



8-14-2023

Marvin Claims at Death

Patricia A. Cain

Santa Clara University School of Law, pcain@scu.edu

Follow this and additional works at: <https://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

Automated Citation

Patricia A. Cain, *Marvin Claims at Death* 49 ACTEC LAW JOURNAL (FORTHCOMING) (2023),
Available at: <https://digitalcommons.law.scu.edu/facpubs/1016>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Marvin Claims at Death

By: Patricia A. Cain*

I. Introduction:

The law applied to unmarried couples experienced a sea change in 1976, when the California Supreme Court handed down its decision in *Marvin. V. Marvin*.¹ Before *Marvin*, courts often held that contracts between cohabitants dealing with rights of support or property could not be enforced because they were against public policy.²

Post-*Marvin*, all states but two³ have recognized the right of unmarried cohabitants to enter into enforceable contracts to the extent there is consideration for the contract other than sex. Those contracts may be implied, express, oral or written. States vary in their willingness to recognize such contracts. Some states require the contract to be express.⁴ A handful require such contracts to be in writing.⁵

But *Marvin* went beyond announcing a rule regarding contracts between unmarried couples. It also established the right of an unmarried partner to asset equitable claims against the other partner upon dissolution of the relationship. Equitable claims and remedies may be required to prevent unjust enrichment by one partner. For example if one partner holds title to all the property acquired during the relationship but the other partner contributed services or funds to the acquisition or improvement of the property, it would be unjust to allowed the titled partner to retain the full benefit of the other partner’s contributions. To prevent unjust enrichment in such cases, courts allow claims for quasi-contract (sometimes called an “implied in law” contract or a constructive contract) and *quantum meruit* (the right to be paid the value of services rendered in the absence of a contract). A court may impose a constructive or resulting trust to remedy the unjust enrichment, recognizing the equitable property interest of the non-titled partner.

* Professor of Law, Santa Clara University, Aliber Family Chair in Law Emerita, University of Iowa

¹ 557 P.2d 106 (Cal. 1976).

² See, e.g., *Traver v. Naylor*, 126 Or. 193, 268 P. 75 (1928), in which the court stated “Future cohabitation is a vicious consideration, and, if it constituted any part of the consideration for the promise, the whole contract is void.” Oregon subsequently changed its position in *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976), handed down shortly before *Marvin*.

³ Illinois and Idaho are the two exceptions. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208 (Ill. 1979)(contracts based on cohabitation are against public policy and therefore void); *Gunderson v. Golden*, 360 P.3d 353 (Idaho Ct. App. 2015)(such contracts violate public policy because they mirror common law marriage which has been abolished in the state). Some scholars include Georgia in this list, but see *Cates v. Brown*, 850 S.E.2d 764 (Ga. Ct. App. 2020)(recognizing the validity of a *Marvin* claim brought at the termination of a lifetime relationship).

⁴ New York is such a state. See *Morone v. Morone*, 413 N.E.2d 1154 (NY 1980).

⁵ See MINN. STAT. §§ 513.075-.076 (2015); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (West 2015); N.J. STAT. ANN. § 25:1-5(h) (West 2020). The New Jersey statute not only required a writing but also required independent attorney review for validation of the contract. In *Moynihan v. Lynch*, 250 N.J. 60, 269 A.3d 435 (2022), the New Jersey Supreme Court ruled the attorney-review requirement unconstitutional under the New Jersey state constitution.

But a number of states refuse to recognize non-contractual claims asserted by one unmarried partner against another. Texas, for example, has clearly stated that any claim arising out of a sexual cohabitation is subject to the statutory requirement that the claim be supported by a writing and in the absence of a writing, all claims, including those based in equity, are void.⁶ And while Massachusetts has clearly adopted the holding in *Marvin* that unmarried cohabiting couples may enter into valid enforceable contracts, the Supreme Judicial Court has stated “[w]e do not adopt those portions of *Marvin v. Marvin* . . . which grant property rights to a nonmarital partner in the absence of an express contract.”⁷

Many articles have been written about the enforcement of contracts, express or implied, by couples who split up during their lifetimes.⁸ Much less has been written about cases in which a surviving partner is seeking to enforce a *Marvin* claim against the estate of a deceased partner. In 2015, Professor Larry Waggoner wrote in this journal:

Not surprisingly, most of the cases arise in the context of a dissolution during life. Claims arising at death are less common because, if the partners remain devoted to one another, the surviving partner might be provided for in the decedent’s will or other parts of the estate plan. Therefore, it is less usual for cases to arise in which a surviving partner is making a claim to a share of a decedent’s estate . . .

Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 65-66 (2015).⁹

I agree with the observation that there are fewer cases featuring nonmarital claims at death than there are involving nonmarital claims during a lifetime breakup. I am less certain that the explanation of the difference in the number of cases¹⁰ is that partners generally carry out their understandings regarding deathtime transfers. In my experience, people are notorious procrastinators when it comes to finalizing estate planning documents. On the other hand, in

⁶ See *Zaremba v. Cliburn*, 949 S.W.2d 822 (Tex. App. 1997).

⁷ *Wilcox v. Trautz*, 693 N.E.2d 141, 145, n.3 (Mass. 1998).

⁸ See, E.g., Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67 (2021) and Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571 (2022). Professor Antognini thoroughly scoured the Westlaw database and identified 122 reported cases regarding the enforcement of contracts between unmarried partners at a lifetime dissolution of the relationship. She consciously excluded any cases in which such claims were made against the estate of a deceased partner.

⁹ In 2020, Raymond C. O’Brien wrote in this journal: “In piecemeal fashion, a variety of states enforce nonmarital agreements, written and oral, during lifetime, while some enforce equitable remedies. Very few states enforce contract or equity remedies at death.” *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79 (2020). See also, Paul J. Buser, *Domestic Partner and Non-Marital Claims Against Probate Estates: Marvin Theories put to a Different Use*, 38 Fam. L.Q. 315 (2004)(pointing out numerous issues that might arise for Marvin claims in probate court).

¹⁰ I have not engaged in as concentrated a search as Professor Antognini did (see note 9, *supra*), but I have been collecting relevant cases over the years and I supplemented my list by doing a Westlaw query for all cases citing the *Marvin* case and including an “estate” as one of the parties. My current list includes over 40 cases. These cases deal with many different issues and not just the enforceability of the asserted claim. I included a few early Washington cases, but omitted the rest because in the state of Washington unmarried cohabitants do not make *Marvin* claims at death. Rather, they assert ownership of half of the accumulated property based on their status as partners in a “committed intimate relationship” (CIR.). Nonetheless, these cases do raise statute of limitations questions and estate tax questions so they will be discussed in this essay.

cases of long-term cohabitation, the surviving partner may be able to work out arrangements with the intestate heirs if they are sufficiently amenable and thereby avoid a lawsuit. Or, the survivor may file a lawsuit and then settle with the heirs before there is a reported decision. Whatever the explanation, it is clear that reported cases of *Marvin* claims at death are few in comparison to cases that involve lifetime claims.

By closely analyzing a sample of cases I have identified as “*Marvin* claims at death” cases,¹¹ I have discovered some issues in these “deathtime” cases that differ from those that arise in lifetime claims. This essay will discuss briefly some of those issues, beginning with the question of enforceability. I will then discuss specific issues that arise in the probate context regarding the applicable statute of limitation. I will end with a brief discussion of whether or not *Marvin* claims paid by the estate can be classified as a deductible expense for estate tax purposes under section 2053 of the Internal Revenue Code.¹²

II. The Enforceability of *Marvin* Claims at Death.

The assertion of a *Marvin* claim at the termination of a cohabitant’s relationship during lifetime typically involves a contract, express or implied, that property acquired during the relationship will be shared and will be divided somewhat equally upon any dissolution of the relationship. Sometimes lifetime contracts can also include a promise for one cohabitant to support the other one, but such contracts are rare. Normally contracts for support must be express contracts, and often they must be in writing.¹³ And some states simply will not recognize a contract for ongoing support when a relationship terminates even though a contract to share property may be recognized.¹⁴

On the other hand, a promise to support the cohabitant is quite common in cases involving a surviving partner who is seeking remuneration from the estate of her deceased partner. Rarely are such promises in writing and often they are expressed imprecisely as a promise to bequeath or devise sufficient property to the survivor to provide for that support. A typical case involves a wealthier partner who invites the other partner to move in with him or her and quit working so that the couple can spend more time together. The partner who accepts such an invitation is typically promised that he or she will be provided for in the event the other partner dies first. Promises such as these may be expressed as a promise to make a will in the favor of the surviving partner or to devise the home to the surviving partner. And in many such cases, there is

¹¹ See *id.*

¹² A different set of tax questions arise for lifetime *Marvin* payments. Is the amount taxable to the recipient as income or is it a gift? Are divisions of property taxable realizations? For a discussion of these issues see Patricia A. Cain, *Taxation of Unmarried Partners*, 99 Wash. U. L. Rev. 1931 (2022).

¹³ See *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997)(requiring a writing under Florida law). New Jersey, in contrast to other states, has been extremely willing to enforce implied promises of support. See *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979)(enforcing a promise of lifetime support and holding that it did not matter whether the contract was express or implied). More recently, however, New Jersey has passed a statute requiring such promises to be in writing. See N.J.S.A. 25:1-5, discussed in *Botis v. Estate of Kudrick*, 22 A.3d 975 (N.J. Super Ct. App. Div. 2011)(holding that the statute applied prospectively only).

¹⁴ See, e.g., *Thomas v. LaRosa*, 400 S.E.2d 809 (W.Va. 1990)(stating that the imposition of an obligation of support, even though it was contracted for by the parties, would result in treating the couple as though they were married when they are not).

evidence that the decedent's intent up until the moment of death was to do just that. He (or she) simply never got around to completing the necessary paperwork.

Oral contracts are enforceable. If they involve promises regarding the conveyance of real property, they are often challenged under the Statute of Frauds. But there are ways to get around that problem, including reliance and part performance. For oral promises 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.¹⁵

In my universe of cases that I have identified as cases involving *Marvin* claims asserted against an estate, there are at least 20 cases in which the plaintiff's primary claim was that the deceased partner had promised to make a will or to otherwise support the surviving partner. Despite the absence of a writing, approximately half of these cases allowed the claim to proceed.¹⁶ The courts ruling against enforcement of such oral promises relied either on the Statute of Frauds¹⁷ or found that there was insufficient evidence to establish such a promise, sometimes requiring a heightened burden of proof.¹⁸

Another common claim pursued at death is a claim for reimbursement for services performed for the deceased partner, usually pleading *quantum meruit* as an equitable remedy. These claims run into the same problems that arise in lifetime claims under a *quantum meruit* theory. Most states presume that family members, or intimate members of the same household, provide these services gratuitously, out of love and affection for the partner. And most claimants have a difficult time establishing that either of the partners expected remuneration for these services because it is true that such services are usually performed out of love and affection. Still, to the extent such services include taking care of the home, cooking, chauffeuring, attending to medical needs and the like, the recipient is undoubtedly enriched by receiving these services for free. Nonetheless, a plea of "unjust enrichment" based on this benefit runs into the same roadblock: the court presumes that the services were gratuitous.¹⁹

¹⁵ See UPC §2-514. In 2001 California amended its statutory provision requiring written evidence of the promise to enforce oral agreement to include enforcement if there is "[c]lear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity." CPC §21700.

¹⁶ See, e.g., *Byrne v. Laura*, 60 Cal. Rptr. 2d 908 (1997)(oral promise Skip made to Flo that everything he had was hers could be enforceable after his death); *Northrup v. Brigham*, 826 N.E.2d. 239 (Mass. App. Ct. 2005)(holding that oral agreement to make a will was unenforceable per se under Statute of Frauds, but might be introduced as evidence of a *quantum meruit* claim).

¹⁷ See *Northrup*, *supra*.

¹⁸ See *Humiston v. Bushnell*, 394 A.2d 844 (N.H. 1978)(requiring "clear and convincing evidence" under case law). See also *Lawrence v. Ladd*, 280 Or. 181, 570 P.2d 638 (1977)(refusing to enforce oral promise finding that testimony of 4 witnesses other than plaintiff was insufficient under Oregon statute that requires "competent, satisfactory evidence other than the testimony of the claimant" to establish any claim that has been denied by the personal representative. ORS §115.195.

¹⁹ See, e.g., *York v. Place*, 544 P.2d 572 (Or. 1975) (applying presumption of gratuitousness in a claim against a deceased partner's estate). Interestingly, Massachusetts is one state that has never taken this position. See *Northrup v. Brigham*, 826 N.E.2d at 368, stating: "No Massachusetts court has applied the presumption." But see *Rupprecht v. Rae*, 31 Mass. L. Rptr. 193, 2013 WL 2445506 (Mass. Super. Ct. 2013) in which the court did not recognize the claim based on *quantum meruit* despite a 45 year cohabitation.

In addition to the hurdles faced by *Marvin* claimants based on a statute of frauds, insufficient evidence to support the claim after one partner has died, and the presumption of gratuitous services, there is one additional roadblock that arises for claims asserted at death. Some courts appear to approach these claims with views similar to those of judges who err on the side of formalities in wills cases. In such cases, it appears that judges are quite reluctant to insert their own views in place of those of a decedent, who is no longer available to clarify his or her true intent. The legislature has created very strict rules governing the means by which a dead person's wishes can be carried out. There must be a will, executed in accord with certain strict formalities, and in the absence of an effective will, the legislature has provided a default expression of the presumed intent of a decedent in the form of intestacy statutes. Judges, wishing to refrain from inserting their own views as to the proper disposition of a decedent's estate have, until very recently,²⁰ required strict compliance with the formalities of the Wills Act, and in the absence of compliance have applied the state's intestacy statutes. To recognize a surviving partner's claim against estate assets outside of these two legislatively approved schemes might be perceived as judicial interference.

To demonstrate my point, consider a recent Alaska case.²¹ Jerry Hatten died intestate survived by Beverly Toland, his domestic partner of 20 years. Jerry was also survived by his two adult children, who claimed the entire estate as intestate heirs. A probate master found that Jerry did not clearly intend to leave the house to Beverly, despite her assertions that he had told her he would. Numerous witnesses, other than Jerry's children, backed Beverly up on this claim. Shortly before his death Jerry had named Beverly as the sole beneficiary on his \$194,000 IRA. This fact seemed to indicate to the master that Jerry had chosen the IRA as the sole means to take care of Beverly, rather than leaving her the home they had lived in for 20 years or anything else. The trial court adopted the master's findings, despite evidence from friends and neighbors that, after naming Beverly as beneficiary on his IRA, Jerry was still inquiring how best to write a will in Beverly's favor. The court of appeals reviewed the master's finding under the "clearly erroneous rule" and found no error. But the appellate court's statements about applicable law are a bit disturbing. Alaska courts readily recognize shared property rights of cohabitants who end their relationships during life. It seems, however that, dissolution at death requires a different analysis. The court says:

If a relationship ends at the death of one member, Alaska's probate code comprehensively governs the rights of both surviving spouses and domestic partners. A surviving spouse takes all, or most, of a deceased spouse's intestate estate; a surviving spouse who is dissatisfied with a deceased spouse's will can choose to receive a statutory elective share of the deceased's augmented estate. A surviving domestic partner, in contrast, inherits none of a deceased partner's estate under the probate code. And, *unlike in the case of an inter vivos separation*, the probate code has provisions disposing of all of a deceased partner's estate, whether the partner died testate or intestate. There is no

²⁰ In response to the judiciary's rigid application of the Wills Act, legislatures have recently adopted a more lenient approach, the harmless error rule, now adopted by 12 states. See Robert H. Sitkoff and Jesse Dukeminier, *Wills, Trusts, and Estates* (11th ed. 2022) at page 181.

²¹ *In re Estate of Hatten*, 440 P.3d 256 (Alaska 2019).

“gap” to fill with a common law scheme that would distribute the deceased partner’s property according to the partners’ shared intent. If the deceased partner did not provide for the surviving partner through a will, the surviving partner will not inherit the deceased’s property as a testamentary matter. (emphasis added)²²

The court concluded:

Because Toland and Hatten’s relationship ended when Hatten died, Alaska’s probate code, not a common law domestic partnership property division scheme, controls the distribution of Hatten’s estate. Domestic partners are not among the heirs who inherit property from an intestate decedent. Toland’s claim thus must fail.²³

An unpublished California case made a similar distinction between lifetime and deathtime claims.²⁴ Although the California court ruled in favor of the surviving partner, it noted in its analysis that *Marvin* claims only concerned the division of property at the termination of a relationship during the lifetime of the partners. Deathtime claims, by contrast, involve promises to leave property at death, i.e., promises to make a will. In a sense, however, any claim by an unmarried cohabitant against his or her partner is a *Marvin* claim, because *Marvin*, at its core, held that any contract or equitable claim recognized under state law could be pursued by a cohabitant despite the fact of cohabitation. *Marvin* removed the public policy exception that had been applied to such claims.

Even more alarming than the Alaska case, which refused any remedy for a cohabitant of 20 years, is the result in a 1984 Mississippi case.²⁵ Margie and Sam lived together for over 33 years. The facts strongly suggest that they would have married but for the fact that Margie was already married to a man who had deserted her and she claimed she did not know how to divorce him since she could not locate him. Sam died intestate, survived by siblings and a nephew, who claimed the entire estate as heirs. Margie was the one who cared for Sam when he grew ill and who arranged his burial. His heirs appeared when it was time to determine who got his property. Margie’s primary claim was based on an oral contract and all she really wanted was the right to continue living in the home she had been living in for the past 33 years. The Chancery Court granted her that life estate. The Supreme Court reversed, primarily claiming that if an unmarried cohabitant was to be given rights to a deceased cohabitant’s property outside of a claim based on an express contract, that was a matter for legislative action, rather than judicial action.²⁶ As the court explained further ““a mere ‘live-in’ relationship ... cannot be allowed to negate the law of descent and distribution.”²⁷ Mississippi has recognized the validity of *Marvin* claims when a

²² *Id.* at 262-63.

²³ *Id.* at 263.

²⁴ *Owens v. Every*, 2003 WL 21540970 (Cal. App. 2003).

²⁵ *In re Estate of Alexander*, 445 So. 2d 836 (Miss. 1984)

²⁶ The Court also made a strange statement. After praising the Chancellor for the compassion demonstrated in trying to help Margie, the Court announced: “Of course, equity is a laudable goal in any case, but equity generally must follow established law.” *Id.* at 840. As the four justices in dissent pointed out, the very aim of equity is to provide relief when other avenues (such as legal claims) are not available.

²⁷ *Id.* at 839.

dissolution of the relationship occurs during the lifetime of the partner, but continues to cite to the *Alexander* case as stating the legal principles for claims claim pursued at death.²⁸

Recently, the Uniform Law Commission (ULC) approved the Uniform Cohabitants' Economic Remedies Act (UCERA).²⁹ A state like Mississippi would benefit from adoption of this act. The act clearly provides for claims to be brought by a surviving partner against a deceased partner's estate based on the same theories that support a lifetime claim.³⁰ The act also makes it clear 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."³¹

III. Statutes of Limitations

When a Marvin claim is asserted before the death of the defendant partner, the applicable statute of limitations depends on the type of claim being asserted. If the claim is for breach of contract, written or oral, the applicable statute is the one that applies to such contracts. Sometimes a state has a different statute that is applied to claims of unjust enrichment, which can be confusing to the parties since unjust enrichment is often the result of an implied contract that is not carried out.³² Lifetime unmarried cohabitant claims often raise questions about the applicable statute of limitations.³³ In addition such cases raise issues about when the statute begins to run. For example, in a quantum meruit claim for reimbursement for services performed by a cohabitant, North Carolina treats the statute as running from the moment the services are performed, such that in the termination of a 14-year relationship in which the plaintiff made a claim upon termination of the relationship, her recovery was limited to services performed in the past three years.³⁴ Courts in other states have ruled that the claim does not arise until the continuous services cease, which typically is at the time of the break-up.³⁵

²⁸ See *Cates v. Swain*, 215 So. 3d 492, 495 (Miss. 2013).

²⁹ See Unif. Cohabitants' Econ. Remedies Act (Unif. L. Comm'n 2021). For a discussion of the process and a summary of the Act see Barbara Atwood and Naomi Cahn, *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*, SSRN (Naomi is this forthcoming someplace?)

³⁰ UCERA §4(c)

³¹ UCERA §2

³² Texas, for example, applies a two-year statute to contract claims and a four-year statute to unjust enrichment claims. See *Pepi v. Galliford*, 254 S.W.3d 457 (Tex. App. 2007), pet. denied (holding that a *quantum meruit* claim, arising partly under a theory of contract, subject to a two year statute, was in fact an unjust enrichment claim, subject to the four-year statute).

³³ See, e.g., *Kopin v. Orange Prods., Inc.*, 297 N.J. Super. 353, 688 A.2d 130 (App. Div. 1997)(holding that a *quantum meruit* claim was subject to a statute of limitations rather than the doctrine of laches, which applies to other forms of equitable claims).

³⁴ *Thomas v. Thomas*, 102 N.C. App. 124, 401 S.E.2d 396 (1991)(the applicable statute of limitations was three years).

³⁵ *Lazzaverich v. Lazzaverich*, 200 P.2d 49 (Cal. Ct. App. 1948)(this case also involved a claim of putative spouse status, but made clear that a *quantum meruit* claim for services would cover all services rendered during the relationship); see also *Hill v. Westbrook's Estate*, 213 P.2d 727 (Cal. App. 2d Dist. 1950)(holding further that if the promise to pay for services was to be made by the estate, then the statute did not begin to run until the death of the deceased cohabitant).

An additional issue arises in cases involving *Marvin* claims pursued at death against an estate. The first question that needs to be answered is whether or not the claim is a “claim” subject to the state’s nonclaim statute, a statute that operates as a much shorter statute of limitations than that applied to the underlying cause of action.³⁶ Application of the state’s nonclaim statute is a contested issue in many states, although there are not many cohabitant claims that present the issue clearly.

The issue has been litigated in California, but even there, the issue is not yet clearly resolved. In *Allen v. Stoddard*,³⁷ plaintiff Richard Allen had been in a long term committed relationship with James Humpert. James had promised Richard that he would be taken care of in the event of Humpert’s death, but Humpert never got around to executing any estate planning documents. Richard sought to be named administrator of Humpert’s estate, but Humpert’s sister intervened and was eventually named. California has a nonclaim statute³⁸ requiring claims against an estate (identified in the statute as creditor’s claims) to be filed within four months. Richard filed a claim based on Humpert’s promise. The claim was denied. Under California law, as in many other states, if a creditor’s claim is rejected, the claimant must file suit within 90 days of the rejection.³⁹ Richard failed to meet that deadline by two days, but he did file the lawsuit within the one year period following Humpert’s death. He argued that California Probate Code § 366.3 applied and thus his claim was timely. Section 366.3 provides:

If a person has a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

The estate objected, claiming that the 90 day statute applied. The Court of Appeals recognized that the two statutes were in conflict, but based on the specificity of §366.3, plus the fact that it was the more recently enacted statute, the Court ruled in favor of Richard and applied §366.3.

Prior to its consideration of the conflict between 366.3 and the 90 day statute (CPC §9353), the court was asked to consider whether or not Richard’s claim was in fact a “claim” covered by the four-month nonclaim statute. If it was not, then the 90 day statute would have been irrelevant since it only applied to creditor’s claims rejected by the administrator in response to plaintiff’s filing under the nonclaim statute.

In 2002, a California Court of Appeal had held that a claim such as Richard’s was a creditor’s claim and therefore subject to the four-month statute and the 90 day statute that applied if the

³⁶ UCERA does not provide clear guidance on this question. Section 4(c) of the act merely states: “An action may be commenced against a deceased cohabitant’s estate and adjudicated under this [act] and other law of this state applicable to claims against decedents’ estates.” UCERA says nothing about what sort of claims do or do not qualify as “claims against the estate.”

³⁷ 212 Cal.App.4th 807, 152 Cal.Rptr.3d 71 (2013).

³⁸ CPC §9100 provides that a creditor shall file a claim within “[f]our months [of] the date letters are first issued to a general personal representative.”

³⁹ CPC § 9353.

claim was rejected.⁴⁰ However, in a subsequent case, *Stewart*,⁴¹ another Court of Appeal ruled to the contrary, finding that if the one year statute of §366.3 was applicable, then the claim was not a creditor's claim under the nonclaim statute. The *Allen* Court agreed with the 2002 decision and ruled that Richard's claim was a creditor's claim under §§9100 and 9353. Given the conflict at the Court of Appeal level, and the fact that the California Supreme Court has not addressed this issue, the question of whether a cohabitant's Marvin claim at death needs to be filed with the estate within the four months required by California's nonclaim statute remains murky. California is not the only state that lacks clarity on this question.⁴²

Sometimes states distinguish between contract claims for money, which more nearly resemble creditor's claims, and a cohabitant's claim to ownership of specifically identifiable property in the estate. If classified as a claim to identifiable property, the nonclaim statute may not apply. For example, under Washington's law of "committed intimate relationships,"⁴³ the surviving partner is deemed to own 50% of the property acquired during the relationship. This ownership right is akin to a quasi-community property interest in that it does not arise until termination of the relationship. But at that moment it is vested in the survivor and not subject to claims against the decedent partner.⁴⁴ Therefore, a surviving partner who pursues his or her interest in such property is not making a creditor's claim against the estate, but instead is merely asserting a recognized right of ownership.⁴⁵

States other than Washington sometimes apply a similar analysis if the survivor's claim can be viewed as a claim to specific property in the estate rather than a claim for money owed by the estate. Under Montana law, a request for specific enforcement of a promise to make a will, even though the promise was for a monetary sum rather than specific property, was not subject to the filing requirements of the nonclaim statute.⁴⁶ The claim to a specific sum of money was treated as a claim to property wrongly included in the estate. Other states apply the nonclaim statute to claims based on a breach of a promise to make a will, even when the promise is to convey specific property.⁴⁷

IV. Estate Tax Deduction

⁴⁰ See *Wilkison v. Wiederkehr*, 101 Cal. App. 4th 822, 124 Cal.Rptr.2d 631 (2002)(claim was a creditor's claim under the nonclaim statute and therefore failure to file a claim with the estate within 4 months was fatal to the claim filed later).

⁴¹ *Stewart v. Seward*, 148 Cal.App.4th 1513 (2007). Plaintiff lost in this case because she proceeded as though her claim were a creditor's claim. She filed her claim with the estate within 4 months and when it was rejected, she filed her claim in court within 90 days. However, this date turned out to be two days beyond the one year after death limitation period set forth in §366.3. Since the court ruled that §366.3 applied rather than §§9100 and 9353, plaintiff's claim was untimely.

⁴² For a further discussion about California law on this topic and an acknowledgment that other states suffer from similar confusion see Steven J. André, *Understanding California Nonclaim Statutes and Statutes of Limitations*, 38 *Lincoln L. Rev.* 1 (2011).

⁴³ See note 10, *supra*.

⁴⁴ See *Olver v. Fowler*, 161 Wash.2d 655, 168 P.3d 348 (2007).

⁴⁵ See *Witt v. Young*, 168 Wash. App. 211, 275 P.3d 1218 (2012).

⁴⁶ See *Erwin v. Mark*, 105 Mont. 361, 73 P.2d 537 (1937).

⁴⁷ *Behle v. Harr*, 2021 ND 190, 965 N.W.2d 860 (N.D. 2021). See generally *What are "claims" against estate?* 31 *Am. Jur. 2d Executors and Administrators* § 458.

The final question considered in this essay is whether or not an estate's payment of a *Marvin* claim can be deducted by the estate for estate tax purposes. There are very few cases that have considered this issue, perhaps in large part because most *Marvin* claims arise in the estates of the less well-off who have engaged in inadequate estate planning. Such estates are not likely to be concerned with estate tax issues.

There is one somewhat recent case that does raise this issue: *Estate of Shapiro v. United States*.⁴⁸ After a 22-year cohabitation with Cora Jane Chenchark, Bernard Shapiro began seeing another woman. Cora Jane moved out and sued Bernard, claiming amongst other things, that she was entitled to be compensated for the services she had performed for his benefit during the cohabitation. Bernard Shapiro died before the case proceeded to trial. Ultimately Bernard's estate settled the claim with Cora Jane for \$1.0 million. The estate sought to deduct the settlement.⁴⁹ The Commissioner disagreed, as did the federal District Court that originally heard the case. Upon appeal, the Court of Appeals for the Ninth Circuit, in a split decision, reversed.

The District Court had concluded that Cora Jane's contributions were not sufficiently beneficial to Bernard to support a contract for remuneration. In that case anything transferred to her should be considered a gift and not a deductible expense. The Court of Appeals disagreed. Based on Nevada law, which controlled in this case, homemaking services were sufficient to support Cora Jane's *Marvin* claim. Since it was a valid claim, it must have had some value and the court concluded that that value was a viable deduction.⁵⁰ In partial concurrence and dissent, Judge Tashima agreed that the claim was valid and enforceable under Nevada law. However, the mere fact that the claim was enforceable did not make the payment deductible. Under §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 an adequate and full consideration in money or money's worth."

At this point, we are once again forced into the world where homemaking services are presumptively worth very little. Judge Tashima concluded that Cora Jane performed the services out of love and affection, and, even if that was sufficient to support an enforceable claim against the estate under state law, it was not sufficient to satisfy the "money or money's worth" requirement under the estate tax.⁵¹ To satisfy that requirement the estate would have to show that Cora Jane's services enriched the estate. There is evidence that she supervised household staff, cooked and helped keep the house clean as well as providing emotional support. Surely those tasks created some benefit to Shapiro and therefore to his estate. Whether the benefit was \$1.0 million is a fact question that presumably was to be settled on remand.

We have no record of what occurred on remand as the case appears to have settled. Note that the estate's attorneys had been placed in a bit of a double bind. Initially they had to represent the estate against Cora Jane's claim by arguing she had provided insufficient consideration and

⁴⁸ 634 F.3d 1055 (9th Cir. 2011).

⁴⁹ Actually the estate claimed a deduction in excess of \$1.0 million based on its estimate of what the claim was worth at the time of Bernard's death.

⁵⁰ It claimed the deduction under 26 U.S.C. 2053 (a)(3).

⁵¹ See Wendy C. Gerzog, *Shapiro: Palimony and the Estate Tax*, 131 TAX NOTES 859 (May 23, 2011)(arguing rather convincingly that the alleged services provided in this case were insufficient to satisfy the "money or money's worth" requirement).

therefore had no claim. Then, once they had settled the claim and elected to take an estate tax deduction, they were forced to argue that the claim was not only valid, but supported by contributions in “money or money’s worth.” While I do believe a *quantum meruit* claim can justifiably be deducted from the taxable estate, I also think there is a stronger argument for a reduction in the taxable estate. If Cora Jane’s claim can be characterized as one that produces an equitable interest in the property titled in Bernard’s name, then her claim is similar to those CIR claims pursued in the state of Washington. That is, she might be treated as though she actually owned a portion of the property that was included in Bernard’s estate. Her claim would be to remove that property from the estate rather than to pay her an amount as a deductible item. Nevada state law supports this characterization.⁵²

These are, in my view, the only two possible theories that can support a deduction under §2053: (1) That the property was in fact owned by the survivor and should not be included in the decedent’s estate at all,⁵³ or (2) That the claim is for compensation for services rendered that did benefit the estate. Outside of cohabitant fact patterns, there are cases in which estates have argued that claims against the estate based on *quantum meruit* are deductible claims under §2053. Some are successful⁵⁴ and some are not.⁵⁵ Facts matter. State law does too since the claim must be an enforceable one under state law in order to be deductible.⁵⁶ However, being enforceable is not sufficient. In some states, promises to make a will are enforceable, but any claim paid pursuant to that promise is often merely a substitute for a testamentary gift and therefore not deductible.

V. Conclusion.

Many of the issues that arise in cases involving *Marvin* claims are the same whether the claim is pursued during the couple’s lifetime or upon the death of one of the partners. This essay has attempted to highlight the instances in which the claims differ depending on when they are pursued. The reluctance of some courts to honor *Marvin* claims pursued at death when they readily accept such claims pursued during lifetime is of particular concern.

⁵² See *Western States Construction, Inc. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992)(recognizing that unmarried couples could not actually hold property as community property because they were not married, but they could hold the property “as though they were married.” *Id.* at 1224.

⁵³ This theory would cover not only CIR claims in the state of Washington but resulting trust or constructive trust claims based on the survivor’s monetary or other contribution to the property. See, e.g., *Scott v. Commissioner*, 226 F.3d 871 (7th Cir. 2000). In this case, the surviving partner did not need to assert a claim against the estate. She was the named beneficiary under the deceased partner’s will. But in order to reduce estate taxes, she claimed that a portion of the property that was titled in the decedent’s name was actually owned by the survivor because she had contributed to its purchase. Good theory for purposes of the estate tax, but bad facts. She could not prove the contribution.

⁵⁴ See, e.g., *Estate of Wilson v. Commissioner*, T.C. Memo. 1998-309.

⁵⁵ See, e.g., *Estate of Olivo*, T.C. Memo. 2011-163

⁵⁶ The Tax Court in *Olivo* concluded that the claim for services provided had not been paid and could not necessarily be established under New Jersey law. *Estate of Shapiro*, note 48, *supra*, found that the claim would have been enforceable under Nevada law.