

Minnesota's Cohabitation Statute

Mary L. Knoblauch*

I. Introduction

Family lifestyles, including marriage, have changed dramatically during the past few years. One significant change in lifestyles is the growing number of women and men cohabiting outside of marriage. The 1980 Census indicates that the number of unmarried, heterosexual couple households tripled between 1970 and 1980.¹ As a result of the increasing number of cohabiting couples, the legal rights and obligations of cohabitants² are under legislative consideration. State legislatures are now beginning to codify cohabitants' rights.

Four years ago, the Minnesota legislature enacted a statute that addressed cohabitants' rights to property acquired during a cohabiting couple's relationship. The Minnesota cohabitation statute bars unmarried cohabitants' claims for property upon separation unless a written contract exists between the two parties.³ This statute of frauds⁴ applies to indi-

* Ms. Knoblauch is a J.D. candidate at the University of Minnesota.

1. The number of unmarried, heterosexual couple households in 1980 had reached 1,560,000. In 1970, the number of such households was 523,000. U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports, Series P-20, No. 365, Marital Status and Living Arrangements 4 (1981).

2. This Argument uses the term "cohabitants" to describe two unrelated adults who share a common household. Although "cohabitants" includes all heterosexual and lesbian/gay couples, this Argument does not include the unique dynamics of lesbian/gay cohabitation, since the Minnesota cohabitation statute applies only to heterosexual couples. *See infra* note 3.

3. Minn. Stat. § 513.075 (1982) (originally enacted 1980) states:

If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if

(1) the contract is written and signed by the parties,

and

(2) enforcement is sought after termination of the relationship.

4. A "statute of frauds" is a legal term of art. It generally means that a legal action cannot be maintained on a certain kind of contract, in this case a cohabitation agreement, unless the contract is in writing and signed by the party against whom enforcement is sought. *See generally* John Calamari and Joseph Perillo, *The Law of Contracts* § 19-1, at 672-74 (2d ed. 1977).

viduals living together in "contemplation of sexual relations and out of wedlock."⁵ The statute denies Minnesota courts jurisdiction to hear any cohabitants' claims which are not based on a written contract, because such claims are "contrary to public policy."⁶ Oral or implied cohabitation agreements are unenforceable, and equitable remedies⁷ are unavailable, if the agreement is based on the relationship of two individuals living together in contemplation of sexual relations.

The Minnesota legislature enacted the cohabitation statute in response to the Minnesota Supreme Court's decision in *Carlson v. Olson*.⁸ Laura Carlson and Oral Olson lived together unmarried for twenty-one years.⁹ Publicly, they presented themselves as a married couple; together they raised a son to majority, and acquired a home and personal property. After the relationship ended, Laura Carlson brought an action to recover what she considered to be her half of their property accumulated during the twenty-one year relationship. Based on the finding that the parties had intended to divide their accumulated property equally, the trial court allowed the action and allotted a fifty percent interest in the property to each. The trial court also held that Laura Carlson's share of the property constituted an irrevocable gift from Oral Olson in consideration for the services she performed as a wife and mother during their relationship. The court in *Carlson* approved the lower court's use of equitable powers and remedies to enforce the reasonable expectations of the couple.¹⁰ The state legislature, in en-

5. Minn. Stat. § 513.076 (1982) states:

Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.

6. *Id.*

7. Equitable remedies are remedies derived from the court's notions of "justice" and "fairness." Equitable remedies extend beyond the remedies that the applicable law may provide. See generally Dan Dobbs, Handbook on the Law of Remedies §§ 2.1-2.2, at 24-34 (1973).

8. 256 N.W.2d 249 (Minn. 1977).

9. Minnesota does not recognize common law marriage.

10. The Minnesota Supreme Court relied heavily on *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), *rev'd on other grounds*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981). The California Supreme Court in *Marvin* held that the courts could enforce contracts between cohabitants unless the consideration for the contract was meretricious sexual services. The California court added that, in the absence of an express contract, the courts may look to a variety of other remedies in order to protect the parties' reasonable expecta-

acting the cohabitation statute, reversed the rule of the *Carlson* decision and limited the court's power to enforce cohabitation agreements to written agreements.¹¹

Minnesota's cohabitation statute contains two defects. First, the cohabitation statute is based upon invalid assumptions. As a result, the statute does not reflect the actual behavior and attitudes of cohabiting couples. Second, and more important, the cohabitation statute deters changes which would adjust or address the actual social inequities between female and male cohabitants.

II. The Cohabitation Statute is Based Upon Invalid Legislative Assumptions

Laws must reflect social reality to function effectively. The cohabitation statute completely fails to reflect the social situation of cohabitants. The legislature erroneously assumes that all cohabitants are alike. "Cohabitation," however, does not define a single kind of relationship. "Cohabitation" encompasses a continuum of relationships that range from relationships closely resembling traditional marriages to relationships free of financial and personal commitment. Actually, the stereotypes of cohabitants as young and of cohabitation as non-traditional are invalid. A significant percentage of cohabitants are over thirty years old.¹² Many more cohabiting relationships adopt traditional marriage forms in contrast to independent relationships.¹³ Cohabitants and married persons behave similarly with respect to their domestic division of labor, their pattern of decision-making and their adoption of roles.

The cohabitation statute does not allow the courts to consider any of these factors which together constitute the nature

tions. 122 Cal. 3d at 665, 134 Cal. Rptr. at 819, 557 P.2d at 110. These reasonable expectations are not expectations of marriage; rather, they are the expectations of the personal relationship at issue. Of course, the court determines both what is reasonable and what classifies as an expectation of the parties. This Argument uses the term "reasonable expectations" merely as a legal term of art.

The *Marvin* court suggested several possible remedies, such as implied contracts, partnerships, constructive and resulting trusts, joint ventures, and the doctrine of quantum meruit. *Id.*

11. Cohabitation Statute: Hearings on S.1295 Before the Minnesota Judiciary Committee (March 18, 1979) (statement of State Sen. Davies, sponsor of the bill) [hereinafter cited as *Hearings on S. 1295*].

12. Kersti Yllo, *Nonmarital Cohabitation: Beyond the College Campus*, 1 *Alternative Lifestyles* 37, 43 (1978).

13. Cees Straver, *Unmarried Couples: Different From Marriage?*, 4 *Alternative Lifestyles* 43, 73 (1981).

of a cohabiting relationship. As a result, the courts cannot distinguish between different cohabiting relationships. Yet differences between cohabiting couples demand different legal treatment. Pursuant to the cohabitation statute, the only factor courts can consider is whether a written contract exists between two cohabitants.

The Minnesota statute distinguishes cohabiting relationships solely on the basis of the existence or non-existence of written contracts. Again, the legislature makes an erroneous assumption. The legislature assumes cohabitants write contracts. Cohabitants do not, however, generally enter into a written contract. In one study, only two of seventy-five cohabiting couples had made legal arrangements to deal with their possible separation. Not unexpectedly, it is difficult, if not impossible, to find one formally executed contract between cohabitants in American case law.

Why don't cohabitants write contracts? Cohabitants are like other people. Few cohabitants recognize the need to draft agreements concerning the economic aspects of their personal relationships with other people. Cohabitants enter their relationship without thought of the legal or financial consequences of either marriage or non-marriage. Cohabitants believe that the law will provide a remedy, or that common law marriages are still legally recognized. Cohabitants procrastinate and never make a contract or get married. Cohabitants fear that consideration of economic matters would debase their relationship. Acknowledging these realities, the question becomes whether we should assume any cohabitants would write a contract to provide for the division of their accumulated property.

The Minnesota legislature, in making its assumption that cohabitants write contracts, did not even consider whether cohabitants actually enter into written cohabitation agreements. The legislature's primary concern was to encourage marriage and discourage cohabitation.¹⁴ Restricting cohabitants' access to the courts addresses this concern—those who do not participate in the state's institution of marriage have restricted access to the state's judicial institution. Such a restriction is consistent with the legislature's unstated interest in having people operate within, rather than outside, the control of the state.

14. *Hearings on S. 1295, supra* note 11. The cohabitation statute applies explicitly only to heterosexual couples. *See supra* note 3. The exclusion of same-sex couples from the statute either indicates that the legislature is unaware of same-sex cohabiting couples or further substantiates that the legislature sanctions only one form of intimate relationship—heterosexual marriage.

The Minnesota legislature's conclusion that cohabitants who agree on a division of their property should enter into a written contract is not only unrealistic, but also unjust. Since most cohabitants will not enter into a written contract, the law does not protect cohabitants, even though they are people whose relationships often give rise to property expectations. The legislature unjustly deprives some cohabitants of their legitimate property rights because the cohabitants had neither the prudence nor the legal or financial means to enter into a written contract.

Cohabitants are the only group subject to such contractual restrictions. Other non-cohabiting individuals can rely on the courts to enforce their property rights through oral contracts or to apply equitable contract remedies when necessary. The statute inequitably deprives two individuals of the same contractual privileges solely on the basis of the individuals' cohabiting status. Obviously, not all cohabiting relationships will include enforceable contractual agreements. The state, however, should neither punish those cohabitants who have reasonable expectations of property interest based on something other than a written contract nor ignore the equitable remedies that vindicate such expectations.

III. The Cohabitation Statute Fails to Address Gender Inequality

The Minnesota cohabitation statute deters changes in the unequal distribution of power between women and men. Although the cohabitation statute is expressed in gender-neutral terms, the impact of the statute inequitably favors men. The power structure in society prompts this result. Most men exercise most power in society. Power is "the ability to act effectively on persons or things, to take or secure favourable decisions which are not of right allocated to the individuals or their roles."¹⁵ The power structure manifests itself in the economic and political spheres of society. Economic power, the primary form of power, inheres in those who control the allocation of scarce goods and services. Political power often results from economic power. Political power also resides with those who control or influence group decision-making. Women hold very little economic or political power.¹⁶ Men dominate both

15. Peggy Sanday, *Female Power and Male Dominance* 114 (1981) (quoting Michael Smith, *Government in Zazzau* 18-19 (1960)).

16. Pervasive gender segregation in the labor force, gender-based pay differentials, higher female unemployment rates, and the feminization of poverty

spheres. Male dominance is the exclusion of women from the economic and political spheres, and thus from economic and political power.

Male dominance is a fundamental and universal feature of social life. The male-power structure perpetuates itself: women are powerless in the home and in the workplace, so they have less money, and because women have less money, they are powerless. Women's position in the male-dominated systems affects all female-male interactions, including cohabiting relationships.

Cohabitants, as all other individuals, are not insulated from the power structure of society. "Intimate relationships do not take place in a social or cultural vacuum."¹⁷ Although individuals may view themselves as separate from the controlling institutions, the very structures they oppose are often repeated within their "alternative" relationships.¹⁸ Many cohabitants do adopt traditional sex roles. The social pressure of the male-power structure inhibits women and men from changing their sex role attitudes. Following an established role is often easier than following a role which society does not support and which others view as deviant. Socialization and role-scripting serve to retain conventional behavior in apparent "alternative" relationships, such as cohabitation. In addition, the historical and continuing economic reality of women serves to limit women to traditional roles, even those women living in "alternative" relationships. When the cohabitation statute was enacted, the Minnesota legislature did not consider the social situation of cohabitants, and therefore ignored the gender inequities between cohabitants.

When analyzing a statute that affects women, legislators should ask: how does the law affect the imbalance between women's power and men's power? At best, the imbalance remains the same under the cohabitation statute. At worst, the imbalance is enhanced, since women's economic investments have little legal protection when there is not a written cohabitation contract. The male-power structure remains intact if the courts

demonstrate women's exclusion from the economic sphere. The disproportionate number of men in the federal, state and local legislatures, as well as in the judiciary, demonstrates the exclusion of women from the political sphere.

17. Laurel Richardson, *The Dynamics of Sex and Gender* 269 (1981).

18. The radical women involved in the 1960's civil rights and peace movements considered themselves separate from the controlling institutions. Yet these radical women were "cast into the traditional roles of serving men coffee, sex, food, and typed copy." *Id.* at 254. See also Sara Evans, *Personal Politics* (1979).

are unable to use their equitable powers to test the fairness of cohabitation agreements. Fairness means equal bargaining power. The societal imbalance of power between women and men conflicts with the equal bargaining concept underlying contract law. A system allowing freedom to negotiate and bargain works fairly only if the parties are in reasonably equivalent positions of power. Otherwise, private contracts reinforce power differences that already exist in a relationship. Women do not have equal negotiating power when entering into agreements with men. As a result, the likelihood of unconscionable or unfairly written contracts between cohabitants is great. The traditionally empowered man can use the contract to restrict property division. The cohabitation agreement thus maintains and reinforces the unequal status quo.

The inequities perpetuated by the cohabitation statute are even worse in a cohabiting relationship where there is no written agreement. The statute permits male cohabitants to retain a disproportionate share of the property obtained through the mutual efforts of the cohabiting parties due to male cohabitants' access to social, political and economic power. Often, cohabitants register property in the man's name.¹⁹ Without a written agreement, the man retains it. Similarly, more often than not, the woman rather than the man will leave a lower-paying job to care for the home and to raise children.²⁰ Even if the woman is in the labor force, she likely earns less money for the family unit. But the woman working in the labor force continues to do most of the unpaid housework and child care. The division of household labor does not change coincident with women's increasing labor force participation. Consequently, the female cohabitant's contributions to the cohabitants' accumulated property will be underestimated, particularly where there is no written agreement between the cohabiting couple. Thus, the cohabitation statute unduly benefits the male cohabitant and maintains, if not enhances, the power inequities between women and men.

Recognition of both cohabitation property rights and women's status need not conflict. Some feminists argue that co-

19. See, e.g., *In re Estate of Ericksen*, 337 N.W.2d 671 (Minn. 1983), discussed *infra* note 24.

20. Grace Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 U.C.L.A. L. Rev. 1125, 1133 (1981). See, e.g., *McCullon v. McCullon*, 410 N.Y.S.2d 226 (Erie Co. 1978) (at the beginning of the 28-year-long cohabiting relationship, the woman left her job as a nurse's aide in order to devote full time to housekeeping for the man).

habitation property rights beyond an express contract further undermine women's status.²¹ These feminists argue that cohabitation property rights allegedly facilitate the general expectation that women are dependents. Women's economic dependency, however, is not a mere expectation; it is a reality for most women. Women's economic dependency prohibits the full acceptance of women in economic and political spheres. Women must certainly attempt to break away from their economic dependency on male-systems. Nonrecognition of cohabitation property rights, however, will only preserve that dependence.

Women need more economic and political power to change their status. Legislators must, therefore, construct property division laws to remunerate a woman's contribution to the economic well-being of a family unit. Laws that compensate women for their traditional contributions, such as maintaining the home, do not enhance their dependency. Such laws would simply recognize and enforce women's economic rights to property earned through their labor. One way women will acquire power is by acquiring property. Recognition of cohabitation property rights would foster women's economic independence from male systems.

A typical response to the problems that cohabiting women face is: "Why don't women get married if they are dissatisfied with their legal position?" This attitude requires us to work within the male system to receive all the legal protection possible. Women should have their property interests legally protected whether they are married or not. Inequitable laws should not deprive women of their legitimate economic interests.

IV. Suggestions for Change

The legal treatment of cohabitation property rights must accommodate the actual behavior of cohabitants and recognize the balance of power within female-male cohabiting relationships. The Minnesota cohabitation statute fails to accomplish either of these objectives. It excludes recovery for a significant number of cohabitants who have legitimate property interests. The statute also does not acknowledge or address the unequal

21. See Ruth Deech, *The Case Against Legal Recognition of Cohabitation in Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* 300 (1980).

distribution of power that exists in most cohabiting relationships.

Legislators could develop a judicial standard or guideline that more equitably distinguishes between relationships where expectations of property interest arise and where no such expectations exist. Legislation could use the degree of interdependency between cohabitants as the distinguishing factor. The economic pattern of a cohabiting relationship, and therefore, the property expectations which arise out of that relationship, is linked with the social structure or interdependencies of the relationship. The legislature could develop a number of factors that attempt to measure this interdependency. The factors could include the age and sex of each cohabitant, the educational or employment background and opportunities of each cohabitant, and the length of the cohabiting relationship.

Legal standards developed by legislatures always contain one major limitation. Legislators cannot properly regulate that which they do not understand. Cohabitation is a diverse and complex social relationship. Each cohabiting relationship gives rise to different expectations and interdependencies. As a result, the legal treatment of cohabitation property rights should be left to the judicial branch for the time being. Courts can consider the circumstances of each unique cohabiting relationship. Courts can examine social and economic factors that create the relationship. Courts have the equitable powers to give effect to the rights and duties that the parties create themselves through oral or written agreement, or other relevant conduct.²²

The court's equitable powers should also extend beyond traditional contract remedies. Relationships are too complex for courts to view them in traditional contract terms. For example, the express contract, implied in fact contract, and resulting trust theories require that the parties manifest their intent to distribute property in a certain manner. Cohabitants rarely manifest their intent with the degree of specificity or in the manner generally required under traditional contract law. "Intent" refers to the objective intent of the parties as though cohabitants act with one mind. Parties to a personal relationship, however, unlike a contractual business or investment relationship, rarely have the same mutual intent. The courts should freely remedy an inequitable or unjust situation without the re-

22. See *supra* note 10 for traditional contract law remedies suggested in *Marvin v. Marvin*.

straints of traditional contract law. The courts have the power to deal with potential fraud and to curb possible abuse. If the courts develop cohabitation property rights on a factual case-by-case basis, eventually a pattern may develop that would allow the legislature to standardize cohabitation rights. If a standard is developed in the courts, cohabitants themselves will have a chance to define their own rights and obligations. The resulting standard would, more likely than the ill-founded Minnesota statute, reflect the actual lifestyle of cohabitants.

Judicial control over cohabitation property rights in itself will not change the male-power structure in society. But judicial control is currently the best way to recognize female cohabitants' contribution to a family unit. The courts, like the legislatures, are still a part of the male-power structure. Judges are freer than legislators, however, to change the inequities existing in the law, because judges' actions are not subject to the same type of political pressure. Legislators, because of their political positions in society, have a greater tendency to conform to the male-power structure which dominates governmental and electoral structures. The Minnesota cohabitation statute illustrates the legislature's tendency to conform. *Carlson v. Olson*²³ and the recent case *In re Estate of Ericksen*²⁴ demonstrate the courts' ability to use their equitable powers to remedy injustice. Until the imbalance of power between women and men is alleviated, the courts must exercise their equitable powers to acknowledge and redress the gender inequities that society perpetuates.

23. 256 N.W.2d 249 (Minn. 1977). See *supra* notes 8-11 and accompanying text.

24. 337 N.W.2d 671 (Minn. 1983). In *Ericksen*, the Minnesota Supreme Court substantially narrowed the potential scope of the cohabitation statute. The court held that the statute only applies where the sole consideration for a contract between cohabitants is their contemplation of sexual relations out of wedlock. 337 N.W.2d at 674. Thus, in *Ericksen*, the cohabitation statute did not apply to a female cohabitant's claim to one half of the home that she jointly purchased and maintained with the deceased male cohabitant, even though the cohabitants did not have a written agreement regarding the property and the title to the house was registered in the male cohabitant's name only. The Minnesota Supreme Court approved the probate court's creation of a constructive trust in favor of the female cohabitant consisting of a one half interest in the home.

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