

Bequest or Debt?

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Background: More and more individuals are cohabiting without the benefit of marriage. This is particularly the case among seniors and retirees. However, we all know how often individuals procrastinate when it comes completing their estate planning documents.

What happens when, in the absence of marriage, one of the partners dies without making a Will or Trust provision for the surviving partner? Promises may have been made, but those understandings may not have been carried out at death.

This situation brings to mind the infamous *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) decision where actor Lee Marvin's companion filed suit to claim an equitable share of his wealth that arose from their long-time cohabitation. However, that case was like a divorce property dispute between unmarried individuals. Instead, what if one companion dies and the surviving companion is not provided for. A claim could be filed either based on a contract, written or oral, or an equitable claim could be pursued for unjust enrichment against the decedent's estate.

Example: Bud and Lou were in a cohabitation relationship for over 25 years, starting when Bud was age 50 and Lou 45. They never married. Bud had the wealth and the high income. Lou worked at a more modest job, earning far less than Bud. They lived in Bud's home, initially in California. When Bud retired at age 67 they promptly moved to Michigan to escape California's high income tax and crazy weather. Lou quit her job to move to Michigan with Bud. Bud was so busy working as an executive that he never got around to creating an estate plan. When they moved to Michigan, Bud promised Lou that he would adopt an estate plan and add her to his Will to provide for her an income for life and the right to live in the Michigan home which was in Bud's name alone. Bud never got around to executing a Michigan Will. Bud died suddenly at age 75. After Bud's death Lou told Bud's brother, his 'default' Personal Representative, about Bud's promise to provide for her due to their long term cohabitation during which she cooked,

cleaned, shopped, provided household services and maintenance to 'Bud's home', and ran errands for Bud who was busy being an executive. Bud's brother, in his capacity as the estate representative told Lou that had Bud wanted to provide for her in his estate, he would have done so in a simple Will, smart and resourceful as Bud was. Lou seeks legal counsel wanting to enforce Bud's promise to make a Will providing for Lou.

Oral Contracts: Oral contracts are enforceable. However, if they involve promises with regard to the conveyance of real property, e.g., Bud's home, the claim is often challenged under the Statute of Frauds. Sometimes the Statutes can be avoided, though, with claims of detrimental reliance or part performance. Yet for an oral promise to make a Will, there is another hurdle- most states have statutes that prevent the enforcement of a promise to make a Will unless there is some written evidence of the promise. [MCL 700.2514.]

Quantum Meruit: *Quantum meruit* is an equitable remedy, often based on a claim for reimbursement for services performed for the decedent-partner. However, Michigan, like most states, presumes that family members or intimate members of the same household, provide those services gratuitously, out of love and affection for the partner. Cohabitant claimants often have a tough time establishing that either of the partners expected remuneration for the services like Lou provided because such services are usually performed out of love and affection, not with the expectation of reimbursement.

Unjust Enrichment: To the extent that such services include taking care of the home, cooking, chauffeuring, attending to medical needs, etc., where the recipient is undoubtedly enriched by receiving these services for free, the surviving cohabitant can claim of *unjust enrichment* based on these benefits and services runs into the same objection in the courts- the court presumes that the services were gratuitously made by the survivor.

Promise to Make a Will (or Bequest:) Deathtime claims of a cohabitant involve a promise to leave property at death, i.e., a promise to make a Will. Yet states have Wills Acts that require formalities, and in the absence of compliance with the

Wills Act, probate courts are more inclined to apply the state's intestacy statutes. In other words, probate judges are often loath to insert their own view as to the property disposition of a decedent's estate when the decedent could relatively easily have provided for their surviving companion with a simple Will provision. Moreover, because the state has adopted a *default* dispositional 'Will substitute' with its comprehensive intestacy laws a probate judge is likely to defer to the Legislature as to the state's public policy expression on dealing with an intestate estate.

Uniform Act: To deal with these uncertain remedies that might be available to the surviving companion who wants to assert claims against his/her deceased companion's estate based on these theories or remedies that support the claim for lifetime services, the Uniform Law Commission approved in 2021 the Uniform Cohabitant's Economic Remedies Act. The Act makes it that "contributions to the relationship" are sufficient consideration for any contractual claim and further that 'contributions' include cooking, cleaning, shopping, household maintenance, conducting errands or other domestic services for the benefit of the other cohabitant or the cohabitants' relationship.. [Section 2(3) of the Uniform Act.] Coming as no surprise, Michigan has not even considered adopting this Act.

Statute of Limitations: Assuming that the surviving cohabitant like Lou seeks to file a claim against Bud's estate, one interesting question that arises is what statute of limitations applies? Is Lou's claim for a breach of contract, covered by the Probate Code's nonclaim statute, which means that her claim must be filed within 4 months after the PR's publication of the Notice to Creditors? But what if Lou's claim against Bud's estate is premised on her conclusion that she has some property right in the assets held in Bud's name, a property right that arose from their long-term cohabitation and/or the Lou's indirect contributions during that period to Bud's acquisition of the property, rising to a property interest? If Lou's claim against Bud's estate is presented as with respect to identifiable property, Michigan's nonclaim statute may not apply with its much shorter 4-month period in which Lou must file her claim, or the short follow-up statute of limitations period if Lou's 'creditor' claim is denied by Bud's estate's Personal Representative. Some states tend to differ if their nonclaim probate statute applies

to claims based upon a breach of a promise to make a Will, even when the promise is to convey specific property. Other states do not apply their nonclaim statute to claims for money or the specific enforcement of a promise to make a Will. Thus, Lou's claim and the statute of limitations which applies to it may turn on how it is presented: (i) breach of promise to make a Will?; (ii) money damages as compensation for services rendered to Bud during his lifetime; or (iii) a claim to recover an interest in a specific asset claimed to be part of Bud's estate.

Estate Tax Deduction: The final question deals with the settlement of the surviving cohabitant's claim. Suppose Lou files her claim against Bud's estate and ultimately there is a settlement where Bud's estate Personal Representative agrees to pay Lou \$2.5 million in settlement of her claim. Can Bud's estate turn around and deduct the \$2.5 million paid as a viable deduction for federal estate tax purposes? Under IRC 2053(c)(1)(A) if the claim is based on an enforceable promise, the promise must be one that was 'contracted bona fide and for adequate and full consideration in money or money's worth. Conversely, if Lou's claim is for an interest in an asset held in Bud's name alone, then the amount paid is not a deduction, but rather a return of Lou's asset to her, and thus the asset is removed from Bud's taxable estate, without the need to prove a 'bona fide contract for full consideration in money's worth.

- This question was raised in *Shapiro v. United States*, 634 F.3d 1055 (9th Circuit, 2011.) In that case, Bernie cohabited with Cora for 22 years. Bernie then began seeing another woman. Cora moved out and sued Bernie claiming that she was entitled to be compensated for her services she has performed for his benefit during the cohabitation. Bernie died before the trial. Bernie's estate ultimately settled with Cora for \$1.0 million. Bernie's estate sought to deduct the \$1.0 settlement. The IRS, the federal District Court disagreed. On appeal, the Circuit Court reversed, in a split decision. The District Judge had concluded that Cora's contributions were not sufficiently beneficial to Bernie to support a contract for remuneration. Thus, it considered the payment a gift and not a deductible expense. In contrast, the Appeals Court, focusing on Nevada law, found that Cora's homemaking services were sufficient to support her claim (citing *Marvin*).

The dissenting judge held that the fact that Cora's claim was enforceable did not make the payment deductible.

Conclusion: With the increase in the number of cohabitation arrangements, the problems and confusion that can arise when one cohabitant dies needs to be considered, and hopefully addressed in a Will or Trust.