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# The State of the Law of Protecting and Securing the Rights of Same-Sex Partners in Illinois Without Benefit of Statutory Rights Accorded Heterosexual Couples

*Richard A. Wilson\**

## I. INTRODUCTION

Legal recognition of and protection for the rights and interests of same-sex couples remains elusive—if not altogether nonexistent—in Illinois,<sup>1</sup> and not much more or less so nationally, despite recent changes in the law in many jurisdictions.<sup>2</sup> This is true as to the couple's *relationship*<sup>3</sup> as well as to their legal *claims*.<sup>4</sup>

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\* Richard A. Wilson received his JD from Loyola University Chicago, 1992; Post-graduate, School of the Art Institute of Chicago, 1985–1988; BA *cum laude*, Loyola University Chicago, 1982. The author wishes to acknowledge and thank his longtime companion, partner, significant other, spouse, Samuel Burckhardt, with whom he has enjoyed twenty-four years of mostly unrecognized marriage-like bliss, despite a legal, yet unrecognized marriage under Illinois law in Toronto in December 2003 and, with few exceptions, without incident and with acknowledgment if not recognition by family, friends and associates (and, frankly, without whom his law school education would likely not have occurred as and when it did). Mr. Wilson is principal in his own firm in Chicago, concentrating on litigation and appellate practice relating to domestic relations law and legal issues, with particular emphasis on same-sex issues, including domestic partnerships, parentage, custody and visitation, and related concerns and rights of persons in same-sex relationships. He is Chair of the National Lesbian and Gay Law Association (effective September 2006); an appointed member and Chair (June 2006) of the Illinois State Bar Association's Standing Committee on Sexual Orientation and Gender Identity; and immediate past-Chair of the Chicago Bar Association's Committee on the Legal Rights of Lesbians and Gay Men (2004–2005 and 2005–2006).

1. Specifically with respect to same-sex marriage with few exceptions; many states by statute or case law provide for lesser or alternative forms of recognition or protection of same-sex relationships, such as domestic partnerships or civil unions. *See infra* Part III.B (outlining the state of marriage laws in Illinois).

2. *See infra* Part III.A (describing marriage laws as they exist in other states and internationally).

3. That is, recognition and/or protection founded on the relationship itself and not the person or the interest alleged. This description includes recognition of such relationships when intact, and also remedies upon dissolution, such as actions for enforcement of agreements made between the parties and actions for enforcement of interests and rights alleged, whether to property, to children or to support.

4. Including discrete claims made, interests alleged, or benefits sought by the parties in such

These relationships are typically understood by constitution or formation as generally monogamous relationships of emotional and financial interdependence between two persons based upon a shared commitment whether proclaimed or not. In addition, they are without resort to and distinguished from the institution of marriage whether or not marriage is available. They are distinguished from marriage not by gender *per se* but by the inability to marry where the gender of the parties prevents it, or by the choice not to marry where the gender of the parties does not. Agreements or contracts formed by the individuals in such relationships are broadly referred to as either cohabitation or domestic partnership agreements.<sup>5</sup> Legal rights are implicated both in the pursuit of recognition for the relationship while intact—or for benefits based upon the status of the relationship—and also in the pursuit of rights and remedies by the parties against one another, or by third parties, upon dissolution.

Advising clients who are in same-sex domestic relationships is complicated by the lack of legal protections afforded such relationships, the legal barriers to enforcement of agreements between persons attendant upon such relationships,<sup>6</sup> and the increasing legal uncertainty brought about by the escalating political and legal conflicts surrounding same-sex marriage, civil unions, and domestic partnerships.<sup>7</sup> This includes the problem of recognition and increasing conflicts of recognition from one jurisdiction to another of various arrangements,<sup>8</sup>

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relationships, where the claim or interest may or may not be dependent upon or legally indistinguishable from the relationship or its consideration. In the alternative, although the claim may not be dependent upon the relationship, the relationship often is used as a bar to defeat it.

5. Typically these terms are gender-based. While cohabitation has historically been used to refer to two persons of the opposite sex who live together without marrying, the denomination of such relationships between two persons of the same sex was rarely discussed, as arrangements of this kind were not acknowledged or, at least, their existence was not a topic of discussion. With increasing consciousness of the existence of homosexual or same-sex relationships, the term “cohabitation” has been supplanted, or separately classified, by use of the term “domestic partnership.” Today, both terms are used to refer to the “unmarried” living arrangement of two persons and are usually denominated or qualified by the gender of the couple (opposite sex or same sex). Generally, where the gender of the parties is opposite, the relationship is called “cohabitation” and agreements formed by the parties attendant upon such relationships, “cohabitation agreements”; where the gender of the parties is the same, the relationship is generally referred to as a “domestic partnership” and agreements formed, “domestic partnership agreements.”

6. In certain jurisdictions, such barriers also exist for unmarried couples of the opposite sex who are capable of being married. *See infra* Part II (explaining that the difference between marriage and its alternatives is primarily one of status).

7. *See infra* Part III.A.1 and 2 (describing same-sex marriage and alternatives to marriage as they exist in the United States and abroad).

8. Including the lack of comparable legal protections, based upon the “right to marry” or the availability of marriage in a given jurisdiction, which is, or can be, a paramount distinction when

further complicated by the increasing number and variety of statutory schemes designed to recognize or protect—or both—the rights of persons in same-sex relationships, distinct from and as alternatives to marriage.<sup>9</sup>

This article will examine the rights and interests of persons in same-sex relationships of emotional and financial interdependence, particularly under and from the viewpoint of Illinois law. Additionally, it will address the greater problem of recognition of such relationships, the pursuit of rights or interests, and enforcement of remedies attendant upon their dissolution. The point of reference is from the practice of what remains essentially a state law concern.<sup>10</sup> This state law concern is marriage and its alternatives.<sup>11</sup> These alternatives require agreements.<sup>12</sup> For relationships where both persons are of the same sex, such agreements—a function of both contract law and the public policy of the state—were (and in most jurisdictions, including Illinois, remain) the only option given the unavailability of the legal right to marry.<sup>13</sup>

The point of departure for this discussion is marriage itself, given the legal sanction of the institution by the state. Despite the Illinois Supreme Court's decision in *Hewitt v. Hewitt*,<sup>14</sup> the rights and interests of unmarried couples under Illinois law are inseparable from a consideration of, as well as defined and measured in light of or in reference to, marriage—even where, for same-sex couples at least, marriage for the most part remains unavailable.<sup>15</sup>

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determining the rights of unmarried persons in such relationships, who are of opposite gender, and for whom such a right is not questioned. See *infra* Part II (discussing the problem of contract recognition without status recognition).

9. See *infra* Part III.A.2 (detailing alternatives to marriage in a variety of states and countries).

10. In the United States; excepting a) other jurisdictions relevant to and discussed in this article, where the marriage laws at discussion are either national (e.g., the Netherlands, Belgium, Spain, South Africa) or have been formally adopted nationally (e.g., Canada, 2005) in response to changes by provincial or state governments; and b) the provisions of the "Defense of Marriage Act" (DOMA), 29 U.S.C. § 1738 (2000); 1 U.S.C. § 7 (2000). See *infra* note 21 (describing DOMA provisions).

11. Included, of course, are the rights and remedies of persons in relationships who choose not to marry, or who form relationships of emotional and financial interdependence by choice or by happenstance, whether or not the right to marry is available to them, and irrespective of their gender. State law is implicated both as to the whole relationship and as to interests independent of it.

12. Including agreements the parties reach in an effort to define and secure their rights in the relationship vis-à-vis one another, and as an entity vis-à-vis society as a whole.

13. Although statistically very few same-sex couples enter into express contracts or written agreements.

14. 394 N.E.2d 1204 (Ill. 1979); see *infra* Part III.B.2 (analyzing *Hewitt* and considering its continuing impact).

15. The discussion necessarily presumes and will examine these rights as to two groups: those

What rights and remedies do persons of the same sex have in securing and in seeking redress upon the break-up or dissolution of their relationships, whether legally sanctioned as marriage, civil union, or domestic partnership, or unrecognized by the law; and what advice can practitioners give to their clients who seek legal protection of such rights and interests? The question is neither readily nor reliably answered. The reality of the changing and conflicting legal landscape for same-sex couples seeking recognition of their relationships is complicated by mobility—including both the historic (and constitutionally protected) mobility of Americans and the increasing residency here of foreign nationals for work—for extended periods of time during which property is acquired and relationships are formed (and often fail). The question is further complicated by the willingness of same-sex couples to travel elsewhere to obtain legally valid marriages in other jurisdictions, and return to their state of residence and demand recognition of, or seek redress based upon, the marriage upon dissolution.

The recent legalization of same-sex marriage for the first time by an American state<sup>16</sup>—Massachusetts, effective May 17, 2004<sup>17</sup>—has not changed things in Illinois, where no such legal remedy exists and where such marriages, wherever obtained, are not recognized. For relationships between persons of the opposite gender, things have not changed much either.

The conflicts and concerns for the practitioner advising clients in such relationships are many. Persons in such relationships typically lack rights based upon or rooted in the relationship between them, other than legal devices or claims found at law based upon ownership of

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who are unmarried either because they lack the right to marry or the right is not recognized in Illinois, and those for whom the right to marry exists, but who choose not to do so in any case. For the former group, generally same-sex couples, the lack of a right to marry precludes the question of choice. For the latter, the existence of the right presumes the right to choose to exercise it or not, and here the discussion will include or other issues which may arise in the quest for recognition of an unmarried relationship, or for pursuit of remedies when it fails, where the right to marry was available.

16. Following the Netherlands (2001); Belgium (2002); the Canadian provinces and territories of Ontario and British Columbia (2003), Quebec (2004), Yukon Territory (2004), Manitoba and Nova Scotia (2004), and nationally, throughout Canada, 2005; Spain (2005) and South Africa (December 1, 2005, to take effect within one year). Peter W. Hogg, *Canada: The Constitution and Same-Sex Marriage*, 4 INT'L J. CONST. L. 712 (2006); Amy K.R. Zaske, *Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws*, 32 WM. MITCHELL L. REV. 625, 641 (2006); Michael Wines, *Same-Sex Unions to Become Legal in South Africa*, N.Y. TIMES, Dec. 2, 2005, at A12.

17. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

property, parentage, etc., and independent of the status of the relationship, resulting in difficulties in attempts to secure benefits or interests otherwise available to married persons. Acquisition of property during the relationship creates no interests or estates vested or protected at law in the relationship; rather, such interests remain with the individual independently. Additionally, rights and relationships to children do not arise from the relationship—unlike in a marriage<sup>18</sup>—but are solely a function of parentage. Accordingly, persons in such relationships must, where parentage is not defined by a biological relationship to the child, secure such rights independently.<sup>19</sup>

Other problems arise particularly upon the dissolution of the relationship and the attendant division of property and interests between the parties. These include, for example, the sudden or unprecedented assertion of rights by an individual without regard to the historical reality of the relationship;<sup>20</sup> the incursion of tax liabilities for the transfer of assets between the parties, from which married persons are exempt; the lack of a right to spousal support; and the lack of legal protection of parentage rights otherwise available to married persons or arising from the marital relationship.

Finally, or increasingly, “last but not least,” there is the Defense of Marriage Act (DOMA).<sup>21</sup> Even if the relationship is recognized or perhaps even protected, the Federal “Defense of Marriage Act”<sup>22</sup> both

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18. Under the laws of most states, a child born to a marriage is presumed to be the child of each parent. V. Woerner, Annotation, *Presumption of Legitimacy, or of Paternity, of Child Conceived or Born Before Marriage*, 57 A.L.R. 2d 729 § 1(b) (1958).

19. Subject, perhaps, to equitable claims upon dissolution or for other reasons. See *infra* Part III.B.5 (explaining how parties can make claims independent of their relationship in the event of dissolution).

20. Denying or ignoring, for example, the fact that the parties to the relationship were of the same gender and using the legal disability of the other, and/or the social opprobrium surrounding the relationship, or both, as a sword, e.g., by asserting biological claims of parentage where the relationship was based upon other claims or asserting the illegality or prevailing social and legal disfavor of the relationship in an attempt to gain a legal advantage upon its dissolution.

21. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. 1738C (2000)), which, in its two constituent parts, on the one hand “permitted” states to refuse to recognize valid marriages between persons of the same-sex performed in other states, 28 U.S.C. 1738C (2000), and on the other created a federal definition of marriage for purposes of federal programs and interests, by declaring that “the word ‘marriage’ means only a legal union between one man and one 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,” 1 U.S.C. § 7 (2000).

22. The Act, widely believed to be unconstitutional, has never been tested on its merits, although for the first time a federal court has declared part of it constitutional in denying a joint bankruptcy petition of two women validly married in British Columbia. *In re Kandu*, 315 B.R. 123, 138 (Bankr. D. Wash. 2004). Its applicability to marriage laws is questionable in any case, given that the Full Faith and Credit Clause is concerned with judgments of the various states, and

prohibits the recognition of same-sex relationships under federal law, creating an integral conflict between federal jurisdiction (e.g., taxation, bankruptcy, social security rights)<sup>23</sup> and state jurisdiction governing domestic partnership (civil union or marital status), and “authorizes” the unprecedented and constitutionally questionable federal sanction for states to refuse to recognize valid marriages between persons of the same sex from other states.

## II. THE PROBLEM CONCEPTUALLY: STATUS VS. CONTRACT RECOGNITION AND RELATED ISSUES

The fundamental distinction between marriage and its alternatives<sup>24</sup> is status. Unlike marriage, nonmarriage-type relationships (including statutory schemes creating “civil unions” or “domestic partnerships”) lack fundamental protection for the *status* of the relationship itself. This lack of status requires the parties and the practitioner to seek protections for the rights and interests of the parties piecemeal, and often by contract. Further, a state’s “recognition” of an alternative to marriage by creation of a status of civil union or domestic partnership typically involves the creation of a body of law of rights and responsibilities wholly distinct from and not mirrored or otherwise found in the state’s marriage laws.

In reality, the rights and interests of same-sex persons in such relationships, lacking the legal protection of marriage, is governed by contract, with few exceptions.<sup>25</sup> The distinction is fundamental. Marriage is—at least throughout the United States and for the most part the rest of the world—a legally sanctioned status, not an expressly contractual relationship.<sup>26</sup> The status is itself fairly uniform from state to

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although a dissolution of marriage is a judgment, a marriage itself is not; and, second, the Act specifically makes reference to the “States” and not to foreign countries, whose marriage laws are in any case historically recognized in this country not by the Full Faith and Credit Clause, which applies to the states, but the Treaties Clause of the Constitution, and long held and established principles of comity.

23. Federal prohibitions to recognition of same-sex relationships are implicated, under federal law, where the claims or interests involve questions of federal law or jurisdiction (tax, bankruptcy, social security, self-insured benefits plans, and the like).

24. See *infra* Part III for a discussion of other forms or types of formalized relationships.

25. See *infra* Part III for a discussion of legislated alternatives such as civil unions and domestic partnerships.

26. The vows of “I do” and the attendant duties and responsibilities notwithstanding; while the proposal (“Will you marry me?”) and its response may fairly be said to constitute offer/acceptance, there is little evidence that parties to a marriage make any further negotiations or consult their state’s marriage laws to determine their rights and responsibilities. In fact, it is the ascendancy of ante- or pre-nuptial agreements that has brought contract law into the marriage arena—not the act of marrying—and despite the formal legal acceptance of such practice when

state, and since the late 1960s, marriages valid where celebrated have been, with few exceptions, recognized in other states.<sup>27</sup> There are three distinct and mostly uniform characteristics to the status at law: the rights and interests of the couple as a couple are derived from the status itself; the status lacks definition at law, upon formation; and the status is uniformly, with few exceptions, recognized.<sup>28</sup> Derived from the status as a social and legal construct, not a bargained-for, expressly enumerated transaction, the rights of married persons and the legal protections—the “benefits and burdens”—of marriage are neither inherently nor in fact a matter of contract. Neither are they set forth in any detail in a given state’s marriage statutes. Marriage laws from state to state and country to country typically contain neither contractual prerequisites nor any enumerated definition of status at law, upon formation—but instead set forth who may marry (requirements of residency, age, opposite gender in most jurisdictions, and unmarried status) and who may not (requirements of unmarried status and lack of certain prohibited relationships between the parties). It is in the dissolution provisions of such laws (or separately, where applicable), where the expectation of redress upon dissolution or divorce arises, and the rights and interests of the parties and the marital estate upon dissolution, are defined.

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certain conditions are adhered to they remain the exception, not the norm, for obvious reasons. *See, e.g.*, The Uniform Premarital Agreement Act, 750 ILL. COMP. STAT. 10 *et seq.* (2006), adopted in Illinois in 1990, PA 86-1028 (outlining to which rights and responsibilities parties to a premarital agreement may contract).

27. This has been increasingly true since 1967, when the U.S. Supreme Court, in *Loving v. Virginia*, 388 U.S. 1 (1967), barred state laws prohibiting marriage based upon racial difference. Thereafter, the recognition of marriages from state to state has been governed by the principle of “valid where celebrated.” Marriages valid where celebrated were recognized as valid in other states, even if the state had a specific prohibition against the marriage (e.g., between cousins). The few exceptions were where residents went elsewhere to obtain marriages prohibited within their state, or on the basis of specific public-policy provisions in the state’s law. Additionally, although not the subject of this article, the trend toward uniform recognition of marriages valid where celebrated since *Loving* has been wholly compromised in reaction to the legalization of same-sex marriage, resulting in exceptions to the doctrine embodied in numerous efforts to amend state and federal law—both statutory and constitutional—permitting exception to such recognition where it involves marriages obtained by persons of the same sex.

28. The exceptions typically involve formation issues (i.e., who may marry), and a given state’s prohibitions to marriage of its own citizens under certain circumstances, and recognition of certain marriages performed elsewhere under the same, or other, defined criteria. *See, e.g.*, 750 ILL. COMP. STAT. 5/212(a)(5) (“The following marriages are prohibited [. . .] (5) a marriage between two persons of the same sex.”).

By contrast, lacking any status at law,<sup>29</sup> the normalization or protection of relationships of emotional and financial interdependence outside of marriage is primarily accomplished by contract. Accordingly, the rights and interests are first a function of contract law, second a question of recognition on other grounds even if valid under contract law, and third, a matter of detail, as rights, interests, scope, and coverage differ from one couple to the next—none of which is a prerequisite to a valid recognized marriage from which, alone, all else typically flows. The legal rights of domestic partners in order to be secured by legal means, are a function of the laws of offer, acceptance, and consideration,<sup>30</sup> which results, by definition, in myriad arrangements and at least as many legal questions, and, inevitably, the lack of uniformity of recognition from state to state that is inherent in the status of marriage.

### III. THE LANDSCAPE

#### A. *The Rest of the World, Including Illinois*

A bit of foundation is in order. Marriage and its alternatives can be organized according to the type of arrangement made available by law either irrespective of, or by definition with reference to, the gender of the parties. Most state marriage laws now make reference to the gender of the parties.<sup>31</sup> Same-sex marriage laws are accomplished either by removal of the gender restrictions in the law, or the express restriction of marriage to persons of the same sex by separate statute or otherwise. The availability of alternatives such as civil unions, domestic

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29. Notwithstanding the formal statewide legal sanction, as a matter of state law, of “Reciprocal Beneficiaries” (Hawaii, 1997); domestic partnerships (New Jersey, 2004; Maine, 2004; and California, 1999); and “civil unions” (Vermont, 1998; Connecticut, 2005). See *infra* notes 41–46 and accompanying text.

30. Yet few same-sex relationships typically seek legal protection and, by contrast, anecdotal evidence consistently demonstrates that those same-sex couples who seek to marry typically do so without reference to contractual bargains or express agreements, but instead by reference to and in pursuit of the same paramount right and benefit of marriage: the status itself and its simple and historical place in the realm of social construct *per se*.

31. Many states amended their marriage laws to include gender-based distinctions where they had not existed before, in reaction to the decision of the Hawaii Supreme Court in 1993, in *Baehr v. Lewin*, 852 P.2d 44 (1993) (plurality), which, in response to suit by same-sex couples for the right to marry, declared marriage to be a fundamental right and remanded the case for determination of whether the state could prove a compelling state interest in prohibiting same-sex marriage. *Id.* at 55, 67–68. The response to the decision in *Baehr* saw the passage of the “Defense of Marriage Act” [DOMA], see *supra* notes 21–22, and a concurrent wave of amendments of state marriage laws both to require marriage to be between persons of the opposite sex, where such requirements had not existed, and to permit the state to refuse to recognize such marriages from other states in response to and reliance on DOMA.

partnerships, or other status types, may or may not be gender-specific. Finally, there is common-law marriage, which in certain states could be a basis for a claim by a couple of the same gender.

### 1. Marriage

Approximately thirty-nine states have statutory bars to same-sex marriage, require a valid marriage to be between two persons of opposite gender, or both.<sup>32</sup> In 2004, thirteen states passed state constitutional amendments forbidding marriage between persons of the same sex or requiring marriage to be between two persons of opposite gender, or both, primarily based upon political moves motivated by a belief that state statutory prohibitions are not sufficient.<sup>33</sup> Many states, including Illinois, list same-sex marriages among “prohibited” marriages for purposes of recognition,<sup>34</sup> including marriages valid where obtained. Further, many states, including Illinois, have statutory prohibitions precluding recognition of or declaring void, or both, marriages obtained elsewhere by residents of the state, which could not be obtained in the state.<sup>35</sup> As of May 2006, same-sex marriage had

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32. Illinois law requires a) parties to a marriage be of opposite gender, 750 ILL. COMP. STAT. 5/201 (2004); b) that the license issue upon, *inter alia*, the “satisfactory proof that the marriage is not prohibited” 750 ILL. COMP. STAT. 5/203(2) (2004); c) that the marriage is not prohibited, 750 ILL. COMP. STAT. 5/212(a)(5) (2004) (“The following marriages are prohibited [. . .] (5) a marriage between 2 individuals of the same sex.”); and d) that the marriage be deemed valid where it is not violative of public policy, 750 ILL. COMP. STAT. 5/213 (2004). Note that the public policy of the state forbids same-sex marriage: “A marriage between 2 individuals of the same sex is contrary to the public policy of this State.” 750 ILL. COMP. STAT. 5/213.1 (2004). In addition, the statute declares void marriages by state residents obtained elsewhere if not permitted under Illinois law. 750 ILL. COMP. STAT. 5/216 (2004).

33. Since the November 2004 national elections, three states have passed such state constitutional amendments: Kansas (April 2005); Texas (November 2005) and Alabama (June 2006). There are six states with such proposed state constitutional bans on upcoming ballots: Idaho, Tennessee, South Carolina, South Dakota, Virginia, and Wisconsin (all in November 2006). Human Rights Campaign, <http://www.hrc.org>. (follow hyperlink “Your Community”) (last visited Nov. 10, 2006). Illinois has not placed such a measure on the ballot here, despite repeated attempts by certain groups to do so, most recently in the form of a proposed “advisory referendum” that proposed that “to secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man and a woman is the only legal union that shall be valid or recognized in this State.” *Protect Marriage Illinois v. Orr*, 463 F.3d 604, 605 (7th Cir. 2006).

34. *See, e.g.*, 750 ILL. COMP. STAT. 5/212(a)(5) (2004) (prohibiting marriages between “2 individuals of the same sex”).

35. Marriages obtained by Illinois residents in another jurisdiction, which are prohibited under Illinois law, are void in Illinois. 750 ILL. COMP. STAT. 5/216 (2004). *See, e.g.*, *Lynch v. Bowen*, 681 F. Supp. 506, 512 (N.D. Ill. 1988) (refusing to recognize common law marriage alleged to have been established outside of Illinois). The statute also holds as void marriages by nonresidents who may come to Illinois to obtain a marriage they could not obtain in their own jurisdiction. 750 ILL. COMP. STAT. 5/217 (2004).

been legalized in the following jurisdictions: the state of Massachusetts, 2004 (the jurisdiction in the United States);<sup>36</sup> the Netherlands, 2001;<sup>37</sup> Belgium, 2003;<sup>38</sup> Canada, 2003–2005;<sup>39</sup> Spain, 2005;<sup>40</sup> and South Africa, 2005.<sup>41</sup>

## 2. Civil Unions, Domestic Partnerships, and Other Alternatives

In the United States, seven states have enacted statewide legal protections for same-sex couples analogous to marriage in the last ten years: Hawaii, ‘reciprocal benefits,’ 1997;<sup>42</sup> Vermont, civil unions, 1998;<sup>43</sup> California, domestic partnerships, 2000, 2002, and 2005;<sup>44</sup> New

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36. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565, 571–72 (Mass. 2004). Other jurisdictions on the county or municipal level followed suit, but all of these statutes have been invalidated by the courts: San Francisco, California, February–March, 2004 (*Lockyer v. City and County of S.F.*, 95 P.3d 459, 499 (Cal. 2004)); New Paltz, New York, 2004 (*Hernandez v. Robles*, 7 N.Y.3d 338, 366 (2006)); Multnomah County, Oregon, 2004 (legality initially not resolved, decision made questionable given passage of state constitutional amendment barring recognition of same-sex marriages in November of 2004; ultimately rejected by Oregon Supreme Court, *Li v. Oregon*, 110 P.3d 91 (2005)); Sandoval County, New Mexico, 2004 (case pending—the Sandoval County District Court granted a temporary restraining order on Mar. 23, 2004, preventing the issuance of same-sex marriage licenses [State v. Dunlop, d-1329-CV-200400292, case history available at <http://www.nmcourts.com/caselookup>], mandamus to lift the injunction was denied by the New Mexico Supreme Court. [Dunlop v. Madrid, No. 28,730, Order available at <http://domawatch.org/stateissues/newmexico/index.html>]).

37. The Netherlands has certain residency requirements. One party must either have Dutch nationality or reside in the Netherlands. Linda Silberman, *Same Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2202 (2005). See also The Dutch Ministry of Justice, Same-Sex Marriage, [http://english.justitie.nl/images/Same-sex%20marriages\\_tcm35-14198.pdf](http://english.justitie.nl/images/Same-sex%20marriages_tcm35-14198.pdf) (last visited Nov. 9, 2006) (stating the conditions and consequences of same-sex marriage as well as the rights and obligations upon divorce).

38. One party must have lived in Belgium for a minimum of three months. HUMAN RIGHTS WATCH, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 153 (2006), <http://hrw.org/reports/2006/us0506/10.htm>.

39. No residency requirements to marry; one year residency requirement to obtain a dissolution; effective 2003 (Ont., B.C.); 2004 (Que., N.S., Man., Yukon, Sask.) and 2005, nationally, Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698; Equal Marriage for Same-Sex Couples, <http://www.samesexmarriage.ca/equality/incanada.html> (last visited Nov. 11, 2006) (summarizing provincial timelines); Gay & Lesbian Advocates & Defenders [GLAD], [http://glad.org/marriage/canadianmarriage\\_faq.shtml](http://glad.org/marriage/canadianmarriage_faq.shtml) (last visited Nov. 11, 2006) (stating requirements for marriage and divorce).

40. Proyecto de Ley, Por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (B.O.E. 2005, 121/000018).

41. *Minister of Home Affairs & Others v. Fourie & Others* 2005 (60) SA 1 (CC) at 101–02 (S. Afr.) (Decided on December 1, 2005, to take effect within one year.).

42. See Hawaii State Department of Health, <http://www.hawaii.gov/health/vital-records/vital-records/reciprocal/index.html> (last visited Nov. 11, 2006) (explaining Reciprocal Beneficiary relationship requirements, including the two individuals must be unmarried and must be prohibited by state law from marrying one another, which, if satisfied, will entitle the two individuals to certain rights and benefits that are presently available only to married couples).

43. The law was passed by the Vermont Legislature in response to the Vermont Supreme

Jersey, domestic partnerships, 2004;<sup>45</sup> Maine, domestic partnerships, 2004;<sup>46</sup> and Connecticut, civil unions, 2005.<sup>47</sup> Additionally, domestic partnership registries are common, mostly on the municipal or countywide level in many places in the United States. These registries are distinct from the statewide domestic partnership or civil union laws, as they typically confer no legal status on the relationship or limit such status to the jurisdiction.

Further, marriage-like legal protections have been enacted nationally by a number of countries since 1989, when Denmark became the first to recognize same-sex couples by passage of a “registered partnership”

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Court’s mandate in *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that the Vermont Constitution entitles same-sex couples to the same protections and benefits under Vermont law as married opposite-sex couples). Civil unions granted under Vermont law are neither expressly recognized nor expressly prohibited by any state in the nation. By definition, they apply only to unions residing in Vermont, although they have no residency requirement for issuance, and they have been obtained by persons from other states. Obtaining dissolution of them outside of Vermont has proved daunting. *See, e.g.*, *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (affirming trial court’s dismissal of an action to dissolve a same-sex Vermont civil union for lack of subject matter jurisdiction), *cert. granted in part*, 806 A.2d 1066 (Conn. 2002), *appeal dismissed as moot* (Dec. 31, 2002); Associated Press, *Houston Judge Dismisses Gay Divorce Case*, Apr. 2, 2003. *But see* *Alons v. Iowa Dist. Ct. for Woodbury County*, 698 N.W.2d 858 (Iowa 2005) (holding petitioners did not have standing to challenge the district court’s amended decree granting termination of a Vermont civil union through exercise of general equitable subject matter jurisdiction under Iowa law to dissolve a marriage); Alan J. Jacobs et al., *The First Lesbian Divorce?*, LESBIAN/GAY LAW NOTES, <http://www.qrd.org/qrd/usa/legal/1gln/2003/05.03> (Arthur S. Leonard ed., May 2003) (citing *In re the Marriage of Misty Gorman and Sherry Gump*, No. 02-D-292 (W. Va. Fam. Ct., Marion County Jan. 3, 2003)).

44. CAL. FAM. CODE § 297 *et seq.* (West 2004 & Supp. 2006) (effective January 1, 2005). The law confers most benefits and burdens of marriage, including vesting of community property rights, presumptions of parentage, duties of spousal support, benefits and burdens of the dissolution statute. *See* CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2006). State residency is not required for registration of a domestic partnership—it can even be done by mail—but it is required for dissolution. The law is retroactive in most applications for those who registered as domestic partnerships under 1/1/2000 or 1/1/2003 prior domestic partnership statutes (Stats1999, c. 588 (A B 26), *as amended* Stats2001, c. 893 (A B 25), Stats2003, c. 421 (A B 205), operative Jan. 1, 2005). Community property will be deemed to have vested in the partnership (community) as of the date of registration, even if such registration occurred prior to the effective date of the later, comprehensive statute. CAL. FAM. CODE § 297.5(m)(1)–(2) (West Supp. 2006).

45. Same-sex couples; also available to opposite sex, unmarried couples where each is over the age of 62. N.J. STAT. ANN. § 26:8A-4(b)(5) (West Supp. 2006). The law provides for no parental rights; inheritance rights; or rights to spousal support. Parties may file a joint state tax return. New Jersey Division of Taxation, *The Domestic Partnership Act: New Jersey Income Tax/Inheritance Tax*, Feb. 18, 2004, <http://www.state.nj.us/treasury/taxation/index.html?dompartact.htm~mainFrame> (last visited Nov. 11, 2006).

46. An Act to Promote the Financial Security of Maine’s Families and Children, 2004 Me. Acts 1579. The Act confers few rights, mostly of status.

47. An Act Concerning Civil Unions, 2005 Conn. Acts 05-10 (residency required; grants all the same rights and responsibilities as spouses under state law). Connecticut’s civil union law is perhaps the most comprehensive of the seven cited here, equal to, if not surpassing, California’s.

law, followed by Norway (1993); Sweden (1994); Iceland (1996); France (“Pact Civile,” 1999);<sup>48</sup> Germany (Lebenspartnerschaft, 2001); Finland (2002); the United Kingdom (Civil Partnership, 2004); and Switzerland (2004, 2005).<sup>49</sup> Other countries that have extended such protections include Israel, New Zealand, Hungary, Portugal, and Croatia.

### 3. Cohabitation and Common-Law Marriage

Cohabitation is no longer illegal in most jurisdictions in the United States. Common-law marriages are legal in nearly one-third of the states, with certain exceptions.<sup>50</sup> Illinois abolished common-law marriage in 1905.<sup>51</sup> The claim of common-law marriage rights or interests by or between persons in same-sex relationships in Illinois is merely anecdotal. There are no reported cases that rested on the assertion of such claims, although they may have been raised either by the parties or the court as secondary, alternative, or ancillary claims.<sup>52</sup>

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48. Law No. 99-944 of Nov. 15, 1999, Journal Officiel de la République Française [J O] [Official Gazette of France], Nov. 16, 1999, pp. 16959–61 (“Pacte Civil de Solidarité” [“Civil Society Pacts”]) available at <http://legifrance.gouv.fr/texteconsolide/AREBT.htm>.

49. Switzerland approved civil unions by a three-fourths majority of Parliament in 2004, after which opponents put the measure to a referendum. In June 2005, Switzerland became the first country to approve civil unions by referendum, with over 58% voting in favor of the law. Wikipedia, Civil Unions in Switzerland, [http://en.wikipedia.org/wiki/Civil\\_unions\\_in\\_Switzerland](http://en.wikipedia.org/wiki/Civil_unions_in_Switzerland) (last visited Nov. 11, 2006).

50. Alabama, Colorado, Georgia (if created before January 1, 1997), Idaho (if created before January 1, 1996), Iowa, Kansas, Montana, New Hampshire (only for inheritance purposes), Ohio (if created before January 1, 1991); Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia. *Which States Recognize Common Law Marriage?* [www.nolo.com/resource.cfm/catID/697DBAFE-20FF-467A-9E9395985EE7E825/118/304/192](http://www.nolo.com/resource.cfm/catID/697DBAFE-20FF-467A-9E9395985EE7E825/118/304/192) (then follow “Common Law marriage FAQ” hyperlink) (last visited Nov. 11, 2006).

51. 750 ILL. COMP. STAT. 5/214 (2004) (“Common law marriages contracted in this State after June 30, 1905 are invalid.”). Illinois will recognize a common-law marriage from another state where the parties reside in another state that recognizes common-law marriage, and then move to Illinois. *In re Mosher*, 612 N.E.2d 838, 840 (Ill. App. Ct. 3d Dist. 1993). “Where the parties are domiciled in another State at the time of contracting a common law marriage, valid in such State, such marriage will be considered valid here upon their removal to Illinois.” *Allen v. Storer*, 600 N.E.2d 1263, 1266 (Ill. App. Ct. 4th Dist. 1992).

52. See, e.g., *In re Estate of Andrea Hall*, 707 N.E.2d 201 (Ill. App. Ct. 1st Dist. 1998) (rejecting claim of same-sex partner of intestate descendant for recognition of common-law marriage with decedent). See *infra* Part III.B.4.

*B. Illinois and Its Peculiarities*

## 1. No Same-Sex Marriage, No Recognition of Same-Sex Relationships

In Illinois, the twin prohibitions against same-sex marriage on the one hand,<sup>53</sup> and against recognition or enforcement of agreements between unmarried persons where the consideration for the agreement includes ‘sexual relations’<sup>54</sup> on the other, leaves same-sex couples without protection, without recognition, and without recourse for rights and interests arising out of the relationship. No recognition of same-sex marriage rights or interests exists under Illinois law, irrespective of where the marriage was performed, or the residence or domicile of the parties to the marriage.<sup>55</sup> Neither are there any legally sanctioned alternatives to marriage under Illinois law, whatever the gender of the parties to the marriage. There is no parallel provision of law for unmarried couples analogous to the institution of marriage granted and governed by statute, including the additional rights and interests in each of the parties, arising from the marital relationship and vested in the marital estate, independent of contract or title.<sup>56</sup> There is no statutory provision in Illinois law barring—or indeed, governing—agreements between two persons, which would apply to the rights of unmarried couples. Likewise, Illinois has no provisions in statutory law, and there is no reported case law, *requiring* that the rights of unmarried persons to a relationship be secured by a contract, or that such a contract, if entered into, be in writing<sup>57</sup> or, similarly, barring the rights of two such persons to contract. Absent statutory provision for the relationship as a whole (such as marriage), the courts are left to define such rights and

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53. *See supra* note 32 (outlining Illinois law requiring parties to be of opposite gender to be married).

54. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207–08 (Ill. 1979) (finding private contracts based upon consideration that includes sexual relations unenforceable under Illinois law).

55. *See supra* note 32 (describing law mandating that individuals may not be married in Illinois unless they are of the opposite sex).

56. In Illinois, forming and dissolving relationships between two persons who are emotionally and financially interdependent is governed either by the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILL. COMP. STAT. 5/101 *et seq.* (2004) where marriage is available or, where it is not, by private contract. There is no other statutory provision for forming unions between two persons in Illinois, excepting various provisions of the Illinois Business Corporations Act of 1983 (IBCA), 805 ILL. COMP. STAT. 5 *et seq.* (2004), and particularly, the Uniform Partnership Act, adopted at 805 ILL. COMP. STAT. 205 *et seq.* (2004). However, while such laws could arguably provide some relief to unmarried persons, the nature of the relationship (business partnerships) is presumably fundamentally different than a relationship of emotional and financial interdependence and, therefore, they are not part of this discussion.

57. By contrast, under the Illinois Frauds Act, contracts incident upon a marriage must be in writing to be enforceable. 740 ILL. COMP. STAT. 80/1 (2004).

remedies: in terms of contract law if a governing agreement exists, or, where express agreements are either absent or unenforceable, in terms of equitable remedies, if at all.<sup>58</sup>

Lacking same-sex marital status, the rights and interests of same-sex couples in Illinois are no different than those of opposite-sex partners in similar relationships, who similarly lack formal legal protection for their unmarried status. But while unmarried couples in Illinois are free to contract with each other and to enter into agreements defining their rights, interests, and intentions as to their relationship and division of their property, as well as their rights and interests upon its dissolution,<sup>59</sup> the freedom to do so is eclipsed by the lack of recognition and absence of remedies at law, and threatened (if not rendered less than reliable) by the refusal of Illinois courts to recognize, enforce, or redress relationship agreements or contracts between or claims brought by unmarried partners, irrespective of the couple's gender. "[T]he State's dichotomous policy on cohabitation . . . is to respect 'purely private relationships' without debasing 'public morality.' . . . Our State's public policy disfavors private contractual alternatives to marriage."<sup>60</sup>

## 2. *Hewitt v. Hewitt*<sup>61</sup>

In a case that continues to resound in courts across the country,<sup>62</sup> and in response to a claim for enforcement of an agreement between two unmarried persons of the opposite sex in a state which did not recognize common-law marriage,<sup>63</sup> the Illinois Supreme Court held in 1979 that

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58. See, e.g., *Spafford v. Coats*, 455 N.E.2d 241 (Ill. App. Ct. 2d Dist. 1983) (holding that "where claims do not arise from a relationship between parties and are not rights closely resembling those arising from conventional marriages," public policy does not bar judicial recognition of mutual property rights between knowingly unmarried cohabitants).

59. See *supra* Part II (discussing distinction between marriage and contract relationships).

60. *Mister v. A.R.K. P'ship*, 553 N.E.2d 1152, 1158 (Ill. App. Ct. 2d Dist. 1990) (internal citations omitted) (citing *Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1979)); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979) (holding private contracts based upon consideration that includes sexual relations unenforceable under Illinois law).

61. 394 N.E.2d 1204 (Ill. 1979).

62. Most states cite *Hewitt*, although few rely on it and most decline to follow it. *Hewitt* was decided three years after the 1976 decision of the California Supreme Court, *Marvin v. Marvin*, 557 P.2d 106 (1976), which held that even in the absence of express agreements, equitable remedies could be invoked to grant redress to unmarried parties in such relationships and that parties to such relationships could enter into express contracts providing for the rights and interests attendant upon their relationship. *Id.* at 22. It is generally agreed that *Hewitt* in no small measure was decided in light of, and perhaps in response to, *Marvin*. To date, the two cases arguably form opposite ends of a continuum in the law of rights and remedies to unmarried, cohabiting persons among the fifty states; nearly all reported cases from other jurisdictions since 1979 fall somewhere in between, and most cite, as persuasive authority, one or the other.

63. See *supra* note 51 (noting that Illinois abolished common-law marriage in 1905).

contracts between unmarried persons could (presumably) only be valid and enforceable where the agreement is valid according to the law of contracts, *and* where the consideration does *not include* sexual relations.<sup>64</sup> Without exception, the decision of the Illinois Supreme Court in *Hewitt*, proclaiming the state's professed public policy "disfavor[ing] private contractual alternatives to marriage,"<sup>65</sup> continues to hold unperturbed and generally unchallenged sway in Illinois, barring both the legal recognition of such relationships as well as actions for enforcement of rights or interests arising from them. Illinois law on the subject of the rights and interests of unmarried cohabiting persons continues to be defined by this clear and unequivocal decision of the Illinois Supreme Court issued twenty-seven years ago, at a time when cohabitation was still defined as a criminal element of fornication under Illinois law,<sup>66</sup> and the then-recent decision of the California Supreme Court in the so-called palimony case of *Marvin v. Marvin*<sup>67</sup> was looming large and was, apparently, of some moment to the court.

### 3. Discussion: *Hewitt*

Victoria and Robert Hewitt lived from 1960 to 1975 "in an unmarried family-like relationship to which three children were born"<sup>68</sup> for which Victoria relied on Robert's "promise [to] 'share his life, his future, his earnings and his property' with her and all of [his] property resulted from the parties' joint endeavors."<sup>69</sup> The plaintiff, Victoria Hewitt,

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64. *Hewitt*, 394 N.E.2d at 1209. And presumably without regard to either marital status or gender. See *infra* Part III.B.4 (discussing the rights of unmarried persons in Illinois, post-*Hewitt*).

65. *Hewitt*, 394 N.E.2d at 1210.

66. See *infra* note 75 (noting that "open and notorious" cohabitation was an element of fornication until the statute was amended in 1990).

67. 557 P.2d 106 (Cal. 1976). *Marvin* issued in 1976, a year before the enactment of the new Illinois Marriage and Dissolution of Marriage Act (IMDMA), codified at 750 ILL. COMP. STAT. 5/101 *et seq.* (2004).

68. *Hewitt*, 394 N.E.2d at 1205.

69. *Id.* The court recited the facts as follows:

The factual background alleged or testified to is that in June 1960, when she and defendant were students at Grinnell College in Iowa, plaintiff became pregnant; that defendant thereafter told her that they were husband and wife and would live as such, no formal ceremony being necessary, and that he would "share his life, his future, his earnings and his property" with her; that the parties immediately announced to their respective parents that they were married and thereafter held themselves out as husband and wife; that in reliance on defendant's promises she devoted her efforts to his professional education and his establishment in the practice of pedodontia, obtaining financial assistance from her parents for this purpose; that she assisted defendant in his career with her own special skills and although she was given payroll checks for these services she placed them in a common fund; that defendant, who was without funds at the time of the marriage, as a result of her efforts now earns over \$80,000 a year and has accumulated large amounts of property, owned either jointly

initially brought an action for divorce, which was dismissed (in part) on a motion to dismiss for want of a valid marriage; the trial court directed the petitioner to amend her complaint accordingly.<sup>70</sup> Victoria filed an amended complaint, seeking an “equal share of the profits and properties accumulated by the parties” during the period they lived together as husband and wife.<sup>71</sup> The amended complaint was “also dismissed, the trial court finding that Illinois law and public policy require such claims to be based on a valid marriage.”<sup>72</sup> The Supreme Court agreed with the trial court’s findings, reversing the Illinois Appellate Court and clearly and unequivocally rejecting all of Victoria Hewitt’s claims.<sup>73</sup>

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with her or separately; that she has given him every assistance a wife and mother could give, including social activities designed to enhance his social and professional reputation.

*Id.*

70. *Id.* (explaining that since paternity had been admitted, a portion of the cause of action would survive).

71. *Id.*

Plaintiff . . . alleg[ed] the following bases for her claim: (1) that because defendant promised he would “share his life, his future, his earnings and his property” with her and all of defendant’s property resulted from the parties’ joint endeavors, plaintiff is entitled in equity to a one-half share; (2) that the conduct of the parties evinced an implied contract entitling plaintiff to one-half the property accumulated during their “family relationship”; (3) that because defendant fraudulently assured plaintiff she was his wife in order to secure her services, although he knew they were not legally married, defendant’s property should be impressed with a trust for plaintiff’s benefit; (4) that because plaintiff has relied to her detriment on defendant’s promises and devoted her entire life to him, defendant has been unjustly enriched.

*Id.*

72. *Id.* at 1206.

The appellate court reversed, stating that because the parties had outwardly lived a conventional married life, plaintiff’s conduct had not “so affronted public policy that she should be denied any and all relief” and that plaintiff’s complaint stated a cause of action on an express oral contract. We granted leave to appeal. Defendant apparently does not contest his obligation to support the children, and that question is not before us.

The appellate court, in reversing, gave considerable weight to the fact that the parties had held themselves out as husband and wife for over 15 years. The court noted that they had lived “a most conventional, respectable and ordinary family life” that did not openly flout accepted standards, the “single flaw” being the lack of a valid marriage. Indeed the appellate court went so far as to say that the parties had “lived within the legitimate boundaries of a marriage and family relationship of a most conventional sort” an assertion which that court cannot have intended to be taken literally. Noting that the Illinois Marriage and Dissolution of Marriage Act does not prohibit nonmarital cohabitation and that the Criminal Code of 1961 makes fornication an offense only if the behavior is open and notorious, the appellate court concluded that plaintiff should not be denied relief on public policy grounds.

*Id.* (internal citations omitted).

73. *Id.* at 1211.

*Hewitt* stands for the proposition that private contracts based upon consideration that includes sexual relations are unenforceable under Illinois law.<sup>74</sup> Driven by state public policy questions as to morality,<sup>75</sup> and specifically (at least in this instance) as to its interest in promoting the institution of marriage, the decision embraced and repeatedly underscored policy concerns about the availability of marriage to the parties.<sup>76</sup> Reversing the appellate court, the Illinois Supreme Court rejected all claims advanced by Victoria Hewitt, and declared that the state's Marriage Act "gives the State a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will."<sup>77</sup> Considering the claims of both parties as those of unmarried, heterosexual individuals to whom the institution of marriage was readily available but common-law marriage was not, and as the lack of any viable alternative to cohabitation was not at issue,<sup>78</sup> the court questioned "whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State."<sup>79</sup> In a clear and strongly worded decision which overturned the appellate court and denied the "wife" all relief sought, the court concluded it was not.<sup>80</sup>

Although the holding in *Hewitt*<sup>81</sup> is in fact cognizant of the gender of the parties and the availability of marriage to them, it depends upon neither. Instead, the holding was based primarily on the court's consideration of claims to enforce an express contract outside of

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74. *Id.* at 1208. By contrast, *Marvin* found such arrangements unenforceable only where the sexual component of the relationship is an "inseparable part of the consideration for the agreement." *Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976).

75. At the time of the *Hewitt* decision, "open and notorious" cohabitation was an element of the crime of fornication under Illinois law. 720 ILL. COMP. STAT. 5/11-8 (2004). The statute was amended Jan. 1, 1990, by removal of "cohabitation" from the definition of fornication. See *infra* Section III.B.4 (discussing the Illinois Supreme Court's decision in *Jarrett v. Jarrett*, 400 N.E.2d 421, 424 (Ill. 1980), decided post-*Hewitt*, in which the court stated that cohabitation was "injurious to the moral well-being and development" of children).

76. *Hewitt*, 394 N.E.2d at 1210.

77. *Id.*

78. A threshold legal and practical matter for two persons of the same sex.

79. *Hewitt*, 394 N.E.2d at 1209.

80. See, e.g., *In re Marriage of Drews*, 487 N.E.2d 1005, 1013 (Ill. App. Ct. 3d Dist. 1985). Illinois has long recognized and honored the sanctity of the marital bond. In fact the stated purpose of the IMDMA itself is to "strengthen and preserve the integrity of marriage and safeguard family relationships" (ILL. REV. STAT. 1983, ch. 40, par. 102(2)). This policy indicates "a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will."

*Id.* (internal citations omitted).

81. *Hewitt*, 394 N.E.2d at 1207-08.

marriage in a relationship of economic and emotional interdependence, focusing on the existence of sexual relations as an element or component of such claims—or, put otherwise, where the “claims . . . depend on the cohabitation itself.”<sup>82</sup> The court was unwilling to find that the agreement itself could rest on sound contractual basis absent, or without regard to, sexual relations.<sup>83</sup> “In a discussion of contract principles . . . the court noted that agreements based on sexual services are void for want of legal consideration and that Illinois courts would not enforce what in effect are private contracts for marriage-like relationships.”<sup>84</sup> The court suggested that to enforce such contracts would grant legal status to cohabitation: “[t]he situation alleged here was not the kind of arm’s length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind.”<sup>85</sup>

Because its holding is not dependent upon the gender of the parties being different (or “opposite sex”), its applicability is likely not so restricted either. Such contracts between unmarried, same-sex couples likely cannot withstand a challenge raising *Hewitt* as a defense.

#### 4. The Rights of Unmarried Persons in Illinois, Post-*Hewitt*

Although *Hewitt* has been widely criticized by other courts and by commentators, in Illinois it remains an absolute bar to the enforcement of express contracts between unmarried persons where the consideration for the contract includes sexual relations or where, arguably, the contract itself is the result of an attempt by two unmarried persons to secure the rights and interests to their relationship. It has been repeatedly invoked in a number of cases brought by persons of the opposite sex, and on different grounds by persons of the same sex, to bar the rights of unmarried persons and attempts to enforce rights or

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82. *Medley v. Strong*, 558 N.E.2d 244, 246 (Ill. App. Ct. 1st Dist. 1990).

83. *Id.* at 247.

84. *Id.* at 247.

85. *Hewitt*, 394 N.E.2d at 1209.

Illinois’ public policy regarding agreements such as the one alleged here was implemented long ago in *Wallace v. Rappleye* (1882), 103 Ill. 229, 249, where this court said: “An agreement in consideration of future illicit cohabitation between the plaintiffs is void.” This is the traditional rule, in force until recent years in all jurisdictions. (See, E.g., *Gauthier v. Laing* (1950), 96 N.H. 80, 70 A.2d 207; *Grant v. Butt* (1941), 198 S.C. 298, 17 S.E.2d 689.) Section 589 of the Restatement of Contracts (1932) states, “A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal.” See also 6A Corbin, Contracts sec. 1476 (1962), and cases cited therein.

*Id.* at 1208.

interests based upon their relationship to one another, whether the rights asserted were founded upon express or implied contracts, or other claims arising from the relationship.

*Hewitt* was first cited in *Jarrett v. Jarrett*,<sup>86</sup> where the same Illinois Supreme Court reversed the Illinois Appellate Court, First District, and upheld the trial court's change of custody of three children from the mother to the father, predicated only upon the open and continuing cohabitation of the custodial parent with a person of the opposite sex.<sup>87</sup> Eleven years later, in *Mister v. A.R.K. Partnership*, the Illinois Appellate Court, Second District, held that the refusal to rent apartments to unmarried couples of the opposite sex did not violate the prohibition against discrimination based on sex or marital status found in the Illinois Human Rights Act.<sup>88</sup> The court in *Mister* found the plaintiff's interpretation of the legislature's intent to be irreconcilable with the state's established policies disfavoring unmarried cohabitation and common-law marriage,<sup>89</sup> and concluded that "it is much more likely

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86. *Jarrett v. Jarrett*, 400 N.E.2d 421, 423–26 (Ill. 1979).

87. The court held that such a change is not "contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children." *Id.* at 423. Citing both *Hewitt* and much earlier cases, the court in *Jarrett* declared, "It is, in our judgment, clear that [the mother's] conduct offends prevailing public policy." The court further proclaimed that the mother's "disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them and could well encourage the children to engage in similar activity in the future. That factor, of course, supports the trial court's conclusion that their daily presence in that environment was injurious to the moral well-being and development of the children." *Id.* at 424, (internal citation omitted); see also H. Joseph Gitlin, *Sexual Morality and Children of Divorce*, 92 ILL. BAR J. 468 (Sept. 2004) (reviewing the *Jarrett* standard and how Illinois courts weigh parents' sexual misconduct in custody proceedings).

88. *Mister v. A.R.K. P'ship.*, 553 N.E.2d 1152, 1160 (Ill. App. Ct. 2d Dist. 1990).

89. *Id.* The court declared that:

In determining whether the [Illinois Human Rights] Act protects cohabitation by unmarried adults of the opposite sex, we would be remiss if we did not examine the public policies embodied in the criminal prohibition against fornication found in section 11-8 of the Criminal Code of 1961 (Code) (Ill. Rev. Stat. 1987, ch. 38, par. 11-8) and the statutory renouncement of common-law marriages found in section 214 of the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1987, ch. 40, par. 214).

*Id.* at 1157.

Although the court acknowledged that the prohibition against "open and notorious" cohabitation, as an element of criminal fornication, had been removed from the statute (it was amended, effective January 1, 1990), the court reasoned that "the statutory fornication provision was in effect the time the Act was adopted, when the alleged discrimination occurred, and also when the complaint with the Commission was filed," and cited with approval by the Illinois Supreme Court in *Jarrett*—decided eleven years before the amendment of the criminal fornication statute—where it noted that the fornication statute expressed the State's public policy against open and notorious nonmarital cohabitation. *Id.* The court set forth its rationale:

Although it seems that the criminal prohibition against fornication may have fallen into disuse, the court in *Jarrett* gave the policy underlying the fornication statute continued

that the legislature, cognizant of the public policy against open and notorious cohabitation, declined to extend the Act's protections to unmarried cohabitants regardless of whether the couple's conduct was open and notorious."<sup>90</sup>

Similarly, in 1998, the Illinois Appellate Court, First District, upheld the dismissal of a probate action brought by a lesbian against the estate of her deceased partner,<sup>91</sup> finding that the plaintiff was not a legal spouse and that even if the state's prohibition against same-sex

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vitality in the marital dissolution setting. The court there stated that both the "fornication statute and the Illinois Marriage and Dissolution of Marriage Act evidence the relevant moral standards of this State, as declared by our legislature." Thus, the criminal prohibition against fornication continues to represent Illinois' public policy on this issue. Furthermore, we need not consider what effect the revised fornication statute has on *Jarrett* and the public policy of this State.

*Mister*, 553 N.E.2d at 1157 (internal citations omitted).

90. *Id.* at 1158. The Illinois Human Rights Act (IHRA), 775 ILL. COMP. STAT. ANN. 5/1-101 *et seq.* (West Supp. 2006) was amended, effective January 1, 2006, by passage of amendments to bar discrimination on the basis of "sexual orientation" in employment, real estate transactions, access to financial credit, and to public accommodations. The amendment to the IHRA barring discrimination against sexual orientation and gender identity is accomplished in two steps. First, the Act is amended to include sexual orientation among the protected categories declared to be "free . . . from unlawful discrimination." Second, sexual orientation is broadly and inclusively defined, expressly including not only homosexuality and gender identity, but heterosexuality and bisexuality as well. 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West Supp. 2006).

The IHRA, as amended, provides that:

§ 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

775 ILL. COMP. STAT. ANN. 5/1-102(A) (West Supp. 2006).

The IHRA as amended, includes both "general definitions" applicable throughout the Act, "unless the context requires otherwise," 775 ILL. COMP. STAT. ANN. 5/1-103 (West Supp. 2006), and specific definitions that "are applicable strictly in the context of [a particular] Article within the Act," *e.g.*, 775 ILL. COMP. STAT. ANN. 5/2-101 (West Supp. 2006). The terms "unlawful discrimination" and "sexual orientation" are general definitions applicable throughout the amended Act. Unlawful discrimination is defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, sexual orientation, or unfavorable discharge from military service as those terms are defined in this Section." 775 ILL. COMP. STAT. ANN. 5/1-103(Q) (West Supp. 2006). Sexual orientation is defined as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth." 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West Supp. 2006).

The IHRA was first enacted in 1979 and became law in 1980. 775 ILL. COMP. STAT. 5/1-101 *et seq.* The amendment to include sexual orientation was first proposed in the 1970s. Associated Press, *State Joins 16 Others With Gay Rights Laws*, CHI. TRIB., Jan. 2, 2006, Redeye Ed. However, the law was not passed until 2005 and did not come into effect until 2006. *Id.*

91. *In re Estate of Andrea Hall*, 707 N.E.2d 201, 202-03 (Ill. App. Ct. 1st Dist. 1998).

marriages<sup>92</sup> could be found to be invalid, “in this case the relationship between petitioner and Hall was, at all times, nothing more than a private contract terminable at will” and *Hewitt* would “preclude [the court] from imposing different terms to the [parties’] ‘private contract.’”<sup>93</sup> The court further stated that “the policy of the [Illinois Marriage and Dissolution of Marriage] Act gives the State a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will.”<sup>94</sup> The court also rejected the plaintiff’s claim of a putative spouse,<sup>95</sup> noting that “in this case, petitioner admits that she knew that she was not legally married to Hall.”<sup>96</sup> Consequently, the putative spouse provision fails to confer spouse status upon petitioner.”<sup>97</sup>

### 5. Independent Claims

Given the lack of legal recognition of unmarried relationships under Illinois law, parties have two options. First, presuming they have executed a contract otherwise valid at law but lacking recognition or enforcement under *Hewitt*,<sup>98</sup> either party could seek enforcement of the contract or remedies for breach in a court of equity, in which case the law of contracts would require a valid contract, a breach, and the right to a remedy. Likely claims include unjust enrichment or, where there is no written or express agreement, an implied-in-fact contract or a suit for

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92. 750 ILL. COMP. STAT. 5/212(a)(5) (2004); 750 ILL. COMP. STAT. 5/213.1 (2004).

93. In re *Hall*, 707 N.E.2d at 206.

94. *Id.*, citing *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979).

95. 750 ILL. COMP. STAT. 5/305 (2004).

Sec. 305. Putative Spouse. Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited, under Section 212 [750 ILL. COMP. STAT. 5/212], or declared invalid, under Section 301 [750 ILL. COMP. STAT. 5/301]. If there is a legal spouse or other putative spouse, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance and support rights among the claimants as appropriate in the circumstances and in the interests of justice. This Section shall not apply to common law marriages contracted in the State after June 30, 1905.

*Id.*

See also, *In re Marriage of May*, 678 N.E.2d 71, 74 (Ill. App. Ct. 3d Dist. 1997) (holding that putative spouse status only applies to those not legally married and is lost when the marriage is ratified by law).

96. In re *Hall*, 707 N.E.2d at 205.

97. *Id.*

98. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

constructive trust. There is no guidance in Illinois law for such remedies and, accordingly, the question of the availability and scope of remedies is answered, again, by both contract law and the decision in *Hewitt*.<sup>99</sup> Given the foregoing, if the claim is in any sense inseparable from emotional or financial interdependence where any consideration includes sexual relations, it is unlikely to survive a motion to dismiss. Second, a party could seek recognition or enforcement of specific rights or interests independent of a claim for the validity or recognition of the relationship itself—based upon other relationships or legal interests arising from or related to the relationship such as parentage,<sup>100</sup> claims of domestic violence,<sup>101</sup> or on specific claims or rights arising from the interest (e.g., title to property).<sup>102</sup> In either instance, the fact of the lack

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99. *Id.*

100. Under the custody provisions of the IMDMA, a person defined as a parent may bring an action for custody, visitation, support or related claims to a child, without regard to marital status or to gender:

750 ILL. COMP. STAT. 5/601. Jurisdiction; Commencement of Proceeding

[...]

(b) A child custody proceeding is commenced in the court:

(1) by a parent, by filing a petition:

(i) for dissolution of marriage or legal separation or declaration of invalidity of marriage; or

(ii) for custody of the child, in the county in which he is permanently resident or found; or

(2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents; or

(3) by a stepparent, by filing a petition, if all of the following circumstances are met

...:

750 ILL. COMP. STAT. 5/601(b). *See also In re K.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1st Dist. 1995) (expressly holding that the Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1 *et seq.*, “must be construed to give standing to the unmarried persons in these cases, regardless of sex or sexual orientation, to petition for adoption jointly”). Illinois is an “all-or-nothing” state with respect to same-sex parentage: if the parties have legally adopted the child or children, parentage will assure them legal rights to the child under the custody provisions of the IMDMA. Absent parentage, no claims of *de facto*, equitable, or psychological parentage are recognized under Illinois law, and a party asserting such claims is likely to lose. *See In re C.B.L.*, 723 N.E.2d 316, 320 (Ill. App. Ct. 1st Dist. 1999) (finding lesbian asserting right to visitation lacked standing under visitation statute, absent legally cognizable claim of parentage).

101. For example, under the Illinois Domestic Violence Act (IDVA), 750 ILL. COMP. STAT. 60 *et seq.* (2004), if the relationship is classified as that of an “abused person” relative to another, where one party is a “family or household member,” the statute grants a broad range of remedies, including support and the temporary exclusive possession of property held by one of the parties, in the context of the entry of an Order of Protection, without regard to marital status or to gender. 750 ILL. COMP. STAT. 60/214 (2004).

102. 27A AM. JUR. 2D *Equity* § 52 (2006) (“A court of equity has broad equitable jurisdiction to protect property rights against a wrongdoer.”). They are not generally a function of the “whole” relationship and they arise from title or other indicia or rights of ownership of particular property and are not, accordingly, determinative of the rights and interests of either party in or to

of recognized marital status should not bar such claims, where the holding of *Hewitt* and its progeny specifically address the consideration for the relationship itself.

6. Equitable Remedies: *Hewitt* No Bar Where the Claims Are “Substantially Independent”<sup>103</sup>

Specific equitable remedies have not necessarily been impaired in Illinois by the court’s holding in *Hewitt*, even where the court refused to grant equitable remedies for unjust enrichment.<sup>104</sup> In *Spafford v. Coats*, the Illinois Appellate Court, Second District, overruled the trial court’s decision based upon *Hewitt* and allowed a claim for unjust enrichment between two persons of the opposite sex, finding that one unmarried party who furnished most of the money for several vehicles purchased during a cohabitating relationship was not barred from bringing an unjust enrichment claim against the other, who retained control over the vehicles.<sup>105</sup> *Spafford* was decided on particular facts—on a claim for a constructive trust for vehicles the parties had purchased during their cohabitation (most of which were financed and purchased with substantial contributions from the plaintiff)—and not for recognition of or rights arising from the relationship itself.

The court in *Spafford* distinguished the facts from those in *Hewitt*, finding that *Spafford*’s claims were “substantially independent” of the parties’ relationship and were “not based on rights arising from their cohabitation” or the performance of domestic services.<sup>106</sup> Because the claim in *Spafford* was limited, however, to particular property and not

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the property of the relationship as a whole. See *infra* Part III.B.6 (discussing equitable claims in Illinois).

103. *Spafford v. Coats*, 455 N.E.2d 241, 245 (Ill. App. Ct. 1st Dist. 1983).

104. *Id.* at 243.

105. *Id.* at 245–46.

106. *Id.* at 245.

We perceive the real and underlying concern of the supreme court in *Hewitt* was that judicial recognition of mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would in effect grant to unmarried cohabitants substantially the same marital rights enjoyed by married persons, resurrect the doctrine of common law marriage, and contravene the public policy enunciated by the Illinois legislature to strengthen and preserve the integrity of marriage. The plaintiff’s claims in *Hewitt* for one-half of defendant’s property were based primarily upon her services as housekeeper and homemaker and obviously fell afoul of the court’s concerns. However, where the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims.

*Id.*

the relationship, it is unlikely that such a claim would have been allowed, in light of *Hewitt*, to enforce an express agreement between unmarried persons to share property where the consideration included intimate relations involved in a relationship based upon financial and emotional interdependence, irrespective of the gender of the parties or their ability to marry legally.

#### IV. CONCLUSION

The rights and interests of unmarried, same-sex couples in Illinois, and the validity and enforceability of agreements between them to secure the rights and interests in their relationships—including the issue of whether such agreements are recognized or enforceable—is sharply framed and answered by *Hewitt*, which holds that such agreements are likely illegal where any part of the consideration includes sexual relations.<sup>107</sup> After *Hewitt*, an otherwise valid contract between any two unmarried persons as to their rights and interests in their relationship would likely be held void, voidable, or otherwise unenforceable in Illinois simply because the parties are not married, and irrespective of whether or not they had the legal right to do so or whether such marriage was valid where celebrated. The validity of such agreements is rarely upheld when challenged, depriving the parties of the very benefits and burdens contracted for, including the availability and enforceability of interests upon dissolution. The parties are then left to pursue piecemeal rights and interests arising from specific title to particular property acquired irrespective of the partnership or, in some instances, to proceed on equitable theories of constructive trust or unjust enrichment.

The query, then, is whether such agreements can ever be valid and enforceable in Illinois. Nearly all states now permit parties to form contracts to secure rights or interests in their relationships where the sexual element is separable from or not an essential part of the consideration.<sup>108</sup> This generally applies irrespective of the gender of the parties to the relationship. Even in states where there is no legal protection for or statutes barring discrimination against homosexuals, the change in law since *Marvin*<sup>109</sup> has, in the main, applied equally to same-sex and opposite-sex couples in the enforcement of express contracts involving property rights and interests. The bar in Illinois under *Hewitt* also applies equally—although the *Hewitt* court squared

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107. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

108. 17A AM. JUR. 2D *Contracts* § 276 (2006).

109. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

its reasoning on the availability of marriage to the parties before it. To date, there has been no successful challenge to *Hewitt*.

The lawyer representing unmarried couples has no reliable basis to advise clients under Illinois law of reliable and enforceable means to protect their relationships, or whether courts will uphold the agreements they may make in the course of attempts to do so. Express contracts that explicitly disavow the emotional and financial interdependence of the parties and presumably circumvent suggestion of sexual relations in consideration for the contract should survive challenges based upon *Hewitt*. Absent express statutory or other recognition, and because a domestic partnership does not automatically create benefits for the partners, unmarried persons—whether same-sex domestic partners or otherwise—should protect themselves by creating and signing contracts that deal with significant parts of their relationship. Considerations should include how they hold property, what will happen to their assets if one of them dies, or how any support obligations would be handled if their relationship should end. Some problems can be avoided or minimized by drafting a will, trust, health care power of attorney, living will declaration, and cohabitation agreement. Although its holding and argument seem to suggest otherwise, the *Hewitt* court noted that “[c]ohabitation by the parties may not prevent them from forming valid contracts about independent matters, for which it is said the sexual relations do not form part of the consideration.”<sup>110</sup> The best advice for persons in Illinois seeking to enter into express agreements to secure the rights and interests of their relationship is to provide in their contract that its purpose is to share ownership of certain property without regard to the parties’ personal relationship. This should at least clear the holding of *Hewitt*. But enforcement, or even mere recognition, is another question.<sup>111</sup>

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110. *Hewitt*, 394 N.E.2d at 1208 (adding that such contracts may be enforceable where, for example, “services such as plaintiff alleges here could be regarded as the consideration for a separate contract between the parties, severable from the illegal contract founded on sexual relations,” and citing *Kozlowski v. Kozlowski*, 408 A.2d 902 (N.J. 1979); *Marvin v. Marvin*, 557 P.2d 106, 113 n.5 (Cal. 1976); *Tyranski v. Piggins*, 205 N.W.2d 595, 597 (Mich. Ct. App. 1973); *contra*, *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977)). *See also* *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976) (“We are not validating an agreement in which the only or primary consideration is sexual intercourse. The agreement here contemplated all the burdens and amenities of married life.”); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977) (allowing partition of property between a cohabiting unmarried couple).

111. Alternatively, the parties could provide that disputes arising out of the agreement be subject to binding arbitration, for example. Although such a provision could deprive either or both parties of access to the courts, should such agreements later become enforceable, or should either seek review or enforcement of a particular provision or separable equitable claim that could arguably be found to be, if challenged, “substantially independent” of the consideration for the

Lacking legal recognition of same-sex relationships under Illinois law, and given the existence of unchallenged law prohibiting redress, recognition or enforcement of agreements between unmarried persons where the consideration for the agreement includes ‘sexual relations,’ the legal rights and interests of persons in same-sex relationships in Illinois—irrespective of where the relationship was founded or the residency or citizenship of either or both parties—are insecure and unreliable, at best. Protection of such relationships has changed little in nearly thirty years since the Illinois Supreme Court’s decision in *Hewitt v. Hewitt*, despite the increasing recognition of same-sex relationships in many jurisdictions and the increasing passage of laws designed to protect, secure, or recognize such relationships in some respect, short of marriage.

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contract or agreement as a whole. *Spafford v. Coats*, 455 N.E.2d 241, 245 (Ill. App. Ct. 1st Dist. 1983). See *supra* Parts III.B.5–6 (analyzing equitable relief available for claims that are substantially independent of the parties’ relationship).