OTHER

APPENDIX

Appendix A: Bar Ass'n, *Family Law Deskbook* § 12 (2012)

Appendix B: Robert E. Rains, *A minimalist approach to same sex divorce*, 2012 Utah L. Rev. 393, 413-417 (2012)

Appendix C: IRS Publication 555, Rev. January 2013.

I. INTRODUCTION

The dissolution on appeal is not the dissolution of a traditional marital relationship. In fact, despite Ms. Reynolds' efforts to characterize this relationship as a marriage, this domestic partnership was not a marriage, nor was it formed under the "everything but marriage" laws of 2009. This was a non-traditional relationship. It was non-traditional, not because it was between two women, but because it was a non-intimate relationship for the vast majority of the relationship (since 1994). It was also non-traditional because Dr. Walsh and Ms. Reynolds intentionally and fastidiously kept their financial lives separate. This was an agreement that they had, and kept, for over 20 years. The purpose of this domestic partnership was to maintain a family environment for their three children.

At the time these women met, there was no legal recognition of domestic partnerships or any registration for domestic partnerships. For the large majority of their relationship, there was no mechanism for any same sex couple to acquire or share community property, or to choose to enjoy many of the benefits which have since been afforded to domestic partnerships and now to same-sex marriages.

Despite these undisputed facts, Ms. Reynolds has asked this Court to find the trial court erred by failing to recognize an equitable relationship as far back as 1988. Ms. Reynolds' argument fails to address the law as it

relates to the development of domestic partnership statutes, and changes in those laws and their corresponding effective dates. Ms. Reynolds' argument fails to address that she and Dr. Walsh agreed to keep their property largely separate and clearly designated as "yours, mine, or ours." It fails to address that Dr. Walsh sufficiently traced the acquisition date for certain property to before the parties' Washington or California registered domestic partnerships or that a significant amount of property was acquired by Dr. Walsh before she met Ms. Reynolds.

Ms. Reynolds repeatedly refers to the parties as together amassing two million dollars in assets, when in fact, the vast majority of the assets were accumulated separately and maintained as separate property. This mischaracterization of the evidence does not account for the fact that not only did Dr. Walsh acquire the majority of the remaining property, pay all of the expenses, but also that Dr. Walsh possessed substantial assets before meeting Ms. Reynolds: she owned a house, a medical practice, and had established retirement accounts. It was not just Dr. Walsh who kept her property separate during the relationship; Ms. Reynolds kept her property separate also. Ms. Reynolds overlooks the over $500,000 in cash that she received and used entirely as she pleased, without any financial obligations. This disposable income allowed Ms. Reynolds the opportunity to spend, save, or invest that money as she chose. This money

was treated as Ms. Reynolds' separate property and at no point was she expected to contribute any of this money, or the money she occasionally earned outside the home, to pay any part of the mortgage, living expenses, or the costs of raising the parties' three children.

When the parties began to live together, there was no way for same sex couples to form a legal union, nor any reasonable expectation that they would require a prenuptial agreement, community property agreement, or other legal devise to manage and maintain separate property.[1] Instead, the parties accomplished this objective through the technique most readily available to them: careful planning to avoid jointly owned property. They owned property as they intended and titled it accordingly, either "yours, mine, or ours." Throughout their relationship and particularly at its inception in 1988, no attorney or accountant recommended a prenuptial agreement, or that the parties hold an interest in any asset or liability other than as they titled it.

At no point during the relationship did Ms. Reynolds object to this arrangement. Only now does Ms. Reynolds try to re-characterize the property that each acquired, and maintained separately, as being

[1] Even now, to distribute property outside of marriage in California, where these parties first lived, the courts require parties to obtain written property sharing

community property, asking the Court to ignore the parties' long standing agreement and practice to hold separate property. Ms. Reynolds now asserts that that the trial court caused great injustice in its award and division of property. Instead, the trial court recognized the intention of the parties with regard to acquisitions; its error was using the date of California's expansion of its' domestic partnership law rather than applying Washington law, when the parties have lived in Washington since 2000. The action before the court was the dissolution of the parties' August 20, 2009 Washington registered domestic partnership.

These parties never co-mingled assets or liabilities. The over-whelming evidence at trial was that each party held separate property and separate debt. This was not, as Ms. Reynolds presents it, the parties' jointly acquired property, amassed as a community estate. This was not a traditional relationship in which joint accounts were created and used. Instead, the parties intentionally lived in a manner such that what Dr. Walsh acquired was her own, and what Ms. Reynolds acquired was her own, and in the very few instances in which the parties intended to co-own an asset, it was titled as such.

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agreements. California law has no doctrine similar to the Washington equity relationship doctrine.

Overall, the trial court properly recognized that the parties acquired separate property, adequately traced that property, and that no community property rights could be applied retroactively. The trial court erred when it distributed separate property as though it were community property and in failing to apply RCW 26.60.080, which grants community property only as of the date of registration of a domestic partnership. In erred when it retroactively converted Dr. Walsh's vested separate property to community property and distributed this to Ms. Reynolds, ignoring both RCW 26.60.080 and the long standing intentional ordering of their financial affairs between the parties.

II. ARGUMENT IN RESPONSE TO CROSS-APPEAL

A. The Trial Court properly considered the common law, statutes, and the length and nature of the parties' relationship when it limited the application of the equitable relationship doctrine. (Response to Cross-Appeal p. 23-30).

Ms. Reynolds has attempted to recast the parties' relationship as "traditional". *See e.g.*, Resp. Brief at 1, 15. She portrays Dr. Walsh as the working parent and herself as the doting mother, and attempts to present the parties' relationship as an agreement to fill traditional roles. A traditional relationship would have involved intimacy between the parties, which the parties were not for the vast majority of the relationship. They agreed, and the evidence supports, that the parties maintained separate

financial lives, and both focused their attention on the children. VRP 97. The "whole relationship was built around [the] children." *Id.* The parties lived separate lives—personally, emotionally, and financially. *Id.*

For example, Dr. Walsh gave birth to two of the three children. After the parties' second child was born, Dr. Walsh sold her private practice and began to scale back her work, doing work such as insurance physicals,. so as to parent the children and be home more. VRP 58. When Dr. Walsh took the Group Health position, she worked an "accommodated schedule" that coincided with the hours the children were in school. Moreover, while Ms. Reynolds claims that she alone was responsible for the children and "keeping a good home," Dr. Walsh drove the children to and from school on a regular basis, and Ms. Reynolds hired gardeners and housekeepers. VRP 254, 353, 380, 393. Dr. Walsh's accommodated schedule allowed her to perform significant parenting functions. Ms. Reynolds' claim of being in the role of traditional mother is further refuted by the agreed parenting plan. Joseph, the second oldest child, resides full-time with Dr. Walsh. CP 81-90. The oldest child, Julia also resides full time with Dr. Walsh. The evidence before the trial court does not support an agreement to maintain traditional roles or that traditional roles were performed.

The absence of intimacy since 1994, strict maintenance of separate finances and lack of any intent for a formal marriage, demonstrate that the neither party viewed this as a "traditional" relationship until Ms. Reynolds' assertions at trial. *See* FF 11; CL 11A; CP 367, 376. The parties had long foregone any intimate relationship, and instead maintained a family relationship for the purpose of the children. *Id.*; FF 45, CP 372; VRP 97; 438. The two times when the parties registered for domestic partnerships, the laws under which they registered did not change their long term practice of keeping financially separate lives. VRP 68. In addition, the parties never attempted to legally marry in jurisdictions where marriage was legal. VRP 108, 243, 376. There was no evidence that the parties intended to get married, or enter any traditional or marriage-like relationship.

This case is not about reverting to the *Creasman*[2] presumption as Ms. Reynolds contends. Rather it is about upholding the parties' intent to purposefully organize their lives in the manner of their choosing.

When the parties initially established their same sex relationship, it was not common practice for attorneys or accountants to recommend a prenuptial agreement, or separate property agreement. 2 Washington State

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[2] *Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948).

Bar Ass'n, *Family Law Deskbook* § 12 (2012); *see* VRP 438. These parties knew they could not marry, and had no reason to believe their agreement to remain separate financial entities would not be upheld. The only reasonable mechanism available to the parties was to intentionally title property separately, and to avoid co-mingling property they intended to keep as separate—a task they accomplished throughout their relationship.

The development of the common law supports that the parties' intentions to operate as separate financial entities should be affirmed. The meretricious relationship doctrine originated in circumstances where the parties chose not to marry, but was not initially applied in situations where the parties could not legally marry. *See, Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000). As the meretricious relationship doctrine developed to the committed intimate relationship doctrine, it was expanded to remove limitations based upon the length of a relationship, while maintaining the requirement that the doctrine applied only to property which would otherwise be community property. Furthermore, the court in *Connell*, established that the relationship must be examined to determine whether the doctrine applies at all; setting forth the five factors under which the court should do so. *Connell v. Francisco*, 127 Wn.2d

339, 348, 898 P.2d 831 (1995); *c.f. In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984).

Even as the law expanded to encompass same-sex relationships, Justices Alexander and Sanders expressed some reservation to broadening this quasi-marital doctrine: Justice Alexander disagreed with expanding the meretricious relationship doctrine when one party to the relationship is deceased; and Justice Sanders proposed limiting the doctrine to couples who could legally marry. *Vasquez v. Hawthorne*, 145 Wn.2d 103 109, 112 33P.3d 735 (2001) (concurrence). In response to the majority's statement that "equitable claims are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties," Justice Sanders opined,

> this statement is literally accurate insofar as it refers to 'equitable claims,' which would include implied partnership and equitable trust. It does not, however, include all equitable claims such as those premised upon a meretricious relationship where, obviously, members of the same sex lack the lawful authority to wed just as much as married people lack the lawful authority to enter into plural marriages, at least in the context of the laws of our jurisdiction.

Vasquez, 145 Wn.2d at 114. Ultimately, while the courts have expanded the doctrine to include same-sex couples, it must still analyze the quality of the relationship, and is strictly limited to dividing property which would have been characterized as community. *Long v. Fregeau*, 158 Wn. App.

919, 244 P.3d 26 (2010) (analyzed the quality of the relationship, including intimacy, commitment between the parties', and an intention to live a marital like relationship before determining that it was an equity relationship); *Sutton v. Widner*, 85 Wn. App. 487, 491, 993 P.2d 1069 (1997) ("the parties lived together and had a sexually intimate relationship from 1989 until August 1994".)

Yet as the common law developed, the *Lindsey* factors continue to guide whether parties have entered into an equitable relationship. Among them the court considers the parties intention to enter into such relationship, and their decision not to marry (when available). *Connell*, 127 Wn. 2d at 350. Throughout their relationship, these parties had no expectation that their intentional organization of their financial lives would be ignored. The parties had no basis to expect their relationship to ever be classified as "traditional." *See In re G.W.-F.*, 170 Wn. App. 631, 285 P.3d 208 (2012).

The law has significantly changed. Domestic partners can acquire community property as provided by statute and same-sex couples can marry in Washington. But throughout this relationship, the parties had an expectation that their agreement, to own property as yours, mine, or ours, would be upheld.

1. **The Community Property Acquired By the Parties Was Very Limited: Most Property Accumulated During This Relationship Was Separate Property.** (Response to Cross-Appeal p. 24-26).

Ms. Reynolds misstates Dr. Walsh's argument by stating that Dr. Walsh urges this court to ignore the common law. Resp. Brief at 23. Dr. Walsh has argued: The common law did not confer the rights on the parties that Ms. Reynolds has requested and argues for – the common law did not grant community property rights to equitable relationships under any name. Instead, the common law instructed the court to look at community property distributions as a guide, and to distribute only *that property which was otherwise community property. See, Connell*, 127 Wn.2d at 350. "Until the Legislature, as a matter of public policy, concludes that meretricious relationships are the legal equivalent to marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married." *Id.* In this case, the trial court characterized most of the property as separate property and erred in retroactively converting separate property to community property as of January 1, 2005, rather than using the date determined by statute, the date of registration of the Domestic Partnership (in this case, August 20, 2009). *See, e.g.,* FF 4, 21, 33, 34, 45; CL 7, 11D, 6.

The court lacks jurisdiction to distribute separate property and is limited to "community like" property. *Id.* In *Connell*, the trial court found that the parties' property was largely separate property, and that finding should not be disturbed absent an abuse of discretion. 127 Wn.2d at 351. The "trial court's discretion is wide and will not be interfered with except for a manifest abuse of such discretion." *Marriage of Lindsey*, 142 Wn.2 at 307 (citing *Baker v. Baker*, 80 Wn.2d 736, 747, 498 P.2d 315 (1972)).

Community property rights were not available to these parties until the legislature enacted the Domestic Partnership Act of 2008, which *expressly* granted community property rights to domestic partners. In fact, Ms. Reynolds has acknowledged that even in 2003, "The parties could not have held *any* property as 'community property.'" Resp. Brief at 35. Ms. Reynolds' request to find the trial court erred by failing to convert separate property to community property under the guidance of the common law, ignores two critical points: (1) under the common law, the court can only distribute what would otherwise be community property; and (2) the trial court held that property at issue was **separate**, but erroneously distributed the property anyway. Neither the common law nor the domestic

partnership statue granted the trial court the authority to distribute separate property as community property.[3]

The common law can act to fill a void when the legislature fails to legislate, or it can operate as a tool to interpret statutes when the legislature is not perfectly clear. Justice Alexander acknowledged this first feature when applying equitable concepts to meretricious relationships: "Indeed, we developed this equitable doctrine because the legislature has not provided a statutory means of resolving the property distribution issues that arise when unmarried persons, who have lived in a marital-like relationship and acquire what would have been community property had they been married, separate." *Vasquez*, 145 Wn.2d at 109, (concurrence). The development of these equity relationships first arose because parties had not married, but developed with same-sex couples when there was no mechanism to formally establish their relationship. Since then, the legislature *has* provided statutory means of resolving property distributions for Washington registered domestic partners, like the parties here. The legislature could not have more clearly stated when

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[3] Respondent argues that the court's characterization of the property as separate property was in opposition to the law established post-*Lindsey*. Resp. Brief at 23. But even in *Lindsey*, the court was not given the power to grant community property rights, but could only divide what would otherwise be "community-like" property. *Marriage of Lindsey*, 101 Wn.2d 299.

to apply community property to domestic partnerships: "Any community property rights of domestic partners established by chapter 6, Laws of 2008 shall apply from the date of the initial registration of the domestic partnership or June 12, 2008, whichever is later." RCW 26.60.080. Before the enactment of this statute, domestic partners could not acquire community property in Washington.

Furthermore, Dr. Walsh's position, that community property rights were unavailable to the parties before 2008, is not novel as Ms. Reynolds asserts. The IRS issued Publication 555 to guide taxpayers with the characterization of community property for income tax purposes. IRS Publication 555, Rev. January 2013. The IRS recognizes Washington registered domestic partnerships as obtaining community property rights only as of June 12, 2008. This publication acknowledges that community property rights were unavailable prior to that date and taxpayers are instructed to complete their federal tax returns accordingly.

The legislature further made it clear that the date of registration is critical to determining the parties' rights in enacting RCW 26.04.010, Washington's same sex marriage statute. Parties who remain registered domestic partners after June 30, 2014, shall be deemed married and the date of marriage shall be deemed to be the date of registration as a domestic partnership. RCW 26.60.100 in part provides:

> (3)(a) Except as provided in (b) of this subsection, any state registered domestic partnership in which the parties are same sex, and neither party is sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2013, is automatically merged into a marriage and is deemed a marriage as of June 30, 2014.
>
> ...
>
> (4) For purposes of determining the legal rights and responsibilities involving individuals who had previously had a state registered domestic partnership and have been issued a marriage license or are deemed married under the provisions of this section, the date of the original state registered domestic partnership is the legal date of marriage. Nothing in this subsection prohibits a different date from being included on the marriage license.

Recognizing that the legislature did not grant community property rights to domestic partners until 2008 does not undermine case law or ignore legislative intent. Based on the above enactment, the Legislature has affirmed the date of domestic partnership registration as the event which property express rights and responsibilities upon the parties.

2. <u>Treating Separate Property As Community Property Would Deprive Dr. Walsh of Her Vested Rights.</u>
(Response to Cross-Appeal p. 29-30).

The trial court could not distribute property acquired or accumulated before the parties registered as a domestic partnership without depriving Dr. Walsh of her vested rights. The risk of depriving a person of a vested right by establishing community property for domestic partnerships was considered by the legislature when they granted

community property rights to domestic partners commencing in 2008. To avoid divesting anyone of their vested property interest, the legislature explicitly instructed that community property rights apply from the date of the initial registration or June 12, 2008, whichever is later. RCW 26.60.080.

Furthermore, the legislature's directive to apply community property laws from the effective date of the act or the date of registration complies with the maxim that statutes operate prospectively. Despite Ms. Reynolds' contention, a retroactive application of domestic partnership law, that treated separate property as community property, *is* a deprivation of a vested right. *See* Resp. Brief at 29.

> As a general rule, courts presume that statutes operate prospectively unless contrary legislative intent is express or implied. (citation omitted). **Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions.** *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 1500, 128 L.Ed.2d 229 (1994); *Id.* at 1505, 114 S.Ct. at 1505 (stating that a statute has a genuinely retroactive effect if it impairs rights a party possessed when he acted, increases his liability for past conduct, or imposes new duties with respect to completed transactions); *In re Cascade Fixture Co.*, 8 Wn.2d 263, 272, 111 P.2d 991 (1941) (stating that **retroactive legislation changing vested rights is not favored**); *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993) (declining to apply a statute retroactively because it created a new civil penalty for noncomplying hospitals). Elementary considerations of fairness dictate that **individuals should have an opportunity to know**

> **what the law is and to conform their conduct accordingly**. *Landgraf*, 114 S.Ct. at 1497.

Matter of Estate of Burns, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997) (emphasis added).

Here, the trial court properly recognized that Dr. Walsh's vested separate property rights were in jeopardy if property characterized as her separate property was distributed to Ms. Reynolds. "The court lacks jurisdiction over the parties' separate property during the term of the equity relationship..." CL 4, 12; CP 372, 376. "Accordingly, prior to those dates, there is no legal basis for finding an equitable relationship to exist without violating the constitutional rights of the parties." CL 4; CP 372. The trial court correctly determined that it could not retroactively assign new rights and obligations between these parties.

Ms. Reynolds relies on *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007) for the proposition that titling is not indicative of a vested property right because both parties have rights, even if it is titled in only one party's name. Resp. Brief at 30. This case, however, is unlike *Olver*. In *Olver*, the parties had a traditional religious wedding, held themselves out as husband and wife, but were never legally married or registered as domestic partners. *Id.* at 658. The parties pooled their money to purchase assets, and titled property in the man's name, in accordance with the

custom of their culture. *Id.* There was no demonstration that the parties intended anything other than to co-own property as husband and wife.

Conversely, Ms. Reynolds and Dr. Walsh *intentionally* titled things in their own names and kept all financial accounts strictly separate because, with rare exceptions, they never intended to co-own property. Property was titled based upon how the parties intended to own it. For example, Ms. Reynolds' owned her cars as her own property and therefore they were titled accordingly. *See e.g.*, VRP 260, 358. The parties knew they were acquiring separate property, and titled property accordingly.

Dr. Walsh had a vested property interest in the separate property she acquired. Respondent contends that the property interest was not vested because the parties had a long meretricious relationship, but the evidence below, and the Court's findings, support the contrary: the parties had an intention to keep separate property, and revision of that intention by Ms. Reynolds' request for an award of that separate property, impairs Dr. Walsh's vested rights. Thus, any interpretation of the domestic partnership act, or the distribution proposed by Ms. Reynolds which distributes Dr. Walsh's separate property, or applies community property laws retroactively, impairs Dr. Walsh's vested rights. The trial court properly recognized that vested rights were in jeopardy, but erred in

distributing separate property accumulated before the parties registered as domestic partners in 2009.

B. <u>The Legislature Clearly Established When Washington Recognized Foreign Domestic Partnerships. Before Then, There Was No Mechanism To Recognize A Domestic Partnership From California.</u> (Response to Cross-Appeal p. 31-33).

The trial court's error is not that it did not go back far enough when it characterized property as "community like" property, as Respondent contends. Instead, the error is that it distributed separate property as community property when Washington did not recognize any domestic partnerships, from any state, in 2005. Again, Respondent has provided no authority nor made any attempt to reconcile the differentiation between the express legislative instruction to recognize community property rights (or in this instance a foreign domestic partnership) at a specific date (June 12, 2008[4]), with her argument that the court failed to recognize the California domestic partnership as early as 2000. RCW 26.60.090 codifies the reciprocity of domestic partnerships. Washington did not recognize a domestic partnership from another jurisdiction before the enactment of the Domestic Partnership Act of 2008. Respondent's argument invites this Court to ignore that the state did not extend

[4] This date was the effective date for the Domestic Partnership Act of 2008.

reciprocity to domestic partnerships (or equivalently titled legal unions) until 2008.

While California may have expanded the rights of domestic partners in 2005, Washington, where the parties were living and acquired property, had not even adopted a domestic partnership statute. The trial court erred by distributing property based upon the California domestic partnership in 2005, before Washington extended reciprocity in 2008.

By way of analogy, this issue is akin to the many cases around the United States where a same-sex couple, legally married in one state, cannot obtain a divorce in their home state that does not recognize same-sex marriages as legal.[5] Washington could not have extended domestic partnership rights to a domestic partnership it did not recognize, especially when domestic partnerships were entirely non-existent in this state at the time.

C. This Court Should Not Award Reynolds' Attorneys' Fees on Appeal. (Response to Cross-Appeal, p. 36)

This Court should deny Ms. Reynolds' request for attorney's fees because she has not provided any basis upon which fees can be awarded. RAP 18.1 permits an award of attorney's fees, "if applicable law grants a

party the right to recover reasonable attorney fees or expenses on review..." Ms. Reynolds entire appeal is devoted to the argument that the equity relationship doctrine was misapplied in this case, and that she should receive a larger property award under that doctrine. *See* Resp. Brief 1-36. However, the court has unequivocally stated that attorney's fees are not available in an action to divide property under the equity relationship doctrine. *Foster v. Thilges*, 61 Wn. App. 880, 887-88, 812 P.2d 523 (1991). As discussed below, no issues related to the dissolution of the domestic partnership itself are at issue in this appeal /cross-appeal. Ms. Reynolds cannot argue exclusively the application of the equity relationship doctrine, which does not award attorney's fees, and then borrow from the Domestic Partnership Act to request attorney's fees and costs. *Connell*, 127 Wn.2d at 349 (citing *Western Cmty. Bank*, 48 Wn.2d 694 (RCW 29.09.140, which permits an award of attorney fees in a marriage dissolution action, is inapplicable to an action to distribute property following a meretricious relationship)).

Moreover, Ms. Reynolds has requested attorneys' fees on appeal based on her alleged need. *See.* RCW 26.09.140. Ms. Reynolds continues

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[5] Robert E. Rains, *A minimalist approach to same sex divorce*, 2012 Utah L. Rev. 393, 413-417 (2012) (citing numerous cases where same sex couples married in one state cannot divorce in the state in which they now reside).

to insist that she is approaching poverty, but does not disclose the over $270,000 she has received since the entry of the dissolution decree or that she continues to receive child support.[6] Even if this Court did not disrupt the trial court's distribution of property at all, Ms. Reynolds has sufficient ability to pay her own attorneys' fees on appeal. For these reasons, the Court should deny Ms. Reynolds request for appellate fees.

Alternatively, if this Court does award any attorney's fees to Ms. Reynolds, the award should be limited and at no point exceed $38,000. Ms. Reynolds' Declaration submitted in opposition to Dr. Walsh's Motion to Stay stated that she had incurred $23,000 in fees, but paid a $5,000 deposit, and only expects to incur $15,000 in additional fees as of the date of the motion to stay. Decl. of Reynolds at ¶ 5, 6. Without waiving any future objection to any fee request, or an opportunity to scrutinize the fees submitted to this Court, Dr. Walsh asks this Court to deny fees on appeal or alternatively to acknowledge a maximum fee award of $38,000, consistent with Ms. Reynolds' declarations.

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[6] In her Declaration in Support of Opposition to Appellant's Motion to Stay, Ms. Reynolds testified that she would be using the proceeds of the sale of the Federal Way property to pay her attorneys' fees on appeal. She stated, "While I paid an initial fee deposit of $5,000 when I retained my appellate counsel, it was with the understanding that I would be receiving a property award that I could use to pay the additional fees incurred beyond the initial deposit." Decl. of Reynolds at ¶ 5.

III. ARGUMENT IN REPLY

A. The Court Erred In Awarding Property Accumulated Before The Registration Of The Washington Domestic Partnership.

Respondent asserts that the trial court and Dr. Walsh have applied domestic partnership law in a manner that ignores case law and is contrary to the Legislature's intent. Resp. Brief at 23. Yet, Respondent fails entirely to address RCW 26.60.080, which explicitly establishes the legislative intent to set the earliest date at which community property rights could attach. Without any effort to reconcile that statute with RCW 26.60.060(2), Respondent urges this Court to apply the common law in areas were the statutory language expressly limits the application of community property to "the date of the initial registration of the domestic partnership or June 12, 2008, whichever is later." RCW 26.60.080. Before the enactment of this statute, domestic partners did not acquire community property in Washington by operation of equity. None of the cases cited by Ms. Reynolds involved a registered domestic partnership.

Respondent asserts the application of the equitable relationship doctrine is in congruence with the statute. Resp. Brief. at 28. RCW 26.60.060(2) states, "Nothing in chapter 156. Laws of 2007 affects any remedy available in common law." However, what Respondent fails to recognize, is that RCW 26.60.060(2) and the laws of 2007 do not

specifically control the primary issues in this case. The 2007 statute, which established domestic partnerships, did not create or allow community property and was supplanted in part by the 2008 enactments. This new statutory scheme superseded some provisions of the common law, for example, the new amendments established, for example, that domestic partners could prospectively acquire community property, could make medical decisions, and had standing in a wrongful death action.

In fact, the Domestic Partnership Act of 2008 specifically required previously registered domestic partners to receive notice of the changes to their rights and obligations as domestic partners. Because this 2008 version of the Act altered property rights for existing domestic partnerships, parties were provided an opportunity to terminate the domestic partnership before the effective date of the new act. This would prevent subjecting a party to community property rights or other obligations without their knowledge or intention to do so. HB 3104 specifically stated:

> Part I – Notice New Section. Section 101. (1) Sixty days before the effective date of this act, and again thirty days before the effective date of this act, the secretary of state shall send a letter to the mailing address on file of each domestic partner registered under Chapter 26.60 RCW notifying the person that Washington's law on the rights and responsibilities of state registered domestic partners will change. (2) The notice shall provide a brief summary of new laws, including changes to the laws governing

> community property, transfer of property, taxes, mutual responsibilities for certain debts to third parties, and other provisions. The notice shall also explain that the way domestic partnerships are terminated has changed and that, unless there are certain limited circumstances, it will be necessary to participate in a dissolution proceeding in court to end a domestic partnership. (3) The notice shall inform the person that those domestic partners who do not wish to be subject to the new rights and responsibilities must terminate their domestic partnership before the effective date of the act.

HB 3104 , pg. 2, lns. 16-32.

Respondent has made no effort to reconcile the differences between the 2007 Statute, which arguably left a void that could be filled by the common law, and the express language of the 2008 Act, which supplants portions of the common law and provides a statutory scheme to specifically address community property rights. These parties registered on August 20, 2009 under the 2008 statute.

Arguably, when the 2007 Act was enacted, a court could look to the meretricious relationship doctrine for guidance in addressing property acquired during a domestic partnership. After 2008, however, the statute expressly stated, that no community property rights shall accrue before the earlier of that Act's effective date (June 12, 2008), or the date of registration.

These parties understood that they could arrange their financial affairs in accordance with their intentions, as they had done the entirety of

their relationship. VRP 438. When the parties entered into the domestic partnership in August 2009, they signed a declaration that states, "Any rights conferred by this registration may be superseded by a will, deed or other instrument signed by either party to this domestic partnership." Ex. 32. Dr. Walsh understood this language to mean that their agreed arrangement would be given legal effect, and retroactive application by the court could not unwind their intentional titling of property. That language gives the parties the freedom to dispose of their separate property: "To me, that said that if I wanted to will all of my property to my children, it was still my property...based on that document, I didn't feel that I needed a prenuptial agreement." VRP 438.

The Supreme Court ordered a distribution similar to that proposed by Dr. Walsh in *Soltero v. Wimer*, 159 Wn.2d 428, 435, 150 P.3d 552 (2007). The trial court was reversed when it distributed separate property. Because the trial court held that there were no community-like assets to distribute, "no equitable distribution under the meretricious relationship doctrine is possible." *Id.* In that case, Soltero moved into Wimer's home, but never paid rent. *Id.* at 430. Wimer paid Soltero a monthly allowance for her expenses, but he paid the majority of the household expenses from his businesses. *Id.* at 431. Soltero also worked for Wimer's businesses and received an annual salary from that job. *Id.* She decorated the parties'

homes, worked in the gardens, and cooked for the couple and their guests. *Id.* But like Ms. Reynolds, she never contributed financially to the relationship. *Id.* The parties held themselves out as a couple, but never purchased any personal or real property jointly, nor did they ever commingle any money. *Id.* While they had a long, stable relationship, the court characterized the property as Wimer's separate property, but erroneously distributed separate property to Soltero. *Id.* at 435.

B. This Was Not A Marriage, Nor Was It A Marriage Like Relationship.

The parties never intended to enter into a marriage, or be treated as if they were married. A meretricious relationship, by any name, and a marriage are not the same. *See, Sutton*, 85 Wn. App. at 490 ("a meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that they are not lawfully married.") The court's jurisdiction is limited when faced with a meretricious relationship to property which would have been community property – this application is by analogy. *Connell*, 127 Wn.2d at 349.

The trial court erred when it treated this domestic partnership as a marriage and awarded separate property:

> A meretricious relationship is not the same as a marriage. *Davis v. Department of Emp't Sec.*, 108 Wn.2d 272, 278–79, 737 P.2d 1262 (1987) (an unmarried cohabitant is ineligible for benefits triggered by a "marital status"

> provision under Washington's unemployment compensation statute); *see also Western Cmty Bank v. Helmer,* 48 Wn. App. 694, 740 P.2d 359 (1987) (RCW 26.09.140, which permits an award of attorney fees in a marriage dissolution action, is inapplicable to an action to distribute property following a meretricious relationship); *Continental Cas. Co. v. Weaver,* 48 Wn. App. 607, 612, 739 P.2d 1192 (1987) (a person cohabiting in a non-marital relationship with an insured is not a member of the insured's "immediate family"); *Roe v. Ludtke Trucking, Inc.,* 46 Wn. App. 816, 732 P.2d 1021 (1987) (under the wrongful death statute an unmarried cohabitant is not included within the statutory category of "wife").

Connell, 127 Wn.2d at 348-49; *see also, In re G.W.-F*, 170 Wn. App. 631, 637, 285 P.3d 208 (2012) ("A committed intimate relationship is not a marriage. Thus the laws involving the distribution of marital property do not directly apply to the division of property following a committed intimate relationship").

Because an equity relationship is not a marriage, the court is more limited.

> Unlike a marriage, at the end of an equity relationship, solely what would be community property is before the court. The court may not dispose of the parties' separate property. We presume any increase in value of separate property is likewise separate in nature.

Long, 158 Wn. App. at 929 (internal citations omitted).

Not only does the law clearly state that this was not a marriage, the facts of this case show that the parties never intended to be married. Ms. Reynolds places heavy emphasis on an exchange of rings (Resp. Brief at

42), although no evidence exists of any ceremonious exchange of rings or other commitment ceremony. VRP 374. Ms. Reynolds suggests that the parties believed they formed a valid marriage for a time in Oregon (Resp. Brief at 17), but ignores both her own testimony at trial in which she stated that she did not believe the marriage would be valid at the time she traveled to Oregon and the trial court's finding to the contrary. FF 24, CP 369; VRP 244.

The parties were never legally married, nor intended to be. When the parties traveled to Oregon, they knew the ceremony was invalid and that Oregon had not legalized same-sex marriage. VRP 107-08, 244. Ms. Reynolds' broad, sweeping assertions that the couple had a "marriage like" relationship misstates the evidence. Ms. Reynolds propounds that the "parties formalized their relationship whenever they could..." Resp. Brief at 15-18. But Ms. Reynolds ignores that the parties never married in Canada or in California when both knew same-sex marriage was legal in both jurisdictions[7]. VRP 376. Indeed, Dr. Walsh and Ms. Reynolds were both in California with their children when same-sex marriage was briefly legal there. In contrast, they traveled to Oregon without their

[7] Ms. Reynolds' argument is further undercut by the fact that she testified that she and Dr. Walsh registered as domestic partners as soon as it was available in Washington, when in

children "to make a political statement." VRP 107. While Ms. Reynolds may attempt to paint a picture of a couple racing to the alter, these parties took careful steps to intentionally structure their lives in a separate manner. What they had was a domestic partnership, not a marriage.

In addition to the fact that the parties did not, in fact, legally formalize their relationship at every opportunity, both domestic partnerships comported with the parties' arrangement to keep separate property separate. California domestic partnership law in 2000 specifically provided that the domestic partnership did not create community property. The Washington domestic partnership registration form itself stated, "Any rights conferred by this registration may be superseded by a will, deed, or other instrument signed by either party to this domestic partnership." For example, in regard to the first domestic partnership registration in California, Dr. Walsh testified:

> Q: From your perspective, what was the reason you elected to enter into a domestic partnership in California in 2000?
>
> A: Well, this domestic partnership provided no benefits to either of us. It provided healthcare benefits in municipalities that neither of us worked in. It provided that you could become next of kin, and since neither of us was planning on dying, and other than that, it provided no benefits other than being identified.

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fact, Washington first allowed domestic partnership registration in 2007, but the parties here did not register until August 2009. FF 29 (CP 370)

> Now, when Kathy and I started living together, we were technically in the closet like most gay people that we knew and gradually people become more visible. But this was the best opportunity that I had seen in a long time to stop being invisible. These were going to be kept somewhere and recorded so someone would know that there were 10,000 or 100,000 or I don't know, some number of gay couples that would no longer be invisible.
>
> Q: And did you have any other reason for registering, or was it to make the statement that you were not invisible? Was it your sole intent—
>
> A: It offered nothing else and we were about to move, so... No, it offered me nothing other than to stop being invisible.

VRP 68-69. Furthermore, Dr. Walsh testified that she began thinking about the Washington domestic partnership when her father was dying, for inheritance purposes. VRP 91. Ms. Reynolds only now attempts to paint an image of a couple intending to marry, but that was not the parties' behavior at any time. They intended to have a domestic partnership, not a marriage.

Ms. Reynolds describes the advancement of domestic partnership law in Washington by setting out the initial enactment of the limited 2007 Act, and the passage of the 2009 Act which created the "everything but marriage laws." Resp. Brief at 18. But Ms. Reynolds incorrectly states that the 2009 amendments were in effect when the parties registered, and fails to present that the 2008 Act, under which the parties registered, was

still limited to a few enumerated rights.[8] The parties never registered for "everything but marriage," and never intended to be in a relationship that was a marriage, or "marriage like." It was error to divide Dr. Walsh's separate property as if had been acquired by a married person.

C. The Trial Court Should Not Have Found an Equitable Relationship Before Registration as Domestic Partners in Washington—The Parties' Deliberate Manner of Organizing Their Assets Shows an Intention to Avoid a Marital Like Relationship.

The trial court erred by focusing on the length of the relationship as if cohabitation alone were sufficient to equate to a marriage or "marriage-like" relationship. Dr. Walsh asserts that the parties did not have a committed intimate relationship. After the court in *Connell* determined that only property before the court was community property, it continued, "Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any economic risks or legal obligations are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080

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[8] The 2009 amendment did not become effective until December 3, 2009. E2SSB 5688, Chapter 521, Laws of 2009, was signed by Governor Gregoire on May 18, 2009, but the effective date was delayed due to Referendum 71. Thus, the law was not in effect when the parties registered in Washington on August 20, 2009.

apply to property distributions following a marriage." *Connell*, 127 Wn.2d at 350.

The intention of the parties throughout their relationship to maintain separate property should be heavily considered when weighing the other *Lindsey* factors.[9] "[T]here must be 'mutual intent to form' a committed intimate relationship. The necessary corollary to this requirement to form such a relationship is that it also requires mutual intent to maintain one." *In re G.W.-F*, 170 Wn. App. 631, 648, 285 P.2d 208 (2012) (citing *Pennington*, 142 Wn.2d at 604). The listed factors are relevant, but not determinative or a limitation on what the court may consider. *Connell*, 127 Wn.2d at 346. Moreover, "[t]hese factors are neither exclusive nor hyper technical, but rather a means to examine all relevant evidence. No factor is more important than another." *Long*, 158 Wn. App. at 926. Ms. Reynolds now tries to portray this intention to maintain separate assets and liabilities as solely on the part of Dr. Walsh, but the evidence is to the contrary. *See* Resp. Brief at 41. The testimony

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[9] This position is not an argument to return to the *Creasman* presumption. The *Creasman* presumption presumed that property belonged to the person in whom title was placed, regardless of intent. Dr. Walsh advances instead that an intention to mindfully title property as an agreement to ownership does not follow the *Creasman* presumption but instead accords with *Connell*. The intention of both parties throughout the relationship should be given significant weight.

at trial by both parties was that they kept separate accounts, assets, and liabilities. Ms. Reynolds knowingly maintained her own accounts, and never believed the parties to share accounts. She knowingly opened separate retirement accounts, was solely responsible for separate credit accounts, had cars titled in either her name or in both parties' names, and never testified that she believed these assets were shared. There was no attempt by Ms. Reynolds to portray the relationship as "marriage-like" until after Dr. Walsh filed for dissolution of the domestic partnership. As late as 2010, Ms. Reynolds continued to pay off a loan she had taken from Dr. Walsh in 2007. This belated effort to revise their intention to re-form how they organized their lives, should not succeed by merely accusing Dr. Walsh of solely determining how the parties held their assets and liabilities. At a minimum, however, the relationship must be "marital like," which Dr. Walsh disputes. *See Connell*, 127 Wn.2d at 346.

It is not "hyper technical" to determine that two people who were not intimate with each other since 1994 were not in a "traditional" marriage-like relationship. Indeed, the intimacy between the parties has long been a consideration throughout the evolution of the "meritorious relationship" doctrine. The current term "committed intimate relationship" makes that factor applicable as well. Courts have long included a description of the degree of physical intimacy in the factual

recitation of cases employing this doctrine. *See Soltero*, 159 Wn.2d 248 (relationship was monogamous and exclusive); *Sutton*, 85 Wn. App. 487 (parties "lived together and had a sexually intimate relationship"). This relationship was not a committed *intimate* relationship, as it was not intimate at all. It is also not "hyper technical" to determine that two people, who for over 20 years purposefully and intentionally, consistently and without fail, kept property separately titled into "yours, mine or ours" categories did not have a "traditional" or marriage-like relationship. This was a domestic partnership, not a marriage. It was the unique, non-traditional relationship that both parties intended it to be. Ms. Reynolds asks this court to declare, now 25 years after the parties first met, that it was something other than the life each lived.

While Ms. Reynolds rebuffs the importance of an intimate relationship, the trial court acknowledged that limited physical intimacy occurred. CL 11A, CP, 374. Intimacy and commitment remain two factors the trial court may consider. *Long*, 158 Wn. App. at 922. This supports Dr. Walsh's point that no "marital like" relationship existed. Ms. Reynolds contests that this is not a factor "the court must consider," but overlooks that the courts have recognized the *Connell* factors as being some that the court *may* consider, and that the factors are not "exclusive, hyper technical," or "limited." However, here, the court may weigh other

considerations when finding whether an equity relationship exists. The intention of these parties, and the manner in which the organized their lives does not support finding an equity relationship.

The remaining factors similarly do not support the finding that an equity relationship existed. First, while the parties lived in the same house continuously, after 1994 it was not a romantic relationship, was emotionally separate, and was for the benefit of the children. VRP 57. *See Long*, 158 Wn. App. at 924 (while infidelities may not have precluded the finding of an equitable relationship, *Long and Fregeau* agreed that their relationship was loving and intimate); Dr. Walsh does not dispute their shared residence, but does dispute that the record demonstrated "cohabitation." The term cohabitation usually refers to a relationship that is more than two people who simply share living space: "Cohabitation is the fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations." COHABITATION, *Black's Law Dictionary* (9th ed. 2009). These parties shared a residence and maintained a family environment as domestic partners for the benefit of their children. It is incongruent to say that the parties cohabitated but did not share an intimate relationship. Dr. Walsh testified, "we were certainly bonded to the same child," and "we had very little in common with each other...and innumerable differences, but our common bond was always our children

and our desire to make their lives the best ones they could be." VRP 57, 97. The trial court held "The commitment of the parties was to the children not each other..." CL 11(B) (CP 375). The absence of any commitment ceremony, the absence of ever entering into a valid marriage, and the lack of an intimate relationship since 1994, all support an absence of an equitable relationship. This was a domestic partnership.

Similarly, the purpose of the relationship was to provide stability for the children. VRP 97. While Ms. Reynolds places significant weight on the description to become "visible" as a "couple," Dr. Walsh in fact said, "No, it offered me nothing other than to stop being invisible." The purpose of the relationship was to provide a stable environment for the three children. *See* Resp. Brief at 42. The parties both intended to create a family environment for the benefit of the children, to avoid disrupting them, and after the birth of the first child, their entire relationship was for that purpose.

Lastly, while Ms. Reynolds points to contributing their time and energy to raising the family, it is undisputed that the parties never pooled resources, but that Dr. Walsh paid for all expenses and provided Ms. Reynolds with funds to spend or save at her discretion. The intent of both parties and the manner in which they both organized their lives does not support finding an equity relationship.

Even with an equity relationship, the presumption of community-like property is rebuttable; failure to permit a party to rebut the presumption creates a common law marriage.

In the large majority of cases where the court applies this doctrine to divide the property one person acquires and award it to another, the parties had already co-mingled assets, or jointly shared expenses. *See Lindsey*, 101 Wn.2d 299; *Gormley v. Robertson*, 120 Wash. App. 31, 83 P.3d 1042 (2004); *compare Soltero*, 159 Wn.2d at 430-31.

Here, the court found multiple examples that illustrated that these parties did not co-mingle their finances:

> Another example of the parties' intent to remain separate financial entities is that when Petitioner paid a significant portion of a debt Respondent had incurred on a Farm Bureau credit card, that amount was repaid to Petitioner by Respondent via a deduction from the amount Petitioner paid to Respondent on a monthly basis. In fact, Respondent testified that she repaid Petitioner in full as agreed between the parties.

FF 45, CP 372. The property in this case was proven to be separate property and any presumption otherwise is rebutted. The court should not have awarded separate property to Ms. Reynolds.

D. The Federal Way House Was Correctly Determined To Be Held As Tenants In Common, Distribution Should Have Been Based On Contribution. (Response to Cross-Appeal at 33-36; Reply to 42-45).

Although the trial court properly held that the Federal Way house was held as tenants in common, it erred in distributing a portion of the property to Ms. Reynolds despite that all contributions were made solely by Dr. Walsh. Ms. Reynolds urges that equity should control, and the trial court properly concluded that the proceeds could be divided in any manner it found equitable. Resp. Brief at 43.

The testimony at trial, and the documents signed by the parties, showed that the Federal Way home was titled for inheritance purposes, not to transfer income, or to change the character of any property. Specifically, the deed states that its purpose is *not* to create community property. VRP 82, Ex 33. Ms. Reynolds never disputed this intention. The parties had no reason to expect any other distribution of this property based upon their previous purchase and sale of property in Fresno.

1. The Court Properly Held The Federal Way Property Was Owned As Tenants In Common.

Joint tenancy was terminated. Any subsequent agreement inconsistent with a joint tenancy, converts title to a tenancy in common. *Lyon v. Lyon*, 100 Wn.2d 409, 411, 670 P.2d 272, 274 (1983); *In Re Estate of Phillips*, 124 Wn.2d 80, 83, 874 P.2d 154, 156 (1994) (when

only one party contracts or agrees to convey the property, the right of survivorship is terminated and the property is held as a tenancy in common). The court looks to the *intent* of the parties to terminate a joint tenancy. *Estate of Phillips*, 124 Wn.2d at 89. The trial court properly recognized that the parties intended to own the property as tenants in common when the property was purchased with Dr. Walsh's separate property, and only Dr. Walsh was ever liable on the mortgage. This is consistent with the document that both parties signed at the request of the escrow officer, stating that titling was for inheritance purposes only and not to transfer income. VRP 82. Despite Ms. Reynolds' objection[10], the fact that Dr. Walsh was solely liable for the mortgage is indicative of the parties' intent to own the property in proportion to contribution. *See* Resp. Brief at 35. Dr. Walsh was the only party to ever pay any portion of the mortgage, insurance, taxes, or expenses. Only Dr. Walsh (or her father) contributed to the purchase price, construction costs or any other expense related to the property. The parties did not intend to own the property as joint tenants, and the trial court properly found the property was owned as tenants in common.

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[10] Ms. Reynolds asserts that her contribution was the "sweat equity" and that was consistent with joint ownership, yet she admits that she hired gardeners and housekeepers to maintain the property. *See* VRP 225, 245.

2. The Court Erred By Failing To Distribute The Proceeds Of The Sale Of The Federal Way House In Accordance With The Parties' Financial Contribution.

In a co-tenancy, the court should distribute the interests in an amount bearing the same proportion as the cotenant's investment. *Cummings v. Anderson*, 94, Wn.2d 135, 145, 614 P.2d 1283 (1980). The parties in *Cummings* purchased property as co-tenants with separate funds before they were married. *Id.* at 136-37. After divorce, the former wife obtained an equity interest in the property in a ratio equal to her investment to the total investment of the parties. *Id.* at 145. The former husband rebutted the presumption that the parties shared equal interests because adequate tracing showed that he contributed more than the former wife. *Id.* at 141. This rule "reflect[s] an understanding that a cotenant should not be permitted to take inequitable advantage of another's investment." *Id.* at 142. Similar to this case, the purchase of the property in *Cummings* came from separate funds, and a subsequent marriage (or domestic partnership) could not change the characterization of that property. *Id.* at 139-40.

Ms. Reynolds relies on *Lindsey* to say that *Knowles* and *Iredell* are overturned.[11] Resp. at 214. However, the court must still be mindful of the fact that only property which is community property is before the court under *Lindsey*.[12] The Federal Way house was not community property. "By their signatures below, Grantees evidence their intention to acquire all interest granted them hereunder as joint tenants with right of survivorship, and not as community property or as tenants in common." Ex. 32. The Federal Way house was purchased with Dr. Walsh's separate funds. The trial court found that Dr. Walsh traced the proceeds of the Davis Court home (separate property) to the down payment on the Federal Way house. In turn, that down payment was traced back to property Dr. Walsh owned before she met Ms. Reynolds. CL 21, CP 268; *see* VRP 186-190, 424. When the parties signed the deed, they acknowledged specifically that it was not community property. Ex 29. While *Lindsey* may have changed the way the court considers the disbursement of what would otherwise be community property, the Federal Way house was acquired, reconstructed and paid for with separate property and held as tenants in common.

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[11] *West v. Knowles*, 50 Wn.2d 311, 311 P.2d 689 (1957); *Iredell v. Iredell*, 49 Wn.2d 627, 305 P.2d 805 (1957).

[12] Similarly, *Lindsey* does nothing to overturn the holding in *Cummings* where the property was acquired with separate property.

Ms. Reynolds asserts, "if the parties intended to own the property in proportion to their purported 'separate' contributions, they would not have titled their family home as 'joint tenants with right of survivorship, and not as community property or tenants in common.'" Resp. at 35.

Again, Ms. Reynolds never denied that she signed the document requested by the escrow officer, which clarified the purpose of titling the property for inheritance purposes, and not to transfer income to Ms. Reynolds. This is also consistent with the parties' treatment of the 20 acre property in Fresno, California that they had co-owned as joint tenants. The trial court found that property was purchased with separate funds after the sale of Dr. Walsh's medical practice. When the property sold for less than the amount invested, the entire sales price was returned to Dr. Walsh as her separate property. The parties had no reason to believe that disposition of the funds from the sale of the Federal Way property (which also sold for less than the amount invested) would be any different than the prior property also titled as joint tenants. Dr. Walsh recouped just over $400,000 on an investment of over $1.1 million. She lost over $700,000, including the $185,000 given to her by her by her father for the construction. Ms. Reynolds risked nothing and gained over $200,000. At the time the parties titled the property, neither had reason to believe that

the term "joint tenants with right of survivorship" would be applicable for a purpose other than inheritance.

Additionally, the court found many examples of an intention to "remain separate financial entities." *See e.g.* FF 45. The evidence on the record directly contradicts the notion that the parties intended to share ownership of the property with equal, rather than proportional shares. VRP 82; Ex. 33. The abundance of the evidence on record shows that the parties intended to keep separate assets and liabilities, and that there were no joint monetary contributions to the house. Furthermore, the fact that only Dr. Walsh was obligated on the mortgage when the property was acquired, and again when it was refinanced further demonstrates that the parties understood the asset to be separate. This separate obligation was further affirmed by the fact that Dr. Walsh used her separate property and income to acquire and reconstruct the home. The distribution should have been proportional to the parties' financial contributions.

E. The Trial Court Erred By Awarding Attorney's Fees. (Reply to 45-49)

1. The Trial Court Erred By Awarding Attorney's Fees When A Significant Portion Of The Trial Was Attributed To The Equity Relationship.

Ms. Reynolds asserts that attorneys' fees are available under RCW 26.60.140 despite the fact that the statute did not apply to domestic partnerships when the parties registered. Resp. Brief 45-49. Yet, almost

the entirety of Respondent's brief is dedicated to the argument that Ms. Reynolds should receive more of Dr. Walsh's property because an equitable relationship existed for many years before the parties registered for a domestic partnership. No attorney's fees provision applies to the dissolution proceeding for non-marital relationships. *Foster*, 61 Wn. App. at 887-88.

Even though the parties were dissolving their domestic partnership, the vast majority of fees were dedicated to arguing whether an equity relationship existed and the proper distribution of property there under.[13] The primary issue at trial was whether or not the court could distribute property under the equitable relationship doctrine. Dr. Walsh spent significant time at trial to trace the assets, establish that the parties maintained separate property, and show that the property was not before the court because of its separate character. The majority of Ms. Reynolds' testimony was in effort to establish an equitable relationship existed. Furthermore, Ms. Reynolds' primary argument on appeal is that the trial court erred by failing to recognize an equitable relationship for the entire time the parties knew each other. Because such a preponderance of time

[13] Dr. Walsh did not dispute the property distribution under the domestic partnership from August 20, 2009 to March 14, 2010, despite a belief that the wording on the declaration itself allows for the maintenance of separate property.

and emphasis was dedicated to the issue of the property distribution under the equity doctrine and whether an equitable relationship existed, the trial court abused its discretion by awarding attorney's fees under that doctrine, for which an award of attorneys' fees is not awardable.

If Ms. Reynolds' basis for entitlement to property is an equitable relationship, the court should consider that attorney's fees were not available upon the dissolution of an equitable relationship. *Connell*, 127 Wn.2d at 349. Most of the property distribution was awarded on the basis of the equitable relationship, and therefore, the trial court erred by awarding the corresponding fees. At a minimum, the trial court should have adjusted the award to reflect that a substantial portion of Ms. Reynolds' case was dedicated to the equitable relationship doctrine.

2. The Trial Court's Award of Attorney's Fees Is Not Supported by Substantial Evidence.

The trial court abused its discretion because substantial evidence does not support the award. Dr. Walsh's objection to Ms. Reynolds' inability to even estimate the fees incurred is to show a lack of credibility in Ms. Reynolds' request for fees, and to further support the contention that the trial court abused its discretion by awarding the fees requested by Ms. Reynolds.

Furthermore, Ms. Reynolds argues that the trial court did not abuse its discretion because Ms. Reynolds' income is substantially less than Dr. Walsh's. Resp. Brief at 47-48. While Dr. Walsh does not dispute that she has a higher annual salary, Ms. Reynolds has elected to pursue her landscaping business. As discussed above, Ms. Reynolds has already received in excess of $270,000 since entry of the decree of dissolution in November 2012. Ms. Reynolds' need is not substantially supported by the evidence. The trial court's award of attorney's fees should be reversed.

IV. CONCLUSION

The trial court erred in finding a committed intimate relationship existed when the relationship lacked a core basis of a CIR, which is intimacy. The trial court properly recognized that the parties had maintained separate financial entities and characterized the parties' property as separate property. However, the trial court erred by dividing that separate property between January 1, 2005 and the date of the domestic partnership registration, August 20, 2009. It did so by erroneously applying the date of January 1, 2005 from California (the date California expanded its domestic partnership law), rather than the date of the Washington domestic partnership registration.

Similarly, the finding that the Federal Way house was held as tenants in common was proper; awarding Ms. Reynolds one-third of the

proceeds of that sale was in error. The distribution of proceeds should have been in proportion to each party's financial contribution and risk. Overall, the trial court should have recognized the intention of the parties to structure their lives separately and to maintain individual financial identities. Lastly, the trial court erred in awarding the Respondent 100% of attorney's fees deemed reasonable. Even if allowed by statute, those fees need to be reasonable for the dissolution, not to include the fees incurred to assert a theory under which attorney's fees are not recoverable.

Appellant respectfully requests this Court to hold the trial court erred by treating separate property acquired before the date of registration of the Washington domestic partnership as community property despite its separate character, and distributing that property accordingly.

DATED this 25th day of October, 2013.

SMITH ALLING, P.S.

By _____
Barbara A. Henderson, WSBA #16175
Morgan K. Edrington, WSBA #46388
Attorneys for Appellant/Cross-Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have this 25 day of October, 2013, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

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BY

I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25 day of October, 2013, at Tacoma, Washington.

Lisa Schrader, Legal Assistant

APPENDIX A

CHAPTER 12

THE NON-MARITAL COUPLE

Nancy Hawkins

Summary

Nancy Hawkins received her undergraduate degree from the University of Washington and her law degree from the University of Puget Sound (now Seattle University) Law School. She is a sole practitioner who concentrates her practice in the areas of family law and personal injury. She is the former chair of the King County Bar Association Family Law Section and an active member of the Northwest Women's Law Center. A significant portion of her family law practice is the representation of unmarried persons, both homosexual and heterosexual, involved in long-term relationships.

Note: A small portion of this chapter is taken from the first edition of this deskbook and was authored by Melanie J. Rowland. Melanie J. Rowland received her undergraduate degree from Stanford University and her law degree magna cum laude from the University of Pennsylvania Law School. She is no longer involved in family law. She is now an attorney with the Office of General Counsel for the National Oceanic and Atmospheric Administration (NOAA) where her focus is on the conservation of endangered salmon. Prior to her present position, Ms. Rowland was a visiting scholar at the University of Washington. She is the co-author of *The Evolution of National Wildlife Law*, the leading treatise on wildlife law in the country. She is a former member of the faculties of the University of Washington and the University of Puget Sound (now Seattle University) law schools, where she taught Community Property.

§12.1 INTRODUCTION

This chapter provides an overview of the law applicable to non-marital couples (unmarried cohabitants). Topics covered in detail are dissolutions of meretricious relationships, children of non-marital couples, property rights, and definitions of family. Because there is little or no Washington case law in some of these areas, significant decisions from other jurisdictions are discussed to advise the reader of trends in the law outside of Washington. Related topics discussed at length in other chapters of this deskbook are pre-nuptial contracts (chapter 9) and paternity (chapter 58).

This chapter applies to heterosexual and homosexual couples. Where statute or case law does not expressly apply to both such types of couples, this will be indicated.

This area of law is evolving at this time. As will be more fully developed below, the three divisions of the Court of Appeals differ in their treatment of meretricious relationships. At the time of this printing, the Washington Supreme Court was reviewing two significant cases involving meretricious relationships, one from Division I and one from Division II. *Chesterfield v. Nash,* 96 Wn. App. 103, 978 P.2d 551, *review granted*, 138 Wn.2d 1016, 989 P.2d 1140 (1999); *Pennington v. Pennington*, 93 Wn. App. 913, 971 P.2d 98, *review granted*, 138 Wn.2d 1016, 989 P.2d 1141 (1999). In addition, a significant decision regarding the property rights of unmarried homosexual partners has recently been handed down by Division II (although a party is seeking review of that decision). *Vasquez v. Hawthorne*, 99 Wn. App. 363, 994 P.2d 240 (2000). Without question, the law regarding unmarried couples, heterosexual and homosexual, may change over the next few years.

§12.2 DISSOLUTION OF MERETRICIOUS RELATIONSHIPS

Courts in Washington have extended to unmarried cohabitants ending their relationships some of the rights and privileges accorded spouses under statutory and common law. In particular, the Washington Supreme Court has in recent years applied to non-marital couples principles that are very similar to those used in dissolution actions. Not all protections available to couples in dissolution actions, however, are available to non-marital couples. The reluctance of courts to extend further protection to unmarried cohabitants is based, in part,

upon a policy consideration: the State's perceived interest in promoting marriage.

In declining to extend maintenance and attorney fee statutes to unmarried couples, courts have justified such denial by stating that these provisions are statutory creations and that Chapter 26.09 RCW applies to unmarried couples only by analogy and not directly. *Foster v. Thilges*, 61 Wn. App. 880, 887-88, 812 P.2d 523 (1991). *See also Western Community Bank v. Helmer*, 48 Wn. App. 694, 740 P.2d 359 (1987).

Although the policy of denying certain rights to unmarried cohabitants in part to encourage marriage cannot logically apply to homosexual cohabitants, because marriage is not a legal option for such couples in the United States, no court has yet made that distinction. In fact, there is only one reported case in Washington addressing property disputes between a homosexual couple. In that case, Division II held that because the homosexual partners could not marry, their relationship could not be considered "quasi-marital" and therefore the rights given to unmarried heterosexual couples in meretricious relationships did not apply to them. Prior to this case, throughout the state, the line of meretricious relationship cases from *In re Marriage of Lindsay*, 101 Wn.2d 299, 678 P.2d 328 (1984), to *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), was frequently applied to homosexual couples at the trial level and in settlement agreements. As will be more fully described below, review of *Vasquez v. Hawthorne*, if granted, may lead to a definitive Supreme Court ruling on the law to be applied to property disputes between homosexual partners.

Note: The Washington Supreme Court expressed its opinion about the term "meretricious" as follows:

> Appellant herself referred to her non-marital relationship as 'meretricious.' Although the word conveys a clear and specific legal meaning, it is nevertheless an offensive, demeaning and sexist word. 'Meretricious' comes from the Latin word 'meretrix,' meaning 'prostitute.' There seems to be no more adequate word or phrase which so clearly conveys the precise legal meaning intended since a 'common-law marriage' may not be established in this state. Perhaps we may eventually find an appropriate substitute. The reasonably synonymous words 'unmarried cohabitating relationship,' 'pseudo marriage' or 'spurious marriage' may be less offensive, but are still demeaning. None of these seems to adequately convey the precise meaning of 'meretricious relationship.' Until a better expression emerges, we will continue to use it. *See In re Eggers*, 30 Wn. App. 867, 871 n.2, 638 P.2d 1267 (1982). A new expression, 'domestic partners,' has entered the linguistic arena to refer to persons living together without a formalized marriage. This does not seem to be as legally precise as 'meretricious relationship' either. See San Francisco City ordinance 176-89, enacted June 5, 1989.
>
> *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 246 n.5, 778 P.2d 1022 (1989).
>
> Division I recently expressed its displeasure with the continued use of the term "meretricious" by describing it as archaic and using instead the phrase "stable, quasi-marital relationship" in which the parties cohabited. *In re Lindemann*, 92 Wn. App. 64, 68, 960 P.2d 966 (1998), *review denied*, 137 Wn.2d 1016 (1999).

Unmarried cohabitants, by definition, lack the "bright line" determination that the date of marriage provides to determine at what point their personal relationship has also become a legal relationship. By case law, as will be more fully described in §12.4(2), a variety of factors are now examined to determine whether a legal relationship has been formed by a cohabitating couple. If so, rights and obligations may follow which affect each party upon the dissolution of these relationships.

Married couples who seek to end their legal relationship file to dissolve their marriage under Chapter 26.09 RCW. Unmarried couples

who wish to end their cohabitation may require court assistance on a variety of subjects including division of property, division of debts, and provisions for children. Such actions may be considered civil or domestic depending upon the county in which they reside. The process for initiating such legal proceedings differs from court to court and is often determined more by custom and practice than by reference to specific local rules. Similarly, final orders arising from such proceedings may take a variety of forms. Possible forms of initial pleadings can be found on the diskette accompanying this deskbook and in WASHINGTON FAMILY LAW DESKBOOK SELECTED FORMS (Wash. St. Bar Assoc. 2000). One petition follows a standard post-*Creasman* approach and utilizes the variety of legal theories available by caselaw to unmarried couples. (See §12.4(1) for a discussion of *Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948).) The other petition follows the pattern dissolution petition.

§12.3 CHILDREN OF NON-MARITAL COHABITANTS

Relationships between unmarried cohabitants, heterosexual and homosexual, frequently involve children. The issues involving children born to unmarried heterosexual cohabitants are described in detail in chapter 58, Paternity.

A number of issues have arisen in the United States from the dissolution of meretricious relationships that include children of homosexual cohabitants. In Washington, many such children are initially born to or adopted by one cohabitant and subsequently adopted by the other cohabitant. These "step-parent" adoptions are not available at this time in all states. *See In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. 1996). In the event that a parent/child relationship has been legally determined through an adoption, in Washington or elsewhere, both cohabitants have legal rights and obligations to the child without regard to the sexual orientation of the parents. These rights, upon the dissolution of the meretricious relationship and in the absence of any other proceeding, may be determined under RCW 26.09.010(3). Parenting plans adopted in such actions are based on the same statutes and criteria that apply to children of married persons who dissolve their marriage.

Issues may also arise regarding the relationships between one partner in a meretricious relationship and the children of the other cohabitant where no stepparent adoption took place. Whether rights

and obligations to such children may arise, particularly for homosexual cohabitants, has been the subject of ground-breaking litigation throughout the country.

New Mexico allows third persons to assert rights to a continuing relationship with a child of a biological parent. *Barnae v. Barnae*, 943 P.2d 1036 (N.M. 1997); *A.C. v. C.B.*, 829 P.2d 660 (N.M. App. 1992). Similarly, Pennsylvania recognizes that a member of a non-traditional family may establish that he or she stood in loco parentis. *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Penn. 1996); *see also In re T.L,*1996 WL 393521 (Mo. App. 1996). Massachusetts allowed visitation when a lesbian parent established that she was a child's de facto parent. *E.N.O. v. L.M.M.*, 1999 Fam. L. Rep. (BNA) (Mass., No. 07878, 6/29/99).

In *In re Custody of H.S.H.-K.,* 533 N.W.2d 419 (Wis.), *cert. denied sub nom. Holtzman v. Knott*, 516 U.S. 975 (1995), the Wisconsin court held that a woman's petition for visitation with the child born to her lesbian partner during their 10-year relationship could go forward to trial and that if she proved, in part, a parent-like relationship, she might be awarded visitation. The court cited with approval *A.C. v. C.B.*, 829 P.2d 660 (N.M. App. 1992); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985); and *In re Marriage of Gayden*, 280 Cal. Rptr. 862 (Cal. App. 1991). Although Minnesota appears to allow such an action, the burden is so high that it may be impossible for any partner to meet it. *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. App. 1991).

Not all states have extended "parental" rights to non-biological partners of homosexual cohabitants. For example, in *West v. Sacramento*, 66 Cal. Rptr. 2d 160 (Cal. App. 1997), the court held that there was no subject matter jurisdiction under the Uniform Parentage Act to establish paternity in the non-biological partner. An earlier case in the First District of California did leave the door open to such "parents" under the doctrines of "in loco parentis" and "parenthood by equitable estoppel," *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (Cal. App. 1991), but subsequently, a First District court stated that the issue was more appropriately addressed by the legislature. *In re Guardianship of Z.C.W.*, 25 Fam. L. Rep. (BNA) 1303 (Cal. App. 1999). *See also Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997) (holding that legal parents retain the right to determine contact, if any, with third parties including former partners who had parent-like relationships with the child); *Van v. Zahorik*, 575 N.W.2d 566 (Mich. App. 1997), *aff'd*, 597 N.W.2d 15 (Mich. 1999) (limiting equitable parenthood status, to convey parental status to a husband not the biological father of child,

to situations in which a child was born or conceived during a marriage); *Music v. Rachford*, 654 So.2d 1234 (Fla. App. 1995); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. App. 1991); *A.B. v. H.L.*, 26 Fam. L. Rep. (BNA) 1109 (Ill. App. 1999).

In Washington, there is no reported case in which a homosexual former partner sought "parental" rights from a biological parent. Such cases have been brought at the trial level under various theories with varying success. Until very recently, there was a remedy for other third parties (such as grandparents) seeking "visitation" with children with whom they had established relationships. RCW 26.10.160(3) allowed for such third persons to petition for visitation if it is "in the best interest of the child." The Washington Supreme Court has, however, recently limited those visitation rights by striking down RCW 26.10.160(3) as an unconstitutionally broad interference with the rights of parents to control their children without additional statutory safeguards limiting such actions, and the United States Supreme Court affirmed that decision. *In re Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, No. 99-138, 2000 WL 712807 (U.S. Sup. Ct. June 5, 2000).

Practice Tip: When representing homosexuals in property division or parenting disputes, research the latest caselaw throughout the country. One of the best sources of information is the Bureau of National Affairs' FAMILY LAW REPORTER.

Practice Tip: Bias against homosexuals and, to a lesser extent, unmarried heterosexuals, is a factor that must be taken into account whenever pursuing a legal remedy involving such individuals. The personal beliefs of judges and commissioners in each county on such subjects may differ widely and affect the success of particular arguments. Attorneys should consult with other attorneys in a local community to assess the likelihood of success of particular arguments in front of particular judges or commissioners or in particular counties.

§12.4 PROPERTY RIGHTS

Property issues arise out of many unmarried cohabitations. The law has changed significantly over time in Washington.

(1) Former law

For many years, in dividing property of unmarried cohabitants, Washington courts distinguished between "meretricious" and "innocent" relationships. A meretricious relationship was one in which domestic partners cohabited with knowledge that they were not legally married. In the "innocent" relationship, at least one partner believed there was a valid marriage. Courts made an equitable division of the property of parties to an "innocent" relationship, *see, e.g., Poole v. Schrichte*, 39 Wn.2d 558, 236 P.2d 1044 (1951), but awarded to the party holding legal title property accumulated by parties to a meretricious relationship. *See Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948). In *Creasman*, the court declared:

> [I]n the absence of any evidence to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it.

Id. at 356.

This language became known as the "*Creasman* presumption." Its application often resulted in unjust divisions of property, in which one party's (usually the woman's) nonmonetary contributions to the couple's economic well-being were disregarded. Courts openly criticized the *Creasman* presumption and used a variety of theories to avoid the inequities resulting from its application. Among the theories used were express or implied contract, implied partnership or joint venture, constructive or resulting trust, co-tenancy, and tracing the source of funds. As use of these theories increased, the line between meretricious and "innocent" relationships began to blur.

(2) Current law

It was not until 1984 that the Washington Supreme Court expressly overruled *Creasman*. The move to do so began when the Washington Court of Appeals held that the provisions of RCW 26.09.080, which govern the division of property upon dissolution of marriage, should govern disposition of property acquired by a man and woman who have lived in a relationship "tantamount to a marital family." *Warden v. Warden*, 36 Wn. App. 693, 698, 676 P.2d 1037, *review denied*, 101 Wn.2d 1016 (1984). The appellate court in *Warden* could have upheld

the trial court's equal division of the family home on the basis of title alone, because title was in both names, but instead it faced the issue squarely and applied the "just and equitable" standard of RCW 26.09.080.

WARDEN V. WARDEN, 36 Wn. App. 693, 676 P.2d 1037 (1984). The Wardens had lived together over 10 years and had two children. They never married, but they held themselves out as a marital family. When the relationship broke down, the woman sought child support and a declaration of property rights. The Superior Court awarded each party a one-half interest in their accumulated real property as tenants in common.

Practice Tip: Washington recognizes that unmarried cohabitants have the same right to dispose of their property by contract as do any other individuals. *See Humphries v. Riveland*, 67 Wn.2d 376, 407 P.2d 967 (1965); *Dahlgren v. Blomeen*, 49 Wn.2d 47, 298 P.2d 479 (1956). No case law in this state exists regarding such contracts between homosexual couples. Barriers to enforcement in other states have generally focused on the existence of criminal statutes against sodomy and the public policy against condoning such relationships. Washington has repealed prohibitions against sodomy; arguably no such public policy therefore exists in this state. Other states have upheld such agreements between homosexual couples. *See Silver v. Starrett*, 24 Fam. L. Rep. (BNA) 1340 (N.Y. Sup. Ct. 1998); *Posik v. Layton*, 23 Fam. L. Rep. (BNA) 1296 (5th Dist. Ct. App. 1997).

You should continue to advise unmarried couples, particularly homosexual couples, to enter into written contracts regarding ownership and division of property to avoid costly litigation and unpredictable results.

In addition, homosexual couples often do not wish to be publicly identified, because of ongoing discrimination against homosexuals and, therefore, prefer to resolve their disputes outside of a public court setting and without reliance upon a system that often excludes and/or discriminates against them. Although contracts may still require court interpretation or enforcement, properly drafted agreements will reduce the likelihood of litigation. They also may provide for private dispute resolution such as pre-approved arbitration. Two examples of such agreements can be found on the diskette accompanying this deskbook and in WASHINGTON FAMILY LAW DESKBOOK SELECTED FORMS (Wash. St. Bar Assoc. 2000).

> IN RE MARRIAGE OF LINDSEY, 101 Wn.2d 299, 678 P.2d 328 (1984). The Lindseys began living together in 1974 and were married in 1976. Before marriage, they built a barn/shop on the husband's separate land. The wife did a substantial amount of construction work on the structure and almost all the painting. The barn/shop burned down in 1981. Insurance proceeds were $85,000. *Held*: The barn/shop was the husband's separate property, but the wife had a pre-marriage interest in it because of her contribution of labor. The court expressly overruled *Creasman* and remanded for a determination of the wife's interest in the insurance proceeds.

In *In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984), the court held that courts must "examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property." *Id.* at 304, quoting *Latham v. Hennessey*, 87 Wn.2d 550, 554 P.2d 1057 (1976). The court declined to limit the rule to cases involving "stable and significant" relationships, as suggested in *Latham v. Hennessey*. Instead, the trial court must examine each case on its facts to determine whether a meretricious relationship exists. The court then should evaluate each party's interest in the property accumulated during the relationship and make a just and equitable distribution. The Supreme Court did not indicate what factors should be considered in making the distribution; it required only that the division be "just and equitable." Consequently, the trial court will be accorded wide discretion.

It appears that the standard for division of property in either an "innocent" or a meretricious relationship now differs very little from that for division of community property upon dissolution.

Lindsey is both broader and narrower than *Warden*. Although the *Lindsey* court did not limit equitable division of property to long-term, stable relationships, neither did it go so far as to hold expressly that the community property statute governs. However, in practical terms the differences in the cases probably are not significant for purposes of property division. It is likely that courts will require something more than a casual relationship before they will make an equitable division of property, and the factors listed in RCW 26.09.080 probably will be important in determining an equitable division.

The *Warden* court emphasized that the trial court should consider nonmonetary, as well as monetary, contributions of each party to the couple's property acquisitions. The court stated: "If we resolve this problem in terms of dollars only, we disregard the contributions made by [one partner's] homemaking and child rearing." 36 Wn. App. at 696.

The *Lindsey* rule has been applied to very short-term relationships. For example, in *In re Marriage of DeHollander*, 53 Wn. App. 695, 770 P.2d 638 (1989), a couple began dating in August of 1984, began living together in November of 1984, became engaged in December of 1984, married in March of 1985, and separated in September of 1986. The court held that property purchased in January of 1985 with husband's $2,500 down payment in the husband's name, but picked out together, should be treated as community property based upon "the parties' intent, the nature of their relationship at the time they acquired the property, and their joint efforts with respect to it." *Id.* at 699. *Lindsey* has also been applied to the contributions to separate property made during pre-marital cohabitation. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 855 P.2d 1210 (1993).

The Washington Supreme Court limited the scope of *Lindsey* in *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995). Although the court confirmed the rule that courts must examine the (meretricious) relationship and the property accumulations and make a just and equitable disposition of the property, it held that it was error to apply all of the principles contained in RCW 26.09.080 to meretricious relationships, stating that a meretricious relationship is not the same as a marriage.

> While portions of RCW 26.09.080 may apply by analogy to meretricious relationship, not all provisions of the statute should be applied. The parties to such a relationship have chosen not to get married and, therefore, the property owned by each party prior to the relationship should not be before the court for distribution at the end of the relationship.... We conclude a trial court may not distribute property acquired by each party prior to the relationship at the termination of a meretricious relationship. Until the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married.

Connell, 127 Wn.2d at 349-50.

After *Connell*, the laws involving the distribution of marital property do not directly apply to the division of property following a meretricious relationship. Nevertheless, Washington courts may look toward those laws as guidance. Therefore portions of RCW 26.09.080 may apply by analogy to meretricious relationships.

CONNELL V. FRANCISCO, 127 Wn.2d 339, 898 P.2d 831 (1995). A dancer began cohabiting with a business owner in Las Vegas in 1984. At the time, he was worth approximately 1.3 million dollars. They moved to Washington in 1986 and operated an inn together until 1990 when they separated. At separation, he was worth over 2.7 million. The court held that property that would be separate had they been married was not before the court for division and that only property that would have been community had they been married could be equitably divided.

Once a trial court determines the existence of a meretricious relationship, the trial court must (1) evaluate the interest each party has in the property acquired during the relationship and (2) make a just and equitable distribution of the property. *Lindsey*, 101 Wn.2d at 307. COMMUNITY PROPERTY DESKBOOK §2.64 (Wash. St. Bar Assoc. 2nd ed. 1989 and Cum. Supp. 1999). The critical focus is on property that would have been characterized as community property had the parties been married. This property is properly before a trial court and is subject to a just and equitable distribution. *Connell*, 127 Wn.2d at 349. A cohabitant's separate property is not before the court for distribution. *Id.*

To determine which property is before the court for division, each item of property must be properly characterized. Property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties. This presumption may be rebutted. *Connell*, 127 Wn.2d at 352. As property owned by each party prior to the relationship is not before the court for distribution, property acquired during the relationship by gift, bequest, devise or descent with the rents, issues and profits thereof, is likewise not before the court for division.

The *Lindsey* and *Warden* decisions were a welcome change from the inequitable results often reached under the *Creasman* presumption and the contrivances used to avoid the presumption. However, the trial court's discretion carries with it the hazards of unpredictability. This lack of uniformity has also been reflected in the decisions of the three divisions of the Court of Appeals. Division III, in a controversial decision, determined that a just and equitable division of "community" property could be rationally determined by a pro rata division of property based on the income each partner had during their meretricious relationship. In *Sutton v. Widner*, 85 Wn. App. 487, 933 P.2d 1069,

review denied, 133 Wn.2d 1006 (1997), 36 percent of property acquired during the relationship was awarded to the woman because she earned 36 percent of the partners' total income. This decision appears to strongly erode the protection that *Lindsey* intended for cohabitants, at least for Division III cohabitants. In a subsequent case, Division III further discouraged claims under *Lindsey* by finding the action frivolous and approving an award of $20,000 in terms against a party who sought to establish a meretricious relationship after a two year on-and-off-again relationship. *In re Cooke*, 93 Wn. App. 526, 969 P.2d 127 (1999).

By contrast, Division I has repeatedly confirmed that the division of property in meretricious relationships is to be determined after application (by analogy) of RCW 26.09.080 and has done so without the reservations of Divisions II and III. *Chesterfield v. Nash*, 96 Wn. App. 103, 978 P.2d 551, *review granted*, 138 Wn.2d 1016, 989 P.2d 1140 (1999); *Foster v. Thilges*, 61 Wn. App. 880, 812 P.2d 523 (1991); *Connell v. Francisco*, 74 Wn. App. 306, 313, 872 P.2d 1150 (1994), *rev'd in part*, 127 Wn.2d 339, 898 P.2d 831 (1995). In fact, in the appellate court decision in *Connell*, Division I of the Court of Appeals held that, as with married couples, all property owned by either or both unmarried parties is before the court for an equitable division of property, including property that would have been characterized as separate had the parties been married.

More recently, Division I again adhered to the protections provided in *Lindsay* for the more financially vulnerable cohabitant and limited the protections for separate property identified in *Connell*. *See In re Lindemann*, 92 Wn. App. 64, 960 P.2d 966 (1998); *Koher v. Morgan*, 93 Wn. App. 398, 968 P.2d 920 (1998), *review denied*, 137 Wn.2d 1035 (1999) (comingling separate property assets with community wages results in all being community); *Chesterfield v. Nash*, 96 Wn. App. 103, 978 P.2d 551, *review granted*, 138 Wn.2d 1016, 989 P.2d 1140 (1999) (dividing all assets acquired during the relationship included goodwill developed by the man through a dental practice). In *Lindemann*, a man and woman married in 1978 and divorced in 1982, then began living together again in 1985. For 10 years they raised children together and commingled their assets and income. The man worked at an auto body business begun in 1982 before they resumed cohabiting. When the business was begun, it had few assets and was worth less than $10,000. Ten years later when the relationship ended, the business was worth $218,725. The court determined that the value was due to the man's labor during the meretricious relationship,

characterized it therefore as community, and awarded one-half to the woman. *In re Lindemann*, 92 Wn. App. 64, 960 P.2d 966 (1998).

CHESTERFIELD V. NASH, 96 Wn. App. 103, 978 P.2d 551, *review granted*, 138 Wn.2d 1016, 989 P.2d 1140 (1999). James Nash and Diana Chesterfield cohabited for four years in Chesterfield's home, sharing resources including payments on Chesterfield's home. Chesterfield worked outside the home and Nash owned a dental practice. During the relationship the dental practice increased in value due to the efforts of Nash and Chesterfield. Division I approved the trial court's division of the value of the dental practice including the goodwill it had developed.

PENNINGTON V. PENNINGTON, 93 Wn. App. 913, 971 P.2d 98, *review granted*, 138 Wn.2d 1016 (1999). Evelyn Van Pevenage began a relationship in 1983 with Clark Pennington and began cohabiting with him for most of the period between 1985 until 1995. She was known during this time as Sammi Pennington and the couple were listed in the telephone book as a couple and were known by friends and health care providers as a couple. From 1983 until 1990 Pennington was married to another woman and subsequently he refused to marry Pevanage (although he gave her a ring in 1986 and, according to her, proposed and promised to marry her). Division II reversed the trial court's finding that a meretricious relationship existed based in large part upon Pennington's unavailability for marriage and refusal thereafter to marry his cohabitant.

VASQUEZ V. HAWTHORNE, 99 Wn. App.363, 994 P.2d 240 (2000). Robert Schwerzler and Frank Vasquez lived together from 1967 until 1995 when Schwerzler died without a will. Vasquez sought an equitable distribution of property as the homosexual cohabitant. The trial court granted such relief and awarded substantially all of the estate to Vasquez. On appeal Division II overturned the trial court and ruled that persons who could not marry legally could not form a meretricious relationship.

Division I continues to protect the interests of the vulnerable cohabitant; Divisions II and III have instead often protected the interests of the partner in whose name disputed property was held. As described above, Division III has approved a division of property that could negate the protections of *Lindsey*. Taking a different approach, Division II has avoided applying *Lindsey* by approving trial court determinations that the parties involved did not meet the criteria for a meretricious relationship. In the first case, despite a six-year cohabitation that included socialization as a couple, an exchange of a ring, designation as a beneficiary on medical and life insurance and

shared living expenses, the trial court found that no meretricious relationship had been created based on one party establishing that he was married during most of the period of cohabitation, that he refused to marry his partner after his dissolution, and that the partner also was involved with another during a portion of the cohabitation. *Pennington v. Pennington*, 93 Wn. App. 913, 971 P.2d 98, *review granted*, 138 Wn.2d 1016 (1999).

One year after *Pennington*, Division II also refused to apply *Lindsey* to homosexual couples. Based on the fact that homosexual couples cannot legally marry, Division II determined that such couples cannot form a quasi-marital or meretricious relationship. As a result the more financially vulnerable partner of 28 years was denied any ownership interest in his deceased partner's estate. *Vasquez v. Hawthorne,* 99 Wn. App. 363, 994 P.2d 240 (2000). Note that Divisions I and III need not reach the same conclusions if and when a case involving homosexual cohabitants reaches those divisions. Litigants in Division II are cautioned to note that the panel in *Vasquez*, although eliminating *Lindsey* divisions of property for homosexual partners, specifically left open other theories of recovery such as constructive trust and implied partnership.

Practice Tip: When real property is exchanged between unmarried partners, excise tax is due on the transfer (1.78 percent, depending on the location of the property). The WAC exception for dissolution of marriage does not apply. The tax is due on the amount of consideration changing hands plus the portion of the mortgage being assumed by the other partner. Such transfers may occur at the beginning of a relationship (one partner putting a home into both names) and may be a gift (with potential gift tax consequences) if no consideration changes hands. If any consideration is given, such as a promise to pay a portion of the mortgage, it is a sale and not a gift and excise tax is due. Such transfers certainly may occur at the conclusion of a relationship. Absent an agreement to the contrary, the tax is due from the seller of the property.

§12.5 WHAT IS A FAMILY?

The definition of "family" arises in a variety of contexts. The definition has been evolving in Washington as it has across the country as the number of non-marital couples increases.

In 1987, Division I of the Court of Appeals held that a driver of his unmarried cohabitant's rental car was not a member of her immediate family. *Continental Casualty Co. v. Weaver*, 48 Wn. App. 607, 739 P.2d 1192 (1987).

> CONTINENTAL CASUALTY CO. V. WEAVER, 48 Wn. App. 607, 739 P.2d 1192 (1987). The partner, Carol Christianson, had rented a car from Avis, Inc. The rental contract specified that one category of permissive drivers was "someone in my immediate family who permanently lives with me." The contract went on to provide that "anyone permitted by this agreement to drive the car will be protected against liability for causing bodily injury, death or property damage...." Christianson's partner, Welton Weaver, drove the rental car, during which time he caused an accident, killing Roger Dahlman.
>
> Weaver and Christianson had a four-year relationship, held themselves out to others as a married couple, shared all expenses associated with the joint maintenance of their home, maintained a joint bank account, and were primarily supported by Weaver, as Christianson worked only part-time. *Id.* at 610. In deciding that the common meaning of the term "immediate family" did not include two unrelated persons cohabitating in a non-marital relationship, Judge Ringold noted that no case had been cited holding otherwise.

The case Judge Ringold could not find was decided two years later. In a landmark decision, *Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (N.Y. Ct. App. 1989), the New York Court of Appeals held that the gay partner of a deceased tenant was a family member for purposes of a New York City eviction regulation. "[I]n the context of eviction, a more realistic...view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." *Braschi*, 543 N.E.2d at 53-54. In making its decision, the court examined the parties' relationship with each partner's family, their respective inclusions in family functions, and their sharing of household debts, bank accounts, credit cards, and safe deposit boxes. After such review, the landlord was not allowed to evict the partner.

In a subsequent decision in a different context, Minnesota recognized a "family of affinity" between Sharon Kowalski and her partner Karen Thompson and determined that Ms. Thompson should be Ms. Kowalski's guardian following her serious brain injuries in an automobile collision. *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. App. 1991), *review denied* (1992).

The term "family" was again reviewed by the Washington Supreme Court when considering a group home operated for profit for disabled adults under a restrictive covenant limiting property use to single-family residential use. The court stated that when interpreting the word family "the context in which the word is used and the fact specific circumstances" must be considered rather the using "a single, all-purpose definition." *Mains Farm Homeowners v. Worthington*, 121 Wn.2d 810, 817, 854 P.2d 1072 (1993):

> On the one hand, in today's society most people, if put to this inquiry, probably would conclude that for this purpose, 'family' means something more than only persons related by blood, marriage or adoption. On the other hand, in this context, it is likely most people would reject the notion that 'family' includes any group of people who happen to share a common roof and table. Some reflection leads us to attribute certain characteristics to a concept of 'family,' even in the extended sense. These include: (1) a sharing of responsibilities among the members, a mutual caring whether physical or emotional, (2) some commonality whether it be friendship, shared employment, mutual social or political interest, (3) some degree of existing or contemplated permanency to the relationship, and (4) a recognition of some common purpose, persons brought together by reasons other than a referral by a state agency.

Id. at 817-18.

Although the Supreme Court did not hold that the group home could be considered a family, it is clear that the court considers family to go beyond the traditional nuclear family. How far this definition will expand will be determined in future cases.

CHAPTER 12

THE NON-MARITAL COUPLE

Nancy Hawkins

ALERT

In February 2012, Governor Gregoire signed ESSB 6239, which permits same-sex couples to marry, effective June 7, 2012. Laws of 2012, ch. 3. The application of the Act was delayed by Referendum 74, which seeks to repeal the law. The referendum has now been certified on the November 2012 ballot. For further information on the potential impact of ESSB 6239, see Chapter 13 (Registered Domestic Partnerships) of this deskbook.

In addition to normal supplement material, new subsections (1) and (2) have been added to §12.2.

§12.1 INTRODUCTION

Add at end of first paragraph:

See §10.3 of this deskbook for a discussion of the right to marry; see also Chapter 13 (Registered Domestic Partnerships) of this deskbook.

Nancy Hawkins received her undergraduate degree from the University of Washington and her law degree from the University of Puget Sound (now Seattle University) School of Law. She is a sole practitioner who concentrates her practice in the areas of family law and personal injury. She is a former chair of the King County Bar Association Family Law Section. A significant portion of her family law practice is the representation of unmarried persons, both homosexual and heterosexual, involved in long-term relationships.

§12.1 / The Non-Marital Couple

Insert after second paragraph:

Note: Couples are no longer married or not married. There are now a number of "bright lines" to look to before advising a client. Couples now fall into one of multiple categories:

(1) traditional heterosexual married couples;

(2) same-sex couples legally married in a state or country that allows such couples to marry;

(3) domestic partners registered in Washington state;

(4) domestic partnerships or civil unions created in a state or country that provides for such legal relationships;

(5) common-law marriages created in other states that recognize common-law marriages;

(6) unmarried couples, regardless of gender, that meet the requirements of an "intimate, committed relationship" (the meretricious relationship); and

(7) all other unmarried couples, regardless of gender.

(1) For issues involving traditional heterosexual married couples, the statutes are well known and case law is generally well established. Those statutes and case law apply to such couples whether married in Washington or married in another state; another state's traditional marriages are recognized in Washington under constitutional full faith and credit provisions.

(2) For same-sex couples legally married in a state or country that allows such couples to marry, there is uncertainty about their legal rights in Washington. Washington currently does not recognize those marriages. RCW 26.04.020(3). There is no case law that definitively determines how Washington courts should handle the dissolutions of those relationships. Some Washington trial courts have entered decrees dissolving those relationships and applying Washington's dissolution statutes and case law by analogy.

Caveat:	Washington currently does not allow same-sex couples to marry. RCW 26.04.020(1)(c). Efforts to strike down the prohibition on same-sex marriage as unconstitutional were rejected by the Washington Supreme Court. *See Andersen v. King Cnty.*, 158 Wn.2d 1, 138 P.3d 963 (2006). (Note, however, that there are isolated cases of traditional marriages in which the spouses, in effect, become same-sex couples when one spouse undergoes gender reassignment. It is assumed that such couples would continue to be treated as traditional married couples for purposes of dissolution statutes.) Also see the Alert at beginning of this chapter.

(3) Domestic partnerships registered in Washington enjoy rights and state protections often referred to as "everything but marriage." For a comprehensive overview, see Chapter 26.60 RCW, discussed more fully in Chapter 13 (Registered Domestic Partnerships) of this deskbook. This legal status applies only to heterosexual couples over the age of 62 and same-sex couples who choose to register with the state. For domestic partners registered in Washington state, state dissolution statutes and case law apply equally to domestic partners and marital spouses "to the extent not in conflict with federal law. RCW 26.60.015.

(4) For domestic partnerships or civil unions created in a state or country that provides for such legally recognized (but not marital) relationships, RCW 26.60.090 requires that they be treated as if they were a domestic partnership registered in Washington state. Ironically, these couples have more protection than same-sex couples legally married elsewhere because Chapter 26.60 RCW specifically excludes same-sex marriages from this reciprocal equal treatment. RCW 26.60.090.

(5) Common-law marriages created under another state's statutes are recognized in Washington state and treated as valid marriages. *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 249, 778 P.2d 1022 (1989). As such, all marriage dissolution statutes and case law apply to such couples.

(6) Unmarried couples, regardless of gender, who meet the requirements of an "intimate, committed relationship" (a meretricious relationship) have been recognized by case law for many years. It is generally believed that this case law developed to avoid the inequities that otherwise arose upon dissolution of such relationships if property were divided taking only into account

how the property was titled. In contrast to decades past, many such couples now have other options. They may go to Canada or any number of countries in Europe and throughout the world to marry, or they may go to one of the states that allow same-sex marriages (currently Connecticut, Iowa, Massachusetts, New Hampshire, Rhode Island, and Vermont). It is still to be determined whether courts will choose not to apply meretricious relationship case law in the future to couples who had the option to marry or register but did not do so.

(7) There remains a category of "all other unmarried couples," regardless of gender, who don't meet the criteria or requirements of any other category above. In these cases, property will likely be divided as titled absent some other equitable remedy such as tracing source of funds, equitable trust, implied joint venture, or resulting trust. In *In re Long & Fregeau*, 158 Wn. App. 919, 244 P.3d 26 (2010), Division III analyzed the quality of an unmarried couple's relationship in detail, including their fidelity to each other (or lack thereof), before determining that they constituted an "equity relationship" rather than an "intimate committed" relationship, and then applied *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), to examine the trial court's division of property.

Replace third paragraph with the following:

This area of the law is evolving in Washington state and around the country. Besides the domestic partner legislation described above, the Washington Supreme Court has issued major decisions in this area since 2000, reversing the Court of Appeals in several instances. *See Chesterfield v. Nash*, 96 Wn. App. 103, 978 P.2d 551 (1999), *rev'd sub nom In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000); *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001). See also the alert at beginning of this chapter.

§12.2 MERETRICIOUS RELATIONSHIPS

Add at end of second paragraph:

The statutory creations of maintenance and attorney fees are now available to registered domestic partners. RCW 26.60.090.

Replace third paragraph with the following:

The policy of denying certain rights to unmarried cohabitants, in part to encourage marriage, cannot logically apply to same-sex cohabitants because presently marriage is not a legal option for such couples in Washington state. (But note the Alert at beginning of this chapter.) By extending many protections to registered domestic partners, public policy is now to encourage committed intimate partners to formalize their relationships through registration.

In *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001), the protections afforded unmarried heterosexual couples under *Lindsey v. Connell* were extended to same-sex couples.

Delete fourth paragraph up to the Note.

Insert new subsection (1) before fifth paragraph:

(1) Establishment of a meretricious relationship

Unmarried cohabitants, by definition, lack the "bright line" determination that the date of marriage provides to determine at what point their personal relationship has also become a legal relationship. By case law, a variety of factors are now examined to determine whether a legal relationship has been formed by a cohabiting couple. If so, rights and obligations may follow that affect each party upon the dissolution of the relationship. As described more fully in §12.1, above, unmarried couples now have a variety of "bright lines."

To determine the existence of a meretricious relationship, the court analyzes five relevant factors: (1) continuance cohabitation, (2) duration of the relationship, (3) purpose of the relationship, (4) pooling of resources and services for joint projects, and (5) the intent of the parties. *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). The court noted in *Connell* that the list of factors is neither "exclusive nor hypertechnical." *Id.*

Whether to characterize a relationship as meretricious depends upon the facts of each case. The consolidated cases of *Pennington v. Pennington*, 93 Wn. App. 913, 971 P.2d 98 (1999), *aff'd sub nom. In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000), and *Chesterfield v. Nash*, 96 Wn. App. 103, 978 P.2d 551, *rev'd sub nom In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000), are instructive. In *Nash*, James Nash and Diana Chesterfield cohabited for four years in Chesterfield's home and assisted each other professionally. 142 Wn.2d at 597-98. They shared some resources including payments

on Chesterfield's home, but maintained separate bank accounts and purchased no property jointly. They ceased living together, reconciled briefly but did not live together, and permanently separated a year later. *Id.* at 599. The Supreme Court overturned the Court of Appeals' decision that held the parties' four-year relationship to be "meretricious." *Id.* at 607-08. The court noted that although the parties' continuous cohabitation and the duration of their relationship were evidence of a meretricious relationship, evidence regarding mutual intent was ambiguous. Further, the separate accounts, lack of significant joint purchases, and failure to significantly or substantially pool their time and effort did not justify the equitable division of property acquired during their relationship. *Id.* at 606-07.

In *Pennington*, Evelyn Van Pevenage began a relationship with Clark Pennington in 1983 and began cohabiting with him in 1985. 142 Wn.2d at 603. They cohabited together until 1991, separated for two years (Van Pevenage lived with another man during this time), and resumed cohabiting for one year during which time they dated other people. She was known during this time as Sammi Pennington, they were listed in the telephone book together, and they were known by friends and health care providers as a couple. From 1983 until 1990 Pennington was married to another woman and subsequently he refused to marry Van Pevenage (although he gave her a ring in 1986 and, according to her, proposed and promised to marry her). *Id.* at 603-04. The Supreme Court upheld the trial court's determination that a meretricious relationship was not established, when the parties did not have a stable cohabiting relationship, the parties' intent did not support such a finding, and they did not significantly pool their resources and services. *Id.* at 604-05.

Seven years after *Pennington* and *Nash*, the Washington Supreme Court issued a significant case regarding meretricious relationships, holding that a meretricious or intimate committed relationship could be determined after the death of both cohabitants. *Olver v. Fowler*, 161 Wn.2d 655, 168 P. 3d 348 (2007). In *Olver*, two cohabitants were killed in a car accident. *Id.* at 657. During their 14-year relationship, Cung Ho and Thuy Nguyen had two children, had a religious wedding ceremony, pooled their assets, ran a business together and presented themselves to the public as a couple. *Id.* at 658. However, consistent with their culture, all assets were titled in the male partner's name. Justice Bridge wrote a lengthy opinion describing 90 years of case law involving unmarried couples and the evolution of meretricious relationship/intimate committed partners case law. *Id.* at 664-69. The opinion concluded with the determination that "when a committed

intimate relationship is terminated by the death of both parties, the couple's jointly acquired property can be equitably divided between the partners' estates." *Id.* at 672.

Insert new subheading (2) before last paragraph:

(2) Dissolution of a meretricious relationship

Replace second sentence of last paragraph with the following:

Registered domestic partners who seek to end their legal relationship file to dissolve their domestic partnership under Chapter 26.09 RCW. Unregistered unmarried couples who wish to end their cohabitation may require court assistance on a variety of matters, including division of property, division of debts, and provisions for children.

Add at end of last paragraph:

See WPF DR 01.0105 for a pattern form petition for dissolution of a registered domestic partnership.

§12.3 CHILDREN OF NON-MARITAL COHABITANTS

Replace second sentence of first paragraph with the following:

The issues involving children born to unmarried heterosexual cohabitants are described in detail in Chapter 58 (Parentage) of this deskbook. Issues involving children of registered domestic partners are described in detail in Chapter 13 (Registered Domestic Partners) of this deskbook. Issues regarding adoptions by same sex couples and/or "stepparent" adoptions are described in detail in Chapter 60 (Adoption) of this deskbook.

Insert after third paragraph:

In *In re Parentage of L.B*, Division I determined that a former unmarried partner was entitled to parental rights to a child not born to or adopted by her if she was determined to be a de facto or psychological parent. 121 Wn. App. 460, 89 P.3d 271 (2004), *aff'd in part, rev'd in part*, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert denied sub nom. Britain v. Carvin*, 547 U.S. 1143 (2006). On appeal, the Washington Supreme Court affirmed the ruling in part, reversed in part, and remanded for further proceedings. *L.B.*, 155 Wn.2d 679. The Supreme Court determined that a person meeting certain limited criteria (shared household with child, legal parent fostered parent-like relationship,

assumption of parental obligations without financial reward, sufficient length of relationship, and establishment of bonded parent-like relationship) would have standing to assert de facto parentage. The court ruled that, if the criteria were met, a de facto parent would stand in legal parity with an otherwise legal parent and would be able to assert parental privileges as determined to be in the best interests of the child. The de facto parentage concept was further defined in 2010 with *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010). In that case, the court determined that de facto parentage could not apply to a stepparent in situations in which the children already have two fit parents. The Washington Supreme Court seems poised to further define de facto parentage in accepting for review two Court of Appeals decisions, *In re Parentage and Custody of A.F.J.*, 161 Wn. App. 803, 260 P.3d 889 (Div. I), *review granted*, 172 Wn.2d 1017 (2011); and *In re Custody of B.M.H.*, 165 Wn. App. 361, 267 P.3d 4989 (2011) (Div. II), *review granted*, 173 Wn.2d 1031 (2012).

Division I had determined that a foster parent could be a de facto parent, particularly if the relationship with the child preceded the foster care placement. *A.F.J.*, 161 Wn. App. at 824. It clarified that, although one of the elements of a de facto parent relationship is involvement with the child without expectation of financial gain, this does not mean that a person seeking de facto parent status would be disqualified if the person accepted financial help such as public assistance or foster care payments. *Id.* at 822-24.

Division II had reversed a trial court decision that had erroneously interpreted *In re Parentage of M.F.* to mean that no stepparent could be a de facto parent; it determined that each case had to be decided on its individual facts and that a stepparent could qualify as a de facto parent, particularly when the child otherwise had only one living parent. *B.M.H.*, 165 Wn. App. at 374-76.

Add at end of seventh paragraph:

See §51.7 of this deskbook.

§12.4 PROPERTY RIGHTS

(2) Current law

Insert after fifth paragraph:

Until 2009, a considerable roadblock to equitable divisions of property for unmarried couples was the unavailability of Qualified Domestic

Relations Orders (QDROs). However, in a landmark decision, a QDRO issued by a trial court was enforced against an objecting labor union and upheld on appeal. *Owens v. Auto. Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009). In *Owens*, an unmarried couple was together for over 30 years, raised two children, acquired property, and held themselves out as a married couple. It was a traditional family, the woman being the primary parent and homemaker and the man being the breadwinner. At the time of dissolution, the ERISA pension plan with Automotive Trust was the major and remaining asset. The trial court awarded one-half the pension to each party and issued a QDRO. The union found the QDRO did not qualify under ERISA because the parties were not married. Ultimately, the Ninth Circuit upheld the QDRO. The successful practitioner, Harry Reichenberg, cautions that, at a minimum, the court must find that the parties were involved in a "quasi-marital" relationship, and the order must meet all of the ERISA requirements.

Replace citation to Chesterfield v. Nash in thirteenth paragraph, which begins "More recently, Division I...," with the following:

Chesterfield v. Nash, 96 Wn. App. 103, 978 P.2d 551 (1999), *rev'd sub nom. In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000)

Add at end of thirteenth paragraph before case briefs:

In *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004), Division III approved a 30 percent award to the more financially vulnerable partner. These decisions appear to strongly erode the protection that *Lindsey* intended for cohabitants, at least for Division III cohabitants. Division III also upheld an award to the financially vulnerable partner of the equivalent of $15,000 per year for each year of a nine-year meretricious relationship, but was reversed by the Supreme Court. *Soltero v. Wimer*, 128 Wn. App. 364, 115 P.3d 393 (2005), *rev'd*, 159 Wn.2d 428, 150 P.3d 552 (2007).

Replace three case briefs at end of thirteenth paragraph with the following:

> SOLTERO V. WIMER, 128 Wn. App. 364, 115 P.3d 393 (2005), *rev'd*, 159 Wn.2d 428, 150 P.3d 552 (2007). A nine-year relationship was determined to be meretricious. The woman, as the more financially vulnerable partner, was awarded the equivalent of $15,000 for each of the nine years of the relationship. The trial court used a "services rendered" analysis and was affirmed by Division III. On appeal, the Washington Supreme Court reversed and denied the financially vulnerable partner any award

after determining that the parties created no joint property during their 18-year relationship (dating for nine years and then living exclusively and monogamously for nine more). The Washington Supreme Court noted that the trial judge had not found that the significant increase in the man's property (from 1.5 million to over 4.5 million) was due to his "community" efforts but rather was due to "'natural enhancement' of his separate property." 159 Wn.2d at 434.

Replace citation to Pennington at end of fourteenth paragraph, which begins "Division I continues to protect...," with the following:

Pennington v. Pennington, 93 Wn. App. 913, 971 P.2d 98 (1999), *aff'd sub nom. In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000).

Insert after fourteenth paragraph:

The Washington Supreme Court's ruling in *Pennington* added a surprising twist to the law on meretricious relationships. *See Pennington*, 142 Wn.2d 592. Carried to its logical conclusion, it erodes or certainly could erode some of the protections within *Lindsey* for the more financially vulnerable partner in these relationships. It may ultimately lead to an intent-based analysis that will negate any of the other factors that the court found relevant in *Lindsey* more than 20 years ago. *Pennington* focused on the man's availability to marry and whether he intended to marry to an extent not seen in prior cases. This approach, although not explicit, lends itself to the innocent/meretricious distinctions of the *Creasman* era.

Delete fifteenth paragraph, which begins "One year after Pennington...," not including the Practice Tip.

Insert before first sentence of Practice Tip at end of subsection:

With a marital dissolution and a registered partner dissolution, no excise tax is due on a transfer of real property between partners. RCW 82.45.010(2)(e).

Insert at end of subsection:

Dividing the non-marital couple's assets can be difficult if a major asset is in the form of retirement accounts. Unlike in a marital dissolution, until now, the option of dividing such assets through a Qualified Domestic Relations Order was generally not available. See

above for a discussion of *Owens*, upholding a QDRO in a dissolution of a 30-year meretricious relationship.

Predictability of trial court decisions applying statutes and case law to individual cases allows counsel to advise clients with some confidence and is essential to prompt settlement of cases. That clarity is missing for the unmarried couple in Washington due to the inconsistency in laws in Washington and other jurisdictions, as well as Washington's refusal to recognize same-sex marriages legally created elsewhere.

Note:	A former wife entitled to pension payments until she remarried was allowed to continue to receive such payments despite an attempt to marry her same-sex partner in Oregon. Division III determined that because Washington state did not recognize same-sex marriages even if legal in the state of the marriage, the former wife had not "remarried" for purposes of terminating her right to her former husband's pension payments under their decree of dissolution. *In re Marriage of Bureta*, 140 Wn. App. 119, 164 P.3d 534 (2007).

APPENDIX B

2012 Utah L. Rev. 393

Utah Law Review
2012

Article

A MINIMALIST APPROACH TO SAME-SEX DIVORCE: RESPECTING STATES THAT PERMIT SAME-SEX MARRIAGES AND STATES THAT REFUSE TO RECOGNIZE THEM

Robert E. Rains[a1]

"Thus Grief still treads upon the Heels of Pleasure: Married in haste, we may repent at leisure."

-- William Congreve, The Old Batchelour, Act V, Scene 1 (1693)

I. Introduction

Unlike most modern countries, the United States has no general law of domestic relations. The powers delegated in the Constitution to the Congress do not include the governance of family law.[1] Moreover, the Bill of Rights provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2] Thus, in 1890, the US Supreme Court unequivocally stated, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[3] In the ensuing 120 years, Congress has, directly and indirectly, addressed multiple family law issues utilizing its various delegated powers.[4] But it remains true that there is no federal law of marriage or divorce. Each of the fifty states has its own marriage and divorce laws, and they are often in sharp conflict with each other.[5] For example, until the Supreme Court ruled such laws unconstitutional in Loving v. Virginia[6] in 1967, sixteen states still prohibited interracial couples from getting married, while thirty-four states authorized such unions.[7]

***394** While the once heated debate over interracial marriage is today probably viewed in most circles as an embarrassing vestige of the era of "Jim Crow," basic disagreements continue among the states as to who can marry whom. American states are fairly equally divided as to whether first cousins may marry.[8]

But, of course, the current marriage issue that most animates vitriolic political dispute in the United States and elsewhere is the question of same-sex couples. This issue first came to the fore in the United States with the 1993 decision of the Hawaii Supreme Court in Baehr v. Lewin,[9] in which that court ruled that several same-sex couples had stated a cause of action that Hawaii's prohibition on same-sex marriage arguably violated the Hawaii State Constitution.[10] This decision, which only called for a remand of the case, created a public firestorm. At the federal level, Congress enacted the "Defense of Marriage Act" ("DOMA").[11]

The federal DOMA has but two substantive provisions. One provision is that the United States government will not recognize a same-sex marriage for any federal purpose.[12] The other provision addresses interstate concerns, specifically recognition by one state of a same-sex marriage legally performed in another state:

> ***395** No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of

such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[13]

This provision carves out an exception to the general American rule that a marriage validly entered into in one state will be recognized in all other states.[14] There is a constitutional, as well as a common law, basis for this rule, as the Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[15] However, in enacting DOMA, Congress purported to rely on its enforcement power under the Full Faith and Credit Clause: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[16] Whether this second provision of DOMA is a proper exercise of that enforcement power, or a violation of it, is a hotly debated question.[17]

This Article will address the legal conundrum that arises when a person who validly entered a same-sex marriage in one state seeks a divorce in another state that refuses to recognize same-sex marriage. The Article will first discuss the interstate recognition of marriages and divorces in general, then the patchwork quilt of same-sex marriage laws in the United States, followed by a discussion on seeking a legal exit from a same-sex marriage in a state that does not recognize that marriage, and finally, suggest a path which will allow a court in the latter state ***396** to grant relief without violating the letter or spirit of state provisions barring recognition of same-sex marriage.

II. Interstate Recognition of Marriages (and Divorces) in General

The validity of a marriage entered into in another state is a matter that is litigated with some frequency, but not usually on a constitutional basis. Different courts have developed different frameworks for addressing this issue.

Perhaps the best-known case is the 1953 decision of the New York State Court of Appeals in In re May's Estate.[18] In that case, a Jewish uncle and niece were barred from marrying in New York.[19] They traveled to Rhode Island, which generally prohibited such marriages but allowed them for persons of the Jewish faith.[20] The marriage lasted thirty-two years until the wife's death, and produced six children.[21] An estate battle ensued between the widower and three of the children who claimed that their parents' marriage was invalid under New York law, and therefore they were next of kin to their deceased mother.[22] The surrogate court (that is, the trial court) agreed with the three children that their parents' marriage was void because it was "opposed to natural law" and contrary to New York statutory law.[23]

The New York Court of Appeals, that state's highest court, disagreed.[24] It expressed the "settled law" that the legality of a marriage is to be determined by the law of the place where it is celebrated (lex loci celebrans).[25] The only exceptions are: (1) cases within the prohibition of positive law; and (2) "cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law."[26] The court found that New York's statute did not contain a positive prohibition on recognition of an out-of-state uncle-niece marriage.[27] And since the marriage was performed in accordance with "the ritual of the Jewish faith," it was "not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law."[28]

The May's Estate decision presents a number of interesting aspects. First, the court never addressed the constitutionality of allowing a marriage of persons of one faith where the same marriage would be declared void if the parties were of another faith. Could a couple convert from one religion to another to avoid a ***397** marriage prohibition? If a couple such as the Mays lawfully married in one religion but later converted to another religion, would it affect their civil marriage? What if they were an interfaith couple? Could they choose which religion governed the validity of their marriage?

The second aspect of the May's Estate decision worth noting is the subjectivity involved in a civil court's attempt to find and apply "natural law." This was highlighted by the fact that a dissenting judge would have found that "[a]ll such misalliances are incestuous, and all, equally, are void."[29] A court's reliance on such an amorphous concept as natural law is akin to reliance on scripture, as often happens today in the battle over same-sex relationships.[30] Those resorting to such scriptural reliance would do well to recall that in 1959 the trial judge who sentenced the Lovings for their crime of inter-racial marriage found support from the Deity in doing so:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his [sic] arrangement there would be no cause for such marriages. The fact that he [sic] separated the races shows that he [sic] did not intend for the races to mix.[31]

It appears that none of the nine justices of the US Supreme Court who reversed the Lovings' convictions shared the trial judge's views of a mandate from the Lord nor did they fear divine retribution.[32]

The third interesting lesson from May's Estate is that context is often critical in marriage recognition cases. The Mays' marriage was of long duration, lasting over three decades, and happy enough to produce six children.[33] There is no indication that the couple ever separated, or that they doubted the validity of their union.[34] Their marriage was not attacked by either of them, but rather by three of their children who were apparently motivated by greed over their mother's estate.[35] ***398** Might the result have been different if, shortly after their wedding in Rhode Island and return to New York, the bride had "come to her senses," left her uncle/husband, and sued for an annulment? There is, of course, no way of knowing, but it seems far more likely that the New York courts would have declared the marriage void under those circumstances.

Often, courts invoke the notion of "comity" to validate an out of state marriage. Thus, in Hesington v. Estate of Hesington,[36] the Missouri Court of Appeals opined: "However, as a matter of comity, Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy of this state."[37] Note, however, that comity (giving deference to a foreign judgment, decree, etc.) is a lesser mandate than the constitutional mandate of full faith and credit--which itself is not absolute.[38] In Hesington, a Missouri woman wished to establish that she was the widow of a deceased Missouri man by virtue of a common law marriage they had entered into in Oklahoma in 1978.[39] At the time of the common law marriage ceremony, Oklahoma permitted common law marriages, but Missouri had abolished such marriages in 1921.[40] The Missouri trial judge found that had the couple been Oklahoma residents, they would have met Oklahoma's requirements for a common law marriage.[41] Nevertheless, the trial judge ruled that the couple's Oklahoma marriage was invalid in Missouri, and the appellate court affirmed.[42] The appellate court noted with approval the Restatement (Second) of Conflict of Laws § 283(1) (1971): "The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage . . . ."[43]

Nevertheless, applying the principle of comity, the court indicated that "Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy" of Missouri.[44] The court noted that while other states are split on the subject, the majority view is that a state that does not permit common law marriages will not recognize a common law marriage of its residents when the ***399** common law marriage took place during a temporary sojourn to a state that permits such marriages.[45]

The court found that when the Missouri legislature abolished common law marriage, it had as a purpose "to require some degree of solemnity and reliability in establishing a marriage of those domiciled in and residing in Missouri."[46] Recognizing the Oklahoma common law marriage of the Missouri residents in this case would violate that public policy.[47]

On a strictly logical basis, it is hard to square the result in Hesington with the result in May's Estate. Both involved marriages that were lawful where contracted. But the couple in May's Estate could not under any circumstances have married in their state of residence because of their consanguinity. There is no suggestion in Hesington that there was any bar whatsoever to the Hesingtons' marriage in their home state; they simply entered into their marriage in a less formal fashion than their home state allowed. In other words, their error only went to the "formalities" of marriage, not the essentials. Therefore, from a logical standpoint, Mr. Hesington's widow had a stronger claim than Mrs. May's widower.

Other than different courts addressing different cases at different times, the only reasonable explanation for the contradictory results is, again, context. The Mays were married for thirty-two years and produced six children. A ruling that their marriage was void would have almost certainly rendered those children "illegitimate" at a time when illegitimacy not only carried a great social stigma, but also far greater legal disadvantages than it does today.[48] (It is indeed ironic that three of the Mays' children were effectively arguing in court for their own illegitimacy.)

By contrast, the Hesingtons entered into their purported common law marriage less than two years before Mr. Hesington's death.[49] There is no indication that their union was blessed with issue, hence there were apparently no children who would be deemed illegitimate by virtue of the Missouri court's ruling.

A case applying yet another approach to marriage recognition is the 1984 Washington Court of Appeals decision, In re Estate of Shippy.[50] This case actually involved the laws of three states: Washington, California, and Alaska.[51] James Shippy executed a will in January 1972, leaving his estate to his then wife, *400 Marion.[52] In January 1973, Marion obtained an interlocutory decree of divorce from James in California.[53] James married Inge in Alaska in 1978 although his divorce from Marion was not final.[54] James died in a plane crash in Alaska on July 15, 1981.[55] On November 16, 1981, four months after James' death, the California court entered the final decree nunc pro tunc divorcing James and Marion as of May 14, 1973.[56] In the subsequent estate battle in Washington, the trial court found that Inge was not James' surviving spouse because her marriage to James was void under Alaska law.[57] The nice issue presented was which state's law would control regarding the retroactive effect of a nunc pro tunc decree on an intervening second marriage.[58] Under the majority view, including the law of Washington state, the later nunc pro tunc decree would validate the intervening marriage.[59] Some states took the contrary position.[60] Although Alaska courts had not addressed the issue, Alaska statutory law provided that, "[a] subsequent marriage contracted by a person during the life of a former husband or wife which marriage has not been annulled or dissolved is void."[61] Hence the Washington Court of Appeals concluded that if it applied Alaska law, James and Inge's marriage would appear to be void.[62] This would have defeated Inge's claim because the counterpart of the general rule that a marriage validly entered into is valid everywhere is that a marriage invalidly entered into is invalid everywhere.[63]

The court went on, however, to apply a choice of law approach that appears to be the polar opposite of those used in May's Estate and Hesington. Relying on the Restatement (Second) of Conflict of Laws § 283 comment i (1971), it reasoned that the Alaska marriage would not be deemed invalid in Washington unless:

> [t]he intensity of the interest of the state where the marriage was contracted in having its invalidating rule applied outweighs the policy of protecting the expectations of the parties by upholding the marriage and *401 the interest of the other state with the validating rule in having this rule applied.[64]

Although the court was unable to determine James and Inge's state of residence at the time of their Alaska marriage, it found that Washington had a substantial relationship to the parties because they resided in Washington when James died, property existed in Washington to be distributed, and probate proceedings were pending in Washington.[65] Thus, Washington law would apply unless Alaska had a clearly contrary policy.[66] Alaska law, by itself, did not establish such a policy.[67] Indeed Washington had a similar statute, but its courts would still recognize such a marriage.[68] Thus, "to protect the expectations of James and Inge," the court applied Washington law and validated their Alaska marriage.[69]

The Shippy decision raises as many issues as it answers. The Shippys' marriage was longer (five years)[70] than the Hesingtons' (two years), but considerably shorter than the Mays' (thirty-two years). While the court explicitly concerned itself with James and Inge's expectations, it did so at the expense of James' children (who may or may not have been the product of his marriage to Marion).[71] The most reasonable explanation is that James and Inge were unaware that his divorce from Marion had not been finalized. Although ignorance of the law is generally no excuse, the court simply chose to protect Inge if she was unfamiliar with the difference between a California interlocutory divorce decree and final divorce decree. Indeed, it is probable that James told her--and actually believed--that he was divorced from Marion. It appears that it was his intention to divorce Marion and, later, to marry Inge. Viewed this way, his error might, or might not, be deemed to have gone to the formalities--as opposed to the essentials--of marriage.

Some state legislatures have sought to proactively bar their residents who cannot marry in their state of residency from getting married in another jurisdiction. For example, Wisconsin enacted a law in 1971 to prevent Wisconsin "deadbeat dads" from marrying.[72] The law generally barred parents who were in *402 arrears in paying child support from marrying.[73] It specifically addressed out-of-state marriages:

> This section shall have extraterritorial effect outside the state; and s. 245.04(1) and (2) [providing that out-of-state marriages to circumvent Wisconsin law are void] are applicable hereto. Any marriage

> contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.[74]

The United States Supreme Court struck down the law in its entirety, finding that it violated the Equal Protection Clause of the Constitution, and hence had no occasion to address the constitutionality of its extraterritorial provision.[75]

Attacking this issue from the opposite perspective, in 1912 the National Conference of Commissioners on Uniform State Laws proposed the confusingly named "Uniform Marriage Evasion Act."[76] Under that statute, a state would not permit a marriage to take place within its borders if it was between nonresidents who were forbidden to marry in their home state. (Hence the statute should have been called the Uniform Marriage Prohibition Evasion Act. It was intended to prevent certain people from evading marriage prohibitions in their home states, rather than evading marriage.) Most states already had some form of marriage evasion act.[77] The proposed uniform act was only adopted in five states, and the Uniform Law Commissioners withdrew it in 1943.[78] However, withdrawal by the commissioners of a uniform law does not repeal that law in any state that has already adopted it.[79] Only a state's legislature can repeal a law (or that state's courts may strike it down). Indeed, over six decades after the Uniform Marriage Evasion Act was withdrawn, the Massachusetts Supreme Judicial Court applied Massachusetts' version of that act to bar same-sex couples from Connecticut, Maine, New Hampshire, and Vermont from getting married in Massachusetts.[80]

***403** The US Supreme Court has had limited opportunity to address interstate marriage recognition. In 1888, in Maynard v. Hill,[81] the Court upheld a ruling of the Supreme Court of the Territory of Washington that a decedent was married to his second wife at the time of his death.[82] David Maynard had married Lydia Maynard in Vermont in 1828 and had two children by her.[83] In 1852, allegedly with no notice to Lydia, David obtained a legislative divorce from her.[84] Shortly thereafter, David married Catherine, with whom he lived until his death.[85] In the ensuing estate battle, Lydia's children asserted that Lydia was still legally married to David when he made a "donation claim" to certain land after the legislative divorce.[86] Lydia's children raised various due process objections to the legislative divorce, all of which were ultimately rejected.[87] The Court did not directly address any interstate conflict of laws issues in Maynard.

In 1907, in Travers v. Reinhardt,[88] the US Supreme Court reviewed a decision of the Court of Appeals of the District of Columbia addressing the marriage of a man from Washington, D.C. to a woman from West Virginia.[89] The marriage took place in Virginia, but was defective there because of the lack of a proper minister; however, it was arguably ratified as a common law marriage in New Jersey during short stays there.[90] The US Supreme Court affirmed the District of Columbia court's finding that the parties had been validly common law married in New Jersey.[91] As in Maynard, the Court did not directly address the standards for interstate marriage recognition.

In Williams v. North Carolina,[92] a case that went to the US Supreme Court twice, the Court did address, under the Full Faith and Credit Clause, North Carolina's refusal to recognize the marriage of two North Carolinians in Nevada.[93] However, the validity of their marriage hinged on the recognition of the parties' divorce decrees, which were issued by the State of Nevada and purported to dissolve the parties' prior marriages to their respective spouses who remained in North Carolina.[94]

***404** Briefly, O.B. Williams married Carrie Wyke in 1916 in North Carolina and lived with her there until 1940.[95] Lillie Shaver Hendrix married Thomas Hendrix in 1920 in North Carolina and lived with him there until 1940.[96] In May 1940, O.B. and Lillie travelled to Las Vegas, Nevada ("Sin City," then as now), where each filed for divorce in June 1940.[97] Neither of their spouses was personally served in Nevada, although each apparently received notice of the proceedings.[98] Neither entered an appearance or participated in any way in either divorce action.[99] The Nevada court granted O.B. a divorce on August 26, 1940, and Lillie a divorce on October 4, 1940.[100] Not letting the grass grow under their feet, O.B. and Lillie got married that same day in Nevada.[101] Presumably, if they had remained in Nevada, they could have lived there together legally ever after.

But O.B. and Lillie returned to North Carolina, where they were tried, convicted, and sentenced to imprisonment for the crime of bigamous cohabitation.[102] The North Carolina courts ruled that North Carolina was not required to recognize their Nevada divorce decrees under the Full Faith and Credit Clause.[103]

The first time that the Williams case went to the US Supreme Court, in 1942, the Court presumed that the newlyweds had met Nevada's domiciliary requirements for a divorce.[104] Overturning past precedent, the Court ruled that a state is empowered to enter a divorce decree that is entitled to full faith and credit in all other states, as long as one of the spouses is domiciled in that state and provides "substituted service" on the other party that meets the requirements of due process.[105] In other words, a state court--applying its own state divorce laws--can grant a divorce that is binding on both parties even when the marriage was entered into in another state, their entire married life took place in another state, and the defendant spouse has never set foot in the state issuing the divorce, was not served in that state and did not participate in the divorce action--as long as the defendant spouse has received "substituted service." Finally, in Williams I, the Court remanded the case to the courts of North Carolina for further proceedings.[106]

O.B. and Lillie were retried before a jury of their peers in North Carolina.[107] The trial judge instructed the jury that O.B. and Lillie had the burden to ***405** demonstrate that they were domiciled in Nevada at the time they obtained their divorces, and that the Nevada court's recitation of bona fide domicil in their divorce decrees was "prima facie evidence," but did not compel "such an inference."[108] If they had only gone to Nevada to get their divorces, intending to return to North Carolina on obtaining them, then they neither lost their North Carolina domicil nor acquiesced new domicils in Nevada.[109] The jury duly convicted O.B. and Lillie again of bigamous cohabitation, and that conviction was upheld through the North Carolina courts.[110]

On appeal to the US Supreme Court the second time, the critical issue was whether the North Carolina courts had failed to give full faith and credit to the Nevada divorce decrees, specifically insofar as those decrees found that O.B. and Lillie had bona fide domicil in Nevada.[111] In Williams II, the Court ruled that, although the "fact that the Nevada court found that they were domiciled there is entitled to respect, and more," the North Carolina courts were not bound by that finding.[112] North Carolina was free to reexamine this issue and had done so, giving appropriate weight to the Nevada court's findings.[113] Concluding that North Carolina had not violated the full faith and credit clause, the Supreme Court affirmed the convictions for bigamous cohabitation.[114]

The Williams I and Williams II decisions--made during the era of "migratory divorce," when the unhappily married frequently left their spouse and home state to find a more conducive jurisdiction and congenial life partner--remain the law in the United States today. The result of those decisions for the individual litigants (O.B. and Lillie) was a truly anomalous situation. As far as Nevada was concerned, they were divorced from their original spouses and lawfully married to each other. As far as North Carolina was concerned, they were each married to their original spouses and it was criminal for them to hold themselves out as married to each other. The Supreme Court rather blithely acknowledged that if one state can review the validity of a divorce, and hence a remarriage, in another state, then "persons may, no doubt, place themselves in situations that create unhappy consequences for them."[115] And that is precisely the situation faced today by certain people who have entered into a same-sex marriage in one state that they have tried to lawfully exit in another state.

Two more Supreme Court full faith and credit cases in the domestic relations arena warrant brief discussion. The Court refined the Williams I doctrine in two subsequent decisions, both of which, not coincidentally, involved departing spouses who sought their legal freedom in Nevada.

***406** In the 1948 case Estin v. Estin,[116] the Court addressed the situation of Mr. Estin, who was married in New York in 1937 and lived there with his wife until they separated in 1942.[117] In 1943, his wife filed an action against him in New York for a legal separation, which the court granted, along with $180 per month as legal alimony that, under New York law as it then existed, would continue until the parties were divorced.[118] Mr. Estin, like other unhappy spouses before and since, headed out to Nevada in 1944 and brought a divorce action in 1945 (thereby clearly meeting the domiciliary requirement).[119] His wife was notified of the action (thereby meeting the due process requirement), but entered no appearance and did not participate.[120] Mr. Estin duly informed the Nevada court of the New York separation and alimony decree; nevertheless, the Nevada court entered a divorce decree with no provision for alimony.[121] So, of course, Mr. Estin stopped paying his now ex-wife.[122] She, naturally, sued him in New York to compel continued payments.[123] He appeared in that action and moved to eliminate the New York alimony order on the basis of his Nevada divorce decree, but the New York courts ruled that the Nevada decree did not extinguish his ex-wife's right to alimony under the earlier New York decree.[124]

On appeal, the Supreme Court created the doctrine of "divisible" divorce, ruling that the Nevada decree was entitled to full faith and credit to the extent that it changed the marital status of the parties, but not insofar as it purported to change the "legal incidence of the marriage," in other words, the alimony order.[125] Because the alimony order was a property interest of the wife, Nevada could not affect that interest without personal jurisdiction over her, which it lacked.[126]

A decade later, the Court refined the Estin divisible divorce doctrine in Vanderbilt v. Vanderbilt.[127] The Vanderbilts were married in 1948 and lived in California, where they separated in 1952. She moved to New York, and he went to Nevada where he obtained a divorce decree in 1953, freeing both parties "from the bonds of matrimony and all the duties and obligations thereof."[128] Mrs. Vanderbilt received notice of the Nevada action but was not served in Nevada and did not participate.[129] In 1954, the former Mrs. Vanderbilt filed suit in New York for a ***407** legal separation and alimony.[130] Mr. Vanderbilt appeared specially in that proceeding and argued that the Full Faith and Credit Clause compelled New York "to treat the Nevada divorce as having ended the marriage and as having destroyed any duty of support which he owed . . . ."[131] The New York court recognized the Nevada decree as terminating the status of the parties' marriage, but found that it did not preclude New York from directing Mr. Vanderbilt to pay support, which it duly ordered.[132]

On appeal, the Supreme Court affirmed, reasoning that the fact that Mrs. Vanderbilt's right to support had not yet been reduced to judgment did not materially distinguish the case from Estin.[133] Since Mrs. Vanderbilt had not been subject to personal jurisdiction in the Nevada court, that court could not terminate her right to support in an ex parte proceeding.[134]

The 1967 "miscegenation" case of Loving v. Virginia also presented a potential interstate marriage recognition issue.[135] Two Virginia residents, Mildred Jeter, described as a Negro woman, and Richard Loving, a white man, had been married in Washington, D.C., pursuant to its laws.[136] Shortly after their marriage, they returned to Virginia where they were indicted, pled guilty to, and were sentenced to jail for violating the Virginia anti-miscegenation statute.[137] While the case might have been litigated and decided under the Full Faith and Credit Clause, that issue was not presented to the Court, which found that the statute violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[138]

III. The Patchwork Quilt of Same-Sex Marriage Laws in the United States

With regard to lawful recognition of same-sex couples, states generally fall into three main categories: 1) those that permit such couples to enter into marriage or a quasi-marriage relationship such as civil union or registered partnership; 2) those that do not permit same-sex couples to enter into legal marriage or marriage-type relationships but recognize such relationships if entered into elsewhere, at least for some purposes; and 3) those that prohibit and do not recognize same-sex marriages or quasi-marriage relationships.

At the time of this writing,[139] six states permit same-sex couples to marry: Massachusetts (as of 2004),[140] Connecticut (2008),[141] Iowa (2009),[142] Vermont ***408** (2009),[143] New Hampshire (enacted 2009, effective 2010),[144] and New York (2011).[145] Three additional states have passed laws permitting same-sex marriage, which had not yet taken effect as of this writing. On February 8, 2012, the Washington State Legislature enacted a bill to allow same-sex couples to marry, which Governor Christine Gregoire signed on February 13, 2012.[146] Opponents have stated that they will seek to block implementation through a referendum measure.[147] New Jersey's legislature passed a bill allowing same-sex marriage on February 16, 2012,[148] which was quickly vetoed by New Jersey Governor Chris Christie.[149] Soon afterward, Maryland enacted a law permitting same-sex marriages, which was signed by Maryland Governor Martin O'Malley and will go into effect (unless blocked) on January 1, 2013.[150]

On Dec. 18, 2009, Washington, D.C. Mayor Adrian Fentry signed bill 18-482, which legalized same-sex marriage in the District of Columbia.[151] It became effective March 2010,[152] after Chief Justice John Roberts, acting as circuit justice for the District, refused to issue a stay.[153]

California permitted same-sex couples to enter into marriage for approximately six months in 2008,[154] during which time it is reported that ***409** approximately 18,000 couples entered these unions.[155] California voters approved Proposition 8 in November 2008, banning such marriages. The California Supreme Court subsequently upheld Proposition 8, but it also ruled

The point is that most states that permit same-sex couples to enter legally recognized, quasi-marital relationships, will normally require a disillusioned member of that couple to obtain a divorce in order to become legally free, just as if she were in a state that permits same-sex marriage by name.

There is another, smaller group of states that will not allow same-sex couples to marry or enter into quasi-marital relationships, but will recognize same-sex marriages validly entered into elsewhere, at least for certain purposes. New York State was a notable example before it authorized same-sex marriage in 2011.[173] Similarly in May 2009, prior to allowing same-sex marriages to be performed there, the Washington D.C. Council had voted to recognize same-sex marriages from other jurisdictions.[174] In February 2010, the Attorney General of Maryland issued a formal opinion that Maryland may recognize such marriages.[175] In May 2010, the Maryland Department of Budget and Management announced that it was extending health benefits to the same-sex spouses of active and retired state employees who were validly married in another state.[176] In January 2011, the Attorney General of New Mexico issued a formal opinion, not binding on New Mexico courts, that "a same-sex marriage that is valid under the laws of the ***412** country or state where it was consummated would likewise be found valid in New Mexico."[177]

The largest group of states are those that not only do not allow same-sex marriage (or quasi marriage), but also explicitly provide by a state statute or constitutional provision that they will not recognize a same-sex marriage validly entered into elsewhere. Following the federal DOMA, many of these state provisions are known as "mini-DOMAs" or "state DOMAs." A survey published in the BNA Family Law Reporter in June 2010 concluded:

> As of June 2, 2010, 45 states prohibit same-sex marriage. Ten do so through statute only, four through state constitution amendments only, 27 through both statute and state constitution amendments, two through case law (New York and New Jersey), and two through the state attorney general's office (New Mexico and Rhode Island). Depending on one's statutory construction, approximately 40 of those expressly refuse to recognize same-sex marriages of other jurisdictions, and some of those more broadly refer to other same-sex relationships.[178]

Pennsylvania enacted a typical mini-DOMA in 1996, containing two new statutory provisions. The first defines marriage as "[a] civil contract by which one man and one woman take each other for husband and wife."[179] The second addresses interstate recognition:

> It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.[180]

IV. Between a Rock and a Hard Place: Seeking a Legal Exit from a Same-Sex Marriage in a State that Does Not Recognize that Marriage

Americans are a famously restless people. Two centuries ago, Alexis de Tocqueville observed that, "[i]n the United States a man builds a house in which to spend his old age, and he sells it before the roof is on; . . . he settles in a place, which he soon afterwards leaves to carry his changeable longings elsewhere."[181] Those words are even truer in today's world of high-speed transportation and the Internet than when they were written in the 1830s.

***413** Moreover, the break up of a serious relationship often triggers, or is triggered by, a move of one or both of the parties to that relationship. A party may leave and put distance between herself and her spouse or partner to escape abuse, to take a new job, to be near or live with family members or friends who can provide a support system (especially when she has minor children), to follow or join a new significant other, or simply to get a "fresh start." Normally the physical departure from the relationship and the situs of the relationship precedes any serious thought about legally ending the relationship. Indeed,

physical separation is often deemed by one or both of the parties to be part of a "trial separation."

Additionally, for a variety of reasons, couples often get married in a jurisdiction where they do not reside. They may marry where one or both have family. They may choose to have a "destination wedding" in some romantic or vacation location. As was the case in May's Estate, they may temporarily leave a jurisdiction where they cannot marry, travel to a jurisdiction where they can and do marry, and then return home.

For all these reasons, it is not surprising that an individual may well reside in a different jurisdiction from the one in which she married at the time that she decides to initiate divorce proceedings. If she has left a same-sex marriage (or quasi marriage) and is domiciled in a jurisdiction that refuses to recognize that marriage, she is likely to find herself in a form of legal limbo. A recent Pennsylvania case, Kern v. Taney,[182] illustrates her dilemma.

Two women, Carole Kern and Robin Taney, were married in Massachusetts.[183] Subsequently, Carole moved to Pennsylvania and filed for a divorce, utilizing the Pennsylvania no-fault divorce ground of irretrievable breakdown of the marriage.[184] Robin did not appear to defend the action.[185] However, the Attorney General of Pennsylvania intervened in order to defend the constitutionality of Pennsylvania's mini-DOMA.[186]

The trial judge reasoned that, "relief under the Divorce Code can only be obtained by parties who are recognized to be married."[187] Under the second section of Pennsylvania's mini-DOMA, Section 1704 of the Domestic Relations Code, quoted above, the parties could not be recognized as married.[188] Therefore, Carole attacked the constitutionality of the act, asserting that it violated her substantive due process and equal protection rights to marry under both the Pennsylvania and United States Constitutions.[189]

The trial court dismissed all of Carole's constitutional challenges, finding that homosexuals have no fundamental right to be married to each other.[190] The court ***414** applied the "rational basis" test.[191] In arguably a circular piece of reasoning, the court concluded, "The amendment did not expand, limit, alter or otherwise change the law of the Commonwealth of Pennsylvania. As such, the legislation did not impose an inequality on homosexuals."[192] Accordingly, the court could not grant her a divorce.[193] The court did, however, offer Carole an alternative legal solution:

> Plaintiff has a concern that she has no available remedy in Pennsylvania, and since she does not qualify under the residency requirements of Massachusetts, she is unable to obtain a divorce. While it is true that Pennsylvania cannot grant her a divorce, there is no reason why she cannot seek relief under section 1704, requesting the court to have her marriage declared void.[194]

However, a declaration in Pennsylvania that Carole and Robin's Massachusetts marriage was void as against Pennsylvania public policy would hardly be the equivalent of a Pennsylvania divorce decree. Under Williams I, a divorce decree should be entitled to full faith and credit in all states.[195] It is difficult to believe that a decree of annulment based on Pennsylvania's public policy against same-sex marriage would be accorded full faith and credit in those states that permit such marriages, especially Massachusetts. So, with a Pennsylvania annulment, Carole might well find herself in the "unhappy" circumstance that befell O.B. and Lillie in the Williams litigation. She would be married in one state and not in another. As was the case with O.B. and Lillie, it would remain questionable whether she could legally remarry. If, after obtaining an annulment in Pennsylvania, she were to marry a man in Pennsylvania, could they honeymoon on "Old Cape Cod" per Patti Page's old chartbuster? If they did, could not Massachusetts arrest, try and punish her for bigamy under Massachusetts law,[196] just as happened to O.B. and Lillie seven decades ago in North Carolina? Indeed, could not that fate befall her if she were to go to any of the states that either permit or recognize same-sex marriage?

Presumably the only effective remedy theoretically available to Carole would be to file for divorce in Massachusetts. But, in Massachusetts, as elsewhere in the United States, it is significantly more time-consuming to get divorced than to get married. As noted by the trial court, there is no residency requirement to be married in Massachusetts, but to get a divorce generally the parties have to have resided in Massachusetts together for a year preceding the commencement of the action.[197] Since Carole had to have resided in Pennsylvania for six months before ***415** filing her Pennsylvania divorce action,[198] she would have to move to Massachusetts--and presumably find housing and employment--for a year just to commence a divorce action

there.[199]

The result in Kern v. Taney is consistent with that reached in other mini-DOMA jurisdictions in similar situations (with three recent notable exceptions that will be discussed infra[200]). Thus, in 2007, in Chambers v. Ormiston,[201] the Rhode Island Supreme Court was presented with this certified question:

> May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?[202]

In Chambers, two Rhode Island women, Margaret Chambers and Cassandra Ormiston, had married each other in Massachusetts in 2004, and then returned to reside together in Rhode Island.[203] In October 2006, Ms. Chambers filed for divorce in Rhode Island.[204] The Family Court was concerned that it lacked jurisdiction and asked for guidance from the state's highest court as to whether the parties were married under Rhode Island law.[205] The Rhode Island courts assumed that the parties' marriage was valid under Massachusetts law.[206] But, the Rhode Island Supreme Court ruled that "marriage" under its state statute is "the state of being united to a person of the opposite sex."[207] Since the parties, therefore, were not married under Rhode Island law, the Rhode Island courts lacked jurisdiction to entertain a divorce action.[208]

Like the Pennsylvania trial court in Kern, the Rhode Island Supreme Court expressed some sympathy for the thwarted plaintiff:

> We know that sometimes our decisions result in palpable hardship to the persons affected by them. It is, however, a fundamental principle of jurisprudence that a court has no power to grant relief in the absence of jurisdiction, as is true in the instant case. Ours is not a policy-making branch of the government. We are cognizant of the fact that this observation may be cold comfort to the parties before us. But, if there is ***416** to be a remedy to this predicament, fashioning such a remedy would fall within the province of the General Assembly.[209]

In 2008, in O'Darling v. O'Darling,[210] the Oklahoma Supreme Court ruled that a trial court judge had properly vacated a divorce decree of a couple that had been married in Canada, where the trial judge learned after entering the decree that both parties were women.[211] The state supreme court admonished counsel for the plaintiff for having failed to disclose the fact that the marriage was between two women, hence invalid under Oklahoma law.[212]

In 2010, a Texas court of appeals likewise ordered dismissal of a divorce action filed between two men who had been married in Massachusetts in In the Matter of the Marriage of J.B. and H.B.[213] In J.B. and H.B., the trial court had granted the divorce, ruling that the state's constitutional and statutory provisions barring recognition of same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[214] On appeal by the state, the Texas Court of Appeals reversed and ordered dismissal of the divorce action for lack of subject matter jurisdiction.[215] The Texas Constitution had been amended in 2005 to provide:

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.[216]

Further, the Texas Family Code had been amended to provide in Section 6.204:

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) The state or an agency or political subdivision of the state may not give effect to a:

(1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex

or a civil union in this state or in any other jurisdiction; or

*417 (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.[217]

The appellate court readily concluded that these constitutional and statutory provisions barred the same-sex divorce action.[218] Thus the court was compelled to address whether these provisions violated the United States Constitution.[219] Applying the rational basis test, the court concluded: "Texas's marriage laws are rationally related to the goal of promoting the raising of children in households headed by opposite-sex couples."[220]

Finally, the appellate court noted that the plaintiff could file a "voidance action" seeking to have his marriage annulled, even though he would not have all the ancillary remedies available in that action that he would have had in a divorce action, such as spousal maintenance and community property rights.[221] The court quite unconvincingly disagreed with his contention that such a declaration of voidance might not be recognized in other jurisdictions.[222] But the court failed to provide any cogent reason why Massachusetts, for example, would give full faith and credit to a declaration that a Massachusetts same-sex marriage is void as against public policy.[223]

In a similar case, Rosengarten v. Downes,[224] decided by the Appellate Court of Connecticut six years before Connecticut authorized same-sex marriage, the court ruled that Connecticut courts lacked jurisdiction to entertain an action by one of its residents to dissolve a same-sex civil union he had entered in Vermont.[225] The court reasoned that, "[i]f Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve."[226]

*418 It was not until June 2011 that a state appellate court in a mini-DOMA jurisdiction found a way to grant relief to an individual seeking legal escape from a foreign[227] same-sex marriage. In Christiansen v. Christiansen,[228] two women, Paula and Victoria, had been legally married in Canada in 2008.[229] Paula filed an apparently uncontested divorce action against Victoria in Wyoming in 2010.[230] The district court dismissed the case for lack of subject matter jurisdiction, applying the now familiar reasoning that since the forum state does not recognize same-sex marriage, the state's divorce law did not apply.[231] In a brief and unanimous opinion, the Wyoming Supreme Court reversed the district court and remanded the case.[232]

The Wyoming Supreme Court expressly limited its analysis to recognition of a foreign same-sex marriage for the sole purpose of granting a divorce. "The question of recognition of such same-sex marriages for any other reason, being not properly before us, is left for another day."[233]

The Court viewed the matter as one of statutory construction, attempting to resolve statutory provisions in apparent conflict with each other. Wyoming Statute Annotated §20-1-111 provides, "all marriage contracts which are valid by the laws of the country in which contracted are valid in this state."[234] But, Wyoming's mini-DOMA defines a marriage as "a civil contract between a male and a female person . . . ."[235] Significantly, however, Wyoming's mini-DOMA "does not speak to recognition of a same-sex marriage validly entered into [elsewhere]."[236]

The Court acknowledged long-standing case law that there are exceptions to Wyoming's recognition of validly entered-into foreign marriages: "namely, marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, such as polygamous and incestuous marriages, and those which the legislature of the state has declared shall not be allowed any validity, because contrary to the policy of its laws."[237]

*419 However, the exceptions are meant to be narrow, lest they "swallow the rule."[238] Thus, for example, although Wyoming will not permit a common law marriage to be created within the state, it will consider valid a common law marriage legally entered into in another state.[239] Accordingly, the Court concluded that "recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages."[240]

The Court noted that all that was being sought was a divorce, that the parties were "not seeking to live in Wyoming as a married couple . . ." and, importantly, that they "are not seeking to enforce any right incident to the status of being

married."[241]

In July 2011, between the date that the New York legislature enacted its Marriage Equality Act and that Act's effective date, an appellate court in New York reached a similar conclusion in Dickerson v. Thompson.[242] Two women, Audrey and Sonya, had entered into a civil union in Vermont. Unable to meet Vermont's residency requirements for a dissolution action, Audrey brought an action in New York to dissolve the civil union, and Sonya did not defend that action. The trial court dismissed the action for lack of subject matter jurisdiction, and the appellate court reversed and remanded.[243] On remand, the trial court entered "a declaration relieving the parties from all rights and obligations arising from the civil union, but denied that portion of the motion seeking a dissolution of the union."[244] The appellate division again reversed. "We disagree with the [trial court's] conclusion that, in the absence of any legislatively created mechanism in New York by which a court could grant the dissolution of a civil union entered into in another state, it was powerless to grant the requested relief."[245]

Most recently, in May 2012, the Maryland Court of Appeals reached a similar conclusion in Port v. Cowan.[246] Two women, Jessica and Virginia, had been legally married in California in 2008 when such marriages could be legally performed there. They separated two years later by mutual agreement. Subsequently Jessica filed for divorce in Maryland on the ground of voluntary separation, and Virginia answered the complaint in a "no contest" manner. The couple had no children, and neither raised a financial claim against the other. Nevertheless the trial court denied the divorce on the ground that the marriage was not valid under Maryland law.[247]

*420 The Maryland Court of Appeals unanimously reversed.[248] Although at the time of this case Maryland Family Law provided that "only a marriage between a man and a woman is valid in this State,"[249] it did not specifically address the recognition of out-of-state same-sex marriages legally performed in another jurisdiction. The Court found that "for purposes of the application of its domestic divorce laws," the doctrine of comity compels recognition of the marriage, and that such recognition is not repugnant to Maryland public policy.[250]

Unfortunately, the Christiansen, Dickerson and Port decisions will be of little or no value to unhappy spouses locked in same-sex marriages in most of the United States. The approach of the Wyoming Supreme Court in Christiansen, whatever its merits under Wyoming law, cannot be utilized in the vast majority of mini-DOMA states. That court was not confronted with a state statute explicitly barring recognition of a foreign same-sex marriage, nor was the Dickerson court confronted with such a statute in New York.[251] Indeed, the Maryland Court of Appeals in Port noted that whereas other states, such as Pennsylvania and Virginia, have enacted specific statutory provisions preventing recognition of foreign same-sex marriages, Maryland's statute is silent on the subject.[252] But, as noted above, approximately forty of forty-five mini-DOMA states do have statutory or constitutional provisions explicitly barring such recognition.[253]

V. Threading the Needle: A Path Forward

Legal scholars who have examined this issue have proposed various ingenious solutions to address it, none of which, as the cases cited above show, have commanded judicial respect.

Professor Barbara J. Cox, herself in a same-sex marriage entered into in Ontario, Canada, has argued that courts in mini-DOMA states:

> should consider whether an 'incidents of marriage' approach to the issue in the case may lead them to recognize the civil union, domestic partnership, or marriage based on the policy reasons behind that disputed issue. They should work as hard to honor the relationships of same-sex couples as they have worked to honor the relationships of opposite-sex couples.[254]

*421 Under this approach a court could address the benefits, rights, and responsibilities flowing to a couple, without necessarily recognizing the marriage itself.[255] There are two major problems with this approach. First, unless those benefits, rights or responsibilities flow out of a valid antenuptial agreement, they don't exist absent a valid marriage. Second, a finding of a valid marriage will be not only contrary to the state's mini-DOMA, but also be politically untenable in a state that has

enacted such a statute or constitutional amendment. Indeed, the very plea that courts in such states should work "hard to honor the relationships of same-sex couples" is doomed to failure (absent, of course, repeal of the state mini-DOMA).[256]

Professor Linda Silberman has taken a more cautious approach.[257] She has proposed "balanced choice-of-law rules," along the line of the old "marriage evasion" laws whereby the problem is avoided by having:

> states . . . limit the application of their same-sex marriage or civil union laws to members of their own community--either through a residency requirement or by restricting application of the law to persons who do not face an impediment to such a marriage under the laws of the jurisdictions where they reside or intend to reside.[258]

There are two main problems with this approach. First, it provides no avenue of legal redress to the person who entered a same-sex marriage while residing or intending to reside in a same-sex marriage jurisdiction, who later--for any of myriad reasons--relocates to a mini-DOMA state. Second, as a practical matter, the genie is already out of the bottle. The first same-sex marriage state, Massachusetts, repealed its "marriage evasion" act in 2008, after its courts used that act to bar same-sex couples from mini-DOMA states from getting married in Massachusetts.[259] Proponents of repeal explicitly noted that Massachusetts had an economic interest in becoming a same-sex marriage destination:

State officials said they expected a multimillion-dollar benefit in weddings and tourism, especially from people who live in New York. A just-released study commissioned by the State of Massachusetts concludes that in the next three years about 32,200 couples would travel here to get married, creating 330 permanent jobs and adding $111 million to the economy, not including spending by wedding guests and tourist activities the weddings might generate.

***422** "We now have this added pressure, given what's happened in California, that we really think that it is a good thing that we be prepared to receive the economic benefit," State Senator Dianne Wilkerson, a Democrat who sponsored the repeal bill, said Tuesday after the vote.[260]

Several law student notes and comments have struggled heroically to resolve the issue of same-sex divorce in mini-DOMA jurisdictions. Writing in the Hastings Law Journal in 2003, Jessica A. Hoogs proposed that states create a "uniform dissolution proceeding," presumably through legislative enactment.[261] Given the failure of the states to generally adopt the Uniform Marriage and Divorce Act[262] and the political divide over same-sex unions, this clever idea appears to be infeasible.

Writing in the Marquette Law Review in 2009, Louis Thorson suggested three methods that Wisconsin courts could use in same-sex divorce cases: 1) bar access to the courts for relief, 2) apply Wisconsin divorce law, or 3) have Wisconsin courts apply the laws of the state where the relationship was founded.[263] He acknowledged that while all three approaches have their justifications, they also have their own difficulties.[264] He admitted that the second approach, applying Wisconsin divorce law, "likely would violate both the Wisconsin Statutes and the Wisconsin Constitution."[265]

Writing in the Boston University Law Review, also in 2009, John M. Yarwood argued that mini-DOMA states should create property distribution mechanisms for same-sex couples seeking to terminate an out-of-state same-sex marriage.[266] While this might be a "consummation devoutly to be wished,"[267] unfortunately it probably falls within the category of wishful thinking, given current political realities.

Writing in the Santa Clara Law Review in 2010, Danielle Johnson proposed, "courts should use an incidental approach to marriage recognition when ***423** considering a divorce petition in order to avoid unreasonably burdensome, illogical results."[268] She argued cogently that:

> When the law of the forum state conflicts with, or is silent on, the legality of the underlying marriage, the court can use an incidental approach to marriage recognition and consider the divorce as an incident of that marriage. By recognizing the marriage for the limited purpose of the divorce, the court can confine its consideration of the relationship so as to avoid addressing the validity of the underlying marriage. The ability to legally end a marriage validly performed in another state is an incident of that marriage that should be available uniformly across the states, regardless of whether that state disagrees with the

> underlying marriage. Parties seeking an uncontested dissolution of their union are not asking the court to validate the union; they are simply asking the court to dissolve it. By refusing to perform a divorce in a same-sex couple's home state, some states have made it incredibly burdensome for that couple to legally end their relationship.[269]

She concluded:

> Using the incidental approach, the court can view divorce as an incident of marriage, analyze the policies behind the incident at issue, and then decide whether the marriage should be recognized for the sole purpose of performing the divorce.[270]

While this approach has the merit of being practical and is similar to what I will suggest, it has one fatal flaw. It would require a court in a mini-DOMA state to do something it is prohibited from doing: recognize a same-sex marriage.

Any effort to bridge the enormous divide between those states that permit same-sex marriage and those that consider it an anathema is obviously fraught with peril. Bearing in mind Justice Holmes' aphorism that, "[t]he life of the law has not been logic: it has been experience,"[271] surely an incremental approach which respects the position of anti-same-sex marriage jurisdictions while providing relief to their unhappily wed citizens is the most likely of success.

The author's proposal for same-sex divorce is minimalist: Where a party to a same-sex marriage seeks a simple, uncontested, no-fault divorce in a mini-DOMA jurisdiction, the court can and should grant the divorce without inquiring into or addressing the validity of the marriage.

***424** It must be acknowledged that this proposal will not aid the happily married (or quasi-married) same-sex couple now residing in a mini-DOMA jurisdiction. Under current law, they have no benefits flowing out of their marital relationship other than those that might be secured by contract. This proposal will not circumvent the incidents of marriage rules articulated by the Court in Estin, Vanderbilt, and their progeny. Even a court that might be persuaded to grant a divorce would probably be barred from addressing financial issues that it would normally resolve in the dissolution of an opposite-sex marriage. The proposal would also provide no relief, for example, to a member of a same-sex couple whose spouse is negligently killed in a mini-DOMA state, who wishes to bring a wrongful death claim.[272]

The proposed solution has several important benefits. First, it is completely consistent with dominant legal practice in the United States today. Since the advent of no-fault divorce in California in 1970,[273] all states have made efforts to simplify the divorce process and make it less adversarial.[274] Based on the author's three decades of family law practice, it would be truly extraordinary for a court to spend its time in an uncontested no-fault divorce questioning the validity of the marriage.

Second, and in the same vein, judicial resources are scarce and judicial time precious. How does it benefit the court or the parties to waste limited judicial resources inquiring into the validity of a marriage when the only action before the court is an uncontested one to terminate the marriage?

Third, as noted, courts in some of the cited cases have recognized the hardship imposed on their own residents by refusing to grant a divorce in this situation.[275] Hence, one may be able to appeal to the judge's sense of equity in seeking such a result.

Fourth, this proposal is neither fanciful nor radical. The author has served as codirector of his law school's Family Law Clinic for almost three decades. During this time, the clinic has filed divorce complaints where it was far from clear that the client was legally married. For example, in one case, the client and her husband had separated years before, and she had no way to contact him.[276] She recalled receiving some papers from a lawyer long ago about a divorce but had long since lost them and didn't even know what state they were from. She asked the clinic if she were already divorced, and, of course, no one could tell her.[277] The only practical option to clarify her legal situation was to file a divorce and serve her ***425** husband by publication. He did not enter an appearance, and the court granted her a no-fault divorce without further ado. In another case, where the parties had had a marriage ceremony in another state but it appeared that they had failed to obtain a marriage

license, the clinic filed a divorce for the wife, and the husband appeared and defended on the grounds that there was no valid marriage. Once the defendant spouse raised the issue, the court quite properly held a hearing on the subject (and ruled that there was a valid marriage).[278] The point is that it is perfectly appropriate--and commonplace--to file a divorce even where a party's marital status might be questioned, and a court will not ordinarily waste its time conducting an inquiry into marital status when a simple, no-fault divorce is uncontested.[279]

Fifth, while a purist might question the logic of granting a divorce from a void marriage, there is *nothing* that inherently prevents a court from granting a divorce where an annulment might also be available. Pennsylvania statutory law contains an explicit example. Section 3304(a)(1) of the Pennsylvania Domestic Relations Code, "[g]rounds for annulment of void marriages," provides:

(a) General rule--Where there has been no confirmation by cohabitation following the removal of an impediment, the supposed or alleged marriage of a person shall be deemed void in the following cases:

(1) Where either party at the time of such marriage had an existing spouse and the former marriage had not been annulled nor had there been a divorce except where that party had obtained a decree of presumed death of the former spouse.[280]
Thus, a woman (or man) who discovers, as one of the clinic's clients did, that her spouse was married all along to someone else, may seek and obtain an annulment of her void marriage. But, she also has a second legal option: divorce. Section 3301(a)(4) of the Domestic Relations Code, "[g]rounds for divorce," provides:

***426** (a) Fault--The court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has: . . .

(4) Knowingly entered into a bigamous marriage while a former marriage is still subsisting.[281]
The fact that such a marriage is void and subject to annulment does not prevent a court from granting a divorce.

Finally, it can be readily and honestly argued that this approach is fully consistent with the mini-DOMA states' anti-same-sex marriage position. The cases where courts have denied a divorce have had the counter-productive result of preserving a same-sex marriage rather than terminating it. By refusing to grant the divorce, the court is assuring that its resident remains in the very same-sex marriage that is antithetical to the state's public policy. For reasons stated above, even an annulment in the mini-DOMA state is unlikely to free its resident from her same-sex marriage in states that recognize such marriages. On the other hand, a divorce granted in compliance with the dictates of Williams I would be entitled to full faith and credit in all states.

Indeed, in striking down a mandatory filing fee for poor people seeking divorces, the Supreme Court recognized the inextricable connection between the right to divorce and the right to marry:

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[282]

The short-term result of a universally recognized divorce is one fewer same-sex marriage. For the plaintiff spouse, the long-term result may be either: 1) remaining single, or 2) entering an opposite-sex marriage, or 3) entering another same-sex marriage. The first two long-term outcomes carry forward the state's anti-same-sex marriage position. The third outcome is actually neutral: the individual is still in a same-sex marriage, albeit a new one, and the sum total of same-sex marriages is not affected.[283] The second outcome is not at all fanciful. Individuals have been known to leave same-sex relationships and, then or later, form opposite sex relationships.[284] It would be the height of irony for a court's ***427** refusal to grant an uncontested divorce to someone in a same-sex marriage to result in that person's not being truly legally free to enter into an opposite-sex marriage, the very institution the mini-DOMA states are supposedly trying to preserve and support.

Footnotes

a1 2012 Robert E. Rains. Professor of Law and Co-Director of the Family Law Clinic. The Pennsylvania State University Dickinson School of Law, Carlisle, PA USA. The author wishes to thank his research assistant, Ujala Aftab, for her contributions to this project.

1 See U.S. Const. art. I, § 8, cl. 1.

2 U.S. Const. amend. X.

3 Ex parte Burrus, 136 U.S. 586, 593-94 (1890).

4 See, e.g., infra text accompanying notes 15-16.

5 There have been efforts over the years to create uniform marriage and divorce laws on the state level, but they have met with little success. The National Conference of Commissioners on Uniform State Laws issued a proposed Uniform Marriage and Divorce Act in 1970, but, to date, only eight states have adopted some form of that act. See Unif. Marriage & Divorce Act (amended 1973), 9A U.L.A. 159 (1998).

6 388 U.S. 1 (1967)

7 Loving, 388 U.S. at 6. Had Barack Obama's parents attempted to get married in 1961 in Virginia, or to have even lived in Virginia as a married couple, they would have been subject to criminal prosecution as were the Lovings.

8 See Frederick Kunkle, Pa. Cousins Try to Overcome Taboo of 'I Do,' Wash. Post, Apr. 25, 2005, at B1, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/04/24/AR2005042401406.html (reporting on Pennsylvania first cousins who traveled to Maryland to avoid Pennsylvania's prohibition on first cousins' marriage, and noting the cloyingly named Cousins United to Defeat Discriminating Laws Through Education (C.U.D.D.L.E.)); cf. Marriage Act, 1949, 12 & 13 Geo. 6, c. 76, sch. 1 (U.K.) (allowing the marriage of first cousins).

9 852 P.2d 44 (Haw. 1993).

10 Id. at 52-54. Baehr was a sharp departure from prior state court decisions on the subject, all of which had rejected the concept of a right to same-sex marriage. See Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (asserting "marriage has always been considered as the union of a man and a woman"); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding Minnesota law "does not authorize marriage between persons of the same sex and that such marriages are ... prohibited" and dismissing the appeal for "want of a substantial federal question"), 409 U.S. 810 (1972); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) ("The law makes no provision for 'marriage' between persons of the same sex."); DeSanto v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding, "as a matter of law," two persons of the same sex cannot contract a common law marriage).

11 Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended in scattered sections of 1 U.S.C. and 28 U.S.C.).

12 1 U.S.C. § 7 (2006). This provision has been and continues to be challenged. Most notably, on July 8, 2010, federal district Judge Joseph L. Tauro issued two companion decisions striking down this section. In Massachusetts v. U.S. Department of Health and Human Services, he ruled that this section violated both the Tenth Amendment and the Spending Clause of the U.S. Constitution. 698 F. Supp. 2d 234, 249, 253 (D. Mass. 2010). In Gill v. Office of Personnel Management, he further ruled that it violated "the equal protection principles embodied in the Fifth Amendment." 699 F. Supp. 2d 374, 397 (D. Mass. 2010). The United States appealed both decisions to the First Circuit Court of Appeals, but the status of those appeals became murky when Attorney General Eric Holder announced on Feb. 23, 2011, that President Obama has concluded that this provision is unconstitutional and, "[g]iven that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination." See Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, U.S. Dep't Just. (Feb. 23, 2011), http:// www.justice/gov/opa/pr/2011/February/11-ag-222.html. A group of Republican leaders of the House of Representatives--the Bipartisan Legal Advisory Group-- retained counsel and intervened to defend this section of DOMA. On May 31, 2012, a panel of the First Circuit Court of Appeals unanimously affirmed the district court in a consolidated opinion. Comm'n of Massachusetts v. U. S. Dep't of Health and Human Servs., No. 10-2204, 2012 WL 1948017 (1st Cir. May 31, 2012).

13 28 U.S.C. § 1738C.

14 See Peter Hay, Recognition of Same-Sex Legal Relationships in the United States, 54 Am. J. Comp. L. 257, 261 (2006).

15 U.S. Const. art. IV, § 1.

16 Id.

17 Compare Lynn D. Wardle, Non-recognition of Same-Sex Marriage Judgments under DOMA and the Constitution, 38 Creighton L. Rev. 365 (2005) (arguing Congress was acting within its authority under the Full Faith and Credit Clause when it enacted DOMA), with Hay, supra note 14, at 261 (arguing a "fine distinction" may be the key to DOMA's constitutionality). A federal district court upheld this provision of DOMA against multiple constitutional challenges in Wilson v. Ake, 354 F. Supp. 2d 1298, 1303-04, 1309 (M.D. Fla. 2005).

18 114 N.E.2d 4 (N.Y. 1953).

19 See id. at 4-5.

20 Id. at 5.

21 Id.

22 Id.

23 Id.

24 Id. at 7.

25 Id. at 6.

26 Id.

27 Id. at 6-7.

28 Id. at 7.

29 Id. at 9 (Desmond, J., dissenting).

30 See, e.g., Steven W. Fitschen, Marriage Matters: A Case for a Get-the-Job-Done-Right Federal Marriage Amendment, 83 N.D. L. Rev. 1301, 1302, 1307-08 (2007) (quoting Bible passages supporting the author's position that "God ordained heterosexual marriage from the beginning of human history"); see also Jennifer Wriggins, Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender, 41 B.C. L. Rev. 265, 315 nn.323-27 (2000) (discussing the debate on whether heterosexual marriage is ordained by God).

31 Loving v. Virginia, 388 U.S. 1, 3 (1966).

32 Id. at 12 (holding that marriage restrictions based on race violate Equal Protection and Due Process); see also id. at 13 (Stewart, J., concurring) ("It is simply not possible for a state law to be valid ... which makes the criminality of an act dependent upon the race of the actor.").

33 In re May's Estate, 114 N.E.2d at 5.

34 See id.

35 See id.

36 640 S.W.2d 824, 826-27 (Mo. Ct. App. 1982).

37 Id. at 826.

38 Compare id. ("[A]s a matter of comity, Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy of this state."), with Williams v. North Carolina, 317 U.S. 287, 296 (1942) ("[E]ven though [a] cause of action could not be entertained in the state of the forum, either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit ... [and although s]ome exceptions have been grafted on the rule ... [they] have been few and far between ....").

39 Hesington, 640 S.W.2d at 824.

40 Id. at 825.

41 Id. at 824-25.

42 Id. at 824-25, 827.

43 Id. at 826.

44 Id.

45 Id. (collecting cases).

46 See id. at 827.

47 Id. (noting that the statute provided the "highest evidence" of the state's public policy regarding common law marriage).

48 Lili Mostofi. Legitimizing the Bastard: The Supreme Court's Treatment of the Illegitimate Child, 14 J. Contemp. Legal Issues 453 (2004) (describing the extension of rights to illegitimate children over the course of approximately forty years). But see Solangel Maldonado. Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children, 63 Fla. L. Rev. 345 (2011) (arguing that social stigma and discrimination against illegitimate issue continue).

49 Hesington, 640 S.W.2d at 824.

50 678 P.2d 848 (Wash. Ct. App. 1984).

51 See id. at 849.

52 Id.

53 Id.

54 See id.

55 Id.

56 Id. The opinion does not explain the eight-year delay from the interlocutory decree to the final decree nor indicate who, if anyone, asked the California court to issue the final decree.

57 Id. at 849-50.

58 Id. at 850.

59 Id.

60 Id. (collecting cases).

61 Id. (citing Alaska Stat. § 09.55.-080 (1982)).

62 Id. The court noted that Alaska did not have a provision for common law marriage, and that under Alaska statutory law, a "[m]arriage is prohibited and void if performed when (1) either party to the proposed marriage has a husband or wife living." Id. (citing Alaska Stat. § 25.05.021).

63 See Farah v. Farah, 429 S.E.2d 626, 629 (Va. Ct. App. 1993) ("A marriage that is void where it was celebrated is void everywhere.").

64 Shippy, 678 P.2d at 851 (quoting Restatement (Second) of Conflict of Laws § 283 cmt. i (1971)).

65 Id.

66 Id.

67 Id.

68 Id. at 851-52 (citing In re Estate of Storer, 544 P.2d 95 (Wash. Ct. App. 1975)).

69 Id. at 852.

70 Id. at 849.

71 See id. at 849, 852. James had two children, Dorothy Coe and Thomas Shippy. It is unclear whether they were the product of James' marriage to Marion.

72 Wis. Stat. §§ 245.10(1), (4), (5) (1973). The United States Supreme Court considered the constitutionality of the law seven years after its passage. Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

73 See Wis. Stat. §§ 245.10(1)-(3).

74 Zablocki, 434 U.S. at 375 n.1 (alterations in original) (quoting Wis. Stat. § 245.10(5)).

75 Id. at 377.

76 See Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 632 n.3 (Mass. 2006) (Spina, J., concurring).

77 Proceedings of the Fifty-Third Annual Meeting of the National Conference of Commissioners on Uniform State Laws, 1943 Handbook Nat'l Commissioners on Uniform St. L. & Proc. Fifty-Third Ann. Conf. 64.

78 See id.

79 See Cote-Whitacre, 844 N.E.2d 632 (Spina, J., concurring).

80 Id. at 631. On remand, the Superior Court of Massachusetts, at Suffolk, also applied Massachusetts' Marriage Evasion Act to bar same-sex couples from New York from being married in Massachusetts. Cote-Whiteacre v. Dep't of Pub. Health, No. 04-2656, 2006 WL 3208758, at *4-5 (Mass. Super. Ct. Sept. 29, 2006).

81 125 U.S. 190 (1888).

82 See id. at 193, 215-16.

83 Id. at 191-92.

84 Id. at 192-93.

85 Id. at 193.

86 Id. at 193-95.

87 Id. at 193, 196, 216.

88 205 U.S. 423 (1907).

89 Id. at 432-33.

90 Id. at 433-34, 438-39. The parties also had lived in Maryland during the marriage. Id. at 438.

91 Id. at 442.

92 317 U.S. 287 (1942) (Williams I); see also Williams v. North Carolina, 325 U.S. 226 (1945) (Williams II).

93 Williams I, 317 U.S. at 289-92; Williams II, 325 U.S. at 234, 236.

94 Williams I, 317 U.S. at 289-92; Williams II, 325 U.S. at 235-39.

95 Herbert R. Baer, So Your Client Wants a Divorce!: Williams v. North Carolina, 24 N.C. L. Rev. 1, 2 (1949).

96 Id.

97 Id.

98 Williams I, 317 U.S. at 289-90.

99 Id.

100 Id. at 290.

101 Id.

102 Id. at 289-90.

103 Id. at 291.

104 Id. at 292-93, 302.

105 Id. at 299, 302-04.

106 Id. at 304.

107 Williams II, 325 U.S. at 233-36.

108 Id. at 235-36 N.B. In describing Williams, this Article uses the Court's spelling of "domicil" in the case. Modern usage is "domicile."

109 Id.

110 Id. at 227.

111 Id.

112 Id. at 233-34.

113 Id.

114 Id. at 239.

115 Id. at 237.

116 334 U.S. 541, 541 (1948).

117 Id. at 542.

118 Id. at 542-43.

119 Id.

120 Id. at 543.

121 Id.

122 Id.

123 Id.

124 Id.

125 Id. at 549.

126 Id. at 549.

127 354 U.S. 416 (1957).

128 Id. at 417.

129 Id.

130 Id.

131 Id.

132 Id. at 417-18.

133 Id. at 418.

134 Id. at 418-19.

135 Loving v. Virginia, 388 U.S. 1 (1967).

136 Id. at 2.

137 Id. at 2-3 N.B. The trial judge suspended the sentence for 25 years on condition that the Lovings leave Virginia and not return together during that period of time.

138 Id. at 10-12.

139 June 2012.

140 In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

141 Kerrigan v. Comm'r Pub. Health, 957 A.2d 407 (Conn. 2008).

142 Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

143 Vt. Stat. Ann. tit. 15, § 8 (2009), enacted over gubernatorial veto. See Vermont Lawmakers Enact Same-Sex Marriage Bill, 35 Fam. L. Rep. (BNA), no. 21, 2009, at 1251.

144 N.H. House Bill No. 436 (2009).

145 New York Marriage Equality Act, 2011 N.Y. Laws 95.

146 S.B. 6239, 62 Leg., Reg. Sess. (Wash. 2012); see William Yardley, Washington State Legislators OK Same-Sex Marriage: Change Could be Stalled by a Referendum, Bos. Globe, Feb. 9, 2012, at 2; Washington: Gay Marriage Legalized, N.Y. Times, Feb. 14, 2012, at A17.

147 Yardley, supra note 146.

148 MaryAnn Spoto, N.J. Assembly Passes Gay Marriage Bill, NJ.Com (Feb. 16, 2012, 5:12 PM), http://www.nj.com/news/index.ssf/2012/02/nj_assembly_passes_gay_marriag.html.

149 Kate Zernickie, Christie Keeps Promise to Veto Gay Marriage Bill, N.Y. Times, (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gaymarriage-bill.html. Under state law, the New Jersey Assembly has two years, until January 2014, to override the veto. Id.

150 See Maryland Legislature Enacts Same-Sex Marriage Law, 38 Fam. L.Rep. (BNA), no. 18, 2012, at 1227.

151 Religious Freedom and Civil Marriage Equality Amendment Act, 2009 D.C. Legis. Serv. 18-110.

152 See Fate of Same-Sex Marriage in D.C. Rests in Hands of Congress, 36 Fam. L.Rep. (BNA), no. 8, 2009, at 1095; Marriage-Homosexuality-District of Columbia-Law Takes Effect, 36 Fam. L. Rep. (BNA), no. 18, 2010, at 1215.

153 Jackson v. D.C. Bd. of Elections & Ethics, 130 S. Ct. 1279 (2010).

154 In re Marriage Cases, 183 P.3d 384 (Cal. 2008), superseded by constitutional amendment as recognized in Strauss v. Horton, 207 P.3d 48, 65 (Cal. 2009).

155 California high court upholds same-sex marriage ban, CNN (May 27, 2009), http://www.cnn.com/2009/US/05/26/california.same.sex.marriage/index.html (last visited Jan. 12, 2012).

156 Strauss, 207 P.3d at 48.

157 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

158 Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

159 Perry v. Brown, No. 10-16696, 2012 WL 1994574 (9th Cir. June 5, 2012).

160 H.B. 118, 1997 Leg., Reg. Sess. (Haw. 1997). Hawaii has since established civil unions, and, effective Jan. 1, 2012, the provisions of Hawaii state tax law that apply to married spouses apply to partners in a civil union. See Matthew J. Eickman, Same-Sex Marriage: DOMA and the States' Approaches, 36 Family L. Rep. (BNA) 1383, 1385 (2010).

161 Baker v. State, 744 A.2d 864 (Vt. 1999); see Vermont Lawmakers Enact Same-Sex Marriage Bill, Fam. L. Rep. (BNA), no. 21, 2009, at 1251.

162 Vt. Stat. Ann. tit. 23, § 1204(a) (2007).

163 S.B. 115, 2009 Leg., 2009-2010 Sess. (Vt. 2009).

164 2003 N.J. Laws 246.

165 2006 N.J. Laws 103 (enacted in response to Lewis v. Harris, 908 A.2d 196 (N.J. 2006)).

166 N.J. Rev. Stat. § 37:1-29 (2009); see also N.J. Rev. Stat. § 37:1-31 (2009).

167 Chrisstine Nyholm, Illinois Governor Quinn signs civil union bill, Examiner.com (Feb. 1, 2011), http://www.examiner.com/social-justice-in-national/illinois-governor-quinn-signs-civil-union-bill.

168 Id.

169 2007 Wash. Sess. Laws 618, Wash. Rev. Code § 26-60-055 (repealed 2009).

170 Wash. Rev. Code § 26-60-015 (2012).

171 Or. Rev. Stat. § 106.325(3) (2009).

172 N.J. Stat. Ann. § 37:1-31 (West 2011), available at http:// www.njleg.state.nj.us/2006/Bills/PL06/103_.HTM.

173 See Godfrey v. Spano, 920 N.E.2d 328 (N.Y. 2009); C.M. v. C.C., 867 N.Y.S.2d 884 (2008) (holding that principles of comity permitted New York to recognize, and thus exercise jurisdiction over, a couple's same-sex marriage in Massachusetts). Thus, a New York trial court was able in 2010 to grant a divorce to a same-sex couple who had entered into a civil union in Vermont without addressing the difficult issues that a state law prohibiting recognition of same-sex marriages would have presented. Parker v. Waronker, 918 N.Y.S.2d 822, 822 (N.Y. Supp. Ct. 2010).

174 See Tim Craig, Uproar in D.C. as Same-Sex Marriage Gains, Wash. Post, May 6, 2009, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/05/AR2009050501618.html.

175 Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May be Recognized in Maryland, 95 Md. Op. Att'y Gen. 3 (2010).

176 Maryland Offers Health Benefits to Workers in Same-Sex Marriages from Other States, 36 Family Law Rep. (BNA) 1335, 1335 (2010).

177 11-01 N.M. Op. Att'y Gen. 1 (2011).

178 Matthew J. Eickman, Same-Sex Marriage: DOMA and the States' Approaches, 36 Family L. Rep. (BNA) 1383, 1385 (2010).

179 23 Pa. Cons. Stat. § 1102 (2012).

180 Id. § 1704.

181 2 Alexis de Tocqueville, Democracy in America 136 (Alfred A. Knopf 1945).

182 Pa. D. & C.5th 558 (2010).

183 Id. at 559.

184 Id. at 559-60.

185 See id.

186 Id.

187 Id. at 562.

188 Id. at 562-63.

189 Id. at 564.

190 Id. at 574.

191 Id.

192 Id. at 575.

193 Id. at 576.

194 Id.

195 See supra text accompanying notes 93-105.

196 Mass. Gen. Laws ch. 272, § 15 (2012).

197 Kern. Pa. D. & C.5th at 560 n.2 (citing Mass. Gen. Laws ch. 208, §§ 4-5).

198 23 Pa. Cons. Stat. § 3104(b) (2012).

199 The U.S. Supreme Court has upheld the constitutionality of a one-year residency requirement to commence a divorce action in Sosna v. Iowa, 419 U.S. 393, 410 (1975).

200 See infra text accompanying notes 228-245.

201 935 A.2d 956 (R.I. 2007).

202 Id. at 958.

203 Id.

204 Id. at 958-59.

205 Id. at 959.

206 Id. at 958-59.

207 Id. at 962.

208 Id. at 967.

209 Id. at 966-67.

210 188 P.3d 137 (Okla. 2008).

211 Id. at 138.

212 Id. at 139. The state supreme court remanded the case for procedural reasons. Id. at 140.

213 326 S.W.3d 654 (Tex. App. 2010).

214 Id. at 659.

215 Id. at 681.

216 Id. at 663 (citing Tex. Const. art I, § 32).

217 Id.

218 Id. at 669-70.

219 Id. at 670.

220 Id. at 677.

221 Id. at 678-79.

222 Id. at 679.

223 There is one Texas trial court case in which the court granted a divorce by agreement to two women who had been married in Massachusetts. The state tried to intervene unsuccessfully. The state appealed, but the Court of Appeals, Austin, ruled that the state lacked standing and dismissed the appeal. State v. Naylor, 330 S.W.3d 434 (Tex. App. 2011), petition for review filed Mar. 21, 2011. Thus, while the divorce decree remains valid, the appellate decision cannot be construed as an affirmance on the merits, nor is it inconsistent with In the Matter of the Marriage of J.B. and H.B.

224 802 A.2d 170, 172 (Conn. App. Ct. 2002).

225 Id. at 172, 184.

226 Id. at 175. The refusal of most American states to recognize valid same-sex marriages from other jurisdictions does not always disadvantage one or both parties to such a marriage. In the anomalous case of In re Marriage of Bureta, a former husband sought to end his pension payments to his ex-wife on the grounds that she had remarried. 164 P.3d 534, 534 (Wash. Ct. App. 2007). She had traveled to Oregon with her female partner, obtained a marriage license, and participated in a marriage ceremony. Id. at 535. But, later, the Oregon Supreme Court declared such marriage to be invalid. Id. Thus, the Washington courts concluded that the ex-wife had never remarried--despite the ceremony--and the ex-husband was not entitled to an order terminating the payments to her. Id. at 536.

227 I use "foreign" in the sense of extra-territorial. This could mean another state, although in this case the parties were married in a foreign country.

228 253 P.3d 153 (Wyo. 2011).

229 Id. at 154.

230 Id. Victoria did not file a brief in the subsequent appeal. Id.

231 Id. at 154-55.

232 Id. at 157.

233 Id. at 154 n.1.

234 Id. at 155 (quoting Wyo. Stat. Ann. § 20-1-111 (2009)).

235 Id. at 154 (quoting Wyo. Stat. Ann. § 20-1-101).

236 Id. at 156. (discussing Wyo. Stat. Ann. § 20-1-101).

237 Id. (citing Hoagland v. Hoagland, 193 P. 843, 843-44 (Wyo. 1920)).

238 Id.

239 Id.

240 Id.

241 Id.

242 928 N.Y.S.2d 97 (N.Y. App. Div. 2011).

243 Id. at 97.

244 Id. at 99. 123.

245 Id.

246 No. 69, 2012 WL 1758629 (Md. Ct. App. May 18, 2012).

247 Id. at *1.

248 Id.

249 Id. (quoting Md. Code Ann., Fam. Law § 2-201 (2009)).

250 Id. at *6.

251 See supra text accompanying notes 234-237, 245.

252 No. 69, 2012 WL 1758629 at *5 (Md. Ct. App. May 18, 2012).

253 See supra text accompanying note 178.

254 Barbara J. Cox, Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships, 13 Widener L.J. 699, 757 (2004).

255 Id. at 718-19.

256 Id.

257 Linda Silberman, Same-Sex Marriage: Refining the Conflict of Laws Analysis, 153 U. Pa. L. Rev. 2195 (2005).

258 Id. at 2204, 2213.

259 2008 Mass. Acts 216 (repeal effective Aug. 1, 2008); see supra text accompanying notes 76-80.

260 Pam Belluck & Katie Zezima, A 1913 Law Dies to Better Serve Gay Marriages, N.Y. Times (July 16, 2008), http://www.nytimes.com/2008/07/16/us/16gay.html?_4=1&pagewanted=print.

261 Jessica A. Hoogs, Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partners Laws, 54 Hastings L.J. 707, 708 (2003).

262 See supra note 5.

263 Louis Thorson, Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?, 92 Marq. L. Rev. 617, 618-19 (2009).

264 Id. at 619.

265 Id. at 642.

266 John M. Yarwood, Breaking Up is Hard to Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division, 89 B.U. L. Rev. 1355, 1388 (2009).

267 William Shakespeare, Hamlet, Prince of Denmark 51 (W.G. Clark & W.A. Wright eds., 2d ed. 1874).

268 Danielle Johnson, Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage that Should Be Uniformly Recognized Throughout the States, 50 Santa Clara L. Rev. 225, 227 (2010).

269 Id. at 245-46.

270 Id. at 253-54.

271 Oliver Wendell Holmes, Jr., The Common Law 1 (Harvard Univ. Press 1881).

272 See, e.g., Littleton v. Prange, 9 S.W.3d 223, 223, 231 (Tex. Ct. App. 1998) (holding that the person who had married a male decedent could not maintain a wrongful death action as a surviving spouse because she was a male-to-female transsexual and hence in a non-recognized same-sex marriage).

273 See Robert E. Rains & Gianluca Benedetti, A Discursive Essay on the Nature of Marriage and Divorce in Italy and the United States, 10 Dig. J. 22-23 (2002).

274 See id.

275 See, e.g., supra text accompanying note 241.

276 Since this case did not result in a reported decision, the client's name is not cited here for privacy reasons.

277 There is no national register of divorces in the United States.

278 Jagdeo v. Dookharan, 58 Cumb. 195 (2009).

279 This approach is also completely consistent with the only appellate case in Pennsylvania addressing same-sex marriage. De Santo v. Barnsley, 476 A.2d 952, 956 (Pa. Super. Ct. 1984). In De Santo, one man sued another man in divorce claiming that they had entered into a common law marriage. Id. at 952. The defendant filed an answer denying that the defendant and the plaintiff were ever married or were capable of being married. Id. Since the defendant put the existence of the marriage at issue, it was entirely appropriate for the trial court to address that matter, and it did so, finding that there was no valid marriage. Id. That finding was affirmed on appeal, with the superior court ruling as a matter of law that two persons of the same sex could not contract a common law marriage in Pennsylvania. Id.

280 23 Pa. Cons. Stat. § 3304(a)(1) (1990).

281 Id. at § 3301(a)(4).

282 Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

283 Of course, it is possible that the other party to the initial same-sex marriage might also remarry another person of the same sex, which would create an additional same-sex marriage.

284 See, for example, L.S.K. v. H.A.N., a Pennsylvania child support case between two formerly lesbian partners, in which the court noted that both women are now married. 813 A.2d 872, 875 n.2 (Pa. Super. Ct. 2002). Similarly, in the long-running interstate custody battles between former Vermont civil union partners, Lisa Miller and Janet Miller-Jenkins, see Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768 (Vt. 2010), Lisa Miller has purportedly "renounced her homosexuality," rediscovered her Baptist faith, and "is often flanked by others who've renounced their homosexuality and joined the faith." See Lorraine Ali, Mrs. Kramer vs. Mrs. Kramer, Newsweek (Dec. 6, 2008), http://www.newsweek.com/2008/12/05/mrs-kramer-vs-mrs-kramer.print.html.

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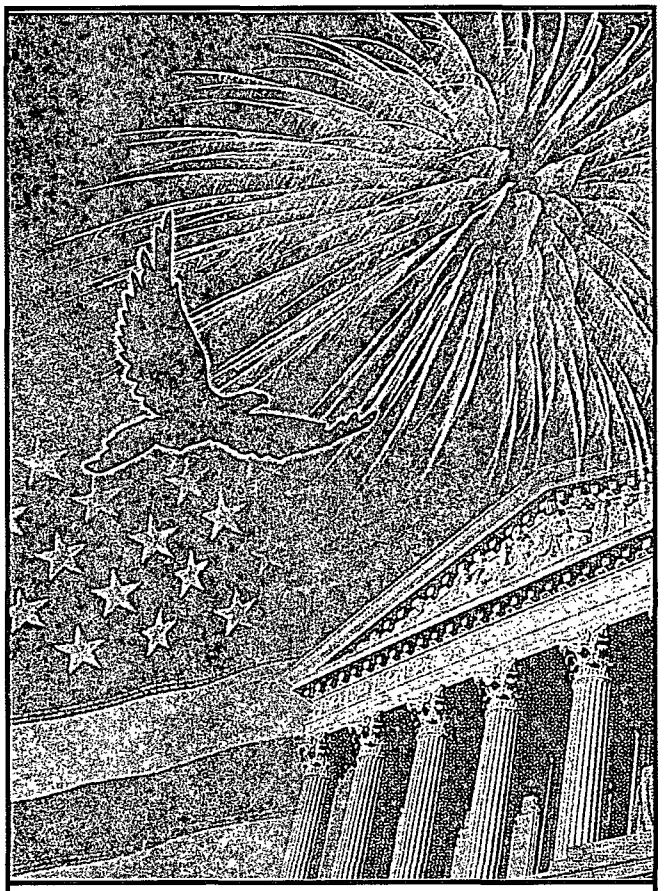
APPENDIX C

Department of the Treasury
Internal Revenue Service

Publication 555
(Rev. January 2013)
Cat. No. 15103C

Community Property



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Contents

Future Developments

For the latest information about developments related to Publication 555, such as legislation enacted after it was published, go to *www.irs.gov/pub555*.

What's New

New Form 8958. Form 8958, Allocation of Tax Amounts Between Certain Individuals in Community Property States, is new. Use Form 8958 to determine the allocation of tax amounts between married filing separate spouses, California or Washington same-sex spouses, or registered domestic partners (RDPs) with community property rights. Each of you must complete and attach Form 8958 to your Form 1040.

Important Reminder

Photographs of missing children. The Internal Revenue Service is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

This publication is for married taxpayers who are domiciled in one of the following community property states:

- Arizona,
- California,
- Idaho,
- Louisiana,
- Nevada,
- New Mexico,
- Texas,
- Washington, or
- Wisconsin.

This publication does not address the federal tax treatment of income or property subject to the "community property" election under Alaska state laws.

Community property laws affect how you figure your income on your federal income tax return if you are married, live in a community property state or country, and file separate returns. For federal tax purposes, a marriage means only a legal union between a man and woman as husband and wife and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. If you are married, your tax usually will be less if you file married filing jointly than if you file married filing separately. However, sometimes it can be to your advantage to file separate returns. If you and your spouse file separate returns, you have to determine your community income and your separate income.

Community property laws also affect your basis in property you inherit from a married person who lived in a community property state. See *Death of spouse*, later.

Registered domestic partners (RDPs) and same-sex spouses. This publication is also for RDPs who are domiciled in Nevada, Washington, or California and for individuals in California and Washington who, for state law purposes, are married to an individual of the same sex. For 2010 and following years, a RDP in Nevada, Washington, or California (or a person in California or Washington who is married to a person of the same sex) generally must follow state community property laws and report half the combined community income of the individual and his or her RDP (or California or Washington same-sex spouse).

These rules apply to RDPs in Nevada, Washington, and California in 2010 and following years because they have full community property rights in 2010. Nevada RDPs attained these rights as of October 1, 2009. Washington RDPs attained them as of June 12, 2008, and California RDPs attained them as of January 1, 2007. For years prior to 2010, RDPs who reported income without regard to the community property laws may file amended returns to report half of the community income of the RDPs for the applicable periods, but are not required to do so. If one of the RDPs files an amended return to report half of the community income, the other RDP must report the other half.

RDPs (and individuals in California and Washington who are married to an individual of the same sex) are not married for federal tax purposes. They can use only the single filing status, or if they qualify, the head of household filing status.

You can find answers to frequently asked questions by going to www.irs.gov/pub555 and clicking on Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California *under* Other Items You May Find Useful.

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions.

You can write to us at the following address:

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Tax questions. If you have a tax question, check the information available on IRS.gov or call 1-800-829-1040. We cannot answer tax questions sent to either of the above addresses.

Useful Items

You may want to see:

Publication

- ❑ **504** Divorced or Separated Individuals
- ❑ **505** Tax Withholding and Estimated Tax
- ❑ **971** Innocent Spouse Relief

Form (and Instructions)

- ❑ **8857** Request for Innocent Spouse Relief
- ❑ **8958** Allocation of Tax Amounts Between Certain Individuals in Community Property States

See *How To Get Tax Help* near the end of this publication for information about getting these publications and forms.

Domicile

Whether you have community property and community income depends on the state where you are domiciled. If you and your spouse (or RDP/California or Washington same-sex spouse) have different domiciles, check the laws of each to see whether you have community property or community income.

You have only one domicile even if you have more than one home. Your domicile is a permanent legal home that you intend to use for an indefinite or unlimited period, and to which, when absent, you intend to return. The question of your domicile is mainly a matter of your intention as indicated by your actions. You must be able to show that you intend a given place or state to be your permanent home. If you move into or out of a community property state during the year, you may or may not have community income.

Factors considered in determining domicile include:

- Where you pay state income tax,
- Where you vote,
- Location of property you own,
- Your citizenship,
- Length of residence, and
- Business and social ties to the community.

Amount of time spent. The amount of time spent in one place does not always explain the difference between home and domicile. A temporary home or residence may continue for months or years while a domicile may be established the first moment you occupy the property. Your intent is the determining factor in proving where you have your domicile.

Note. When this publication refers to where you live, it means your domicile.

Community or Separate Property and Income

If you file a federal tax return separately from your spouse, you must report half of all community income and all of your separate income. Likewise, a RDP (and an individual in California and Washington who is married to an individual of the same sex) must report half of all community income and all of his or her separate income on his or her federal tax return. You each must attach your Form 8958 to your Form 1040 showing how you figured the amount you are reporting on your return.

Generally, the laws of the state in which you are domiciled govern whether you have community property and community income or separate property and separate income for federal tax purposes. The following is a summary of the general rules. These rules are also shown in *Table 1*.

Community property. Generally, community property is property:

- That you, your spouse (or RDP/California or Washington same-sex spouse), or both acquire during your marriage (or registered domestic partnership/ same-sex marriage in California or Washington) while you and your spouse (or RDP/California or Washington same-sex spouse) are domiciled in a community property state.
- That you and your spouse (or RDP/California or Washington same-sex spouse) agreed to convert from separate to community property.
- That cannot be identified as separate property.

Community income. Generally, community income is income from:

- Community property.
- Salaries, wages, and other pay received for the services performed by you, your spouse (or RDP/California or Washington same-sex spouse), or both during your marriage (or registered domestic partnership/ same-sex marriage in California or Washington).
- Real estate that is treated as community property under the laws of the state where the property is located.

Separate property. Generally, separate property is:

- Property that you or your spouse (or RDP/California or Washington same-sex spouse) owned separately before your marriage (or registered domestic partnership/same-sex marriage in California or Washington).
- Money earned while domiciled in a noncommunity property state.
- Property that you or your spouse (or RDP/ California or Washington same-sex spouse) received separately as a gift or inheritance during your marriage (or registered domestic partnership/same-sex marriage in California or Washington).
- Property that you or your spouse (or RDP/California or Washington same-sex spouse) bought with separate funds, or acquired in exchange for separate property, during your marriage (or registered domestic partnership/same-sex marriage in California or Washington).
- Property that you and your spouse (or RDP/California or Washington same-sex spouse) converted from community property to separate property through an agreement valid under state law.

- The part of property bought with separate funds, if part was bought with community funds and part with separate funds.

Separate income. Generally, income from separate property is the separate income of the spouse (or RDP/California or Washington same-sex spouse) who owns the property.

In Idaho, Louisiana, Texas, and Wisconsin, income from most separate property is community income.

Identifying Income, Deductions, and Credits

If you file separate returns, you and your spouse (or RDP/California or Washington same-sex spouse) each must attach your Form 8958 to your Form 1040 to identify your community and separate income, deductions, credits, and other return amounts according to the laws of your state.

Income

The following is a discussion of the general effect of community property laws on the federal income tax treatment of certain items of income.

Table 1. **General Rules — Property and Income: Community or Separate?**

Community property is property:	**Separate property** is:
• That you, your spouse (or RDP/California or Washington same-sex spouse), or both acquire during your marriage (or registered domestic partnership/same-sex marriage in California or Washington) while you are domiciled in a community property state. (Includes the part of property bought with community property funds if part was bought with community funds and part with separate funds.) • That you and your spouse (or RDP/California or Washington same-sex spouse) agreed to convert from separate to community property. • That cannot be identified as separate property.	• Property that you or your spouse (or RDP/California or Washington same-sex spouse) owned separately before your marriage (or registered domestic partnership/same-sex marriage in California or Washington). • Money earned while domiciled in a noncommunity property state. • Property either of you received as a gift or inherited separately during your marriage (or registered domestic partnership/same-sex marriage in California or Washington). • Property bought with separate funds, or exchanged for separate property, during your marriage (or registered domestic partnership/same-sex marriage in California or Washington). • Property that you and your spouse (or RDP/California or Washington same-sex spouse) agreed to convert from community to separate property through an agreement valid under state law. • The part of property bought with separate funds, if part was bought with community funds and part with separate funds.
Community income [1,2,3] is income from: • Community property. • Salaries, wages, or pay for services of you, your spouse (or RDP/California or Washington same-sex spouse), or both during your marriage (or registered domestic partnership/same-sex marriage in California or Washington). • Real estate that is treated as community property under the laws of the state where the property is located.	**Separate income** [1,2] is income from: • Separate property which belongs to the spouse who owns the property. • Separate property which belongs to the RDP/California or Washington same-sex spouse who owns the property.

[1]In Idaho, Louisiana, Texas, and Wisconsin, income from most separate property is community income.

[2]Check your state law if you are separated but do not meet the conditions discussed in *Spouses living apart all year*, later. In some states, the income you earn after you are separated and before a divorce decree is issued continues to be community income. In other states, it is separate income.

[3]Under special rules, income that can otherwise be characterized as community income may not be treated as community income for federal income tax purposes in certain situations. See *Community Property Laws Disregarded*, later.

Wages, earnings, and profits. A spouse's (or RDP's/California or Washington same-sex spouse's) wages, earnings, and net profits from a sole proprietorship are community income and must be evenly split.

Dividends, interest, and rents. Dividends, interest, and rents from community property are community income and must be evenly split. Dividends, interest, and rents from separate property are characterized in accordance with the discussion under *Income from separate property*, later.

Example. If you and your spouse, (or RDP/California or Washington same-sex spouse) buy a bond that is considered community property under your state laws, half the bond interest belongs to you and half belongs to your spouse. You each must show the bond interest and the split of that interest on your Form 8958, and report half the interest on your Form 1040. Attach your Form 8958 to your Form 1040.

Alimony received. Alimony or separate maintenance payments made prior to divorce are taxable to the payee spouse only to the extent they exceed 50% (his or her share) of the reportable community income. This is so because the payee spouse is already required to report half of the community income. See also *Alimony paid*, later.

Gains and losses. Gains and losses are classified as separate or community depending on how the property is held. For example, a loss on separate property, such as stock held separately, is a separate loss. On the other hand, a loss on community property, such as a casualty loss to your home held as community property, is a community loss. See Publication 544, Sales and Other Dispositions of Assets, for information on gains and losses. See Publication 547, Casualties, Disasters, and Thefts, for information on losses due to a casualty or theft.

Withdrawals from individual retirement arrangements (IRAs) and Coverdell Education Savings Accounts (ESAs). There are several kinds of individual retirement arrangements (IRAs). They are traditional IRAs (including SEP-IRAs), SIMPLE IRAs, and Roth IRAs. IRAs and ESAs by law are deemed to be separate property. Therefore, taxable IRA and ESA distributions are separate property, even if the funds in the account would otherwise be community property. These distributions are wholly taxable to the spouse (or RDP/California or Washington same-sex spouse) whose name is on the account. That spouse (or RDP/California or Washington same-sex spouse) is also liable for any penalties and additional taxes on the distributions.

Pensions. Generally, distributions from pensions will be characterized as community or separate income depending on the respective periods of participation in the pension while married (or during the registered domestic partnership/same-sex marriage in California or Washington) and domiciled in a community property state or in a noncommunity property state during the total period of participation in the pension. See the example under *Civil service retirement*, later. These rules may vary between states. Check your state law.

Lump-sum distributions. If you were born before January 2, 1936, and receive a lump-sum distribution from a qualified retirement plan, you may be able to choose an optional method of figuring the tax on the distribution. For the 10-year tax option, you must disregard community property laws. For more information, see Publication 575, Pension and Annuity Income, and Form 4972, Tax on Lump-Sum Distributions.

Civil service retirement. For income tax purposes, community property laws apply to annuities payable under the Civil Service Retirement Act (CSRS) or Federal Employee Retirement System (FERS).

Whether a civil service annuity is separate or community income depends on your marital status (or your status as a RDP/California or Washington same-sex spouse) and domicile of the employee when the services were performed for which the annuity is paid. Even if you now live in a noncommunity property state and you receive a civil service annuity, it may be community income if it is based on services you performed while married (or during the registered domestic partnership/same-sex marriage in California or Washington) and domiciled in a community property state.

If a civil service annuity is a mixture of community income and separate income, it must be divided between the two kinds of income. The division is based on the employee's domicile and marital status (or RDP/California or Washington same-sex marital status) in community and noncommunity property states during his or her periods of service.

Example. Henry Wright retired this year after 30 years of civil service. He and his wife were domiciled in a community property state during the past 15 years.

Since half the service was performed while the Wrights were married and domiciled in a community property state, half the civil service retirement pay is considered to be community income. If Mr. Wright receives $1,000 a month in retirement pay, $500 is considered community income—half ($250) is his income and half ($250) is his wife's.

Military retirement pay. State community property laws apply to military retirement pay. Generally, the pay is either separate or community income based on the marital status and domicile of the couple while the member of the Armed Forces was in active military service. For example, military retirement pay for services performed during marriage and domicile in a community property state is community income.

Active military pay earned while married and domiciled in a community property state is also community income. This income is considered to be received half by the member of the Armed Forces and half by the spouse.

Partnership income. If an interest is held in a partnership, and income from the partnership is attributable to the efforts of either spouse (or RDP/California or Washington same-sex spouse), the partnership income is community

property. If it is merely a passive investment in a separate property partnership, the partnership income will be characterized in accordance with the discussion under *Income from separate property*, later.

Tax-exempt income. For spouses, community income exempt from federal tax generally keeps its exempt status for both spouses. For example, under certain circumstances, income earned outside the United States is tax exempt. If you earned income and met the conditions that made it exempt, the income is also exempt for your spouse even though he or she may not have met the conditions. RDPs and same-sex married couples in California and Washington should consult the particular exclusion provision to see if the exempt status applies to both.

Income from separate property. In some states, income from separate property is separate income. These states include Arizona, California, Nevada, New Mexico, and Washington. Other states characterize income from separate property as community income. These states include Idaho, Louisiana, Texas, and Wisconsin.

Exemptions

When you file separate returns, you must claim your own exemption amount for that year. (See your tax return instructions.)

You cannot divide the amount allowed as an exemption for a dependent between you and your spouse (or RDP/California or Washington same-sex spouse). When community funds provide support for more than one person, each of whom otherwise qualifies as a dependent, you and your spouse (or RDP/California or Washington same-sex spouse) may divide the number of dependency exemptions as explained in the following example.

Example. Ron and Diane White have three dependent children and live in Nevada. If Ron and Diane file separately, only Ron can claim his own exemption, and only Diane can claim her own exemption. Ron and Diane can agree that one of them will claim the exemption for one, two, or all of their children and the other will claim any remaining exemptions. They cannot each claim half of the total exemption amount for their three children.

Deductions

If you file separate returns, your deductions generally depend on whether the expenses involve community or separate income.

Business and investment expenses. If you file separate returns, expenses incurred to earn or produce community business or investment income are generally divided equally between you and your spouse (or RDP/California or Washington same-sex spouse). Each of you is entitled to deduct one-half of the expenses on your separate returns. Separate business or investment income is deductible by the spouse (RDP/California or Washington same-sex spouse) who earns the income.

Other limits may also apply to business and investment expenses. For more information, see Publication 535, Business Expenses, and Publication 550, Investment Income and Expenses.

Alimony paid. Payments that may otherwise qualify as alimony are not deductible by the payer if they are the recipient spouse's part of community income. They are deductible as alimony only to the extent they are more than that spouse's part of community income.

Example. You live in a community property state. You are separated but the special rules explained later under *Spouses living apart all year* do not apply. Under a written agreement, you pay your spouse $12,000 of your $20,000 total yearly community income. Your spouse receives no other community income. Under your state law, earnings of a spouse living separately and apart from the other spouse continue as community property.

On your separate returns, each of you must report $10,000 of the total community income. In addition, your spouse must report $2,000 as alimony received. You can deduct $2,000 as alimony paid.

IRA deduction. Deductions for IRA contributions cannot be split between spouses (or RDPs/California or Washington same-sex spouses). The deduction for each spouse (or RDP/California or Washington same-sex spouse) is figured separately and without regard to community property laws.

Personal expenses. Expenses that are paid out of separate funds, such as medical expenses, are deductible by the spouse who pays them. If these expenses are paid from community funds, divide the deduction equally between you and your spouse.

Credits, Taxes, and Payments

The following is a discussion of the general effect of community property laws on the treatment of certain credits, taxes, and payments on your separate return.

Child tax credit. You may be entitled to a child tax credit for each of your qualifying children. You must provide the name and identification number (usually the social security number) of each qualifying child on your return. See your tax return instructions for the maximum amount of the credit you can claim for each qualifying child.

Limit on credit. The credit is limited if your modified adjusted gross income (modified AGI) is above a certain amount. The amount at which the limitation (phaseout) begins depends on your filing status. Generally, your credit is limited to your tax liability unless you have three or more qualifying children. See your tax return instructions for more information.

Self-employment tax. For the effect of community property laws on the income tax treatment of income from a sole proprietorship and partnerships, see *Wages, earnings, and profits* and *Partnership income*, earlier. The following rules only apply to persons married for federal tax

purposes. RDPs and same-sex spouses in California and Washington report community income for self-employment tax purposes the same way they do for income tax purposes.

Sole proprietorship. With regard to net income from a trade or business (other than a partnership) that is community income, self-employment tax is imposed on the spouse carrying on the trade or business.

Partnerships. All of the distributive share of a married partner's income or loss from a partnership trade or business is attributable to the partner for computing any self-employment tax, even if a portion of the partner's distributive share of income or loss is community income or loss that is otherwise attributable to the partner's spouse for income tax purposes. If both spouses are partners, any self-employment tax is allocated based on their distributive shares.

Federal income tax withheld. Report the credit for federal income tax withheld on community wages in the same manner as your wages. If you and your spouse file separate returns on which each of you reports half the community wages, each of you is entitled to credit for half the income tax withheld on those wages. Likewise, each RDP/California or Washington same-sex spouse is entitled to credit for half the income tax withheld on those wages.

Estimated tax payments. In determining whether you must pay estimated tax, apply the estimated tax rules to your estimated income. These rules are explained in Publication 505.

If you think you may owe estimated tax and want to pay the tax separately (RDPs and same-sex spouses in California and Washington must pay the tax separately), determine whether you must pay it by taking into account:

1. Half the community income and deductions,
2. All of your separate income and deductions, and
3. Your own exemption and any exemptions for dependents that you may claim.

Whether you and your spouse pay estimated tax jointly or separately will not affect your choice of filing joint or separate income tax returns.

If you and your spouse paid estimated tax jointly but file separate income tax returns, either of you can claim all of the estimated tax paid, or you may divide it between you in any way that you agree upon.

If you cannot agree on how to divide it, the estimated tax you can claim equals the total estimated tax paid times the tax shown on your separate return, divided by the total of the tax shown on your return and your spouse's return.

If you paid your estimated taxes separately, you get credit for only the estimated taxes you paid.

Earned income credit. You may be entitled to an earned income credit (EIC). You cannot claim this credit if your filing status is married filing separately.

If you are married, but qualify to file as head of household under rules for married taxpayers living apart (see Publication 501, Exemptions, Standard Deduction, and Filing Information), and live in a state that has community property laws, your earned income for the EIC does not include any amount earned by your spouse that is treated as belonging to you under community property laws. That amount is not earned income for the EIC, even though you must include it in your gross income on your income tax return. Your earned income includes the entire amount **you** earned, even if part of it is treated as belonging to your spouse under your state's community property laws. The same rule applies to RDPs and same-sex spouses in California and Washington.

This rule does not apply when determining your adjusted gross income (AGI) for the EIC. Your AGI includes that part of both your and your spouse's (or RDP's/California or Washington same-sex spouse's) wages that you are required to include in gross income shown on your tax return.

For more information about the EIC, see Publication 596, Earned Income Credit (EIC).

Overpayments. The amount of an overpayment on a joint return is allocated under the community property laws of the state in which you are domiciled.

- If, under the laws of your state, community property is subject to premarital or other separate debts of either spouse, the full joint overpayment may be used to offset the obligation.
- If, under the laws of your state, community property is not subject to premarital or other separate debts of either spouse, only the portion of the joint overpayment allocated to the spouse liable for the obligation can be used to offset that liability. The portion allocated to the other spouse can be refunded.

Community Property Laws Disregarded

The following discussions are situations where special rules apply to community property and community income for spouses. These rules do not apply to RDPs or California or Washington same-sex spouses.

Certain community income not treated as community income by one spouse. Community property laws may not apply to an item of community income that you received but did not treat as community income. You are responsible for reporting all of that income item if:

1. You treat the item as if only you are entitled to the income, and
2. You do not notify your spouse of the nature and amount of the income by the due date for filing the return (including extensions).

Relief from liability arising from community property law. You are not responsible for the tax relating to an item

of community income if all the following conditions are met.

1. You did not file a joint return for the tax year.
2. You did not include an item of community income in gross income.
3. The item of community income you did not include is one of the following:
   a. Wages, salaries, and other compensation your spouse (or former spouse) received for services he or she performed as an employee.
   b. Income your spouse (or former spouse) derived from a trade or business he or she operated as a sole proprietor.
   c. Your spouse's (or former spouse's) distributive share of partnership income.
   d. Income from your spouse's (or former spouse's) separate property (other than income described in (a), (b), or (c)). Use the appropriate community property law to determine what is separate property.
   e. Any other income that belongs to your spouse (or former spouse) under community property law.
4. You establish that you did not know of, and had no reason to know of, that community income.
5. Under all facts and circumstances, it would not be fair to include the item of community income in your gross income.

Requesting relief. For information on how and when to request relief from liabilities arising from community property laws, see *Community Property Laws* in Publication 971, Innocent Spouse Relief.

Equitable relief. If you do not qualify for the relief discussed earlier under *Relief from liability arising from community property law* and are now liable for an underpaid or understated tax you believe should be paid only by your spouse (or former spouse), you may request equitable relief. To request equitable relief, you must file Form 8857, Request for Innocent Spouse Relief. Also see Publication 971.

Spousal agreements. In some states a husband and wife may enter into an agreement that affects the status of property or income as community or separate property. Check your state law to determine how it affects you.

Nonresident alien spouse. If you are a U.S. citizen or resident alien and you choose to treat your nonresident alien spouse as a U.S. resident for tax purposes and you are domiciled in a community property state or country, use the community property rules. You must file a joint return for the year you make the choice. You can file separate returns in later years. For details on making this choice, see Publication 519, U.S. Tax Guide for Aliens.

If you are a U.S. citizen or resident alien and do not choose to treat your nonresident alien spouse as a U.S. resident for tax purposes, treat your community income as explained next under *Spouses living apart all year.* However, you do not have to meet the four conditions discussed there.

Spouses living apart all year. If you are married at any time during the calendar year, special rules apply for reporting certain community income. You must meet all the following conditions for these special rules to apply.

1. You and your spouse lived apart all year.
2. You and your spouse did not file a joint return for a tax year beginning or ending in the calendar year.
3. You and/or your spouse had earned income for the calendar year that is community income.
4. You and your spouse have not transferred, directly or indirectly, any of the earned income in condition (3) above between yourselves before the end of the year. Do not take into account transfers satisfying child support obligations or transfers of very small amounts or value.

If all these conditions are met, you and your spouse must report your community income as discussed next. See also *Certain community income not treated as community income by one spouse*, earlier.

Earned income. Treat earned income that is not trade or business or partnership income as the income of the spouse who performed the services to earn the income. Earned income is wages, salaries, professional fees, and other pay for personal services.

Earned income does not include amounts paid by a corporation that are a distribution of earnings and profits rather than a reasonable allowance for personal services rendered.

Trade or business income. Treat income and related deductions from a trade or business that is not a partnership as those of the spouse carrying on the trade or business.

Partnership income or loss. Treat income or loss from a trade or business carried on by a partnership as the income or loss of the spouse who is the partner.

Separate property income. Treat income from the separate property of one spouse as the income of that spouse.

Social security benefits. Treat social security and equivalent railroad retirement benefits as the income of the spouse who receives the benefits.

Other income. Treat all other community income, such as dividends, interest, rents, royalties, or gains, as provided under your state's community property law.

Example. George and Sharon were married throughout the year but did not live together at any time during the year. Both domiciles were in a community property state. They did not file a joint return or transfer any of their earned income between themselves. During the year their incomes were as follows:

	George	Sharon
Wages	$20,000	$22,000
Consulting business	5,000	
Partnership		10,000
Dividends from separate property	1,000	2,000
Interest from community property	500	500
Total	$26,500	$34,500

Under the community property law of their state, all the income is considered community income. (Some states treat income from separate property as separate income—check your state law.) Sharon did not take part in George's consulting business.

Ordinarily, on their separate returns they would each report $30,500, half the total community income of $61,000 ($26,500 + $34,500). But because they meet the four conditions listed earlier under *Spouses living apart all year*, they must disregard community property law in reporting all their income (except the interest income) from community property. They each report on their returns only their own earnings and other income, and their share of the interest income from community property. George reports $26,500 and Sharon reports $34,500.

Other separated spouses. If you and your spouse are separated but do not meet the four conditions discussed earlier under *Spouses living apart all year*, you must treat your income according to the laws of your state. In some states, income earned after separation but before a decree of divorce continues to be community income. In other states, it is separate income.

End of the Community

The marital community may end in several ways. When the marital community ends, the community assets (money and property) are divided between the spouses. Similarly, a same-sex couple's community may end in several ways and the community assets must be divided between the RDPs or California or Washington same-sex spouses.

Death of spouse. If you own community property and your spouse dies, the total fair market value (FMV) of the community property, including the part that belongs to you, generally becomes the basis of the entire property. For this rule to apply, at least half the value of the community property interest must be includible in your spouse's gross estate, whether or not the estate must file a return (this rule does not apply to RDPs and individuals married to a same-sex spouse in California and Washington).

Example. Bob and Ann owned community property that had a basis of $80,000. When Bob died, his and Ann's community property had an FMV of $100,000. One-half of the FMV of their community interest was includible in Bob's estate. The basis of Ann's half of the property is $50,000 after Bob died (half of the $100,000 FMV). The basis of the other half to Bob's heirs is also $50,000.

For more information about the basis of assets, see Publication 551, Basis of Assets.

The above basis rule does not apply if your spouse died in 2010 and the spouse's executor elected out of the estate tax, in which case section 1022 will apply. See Publication 4895, Tax Treatment of Property Acquired From a Decedent Dying in 2010, for additional information.

Divorce or separation. If spouses divorce or separate, the (equal or unequal) division of community property in connection with the divorce or property settlement does not result in a gain or loss. For RDPs and same-sex married couples in California and Washington, an unequal division of community property in a divorce or property settlement may result in a gain or loss. For information on the tax consequences of the division of property under a property settlement or divorce decree, see Publication 504.

Each spouse (or RDP/California or Washington same-sex spouse) is taxed on half the community income for the part of the year before the community ends. However, see *Spouses living apart all year*, earlier. Any income received after the community ends is separate income. This separate income is taxable only to the spouse (or RDP/California or Washington same-sex spouse) to whom it belongs.

An **absolute decree of divorce or annulment** ends the marital community in all community property states. A decree of annulment, even though it holds that no valid marriage ever existed, usually does not nullify community property rights arising during the "marriage." However, you should check your state law for exceptions.

A **decree of legal separation or of separate maintenance** may or may not end the marital community. The court issuing the decree may terminate the marital community and divide the property between the spouses.

A **separation agreement** may divide the community property between you and your spouse. It may provide that this property, along with future earnings and property acquired, will be separate property. This agreement may end the community.

In some states, the marital community ends when the spouses permanently separate, even if there is no formal agreement. Check your state law.

If you are a RDP or an individual married to a same-sex individual in California or Washington, you should check your state law to determine when the community ends.

Preparing a Federal Income Tax Return

The following discussion does not apply to spouses who meet the conditions under *Spouses living apart all year*, discussed earlier. Those spouses must report their community income as explained in that discussion.

Joint Return Versus Separate Returns

Ordinarily, filing a joint return will give you a greater tax advantage than filing a separate return. But in some cases, your combined income tax on separate returns may be less than it would be on a joint return.

This discussion concerning joint versus separate returns does not apply to RDPs and same-sex married couples in California and Washington.

The following rules apply if your filing status is married filing separately.

1. You should itemize deductions if your spouse itemizes deductions, because you cannot claim the standard deduction.
2. You cannot take the credit for child and dependent care expenses in most instances.
3. You cannot take the earned income credit.
4. You cannot exclude any interest income from qualified U.S. savings bonds that you used for higher education expenses.
5. You cannot take the credit for the elderly or the disabled unless you lived apart from your spouse all year.
6. You may have to include in income more of any social security benefits (including any equivalent railroad retirement benefits) you received during the year than you would on a joint return.
7. You cannot deduct interest paid on a qualified student loan.
8. You cannot take the education credits.
9. You may have a smaller child tax credit than you would on a joint return.
10. You cannot take the exclusion or credit for adoption expenses in most instances.

Figure your tax both on a joint return and on separate returns under the community property laws of your state. You can then compare the tax figured under both methods and use the one that results in less tax.

Separate Return Preparation

If you file separate returns, you and your spouse must each report half of your combined community income and deductions in addition to your separate income and deductions. Each of you must complete and attach Form 8958 to your Form 1040 showing how you figured the amount you are reporting on your return. On the appropriate lines of your separate Form 1040, list only your share of the income and deductions on the appropriate lines of your separate tax returns (wages, interest, dividends, etc.). The same reporting rule applies to RDPs and individuals in California and Washington who are married to an individual of the same sex. For a discussion of the effect of community property laws on certain items of income, deductions, credits, and other return amounts, see *Identifying Income, Deductions, and Credits*, earlier.

Attach your Form 8958 to your separate return showing how you figured the income, deductions, and federal income tax withheld that each of you reported. Form 8958 is used for married spouses in community property states who choose to file married filing separately. Form 8958 is also used for RDPs who are domiciled in Nevada, Washington, or California and for individuals in California and Washington who, for state law purposes, are married to an individual of the same-sex. For 2010 and following years, a RDP in Nevada, Washington, or California (or a person in California or Washington who is married to a person of the same sex) must follow state community property laws and report half the combined community income of the individual and his or her RDP (or California or Washington same-sex spouse).

Extension of time to file. An extension of time for filing your separate return does not extend the time for filing your spouse's (or RDP's/California or Washington same-sex spouse's) separate return. If you and your spouse file a joint return, you cannot file separate returns after the due date for filing either separate return has passed.

How To Get Tax Help

You can get help with unresolved tax issues, order free publications and forms, ask tax questions, and get information from the IRS in several ways. By selecting the method that is best for you, you will have quick and easy access to tax help.

Free help with your tax return. Free help in preparing your return is available nationwide from IRS-certified volunteers. The Volunteer Income Tax Assistance (VITA) program is designed to help low-moderate income, elderly, disabled, and limited English proficient taxpayers. The Tax Counseling for the Elderly (TCE) program is designed to assist taxpayers age 60 and older with their tax returns. Most VITA and TCE sites offer free electronic filing and all volunteers will let you know about credits and deductions you may be entitled to claim. Some VITA and TCE sites provide taxpayers the opportunity to prepare their return with the assistance of an IRS-certified volunteer. To find the nearest VITA or TCE site, visit IRS.gov or call 1-800-906-9887 or 1-800-829-1040.

As part of the TCE program, AARP offers the Tax-Aide counseling program. To find the nearest AARP Tax-Aide site, visit AARP's website at *www.aarp.org/money/taxaide* or call 1-888-227-7669.

For more information on these programs, go to IRS.gov and enter "VITA" in the search box.

Internet. You can access the IRS website at IRS.gov 24 hours a day, 7 days a week to:

- *E-file* your return. Find out about commercial tax preparation and *e-file* services available free to eligible taxpayers.
- Check the status of your 2012 refund. Go to IRS.gov and click on *Where's My Refund.* Information about your return will generally be available within 24 hours after the IRS receives your e-filed return, or 4 weeks after you mail your paper return. If you filed Form 8379 with your return, wait 14 weeks (11 weeks if you filed electronically). Have your 2012 tax return handy so you can provide your social security number, your filing status, and the exact whole dollar amount of your refund.
- *Where's My Refund?* has a new look this year! The tool will include a tracker that displays progress through three stages: (1) return received, (2) refund approved, and (3) refund sent. *Where's My Refund?* will provide an actual personalized refund date as soon as the IRS processes your tax return and approves your refund. So in a change from previous filing seasons, you won't get an estimated refund date right away. *Where's My Refund?* includes information for the most recent return filed in the current year and does not include information about amended returns.
- You can obtain a free transcript online at IRS.gov by clicking on *Order a Return or Account Transcript* under "Tools." For a transcript by phone, call 1-800-908-9946 and follow the prompts in the recorded message. You will be prompted to provide your SSN or Individual Taxpayer Identification Number (ITIN), date of birth, street address and ZIP code.
- Download forms, including talking tax forms, instructions, and publications.
- Order IRS products.
- Research your tax questions.
- Search publications by topic or keyword.
- Use the Internal Revenue Code, regulations, or other official guidance.
- View Internal Revenue Bulletins (IRBs) published in the last few years.
- Figure your withholding allowances using the IRS Withholding Calculator at www.irs.gov/individuals.
- Determine if Form 6251 (Alternative Minimum Tax—Individuals), must be filed by using our Alternative Minimum Tax (AMT) Assistant available at IRS.gov by typing *Alternative Minimum Tax Assistant* in the search box.
- Sign up to receive local and national tax news by email.
- Get information on starting and operating a small business.

Phone. Many services are available by phone.

- *Ordering forms, instructions, and publications.* Call 1-800-TAX-FORM (1-800-829-3676) to order current-year forms, instructions, and publications, and prior-year forms and instructions (limited to 5 years). You should receive your order within 10 days.
- *Asking tax questions.* Call the IRS with your tax questions at 1-800-829-1040.
- *Solving problems.* You can get face-to-face help solving tax problems most business days in IRS Taxpayer Assistance Centers (TAC). An employee can explain IRS letters, request adjustments to your account, or help you set up a payment plan. Call your local Taxpayer Assistance Center for an appointment. To find the number, go to www.irs.gov/localcontacts or look in the phone book under *United States Government, Internal Revenue Service.*
- *TTY/TDD equipment.* If you have access to TTY/TDD equipment, call 1-800-829-4059 to ask tax questions or to order forms and publications. The TTY/TDD telephone number is for individuals who are deaf, hard of hearing, or have a speech disability. These individuals can also access the IRS through relay services such as the Federal Relay Service at www.gsa.gov/fedrelay.
- *TeleTax topics.* Call 1-800-829-4477 to listen to pre-recorded messages covering various tax topics.
- *Checking the status of your 2012 refund.* To check the status of your 2012 refund, call 1-800-829-1954 or 1-800-829-4477 (automated *Where's My Refund?* information 24 hours a day, 7 days a week). Information about your return will generally be available within 24 hours after the IRS receives your e-filed return, or 4 weeks after you mail your paper return. If you filed Form 8379 with your return, wait 14 weeks (11 weeks if you filed electronically). Have your 2012 tax return handy so you can provide your social security number, your filing status, and the exact whole dollar amount of your refund. *Where's My Refund?* will provide an actual personalized refund date as soon as the IRS processes your tax return and approves your refund. *Where's My Refund?* includes information for the most recent return filed in the current year and does not include information about amended returns.

Evaluating the quality of our telephone services. To ensure IRS representatives give accurate, courteous, and professional answers, we use several methods to evaluate the quality of our telephone services. One method is for a second IRS representative to listen in on or record random telephone calls. Another is to ask some callers to complete a short survey at the end of the call.

Walk-in. Some products and services are available on a walk-in basis.

- *Products.* You can walk in to some post offices, libraries, and IRS offices to pick up certain forms, instructions, and publications. Some IRS offices, libraries, and city and county government offices have a collection of products available to photocopy from reproducible proofs. Also, some IRS offices and libraries have the Internal Revenue Code, regulations, Internal Revenue Bulletins, and Cumulative Bulletins available for research purposes.
- *Services.* You can walk in to your local TAC most business days for personal, face-to-face tax help. An employee can explain IRS letters, request adjust-

advocate who will be with you at every turn. TAS has offices in every state, the District of Columbia, and Puerto Rico. Although TAS is independent within the IRS, their advocates know how to work with the IRS to get your problems resolved. And its services are always free.

As a taxpayer, you have rights that the IRS must abide by in its dealings with you. The TAS tax toolkit at www.TaxpayerAdvocate.irs.gov can help you understand these rights.

If you think TAS might be able to help you, call your local advocate, whose number is in your phone book and on our website at www.irs.gov/advocate. You can also call the toll-free number at 1-877-777-4778. Deaf and hard of

that those same-sex marriages that had been lawfully entered into remained valid.[156] A federal district court subsequently struck down California Proposition 8 as unconstitutional.[157] On February 7, 2012, a divided panel of the Ninth Circuit Court of Appeals affirmed the district court.[158] The Ninth Circuit denied rehearing en banc by order of June 5, 2012.[159]

Several other states permit same-sex couples to enter into variously named forms of legally recognized quasi marriages. In the midst of the Baehr v. Lewin litigation, the Hawaii legislature enacted a law in 1997 allowing same-sex couples to become "reciprocal beneficiaries" with many of the "rights and benefits available only to married couples."[160] Similarly, Vermont created "civil unions" for same-sex couples in 1999 after its supreme court ruled that denying such couples the benefits of marriage violated the state constitution.[161] Parties to a Vermont civil union were to have "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage."[162] When Vermont amended its marriage law to permit same-sex couples to marry as of September 1, 2009, it also repealed the procedure for such couples to enter civil unions, while allowing existing civil unions to continue and allowing parties in civil unions to marry their civil union partners if they so choose.[163] In 2004, New Jersey enacted its "Domestic Partnership Act," permitting same-sex and opposite-sex couples to register as domestic partners and obtain some of the rights of married couples.[164] In late 2006, New Jersey enacted a Civil Union Act, amending the 2004 Domestic Partnership Act.[165] Under the Civil Union Act, two eligible individuals of the same sex can enter a civil union and "receive *410 the same benefits and protections and be subject to the same responsibilities as spouses in a marriage."[166]

The latest state to create a statutory framework for same-sex (and opposite-sex) couples to enter into a civil union is Illinois. On January 31, 2011, Illinois Governor Pat Quinn signed legislation creating civil unions in that state, effective June 1, 2011.[167] The Governor's Office noted that California, Nevada, New Jersey, Oregon, Washington State, and Washington, D.C. all have civil union or similar laws on the books.[168]

Such state quasi-marriage laws have not been consistent as to the means to dissolve a civil union, domestic partnership, etc., but the trend has been to apply the same rules that apply to married couples. For example, under Washington State's 2007 registered domestic partnership law, a member of a registered domestic partnership could exit that legal status by the simple expedient of filing a notice of termination and paying a filing fee.[169] However, in 2009, the Washington State legislature amended the law to make those in registered domestic partnerships subject to the same rules as married people:

> It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses. Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a state registered domestic partnership, or because the individual is or was, based on a state registered domestic partnership, related in a specified way to another individual. The provisions of [this act] shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.[170]

Oregon law places the same burden upon a party to a domestic partnership: that partnership will be treated like a marriage for purposes of dissolution:

> An individual who has filed a Declaration of Domestic Partnership may not file a new Declaration of Domestic Partnership or enter a marriage with someone other than the individual's registered partner unless a *411 judgment of dissolution or annulment of the most recent domestic partnership has been entered. This prohibition does not apply if the previous domestic partnership ended because one of the partners died.[171]

New Jersey follows the same pattern with its civil unions:

> The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage.[172]

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Index

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