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Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile

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CHOICE OF LAW PROBLEMS ARISING WHEN UNMARRIED COHABITANTS CHANGE DOMICILE

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INTRODUCTION

THIS article explores choice of law problems that will arise when a court determines the property-based claims that one unmarried cohabitant (or her estate) has against the other (or his estate) when the pair began their cohabitation in another state before at least one of them moved to the state of the forum that is dealing with such claims after the breakup of the couple or the death of one of them. It will be seen that these choice of law issues affecting cohabitants are far more intricate and complex than the conflict of laws issues arising when lawfully married couples change domicile, primarily because of lack of agreement among the American states as to what legal theory controls the rights of unmarried cohabitants.[1] With respect to married persons, all states agree that unless the pair have made a contract addressing the property rights and obligations between them, the governing law is drawn from a jurisdiction having authority to regulate the status of their marriage, usually the domiciliary state of the spouse seeking divorce. The contract that may displace the effects of status-based law of property rights must be in writing in the case of persons lawfully married. As a result, such contracts are not often encountered.

There exist several different legal theories that courts may employ in deciding to recognize or bar one cohabitant's claim after the termination of their relationship to property the other cohabitant had acquired. With respect to unmarried cohabitants, only a handful of American jurisdictions takes the position that the cohabitants, having made no contract, share a legal status similar in some respects to the status of marriage, a

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1. Most of the cases are analyzed in an exhaustive and recent annotation, Randy J. Sutton, *Property Rights Arising From Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R. 5th 219 (1999). Many pertinent cases are analyzed in the eight articles constituting the Symposium: Unmarried Partners and the Legacy of *Marvin v. Marvin*, 76 NOTRE DAME L. REV. no. 6 (2001). A recent case reviewing many of the leading decisions granting and denying relief to one cohabitant asserting contract, property or equitable claims against the other cohabitant is Salzman v. Bachrach, 996 P.2d 1263, 1266-69 (Colo. 2000).

status supported by rules of law (almost always judge-made) creating property rights and obligations of the cohabitants. The status-based rules of law can be displaced by provisions of a contract the cohabitants have made. None of the states recognizing the status of unmarried cohabitants requires that such a contract be in writing.

A second small group of states attaches to the couple what can be called a negative status,[2] under which the perceived immorality of their relationship not only precludes any judge-made rules granting property rights but disables the pair from making a contract concerning property rights related to their cohabitation.

A third and larger group of states will enforce an express, but not an implied, contract concerning property rights made by the cohabiting couple. Only two states in this group require such a contract to be in writing, as a result of which claims based on alleged express promises are not uncommon. A few of these jurisdictions hold that the existence of the contract is a basis for attaching to the relationship certain incidents that the parties could not agree to by contract (e.g., that if one was injured by a third party the other could sue that person for loss of consortium). At least to that extent, the state is necessarily recognizing a status shared by the cohabitants.

The largest group of states recognizes not only express, but also implied-in-fact agreements arising out of the conduct of the cohabitants. As with express agreements, a few of these states annex on to implied-in-fact agreements legal incidents that parties lack capacity to expressly make part of their contract. A thesis of this article is that a forum that determines that the law of former domicile of the cohabitant litigants treated their relationship as creating an implied contract on to which status-like incidents are added is free to disregard the former domicile's reliance on a contract as the theoretical foundation of the property claims one cohabitant may assert against the other and to classify the relationship existing under the law of the former domicile as wholly status-based.

For purposes of illustration and classification, the following abbreviations will be used in this Article. D1 is the domicile of the parties when they begin their cohabitation. D2 is the state of the forum where property claims based on the cohabitation are being litigated and, in most of the cases discussed, the state to which both cohabitants moved and where they continued their cohabitation before their breakup or the death of one. In a few of the cases analyzed, only one cohabitant has moved to D2. Because most of the reported cases concerning property rights *inter se* of cohabitants have involved heterosexual couples, this Article refers to the parties as M, the male, and F, the female. In general, however, the law is no different where the cohabitants are of the same sex.

Part I of this Article examines in more detail five theoretical bases for recognizing or precluding property claims by one cohabitant against the

2. *See* William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1678-80 (1984).

other: express contract, implied-in-fact contract, negative status, positive status not founded on a contract, and positive status arising out of contract. Part I will note different legal rules that may be applied by states that adhere to the same one of the five theoretical bases to demonstrate that conflict of laws problems can arise on change of domicile from, for example, one positive status state to another, or from one state requiring an express contract to another also using express contract law as the theoretical basis for granting relief.

Part II lays out (1) the choice of law rules a forum might use if it employs a contract theory to resolve the litigation between cohabitants—with most states looking to the domicile of the cohabitants at the time the alleged contract was made—and (2) the choice of law rules applied if its theory for granting relief is regulation of a status similar to the status of marriage. In the later instance, a court is likely to apply the law of the forum as it would in a divorce case involving married persons who acquired property in a former domicile that is before the court. Part II also examines the only three reported cases I found where a court made a choice of law in litigation involving migratory cohabitants, as well as some additional cases where the facts stated presented a choice of law question that the courts did not consider.

Part III narrows the theoretical bases for resolving the property claims of cohabitants from five to three—negative status, positive status, and contract (of any type)—and closely examines the choice of law questions a forum will face in eight of the nine possible combinations presented taking into account that D1 may be using one of three possible theories and D2, the forum, also may use one of the three.

Part IV of this Article considers constitutional provisions that may restrict the forum in some of the nine conflict of laws scenarios from applying its own law to assets before the court.

I. THE FIVE THEORETICAL BASES FOR RESOLVING PROPERTY CLAIMS OF COHABITANTS

A. NEGATIVE STATUS

Georgia, Louisiana, and Illinois,[3] and maybe a few more states,[4] hold that cohabitants do not share a status from which arise any property rights one may claim against the other; but, on the contrary, they are disabled, because of the immorality of their sexual relations, from enter-

3. Rehak v. Mathis, 238 S.E.2d 81 (Ga. 1977); Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994); Liles v. Still, 335 S.E.2d 168 (Ga. Ct. App. 1985); Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Crawford v. City of Chicago, 710 N.E.2d 91 (Ill. Ct. App. 1999); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1984) (denying relief based on claims of express oral contract, implied-in-fact contract, and quantum meruit for the value of domestic services rendered by F).

4. *See* Estate of Alexander, 445 So. 2d 836 (Miss. 1984); Lauper v. Lauper, 492 N.E.2d 472 (Ohio Ct. App. 1985). *But see* Tarry v. Stewart, 649 N.E.2d 1, 6 (Ohio Ct. App. 1994) (denying relief on implied contract and equitable claims while implying that an express pooling contract might be enforced).

ing into a broad agreement for pooling of gains they make during their relationship. If M and F work together in a business, the courts of these states might recognize an implied partnership unrelated to their living arrangement and order one of the pair to disgorge an appropriate share of profits in favor of the other business.[5] Under the laws of the negative status states, if one cohabitant pays all or part of the consideration for an acquisition of property but title is taken in the name of the other, their sexual relationship does not bar recognition of a purchase-money resulting trust.[6] Since all states would enforce between cohabitants a classic purchase money resulting trust and a business partnership agreement, these areas of law do not raise conflict of laws issues related to an allegedly immoral living arrangement and will not be further discussed in this Article.

One negative status state—and I expect the others would agree—has held that the relationship of cohabitants is not a fiduciary or confidential relationship such that breach of a promise by one to share his earnings with the other could be the basis for imposing a constructive trust on the theory of breach of a fiduciary or confidential relationship.[7] Although I found no case on point, because they enforce resulting trusts and implied business partnerships that are independent of the living arrangement of M and F, I would expect the negative status states to enforce a constructive trust based on a promise false when made[8] that also is independent of the pair's sexual relations. For example, F owns land on which she wishes to build a home where her mother can live; F has a dreadful credit rating, but M's is excellent. To get a construction loan for the home, F transfers title to the land to M on his promise to let F's mother live in the home and to grant the title back to F at her request. At the time he makes the promise, M is planning to leave F to move in with another woman and has no intention of keeping any aspect of his promise. The courts in negative status states would likely subject M to a constructive trust because his promise was false when made.

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5. *See, e.g.*, Gerin v. Bonaventure, 190 So. 2d 476 (La. Ct. App. 1966).

6. *See* Spafford v. Coats, 455 N.E.2d 241 (Ill. Ct. App. 1983). For general principles concerning purchase money resulting trusts see RESTATEMENT (SECOND) OF TRUSTS § 440 (1959). *See also* Phillips v. Blankenship, 554 S.E.2d 231 (Ga. Ct. App. 2001), affirming a recovery by cohabitant F from M of $2,525.14 on a theory she characterized as "unjust enrichment" based on "increased value to his real property consisting of a finished basement rental apartment." Other evidence the court found free of sexual taint and thus supportive of this recovery showed that F had done computer work for M that he submitted to his employer and was paid for and that she paid off all of his debts.

7. *See* Schwegmann v. Schwegmann, 441 So. 2d 316, 322-24 (La. Ct. App. 1984). If the promisor and promisee do stand in a fiduciary relationship, the party claiming a constructive trust based on failure to perform the promise made by the other need not show that the promise was made with an intent not to abide by it. *See, e.g.*, 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 44.2 (4th ed. 1987); Alaniz v. Casenave, 27 P. 521, 522 (Cal. 1891).

8. Regarding constructive trusts based on fraudulent promises, see GEORGE T. BOGERT, TRUSTS § 79 (6th ed. 1987); Hensly v. Stevens, 481 P.2d 694 (Mont. 1971); Ferguson v. Ferguson, 285 S.E.2d 288 (N.C. App. 1982) .

In other states, courts have imposed a constructive trust on property after finding an express or implied pooling agreement between the cohabitants.[9] I do not view this use of the constructive trust doctrine as creating a sixth theoretical basis for dealing with property claims of cohabitants, but rather as a remedy for clearing up the title after employing contract theory as the basis for granting relief. Accordingly, choice of law problems with respect to constructive trusts are, like those involved with purchase money resulting trusts, beyond the scope of this Article.

Can a choice of law problem arise when D1 and D2 are both negative status jurisdictions? Yes, because it does not necessarily follow from the fact that such a state disables its own domiciliaries—or M and F who are present there when they try to contract—from making an income-pooling agreement that the state would refuse to enforce an agreement made by M and F while domiciled in another state concerning property acquired before moving to the negative status state.[10] In such a scenario, a conflict of laws problem could arise when a cohabiting couple moves from one negative status state to another. For example, M and F domiciled in Georgia, a *lex loci contractus* state,[11] make an express pooling agreement while on temporary work assignment in California and thereafter acquire assets they take with them to a new domicile in Illinois. There they split up and become involved in litigation over property rights. It is possible that Georgia might enforce the contract made in California but that Illinois would not (or vice versa).

B. "PURE"[12] POSITIVE STATUS

In Washington,[13] West Virginia,[14] Kansas,[15] and maybe one or more

9. *See* Nevel v. Nevel, 201 Cal. Rptr. 93 (Ct. App. 1984); Evans v. Walls, 542 So. 2d 1055 (Fla. Dist. Ct. App. 1989); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

10. *See* text accompanying notes 148-56, *infra*, discussing the contra public policy doctrine.

11. *See* Gen. Tel. Co. v. Trimm, 311 S.E.2d 460 (Ga. 1984); Int'l Machs. Corp. v. Kemp, 536 S.E.2d 303, 307 (Ga. Ct. App. 2000). The version Georgia uses applies the law of the place of making of the contract to issues of validity and of determining the undertakings of the parties.

12. The term "pure" is used to distinguish the approach to status analyzed here from status arising when the cohabitants have made a pooling contract and the law of their domicile attaches to it terms on which the parties could not have contractually settled. Status arising in this manner is discussed in text accompanying notes 70-81, *infra*.

13. *See* Connell v. Francisco, 898 P.2d 831 (Wash. 1995) (contract is just one of several factors to be considered and is not essential in granting property rights to a cohabitant).

14. Goode v. Goode, 396 S.E.2d 430, 439 (W. Va. 1990) (relief available "in the absence of a valid contract" on "equitable principles").

15. Eaton v. Johnston, 681 P.2d 606 (Kan. 1984) (division of property based on equities; no contract required).

additional states,[16] a cohabitant[17] asking a court to order the other cohabitant to pay over money or other property acquired during their relationship need not pursue any theory of contract, express or implied. He or she needs only to show that for some period of time the pair lived together in a stable relationship much as lawful spouses do. By living together in this way, the pair acquire a status similar to that of lawfully married persons. In Washington, the relationship creating the status is bizarrely called a "meretricious relationship."[18]

By basing relief on the theory that the state is regulating a status, these states eliminate the issue of whether a pooling contract between the parties is tainted by sex-based consideration. Washington has issued numerous[19] positive-status decisions laying out many judge-made rules that attach to the status of unmarried cohabitant. Some apply by analogy the law applicable to lawfully married couples. Thus, whatever would be community property were the pair lawfully married is automatically coowned during the relationship from the moment of acquisition by M or F without need for the acquiring cohabitant to pay over or assign a share to the other cohabitant.[20] At the end of the relationship by the breakup of the cohabitants (as opposed to death of one of them), courts divide this property equitably, not 50-50, although it is owned in equal shares.[21] The presumption favoring community rather than separate property ownership of assets in a lawful marriage applies by analogy to property in a meretricious relationship.[22] Rules for granting reimbursement for use of

16. The American Law Institute says a status approach is used in Oregon with respect to long-term relationships. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 reporter's notes, cmt. b (Tentative Draft No. 4, 2000) (citing Wilbur v. DeLapp, 850 P.2d 1151 (Or. Ct. App. 1993) and Shuraleff v. Donnelly, 817 P.2d 764 (Or. Ct. App. 1991)). *See also* Tolan v. Kimball, 33 P.3d 1152 (Alaska 2001) (relief granted not on theory of contract but on inferred intent of cohabitants, relying on Oregon cases).

17. The plaintiff could be the estate of a deceased cohabitant, as could the defendant. To cut down on verbiage, the hypothetical cases discussed in the text will assume that the cohabitants have broken up before litigation was commenced and are both living. In general the points made with respect to this fact pattern would apply as well if there was no breakup but one of the cohabitants had died.

18. *See* Peffley-Warner v. Bowen, 778 P.2d 1022, 1023 n. 5 (Wash. 2000) (conceding that "meretricious" is "an offensive, demeaning and sexist word," derived from the Latin word for prostitute).

19. *See* Amanda J. Beane, Note, *One Step Forward, Two Steps Backward:* Vasquez v. Hawthorne *Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples*, 76 WASH. L. REV. 475 (2001); Gavin M. Parr, Comment, *What is a "Meretricious Relationship"?: An Analysis of Cohabitant Property Rights Under* Connell v. Francisco, 74 WASH. L. REV.. 1243 (1999); Jennifer L. King, Comment, *First Comes Love, Then Comes Marriage? Applying Washington's Property Marriage Statutes to Cohabitational Relationships*, 20 SEATTLE U. L. REV. 543 (1997).

20. *See* Koher v. Morgan, 968 P.2d 920, 921 (Wash. Ct. App. 1998); Lindemann v. Lindemann, 960 P.2d 966, 969 (Wash. Ct. App. 1998); Warden v. Warden, 676 P.2d 1037, 1039 (Wash. Ct. App. 1984); Cummings v. Anderson, 614 P.2d 1283, 1286-87 (Wash. Ct. App. 1980).

21. Connell v. Francisco, 898 P.2d 831 (Wash. 1995); *In re* Marriage of Lindsey, 678 P.2d 831 (Wash. 1984); *In re* Sutton & Widner, 933 P.2d 1069 (Wash. Ct. App. 1999).

22. Connell v. Francisco, 898 P.2d 831 (Wash. 1995); Koher v. Morgan, 968 P.2d 920 (Wash. Ct. App. 1998).

divisible property to improve nondivisible property and for uncommingling when fungible assets of both types have been commingled are the same as those applied to community and separate properties of lawfully married spouses at the end of their marriage.[23] The rules for segregating gain in the value of property that is nondivisible at the termination of a meretricious relationship from gain due to labor by a cohabitant (creating a divisible interest in the asset) are the same as those applied at the termination of a lawful marriage where community labor has caused part of the increase in value during marriage of separate capital.[24]

On the other hand, about the same number of rules applicable to Washington meretricious relationships are different from those applicable to lawful marriages. Thus, a Washington court has no power to divide between cohabitants what would be separate property of a lawfully married spouse,[25] although at a divorce in Washington of lawfully married persons separate property is divisible.[26] At litigation following breakup of a meretricious relationship, a court cannot award attorneys fees to one of the cohabitants, although a needy lawful spouse similarly situated would receive such an award.[27] At the end of the relationship by death of a cohabitant, property that is divisible at breakup when both cohabitants are living is divided equitably between the survivor and the decedent's estate,[28] whereas when a lawful spouse dies, his or her estate and the survivor own a precise half share of each asset that was community property.[29] The surviving cohabitant is not an heir able to make claims under the statutes of intestate succession, as could a lawful widow or widower.[30] One cohabitant cannot recover for the wrongful death of the other.[31] While a lawful spouse is not disqualified from receiving unemployment insurance compensation upon quitting her job to follow the other spouse to a new place of employment, a cohabitant who does the same is disqualified.[32] A cohabitant cannot invoke the statute barring discrimination based on marital status.[33] A divorced person receiving alimony does not forfeit the right to it by entering into a meretricious relationship in circumstances where by statute he or she would upon marrying the person

23. Koher v. Morgan, 968 P.2d 920 (Wash. Ct. App. 1998); Lindemann v. Lindemann, 960 P.2d 966 (Wash. Ct. App. 1998).

24. Lindemann v. Lindemann, 960 P.2d 966 (Wash. Ct. App. 1998).

25. Connell v. Francisco, 898 P.2d 831 (Wash. 1995).

26. WASH. REV. CODE ANN. § 26.09.080 (West 1997) (separate property divisible at divorce if necessary to achieve fair overall distribution).

27. Foster v. Thilges, 812 P.2d 523 (Wash. Ct. App. 1991); W. Cmty. Bank v. Helmer, 740 P.2d 359 (Wash. Ct. App. 1987).

28. Peffley-Warner v. Bowen, 778 P.2d 1022 (Wash. 1989).

29. Estate of Patton, 494 P.2d 238 (Wash. Ct. App. 1972).

30. Pefley-Warner v. Brown, 778 P.2d 1022 (Wash. 1989). This decision also discusses with approval a trial court holding in related litigation that a surviving cohabitant is not entitled to a homestead allowance granted by statute to a surviving spouse.

31. Roe v. Ludtke Trucking, Inc., 732 P.2d 1021 (Wash. Ct. App. 1987).

32. Davis v. Dep't of Employment Sec'y, 737 P.2d 1262 (Wash. 1987).

33. Waggoner v. Ace Hardware Corp., 953 P.2d 88 (Wash. 1998).

with whom he or she begins living.[34]

There is also considerable Washington caselaw considering exactly what kind of living arrangement qualifies as a meretricious relationship. The fact that one of the cohabitants is during the relationship lawfully married to a third party does not *per se* bar the recognition of a meretricious relationship,[35] although the fact that one is married creates an inference that the parties did not intend to have such a relationship.[36] A sporadic relationship does not meet the "stability" requirement of a meretricious relationship, and a brief relationship fails the "continuity" requirement.[37]

The law in West Virginia and Kansas governing the status of unmarried cohabitants, on the other hand, is so embryonic at the present time that few rules in those states can be pointed to as different from the rules in Washington. One difference has emerged in West Virginia, where it is held that the status of unmarried cohabitants cannot arise if one of the cohabitants knows the other is lawfully married.[38] Very likely, however, there will develop in the future in the positive status states different rules concerning what property is shared, how "stable" the relationship must be (including how long the cohabitation must be) in order for the status to arise, what factors are to be considered in dividing the property at the breakup of the relationship or after the death of M or F, etc.

None of these positive status states has faced the question, certain to rise in the future, as to what kind of contract between cohabitants can displace the rules that would attach because of their status.[39] Since it is essentially the same conduct of M and F that in some states gives rise to an implied-in-fact agreement that creates the status in Washington, West Virginia, and Kansas, it seems unlikely that a cohabitant in one of these states could successfully argue that interaction of the type engaged in by spouses lawfully married can create an implied-in-fact contract that

34. Marriage of Karon, No. 41944-7-I, 1999 WL 211826, 95 Wash. App. 1007 (Apr. 12, 1999), *ordered depublished.*

35. Foster v. Thilges, 812 P.2d 523 (Wash. Ct. App. 1991); Warden v. Warden, 676 P.2d 1027 (Wash. Ct. App. 1984). *Accord*, Marriage of Kinzer, No. 16035-1-III, 1998 WL 151795, 90 Wash. App. 1012 (Apr. 2, 1998), *ordered depublished.*

36. Pennington v. Pennington, 14 P. 3d 764, 772 (Wash. 2000).

37. *Id.*

38. LaRosa v. LaRosa, 400 S.E.2d 809 (W. Va. 1990). If one is married but the other is unaware of that, apparently the status does arise, but the unaware cohabitant cannot be awarded any property of the married cohabitant that his lawful wife might have a claim to under any circumstances. Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990). In Washington, if one cohabitant, say M, is, after a final rupture of their marriage, living separate and apart from his lawful wife while cohabiting with F, the lawful wife would have no claim on any of M's earnings while cohabiting due to the state's living-apart statute that limits the community property regime. WASH. REV. CODE ANN. § 26.16.140 (West 1997).

39. *See* Gavin M. Parr, Comment, *What is a "Meretricious Relationship"?: An Analysis of Cohabitant Property Rights Under* Connell v. Francisco, 74 WASH. L. REV. 1243, 1249 n. 53 (1999). In *Western Community Bank v. Helmer*, 740 P.2d 359 (Wash. Ct. App. 1987), the trial court enforced an oral agreement between M and F at the end of their cohabitation as to how property divisible under the status-based rules of meretricious relationships would be divided between them. One could infer the trial court would also have enforced such a contract made at the outset of the relationship.

would displace the status-based rules of cohabitants' property rights. The case for a contrary decision might arise where, for example, one cohabitant, M, inherited $100,000 while cohabiting in Washington; F inherited $40,000; and each added his or her inheritance to a brokerage account in their common names. Upon their breakup, when there is little property on hand that would be community in a lawful marriage and thus divisible between the cohabitants under status-based law in Washington, the sickly and very needy F argues that what the pair did with their inheritances evidences an implied contract of pooling of gains broader than the scope of pooling arising under status law. That is, they pooled inherited property. Thus a court could award her a chunk of assets traceable to M's inheritance.

On the other hand, these pure status states may recognize implied-in-fact contracts arising out of conduct not typical of lawfully married persons but of people interacting for a reason other than their living together. Suppose a case from Washington where the cohabitation of M and F is so sporadic that the status of meretricious relationship does not arise.[40] During the same period of time, however, M and F work consistently together at a business venture, although they never discuss how gains of the business would be owned. Washington could be expected to find an implied contract to share gains limited to the profits of the business. (Note that it would not *displace* otherwise applicable status-based rules of law, because no meretricious relationship existed.)

What about express contracts? It is fairly common for one cohabitant to allege that the pair agreed to share equally *all* assets each possessed during their relationship,[41] which would include property owned before the relationship began and property acquired by gift, will or intestate succession during the relationship, all of which are not divisible under the status-based rules of Washington. Will Washington hold that such an oral agreement supercedes the status-based rules of law on division of property at termination of the relationship?[42] The American Law Institute

40. *See, e.g., Pennington*, 14 P.3d 764.

41. *See, e.g.*, Byrne v. Laura, 60 Cal. Rptr. 2d 908, 911 (Ct. App. 1997), where the evidence was that M told F "that anything he had was mine, and I [F] told him . . . whatever I had was his." This would pick up assets acquired before the relationship began, property not divisible under the status-based rules of Washington. *See* Henderson v. Superior Court, 142 Cal. Rptr. 478 (Ct. App. 1978); Knauer v. Knauer, 470 A.2d 553 (Pa. Super. Ct. 1983) ("We will share everything together"). *See also* Small v. Harper, 638 S.W.2d 24, 29-30 (Tex. App.—Houston [lst Dist.] 1982, writ ref'd n.r.e.), where the evidence was that the cohabitants agreed to pool "'income and earnings that each of us should acquire from whatever source, including corporate stocks, savings accounts, bonds realty, personalty and other divers [sic] assets.'" This could be construed to extend to stock that was inherited by one of the cohabitants and certainly to dividends earned from such stock, both of which would not be divisible under the status-based rules of Washington.

42. It seems highly improbable that a pure positive status state would hold that an express contract dealing only with what property would be co-owned by the cohabitants would act to eliminate entirely the status that the law would impose on the pair. The contract would displace only those status-based rules directly in conflict with its terms. For example, a "share everything" contract has nothing to do with whether one cohabitant can collect damages for loss of consortium from a third party who tortiously injures the other.

says that where the status of unmarried cohabitants is recognized, the law should require a writing to evidence any contract that would displace all or some of the rules arising out of the status.[43] Would the courts in pure status states like Washington dare to create a judge-made "statute" of frauds applicable to the express contract made by parties to a meretricious relationship? Courts in at least two states have held that a statute of frauds for antenuptial contracts made by parties who become lawfully wedded spouses cannot be construed to extend to cohabitants.[44] But these states, unlike Washington, had not decided to apply much of the statutory law concerning married persons to cohabitants. The notion that the statue of frauds[45] for contracts by which married persons agree to depart from application of the statutes defining community property is part of a " package of property law" that should be applied as a unit to cohabitants is tenable.

Assuming that the courts do not find a way to require a written contract in order to displace the status-based rules of property rights of cohabitants, one might expect those courts to require considerable specificity in any oral contract that is relied on as a source of a different rule. Thus, an oral agreement by which M and F "agree to share everything 50-50" could be held unenforceable for failing to specify WHEN the 50-50 sharing was to occur. Did M and F intend this to apply during the relationship (as when one tries to sell an item of property or when a creditor of one cohabitant levies execution on an asset)? Is it to apply at the time of litigation after breakup of M and F? In litigation after one of the cohabitants has died? In lieu of requiring a writing, the courts might feel more comfortable using judge-made law to limit the number of contracts that would displace the status-based rules by requiring clear and convincing evidence of the making of and the terms of such a contract, rather than a mere preponderance of the evidence.

C. EXPRESS CONTRACT STATES

Several American states have held that only an express pooling agreement made by cohabitants will be enforced.[46] An implied-in-fact agreement is not recognized, nor are implied-in-law contracts alleged as a basis

43. "An agreement is not enforceable if it is not set forth in a writing signed by both parties." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05(1) (Tentative Draft No. 4, 2000). The term "agreement" here includes "agreements between current or prospective domestic partners," the term the American Law Institute uses instead of "cohabitants."

44. *See* Marvin v. Marvin, 557 P.2d 106, 115 (Cal. 1976); Watts v. Watts, 405 N.W.2d 303, 308 (Wis. 1987).

45. WASH. REV. CODE ANN. § 19.36.010(3) (West 1997). *See* Marriage of Fox, 795 P.2d 1170, 1173 (Wash. Ct. App. 1990).

46. Aehegma v. Aehegma, 797 P.2d 74 (Haw. Ct. App. 1990); Wilson v. Trautz, 693 N.E.2d 141, 146 n. 3 (Mass. 1998) (dictum); Featherstone v. Steinhoff, 575 N.W.2d 6 (Mich. Ct. App. 1997); Carnes v. Sheldon, 311 N.W.2d 747 (Mich. Ct. App. 1981); Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980); Potter v. Davie, 713 N.Y.S.2d 627 (App. Div. 2000); Kohler v. Flynn, 493 N.W.2d 647 (N.D. 1992).

for recovery on the theories of *quantum meruit* or unjust enrichment.[47]

Two states in this group—Minnesota and Texas—have enacted statutes of frauds addressed to pooling agreements made by cohabitants. The Texas statute,[48] concerning "an agreement made on consideration of conjugal cohabitation," has been broadly construed[49] to bar any kind of relief for cohabitants permissible in the seminal California case, *Marvin v. Marvin*.[50]

Significantly, the Texas statute has been construed to apply even when the oral contract allegedly called for pooling of gains not for sexual services by one cohabitant for the benefit of his lover but non-sexual assistance "like shopping, doing the mail, paying the bills, drafting checks, dealing with accountants, creditors and real estate agents, and co-managing the household."[51] The Texas court held that this theory of pleading the case was "an attempt to disguise the palimonial nature of the suit."[52] Yet to be decided in Texas is whether in a case where sex is the dominant but not sole consideration and the pooling agreement is in writing the statute of frauds will be construed as precluding judicial resort to the contra public policy doctrine to deny enforcement to the written contract.[53]

The Minnesota statute of frauds applies to a contract "concerning the property and financial relations of the parties" "[i]f sexual relations between the parties are contemplated."[54] Although this language seems even broader than that of the Texas statute, the Minnesota Supreme Court appears to have rendered the Minnesota statute almost a legal nullity. On three occasions it has declared—with emphasis added—that the statute will apply only where the *sole* consideration for a contract between the cohabiting parties is their "contemplation of sexual relations . . . out of wedlock."[55] In each of the three cases, the prevailing

47. What is called an implied-in-law contract "is not a contract in any sense" but a remedy like restitution. DAN B. DOBBS, DOBBS LAW OF REMEDIES § 4.2(3) at p. 580 (2d ed. 1993). If there are any choice of law issues peculiar to a court's use of this remedy that are not encountered when regulation of status or enforcement of an implied-in-fact contract is the basis for a court's granting relief to a cohabitant, they are beyond the scope of this Article.

48. TEX. BUS. & COM. CODE ANN. § 26.01(a) and (b)(3) (Vernon 1987 & Supp. 2001).

49. Zaremba v. Cliburn, 949 S.W.2d 822 (Tex. App.—Fort Worth 1997, writ denied).

50. 557 P.2d 106 (Cal. 1976).

51. *Zaremba*, 949 S.W.2d at 826.

52. *Id.* at 827.

53. The argument would be that the Texas legislature assumed that oral agreements on the same terms as the written agreement before the court would be judicially enforced unless the legislature intervened by requiring a writing.

54. MINN. STAT. ANN. § 513.075 (West 1990), *discussed in* Kim Kantorowicz, Note, *Contracts—Cohabitation in Minnesota: From Love to Contract—Public Policy Gone Awry—In Re* Estate of Palmen, 26 WM. MITCHELL L. REV. 213 (2000).

55. Estate of Erickson, 337 N.W.2d 671, 674 (Minn. 1983) (emphasis on word "sole" added by the court). Earlier the *Erickson* court had said without italics that the unwritten contract between cohabitants in that case was not subject to the statute of frauds because "their sexual relationship did not provide the sole consideration for the agreement." *Id.* The passage with the italicized "sole" was quoted in *Estate of Palmen*, 588 N.W.2d 493, 495 (Minn. 1999), and by the intermediate appellate court in *Obert v. Dahl*, 574 N.W.2d 747, 749 (Minn. Ct. App. 1998), which was summarily affirmed, 587 N.W.2d 844 (Minn. 1999).

cohabitant had contributed money or labor to the acquisition of an asset in dispute. But if the court is serious about "sole," it would have to hold the statute of frauds inapplicable where a cohabitant who had made no such direct contribution to the acquisition alleged that doing household chores and/or raising children was along with sex the consideration for the pooling agreement sued on. If so, the statute can never apply, since prostitution is illegal in Minnesota.[56]

For choice of law purposes, modern courts classify statutes of frauds as substantive, not procedural.[57] Thus, Texas has no basis for requiring a written contract when one cohabitant sues another in a Texas court on a contract made elsewhere when M and F were domiciled elsewhere.

In the states where an express pooling contract is not subject to a statute of frauds, the issue of sexual taint arises in the context of whether an otherwise valid oral agreement is unenforceable as contra public policy, that is, due to consideration tainted by immorality. The caselaw in this area contains views as widely divergent as those of Minnesota and Texas in construing what consideration based on sex means under their statutes of frauds. Like Texas, one California case[58] held an express oral contract unenforceable because the plaintiff pleaded that serving as "lover" of the other cohabitant was one of many services he had agreed to perform as consideration for earning a share of the other's acquisitions.[59] Many more decisions follow Minnesota's approach and hold the contract valid if there is any consideration in addition to sex.[60] Somewhere in between these extremes is the Massachusetts rule that sex must not be the "domi-

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A passage in *Palmen* states the point differently: the cohabitant can recover by "establish[ing] that his or her claim is based on an agreement supported by consideration independent of the couple's 'living together in contemplation of sexual relations . . . out of wedlock.'" 588 N.W.2d at 496.

56. MINN. STAT. ANN. § 609.324 (West 1987 & Supp. 2000); State v. Woelm, 317 N.W.2d 717 (Minn. 1982). A companion statute to the statute of frauds for pooling contracts made by cohabitants denies jurisdiction to enforce an unwritten contract of exactly the same type referred to in section 513.075 and is directed at contracts not governed by Minnesota substantive law. MINN. STAT. ANN. § 513.076 (West 1990). It would be not quite a nullity, as it could apply to an oral contract of prostitution made by a Wisconsin defendant with a Nevada woman in a Nevada county where prostitution is legal. *See* NEV. REV. STAT. ANN. § 201.354(1) (Michie 2001); Nye County v. Plankinton, 587 P.2d 421, 423 (Nev. 1978).

57. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1141 (1971); Bergstrom Air Force Base Fed. Credit Union v. Mellon Mortgage, Inc., 674 S.W.2d 845 (Tex. App. — Tyler, 1984, writ ref'd n.r.e.).

58. California recognizes implied as well as express pooling contracts. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). The discussion here concerning tainted consideration is focused on express contract cases in all states that enforce them.

59. Jones v. Daly, 176 Cal. Rptr. 130, 131 (Ct. App. 1981) (plaintiff pleaded the pair had agreed he would "render his services as lover, companion, homemaker, traveling companion, housekeeper and cook"). In Kentucky, sex must "constitute[ ] no part of the consideration bargained for." Couglar v. Fackler, 510 S.W.2d 16, 18 (Ky. 1974) (suggesting that that state would agree with *Jones*). More recent California cases ignore *Jones* or declare it erroneous. *See, e.g.*, Cochran v. Cochran, 106 Cal. Rptr. 2d 899, 904 (Ct. App. 2001); Bergen v. Wood, 18 Cal. Rptr. 2d 75, 79 (Ct. App. 1993); Whorton v. Dillingham, 248 Cal. Rptr. 405, 455 (Ct. App. 1988).

60. *See* Cook v. Cook, 691 P.2d 664 (Ariz. 1984); Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000); Stevens v. Muse, 562 So. 2d 852 (Fla. Dist. Ct. App. 1990); Poe v. Estate of

nant" consideration.[61] These states could also disagree on how much cohabitation is necessary in order that the relationship not be classified as sex for sale.[62]

The various states that enforce express pooling contracts made by cohabitants will have to grapple with matters of construction and implied terms to fill gaps left by the cohabitants, which is certain to lead to further differences in the laws among the states in this group. For example, if M and F agree to be equal owners of the acquisitions of each during their relationship but fail to state whether this is to be self executing, is F automatically co-owner of an asset M has bought with his on-the-job earnings during their relationship? If so and the couple are domiciled in a community property state, is the co-ownership tenancy in common or do the rules of community property apply by analogy?

If M and F agree orally to "share everything equally," does "everything" include properties each then owned or only subsequent acquisitions? Does it include an inheritance one receives during the relationship if such property would not be divisible at the divorce of a lawfully married couple?[63] Does "equally" mean that, although applicable law makes the agreement self executing so that during the relationship the cohabitants are automatically co-owners of the acquisitions of each of them, a court in post-breakup litigation over property rights cannot make an unequal division of such property under an equitable distribution standard borrowed from divorce law?[64]

D. States Recognizing Implied-in-Fact Agreements

In several states, one cohabitant can assert property-based claims against the other on a theory of implied-in-fact contract even though the pair never discussed pooling of gains.[65] The crucial fact upon which the agreement is recognized is that the pair lived together as do a husband and wife lawfully married.

Levy, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); Suggs v. Norris, 364 S.E.2d 159 (N.C. Ct. App. 1988).

61. Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998).

62. *See* Cochran v. Cochran, 106 Cal. Rptr. 2d 899 (Ct. App. 2001), where the trial court found the cohabitation of M and F was too sporadic to permit application of the line of cases involving contracts between cohabitants in a marriage-like relationship, but the appellate court held the record raised a question of fact concerning the amount of cohabitation that precluded summary judgment.

63. This issue also arises when by the terms of their agreement M promises F "one-half (½) of all the property, both real and personal, accumulated by [him] during the agreement." Latham v. Latham, 547 P.2d 144, 145 (Or. 1976).

64. *See* Domestic Partnership of Raimer & Wheeler, 849 P.2d 1122 (Or. Ct. App. 1993) (contract was to share equally profits of ranch where both M and F worked, but at post-breakup litigation court relied on equitable considerations in determining how much F, holder of the title, should have to pay M).

65. *See* Carroll v. Lee, 712 P.2d 923 (Ariz. 1986); Alderson v. Alderson, 225 Cal. Rptr. 610 (Ct. App. 1986); Boland v. Catalano, 521 A.2d 142 (Conn. 1987); Maria v. Freitas, 832 P.2d 259 (Haw. 1992) (dictum); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987); W. States Constr., Inc. v. Michoff, 840 P.2d 1220 (Nev. 1992); Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

The caselaw concerning general pooling agreements implied-in-fact—as opposed to an implied agreement limited to specific assets—seems indistinguishable from the caselaw in positive status states except that the stated theory of recovery is contract, not status. Since the theory is contract, the court may feel obligated to explain that there is no problem of immoral consideration. Because the pair live together, they perform household services,[66]or they may place their paychecks in a joint account, indicating a tacit pooling of gains.[67] In such a case, there is always some consideration independent of sexual services so that immoral consideration is no more a problem than it is in positive status states.

As in cases where regulating status is the theory of recovery, courts using implied contract theory must decide whether division of property is to be 50-50 or equitable. In status states the answer may be said to be a rule of law; whereas, in implied contract states, an implied term of the contract supplies the rule for division of property. Nevada, in its implied contract cases, borrows the status-based rules defining community property as the implied terms governing the scope of 50-50 sharing.[68] Also, in Nevada the implied agreement to share 50-50 is self-executing.[69] Other jurisdictions enforcing implied-in-fact contracts will have to grapple with these and many other issues concerning the implied terms, such as how long a period of separation of M and F terminates the contract. Certainly, many conflicting rules of law will develop in the several states that enforce implied-in-fact pooling agreements between cohabitants.

E. Status Based on Express or Implied Contract

If the domicile of M and F enforces a pooling contract—express or implied—between cohabitants and also recognizes as an implied term of the contract or a legal incident arising out of the contract a legal right that could not be created by contract, such a state is necessarily recognizing a status existing between the cohabitants. For example, if an express agreement between M and F stated that in the event a tortfeasor injured one of them the other could sue the tortfeasor for damages for loss of consortium, such a provision would not bind the third party as a matter of contract law. But if the law of the domicile of M and F governs their contract and, when the tortfeasor is sued there, that state holds that a duty of care in tort law runs to the uninjured cohabitant because the cohabitation under a pooling agreement is similar to the status of marriage, the relationship between M and F is now more than contractual. They share at least for some purposes a status like lawfully married spouses. There is authority in Nevada and New Jersey, which are not pure positive status states but which do recognize pooling contracts of cohabitants, that the

66. *See* Carroll v. Lee, 712 P.2d 923 (Ariz. 1986); Boland v. Catalano, 521 A.2d 142 (Conn. 1987); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

67. *See* Alderson v. Alderson, 225 Cal. Rptr. 610 (Ct. App. 1986); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. App. 1987).

68. *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220 (Nev. 1992).

69. *Id.*

cause of action for loss of consortium lies.[70] Also, New Jersey has held that a cohabitant has a close enough relationship to the other cohabitant that she can recover emotional distress as a bystander when she sees her cohabitant injured by a tortfeasor.[71] No contract between M and F could impose such tort liability on a third party. Only a recognized status could provide standing to assert the claim under the tort rules of liability to bystanders.

In a Massachusetts case,[72] M moved his business away from the city where he and F had cohabited for 13 years and where F worked. She quit her job to move with him. Relying on precedents granting unemployment insurance benefits to a lawfully married spouse who quit work to follow his or her spouse to a new place of employment, the Massachusetts high court held F eligible for unemployment insurance because her leaving the job was involuntary. M and F could not have successfully added a term to their express pooling agreement that F would have such a claim against the unemployment insurance fund. It had to arise because a status was added as a matter of law to their contract.

In Arizona, statutes entitle a taxpayer to claim his or her cohabitant as a dependent for purposes of state income tax laws, resulting in an increased personal exemption and possible eligibility to claim a family income tax credit.[73] Most certainly a provision in a cohabitants' pooling contract announcing that the relationship would result in tax benefits ac-

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70. Two federal district courts having to guess under *Erie* how Nevada and New Jersey would resolve the claim for loss of consortium have held recovery is proper. Norman v. Gen. Motors Corp., 628 F. Supp. 702 (D. Nev. 1986); Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980). The New Jersey federal court may have guessed correctly based on the New Jersey Supreme Court's later holding in a bystander liability case. *See* text accompanying note 71, *infra*. The Nevada federal court's guess may prove to be wrong, as the trend is to deny a cohabitant standing to sue for loss of consortium when the other cohabitant has been tortiously inured. *See* Kiesel v. Peter Kiewit & Sons' Co., 638 F. Supp. 1251 (D. Haw. 1986); Eldon v. Sheldon, 758 P.2d 582 (Cal. 1988); Roe v. Ludtke Trucking, Inc., 732 P.2d 1021 (Wash. Ct. App. 1987). *See also* Sonja A. Soehnel, Annotation, *Action for Loss of Consortium Based on Nonmarital Cohabitation*, 40 A.L.R. 4th 553 (1985).

71. Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994).

72. Reep v. Comm'r of Dep't of Employment & Training, 593 N.E.2d 1297 (Mass. 1992). The law in California is the same—a status arises—if the cohabiting couple has a child. MacGregor v. Unemployment Ins. Appeal Bd., 689 P.2d 453 (Cal. 1984).

73. Arizona House Bill 2016, 45th Leg., 1st Reg. Sess. (2001), amended section 43-1001 of the Arizona Revised Statutes, which borrows the definition of "dependent" from the federal tax code, to add that "[Internal Revenue Code] section 152(b)(5) does not apply." Section 152(b)(5) provides that "[a]n individual is not a member of the taxpayer's household [for purposes of being claimed a dependent] if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law." This amendment was not necessary, since House Bill 2016 also repealed the statute making open cohabitation a crime, former section 13-1409 of the Arizona Revised Statutes. Nothing in the amended Arizona tax statutes expressly states that a cohabitant can be claimed as a dependent, but the legislative history of House Bill 2016 indicates that this was the lawmakers' intent. *See* State of Ariz. H.R., 45th Leg., 1st Reg. Sess., Fiscal Note on H.B. 2016 (Mar. 28, 2001), *available at* http://www.azleg.state.az.us. Thus, a taxpayer with a dependent cohabitant should be able to obtain the increased personal exemption under section 43-1043(2) of the Arizona Revised Statutes and the family income tax credit under section 43-1073(A)(5) to (A)(8).

corded to married persons would be a legal nullity. The tax law thus recognizes a status.

In Hawaii, upon the death of one of two same-sex cohabitants who have registered as reciprocal beneficiaries, the survivor has the same rights of inheritance as if lawfully married to the decedent.[74] Absent such a statute, the pair could still sign a contract in which each agreed to leave by will to the other the statutory intestate share the survivor would be entitled to if they were lawfully married and one died. But such a contract would not cause title to vest immediately upon death in the survivor as in the case of a statutory heir. Equitable considerations might bar specific performance of the contract if the decedent had failed to write the agreed on will. Nor could the contract cast on the surviving cohabitant standing that a statutory heir would have to attack a prior will in favor of another person as void due to lack of testamentary capacity. Thus, Hawaii recognizes the existence of a status between same-sex cohabitants with a pooling contract who register as domestic partners.

In California, same-sex couples and opposite-sex couples consisting of persons both over the age of 61 may register as domestic partners. Doing so entitles them to a handful of legal rights that the law grants to lawfully married spouses, including hospital visitation privileges and access for the nonemployee cohabitant to the same health insurance coverage offered to lawful spouses by the working cohabitant's employer; the right to recover damages for emotional distress suffered upon seeing his or her cohabitant injured by a tortfeasor; and standing to sue for wrongful death of the cohabitant.[75] In Hawaii, same-sex couples can also obtain these kinds of benefits by registering as reciprocal beneficiaries.[76] Again, a mere contractual provision between the cohabitants purporting to require hospitals and employers to accord such rights would be a legal nullity. These statutes create status-based rights.

A number of cities have enacted ordinances[77] entitling cohabitants to

74. HAW. REV. STAT. ANN. § 560:2-102 (Michie 1999).

75. CAL. GOVT. CODE §§ 22868-22877 (West 1995 & Supp. 2001); CAL. HEALTH & SAFETY CODE § 1261 (West 2000). CAL. CIV. CODE § 17714.01; CAL. CODE CIV. PROC. § 377.60. *See also* 1999 CAL. STATS. ch. 588, § 1.

76. HAW. REV. STAT. ANN. § 323-2 (Michie 2000); HAW. REV. STAT. ANN. § 431L-4 (Michie 1998); *see also* HAW. REV. STAT. ANN. § 431:10H-205 (Michie 2000 & Supp. 2001).

77. *See, e.g.*, ITHACA, N.Y. MUN. CODE ch. 7, §§ 7.1 - 7.9 (2000); MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 7, §§ 142.10 -142.70 (2000); NEW YORK CITY, N.Y. ADMIN. CODE §§ 3-240-244 (2000); SAN FRANCISCO, CAL. ADMIN. CODE §§ 62.1 - 62.9 (2000) and chs. 12B and 12C, *upheld in* S.D. Myers, Inc. v. San Francisco, 253 F.3d 461 (9th Cir. 2001), and *discussed in* Emily V. Griffin, *"Relations Stop Nowhere": ERISA Preemption of San Francisco's Domestic Partner Ordinance*, 89 CAL. L. REV. 459 (2001); SEATTLE, WASH. MUN. CODE chs. 4.24, 4.28, 4.29. A website has collected ordinances conferring status-type rights on same-sex cohabitants. *See* William Meyers, States, Counties, and Towns with Some Type of Benefit or Recognition to Domestic Partners for Homosexuals *available at* http://www.actwin.com/eatonohio/gay/dompar.htm (last modified Aug. 23, 2001). *See also* Craig A. Bowman and Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

register as domestic partners and conferring on those who do benefits that could not be achieved by contract, such as the right to compel an employer to honor a leave request to care for a sick cohabitant like that which would be granted in the case of a sick lawful spouse; the same right to visit an incarcerated cohabitant that would be accorded the lawful spouse of a jailed person; the same right to succeed on death of a cohabitant to continued occupancy of rent-controlled housing as a surviving spouse would have; and the right to health coverage for an employee's cohabitant equivalent to that accorded by the employer to the lawful spouse of a worker. There is no requirement that a state classify all cohabiting couples in the same way. Those living in one of these cities and registering under such an ordinance can be recognized as sharing a status, while other cohabitants are governed only by contract law.

Suppose A and B, who do not live together, make a contract under which A agrees to serve as housekeeper for B and B promises that so long as A does so serve A will automatically become one-half owner as tenant in common of any asset B acquires. With his earnings while A is working for him B buys an oil painting. If the jurisdiction where this occurs holds A is not automatically co-owner of the painting because the contract is not self-executing[78]—that is, B must do some act such as give A a document of title or deliver the asset to A[79]—but would recognize A as automatically becoming co-owner if they were cohabitants who had a pooling agreement, a status between the cohabitants arising out of their contract is recognized. The cohabitants obtain a legal right of automatic co-ownership like that enjoyed by lawfully married persons in community property states that unmarried and noncohabiting couples making a similar contract do not get the benefit of. Nevada[80] and at least some Califor-

78. This is not a case where, using language of "grant," B has vested in A a springing executory interest. *See* Speelman v. Pascal, 178 N.E.2d 723 (N.Y. 1961). Apparently it is possible to create an executory interest in described personalty not yet owned by the grantor. But there is no precedent that an executory interest can be created in so vague a class of future acquisitions as "whatever I may acquire." A business partnership is self-executing in that the earnings of one partner automatically become partnership property without need of his doing any act of assignment. *Cf.* UNIFORM PARTNERSHIP ACT § 502 (1994). I could find no case outside the context of either business partnership or cohabitants' pooling agreement that considered whether an agreement to become co-owners of future acquisitions of personalty is self-executing. With respect to existing items of personalty, a split of authority exists as to whether a contract of sale can create an executory interest in the absence of delivery to the acquirer of the future interest of some document of title. *See* LEWIS M. SIMES & ALLEN F. SMITH, FUTURE INTERESTS § 445 (2d ed. 1956 & Supp. 2001). Those states that hold the contract itself insufficient with respect to identifiable items of personalty would certainly take the same position where the alleged asset in which a future interest is conveyed is "everything I may acquire while we live together."

79. Delivery of the asset being donated or of a written memo of gift is necessary to complete a gift in most situations. *See* RESTATEMENT OF PROPERTY (WILLS & OTHER DONATIVE TRANSFERS) § 6.2 (Tentative Draft No. 3, 2001). Where the donation is of an undivided interest in an asset, the donor has as much right to possession, after co-ownership has been established, as the donee. To demand manual delivery to complete the gift would be improper. In this situation courts might require use of a written instrument of gift.

80. W. States Constr., Inc., v. Michoff, 840 P.2d 1220 (Nev. 1992); Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984).

nia cases[81] treat pooling agreements between cohabitants as self-executing.

II. CHOICE OF LAW METHODS EMPLOYED IN LITIGATION BETWEEN COHABITANTS OVER PROPERTY CLAIMS

Unless ownership of out of state realty is contested (in which case situs law might be applied to that issue[82]), the court hearing litigation concerning property rights and obligations between former cohabitants who have lived in more than one domicile will determine what choice of law rule to apply by classifying the claims as sounding in contract or status law.

A. CLAIMS CLASSIFIED AS SOUNDING IN CONTRACT

For claims classified as express or implied contract, the court likely will use the same choice of law rule applied to contract cases not involving cohabitants.

1. Most Significant Relation Method of Choice of Law

The most commonly used method among American jurisdictions is the most significant relation test of the Second Restatement of Conflict of Laws. It authorizes the parties to an express contract to select the governing law in most instances.[83] An implied contract could have no such law selection clause, and, since most express pooling contracts among cohabitants are oral and informal, such a clause will seldom be encountered by the court.[84]

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81. *See* Marriage of Stitt, 195 Cal. Rptr. 172, 175 (Ct. App. 1983). Using a mix of M's earnings during their relationship and hers (more of hers than his), F bought land, taking title in her name. She later borrowed money, putting up the land as security. If the land were equally co-owned by M and F, under California law they would also co-own the loan proceeds, which the court held they did, because the real "property was 'community' in the sense that between the parties it was owned equally."

82. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 235 (1971) (equitable interests in land determined by whole law of the situs state). Courts viewing the claims to out-of-state realty as based on status might apply by analogy sections 233 and 234, which look to the whole law of the situs state to determine rights in real property arising out of the status of lawful marriage.

Or the court hearing a suit between cohabitants over property rights might follow by analogy the choice of law rule for out-of-state land used by courts of the state in dividing property at the divorce of lawfully married persons, which usually is to apply forum law. *See* note 115, *infra*. Tannehill v. Finch, 232 Cal. Rptr. 749 (Ct. App. 1986), was a case of cohabitants litigating property rights. The California court applied to land in Arizona a California statute providing that "[t]he owner of the legal title to property is presumed to be the owner of the full beneficial title," which is arguably a substantive rather than procedural rule of law.

83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS§ 187 (1971). A few states that do not use the Restatement Second's choice of law rules nevertheless find the section 187 tests for validity of a law-selection clause appropriate. *See* Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148 (Cal. 1992).

84. In written antenuptial agreements for lawfully married persons choice of law clauses are sometimes encountered. *E.g.*, Carr v. Kupfer, 296 S.E.2d 560 (Ga. 1982) (enforcing the clause).

A Second Restatement jurisdiction next must determine if the contract between cohabitants at issue should be considered a contract "for the rendition of services." If so, section 196 rebuttably presumes that the applicable law is that of the state where all or most of the services will be performed under the terms of the contract. That would be the domicile of M and F.[85] That M and F might have made their express agreement while on a vacation trip away from their domicile would not result in rejection of domicile law.

If the forum does not classify the cohabitants' contract as one for rendition of services, it applies the factors of section 188 dealing with contracts in general. Four of the five factors there listed could be significant:[86] place of negotiation, place of contacting, place of performance, and domicile of the parties. Implied contracts will arise primarily out of conduct in the domicile of M and F, and its law clearly should apply to an implied contract under section 188.

Consider, however, the case where M and F negotiate and conclude their express pooling contract in state X and not in their domicile, perhaps while on a quasi-honeymoon taken after they agree to begin living together but before they've discussed property issues. Now two of the section 188 factors—place of negotiation and place of contracting—favor state X, and two others, place of performance and domicile of the cohabitants[87] point to application of domicile law. Section 188(2) states that the listed "contacts are to be evaluated according to their relative importance with respect to the particular issue." I predict that in a case where factors appear to be evenly distributed between two states Restatement Second jurisdictions will hold that domicile is the most important contact when the issue—how if at all shall cohabitants share property acquired during their relationship—is so closely related to family law matters.

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85. It could be that M and F meet and fall in love when they have separate domiciles. They make their express contract before one of them leaves his home to move in with the other. Ordinarily, parties to a contract need to know what law applies to it at the time they negotiate and complete it, so that the appropriate time for ascertaining domicile is no later than the moment the contract is finalized. Subsequent changes of domicile are generally not relevant. See discussion of this time of interest analysis in the tort context—most of the pertinent cases have been tort cases—in William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L. J. 591, 605-06 (2000). Nevertheless, because of the strong interest in the couple of the state that becomes their common domicile, I predict courts using any modern choice of law method will find some way to select its law as controlling.

It is conceivable that M and F retain their separate domiciles even after they begin cohabiting, spending part of the year together in M's home state and part in F's. Faced with this fact pattern, a court could choose the law of the state where the couple have spent most of their time during the relationship or the domiciliary state in which they made an express pooling contract.

86. The factor not likely to be involved is location of the subject matter of a contract, section 188(2)(d).

87. Section 188(2)(e) seems to count the domicile of BOTH parties as one factor—not two—having the same potential weight as the four other factors listed in section 188(2). Where parties to a contract are from different domiciles, apparently each such state gets half a "credit" in the weighing-of-factors approach of section 188.

After a thorough search,[88] I could find only three reported cases involving property rights of cohabitants where a choice of law was made. In two of them, the courts applied section 188 of the Second Restatement. In a 1978 California case,[89] once the court classified the action as sounding in contract rather than arising out of status, the choice was obvious. M and F began cohabiting in Florida when both lived there and made there an oral agreement to share equally in property each acquired during their relationship. They broke up in Florida, and F moved to California. She relied on California law in her suit against M. Quoting section 188, the court held that Florida law applied.[90]

A 1983 case from Pennsylvania, on the other hand, presented a difficult three-state conflict.[91] While domiciled in Pennsylvania, and before they began cohabiting,[92] M and F made an oral agreement that she would "come with" M, who was planning to move to Delaware, and that the two would "share everything together."[93] The two did take up domicile and began cohabiting in Delaware, remaining there more than two years. Later, they changed their domicile to Maryland and were living there when M left F. F returned to Pennsylvania and was domiciled there when she sued M for breach of the contract. M remained domiciled in Maryland and asked for application of Maryland law. Classifying the case as

88. I started with the lengthy and recent ALR annotation, *supra* note 1, and Shepardized the cases found there. These results were supplemented with a computer search. The writers of West headnotes *always* include the phrase "what law governs" when they detect a choice of law issue. For my search in Westlaw I used that as a mandatory phrase coupled with, in various searches, "cohabit!," "meretricious," "live together," and "Marvin."

89. Henderson v. Superior Court, 142 Cal. Rptr. 478 (Ct. App. 1978). The ultimate issue there was whether California could exercise long-arm jurisdiction over M in F's suit. Governing law was one factor to be weighed in deciding if due process would be offended should California force M to litigate there.

90. The court also cited section 196, but relied on section 188 for its choice of law. It is now clear that California does not use the Second Restatement method of choice of law in contract cases but rather interest analysis. *See* Wong v. Tenneco, Inc., 702 P.2d 570 (Cal. 1985) (citing Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721 (Cal. 1978) (decided after *Henderson*)). Since the California Supreme court in *Offshore Rental* had strongly embraced interest analysis in the tort context shortly before *Henderson* was decided in Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976), *Henderson's* use of the Second Restatement was inexplicable even pre-*Wong*.

Henderson also relied on section 1646 of the California Civil Code, which provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Section 1646 was part of California's Field Code of 1872. The California Supreme Court can abrogate these statutes at will. *See* Li v. Yellow Cab Co., 532 P.2d 1226, 1233 (Cal. 1975). The *Henderson* court should have understood that the California Supreme Court's adoption of interest analysis had worked a judicial repeal of the codification of a version of the *lex loci* choice of law rule in section 1646. *Henderson* was decided before a California case held that California's status-based rules for dividing property at divorce of lawfully married persons could not be applied in the instance where only one spouse moved from D1 to California. *See* text at note 127, *infra*. The *Henderson* court had no reason to consider applying that rule by analogy as a basis for choosing Florida law, particularly since it viewed the action as one for breach of contract.

91. Knauer v. Knauer, 470 A.2d 553 (Pa. Ct. Super. 1983).

92. *Id.* at 558.

93. *Id.* at 555.

one in contract and quoting section 188, the court chose Pennsylvania law. It relied on the facts that the contract was made in Pennsylvania (and, although the court did not say so, it surely was negotiated there) and that an "important part" of the gains of which F sought a share were held in a Pennsylvania corporation. Apparently the court thought that this implicated the section 188(2)(d) factor, "location of the subject matter of the contract."

If domicile is examined at the precise moment of completion of the contract sued on,[94] the decision is correct, as only Pennsylvania was then involved with the section 188 factors. A sound argument can be made, however, for application of Delaware law because part of the agreement was that the pair would begin cohabiting in Delaware. Sharing of gains would not begin until after the move to Delaware under the contract.

2. *Interest Analysis*

The choice of law method used in California contract cases is interest analysis, and New York uses this method for some but not all contract issues. Under interest analysis, if the parties have a common domicile, its law is used.[95] If M and F are cohabiting in D1 and make a pooling contract while so domiciled but later move to D2 and continue cohabiting there, a court has to decide which common domicile supplies the governing law, a matter considered in detail in Part III of this article. If M and F have different domiciles when they make their express pooling contract—which will be rare—the court will face a nonfalse conflict that needs to be broken, but the laws of some domiciliary state will be chosen.[96]

In New York if the court decides that an issue in a contract case involving choice of law "involve[s] only the private economic interests of the parties,"[97] it uses section 188 of the Second Restatement or one of the Second Restatement's sections dealing with particular types of contracts, such as section 196.[98] On the other hand, with respect to issues "where the policies underlying conflicting laws in a contract dispute are readily

94. Actually, F's pleaded theory of recovery was the common count of assumpsit, *id.*, which would cover an implied contract arising out of the living arrangement in Delaware. The court, however, treated the case as one of express contract once F had proved M's express promise to her to "share everything."

95. On some performance issues, of course, the law of the place of performance applies. Thus if P of California contracts with D of California to be build a vacation cabin on land D owns in Oregon, the Oregon building code must be applied.

96. The complex rules used in California to break nonfalse conflicts are explained in William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 670-77 (1983). That article explains that the category of "nonfalse" conflict includes the true conflict and the zero interest case. New York uses center of gravity analysis to break nonfalse conflicts when the choice of law method employed is interest analysis. *See* Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679 (N.Y. 1985).

97. *In re* Allstate Ins. Co. ("Stolarz"), 613 N.E.2d 936, 939 (N.Y. 1993).

98. *Id.* at 939, 940; Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 642 N.E.2d 1065, 1068 (N.Y. 1994); Ackerman v. Price Waterhouse, 583 N.Y.S.2d 921, 922-23 (App. Div. 1998).

identifiable and reflect strong governmental interests,"[99] New York employs the interest analysis method, and domiciliary law will be chosen.

Many of the contract issues litigated between cohabitants do implicate governmental interests. What degree of immoral consideration voids a contract between cohabitants? Does F automatically become co-owner of M's earnings (a matter of major significance to creditors of F and thus not a purely private economic matter between M and F)? What equities are to be considered in dividing up the property if recovery is to be granted? I predict New York will use interest analysis in most of its cases of litigation between cohabitants that raise choice of law issues.

The third case I located in which a court made a choice of law in litigation between cohabitants over property claims turned on an issue that under present New York law ought to be treated as involving governmental interests: whether implied-in-fact pooling agreements will be enforced or only express contracts between cohabitants.[100] M and F cohabited in California for some ten years. She then moved to New York, where M cohabited with her at times, although he claimed to have retained his California domicile. She sued him in New York for breach of an implied pooling agreement, relying on California law. He countered that New York law applied,[101] since it does not recognize implied-in-fact cohabitant pooling agreements.[102] Using interest analysis, the court chose California law: "[t]hat she [F] and Weisman [M] may also have cohabited elsewhere does not, of course, affect California's interest in allowing a lawsuit sounding in implied contract that arose out of cohabitation within its borders."[103]

3. The Traditional, Territorial Method

Eleven states cling to the traditional territorial method of choice of law in contract cases.[104] There are two versions of this territorial method, also called *lex loci*. Under one method, all issues except details of performance are governed by the law of the place of making of the con-

99. *Stolarz*, 613 N.E.2d at 939. Curiously in the nine years since *Stolarz* laid out the crucial dichotomy between contract issues suitable for interest analysis and those subjected to a Second Restatement analysis, very few cases have classified contract issues under this approach. One court applied interest analysis to the issue of availability of punitive damages for bad faith breach of contract, Caribbean Constr. Servs. & Assocs. v. Zurich Ins. Co., 700 N.Y.S.2d 129 (App. Div. 1999), but the cause of action looks like tort.

100. Bower v. Weisman, 650 F. Supp. 1415 (S.D.N.Y. 1986), was decided seven years before New York's high court created in *Stolarz* the category of private economic issues created by contracts that are not subject to interest analysis as a choice of law method.

101. *Id.* and Bowers v. Weisman, 639 F. Supp. 532 (S.D.N.Y. 1986), where more factual details appear.

102. *See* Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980).

103. *Bowers*, 650 F. Supp. at 1424-25.

104. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 12-15 (2001) [hereinafter *2000 Survey*]; *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, *available at* http://www.willamehe.edu/wucl/wlo/conflicts/01survey/01survey.htm (stating that there were no changes to the choice of law groups contained in the 2000 Survey).

tract.[105] This version of the traditional approach is the one method that will apply law other than that of the common domicile of M and F when they make their express pooling contract on a trip away from home.

The second version of the territorial approach submits all issues in a contract case to the place of performance of the contract, if there is one.[106] This should result in application of domicile law when M and F have made an express pooling agreement somewhere else.

A state which uses the *lex loci contractus* rule—place of making—for contracts in general may have a different rule for contracts for a common law marriage under which mere presence of the man and woman in a state and the making of promises according to the law of that place does not call for application of the *lex loci contractus*. In New Mexico, for example, the couple domiciled in a state that does not recognize common law marriage must have "significant contacts" in the state which does recognize such informal marriages before that state's law will be applied based on their informally exchanging marriage vows there.[107] A forum that considers a cohabitants' pooling contract analogous to a contract for a common law marriage might apply the same choice of law rule in both situations.

4. Leflar's Five Choice Influencing Considerations

The fourth method of choice of law is Leflar's five choice-influencing considerations, sometimes called by commentators the "better law" method.[108] It is used in two states—Minnesota and Wisconsin—in contract cases according to Dean Symeonides.[109] As applied, this method has almost always resulted in application in contract cases of the law that most favors the aggrieved party suing for breach.[110] Suppose a situation

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105. RESTATEMENT OF CONFLICT OF LAWS §§ 332, 358 (1934).

106. *See* Poole v. Perkins, 101 S.E. 240 (Va. 1919). *See also* CAL. CIV. CODE § 1646, discussed in note 90, *supra*.

107. Estate of Lamb, 655 P.2d 1001 (N.M. 1982) (alternative holding). *See also* State *ex rel* Smith v. Superior Court, 161 P.2d 188 (Wash. 1945) (dictum). New Mexico was applying the *lex loci contractus* rule to contracts in general as recently as 1994. *See* Federal Deposit Ins. Corp. v. Hiatt, 872 P.2d 879 (N.M. 1994).

108. The "better rule of law" is the fifth of the choice-influencing considerations, *see* Milkovich v. Saari, 203 N.W.2d 408, 417 (Minn. 1973), but since in the earliest cases applying this method (*see id.* and Bigelow v. Halloran, 313 N.W.2d 10, 12-13 (Minn. 1981)) determination of the "better rule of law" usually was controlling as to choice of law, the legal literature picked up the shorter name for the method. *See, e.g.*, Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 732 (1990).

In *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 96 (Minn. 2000), the court said better law was not more significant in choice of law analysis than the other four factors, the fourth of which is governmental interest of the forum. Minnesota may be evolving into an interest analysis jurisdiction.

109. *See 2000 Survey*, *supra* note 104 at 13. For my own view that Wisconsin primarily uses interest analysis, resorting to better law to break nonfalse conflicts, see William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 695-98 (1983).

110. *See* Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829 (Minn. 1979) (rule voiding family exclusion clause in liability contract applied in lieu of law upholding such clause, resulting in recovery for injured party); Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn.

where the law of the domicile of M and F would deny relief to the cohabitant seeking a share of the property acquired during the relationship because it is a negative status state, because sexual service is found to be too much a part of the consideration to permit enforcement of a pooling contract, or because the plaintiff's theory is implied-in-fact contract but the state of domicile will enforce only express pooling agreements. The contract sued on was allegedly made by the pair while away from their domicile in a state that would grant relief based on the facts occurring there.[111] Precedent suggests the forum using Leflar's five-factor method would chose the law of the place of making so that the plaintiff could prevail.

B. Claims Classified as Arising Out of State Regulation of a Status

1. Majority Rule: Apply Only Forum Law

If the forum considers division of property at the termination of a relationship between cohabitants to be a matter of status law, it will surely apply to conflicts of laws that arise in such litigation the same method of choice of law used at divorce of lawfully married persons or in estate administration upon the death of a lawfully married spouse. In the latter situation where a spouse has died, the nonbarrable share of the decedent's property is determined by the law of decedent's domicile[112] except in the case of out-of-state realty, as to which situs law is applied.[113]

Most of the litigated cases concerning property rights of cohabitants arise while both are alive, in which case the forum should employ the choice of law method it uses at divorce with respect to issues concerning division of property. Except in very few American jurisdictions, the rule is that the law of the forum applies with respect to all property,[114] includ-

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1978), *aff'd*, 449 U.S. 302 (1981) (rule interpreting contract to require insurer to pay $45,000 to widow of decedent applied over rule interpreting amount owed to be $15,000); Wille v. Farm Bureau Mut. Ins. Co., 432 N.W.2d 784 (Minn. Ct. App. 1988) (similar to *Hague, supra*); Lindquist v. State Farm Mut. Auto. Ins. Co., 415 N.W.2d 28 (Minn. Ct. App. 1987) (law requiring insurer to give insured 30 days notice of nonrenewal applied rather than law requiring 20 days notice); Schlosser v. Allis-Chalmers Corp., 271 N.W.2d 879 (Wis. 1978) (law barring employer from altering retirement plan contract to eliminate group life insurance for persons over age 65 applied rather than law allowing such a change); Air Prods. & Chem., Inc. v. Fairbanks Morse, Inc., 206 N.W.2d 414 (Wis. 1973) (six year statute of limitations for breach of contract applied rather than four year statute which would have barred action); However, under the choice influencing considerations method, on occasion courts choose to apply a protective rule for consumers or parties of weaker bargaining power that denies enforcement of an alleged contract. *See* Wyss v. Albee, 515 N.W.2d 517 (Wis. Ct. App. 1994) (statute of frauds for land sales contract requiring disclosure of agency relationship applied over statute of frauds not requiring such disclosure).

111. For an implied-in-fact contract to arise, an extended stay in this state would be required, but that could happen if M or F was a visiting professor for a school year at a university away from his or her domicile, and his or her cohabitant joined the visiting professor there for the full year.

112. Restatement (Second) of Conflict of Laws § 265 (1971).

113. § 242 (whole law of the situs).

114. *See* William A. Reppy, Jr., *Conflicts of Law Problems in the Division of Marital Property* § 10.02, in 1 Valuation And Distribution Of Marital Property (Matthew-

ing out-of-state realty.[115] And even though only one of the divorcing spouses has become domiciled in the forum state, its division law will be applied to the detriment of the nondomiciliary spouse over which the court has personal jurisdiction.[116]

These majority-rule jurisdictions will recognize that the law of the state of a former domicile of a married couple had determined whether *during* their marriage acquisitions of one spouse were owned by him or her alone or co-owned,[117] but the form of ownership during marriage is not relevant to the forum in dividing property at divorce. The court considers the source: was it inherited property, earnings of a spouse during marriage, a gift, etc?[118]

Courts in two states that approach rights of cohabitants in property as arising out of law regulating a status have rendered reported decisions where the facts raised a choice of law issue, and the court applied the law of the domicile, as it would have had the parties before it been lawfully married spouses litigating a divorce action. In none of the three pertinent cases did the court acknowledge there was a choice of law issue, probably because the parties in their briefs simply assumed forum law would apply. But choice of sister state law is a question of law, not fact,[119] and appellate courts have been known to sua sponte make a choice of law other than forum law.[120]

In a Washington case, M and F cohabited for 31 months as Nevada domiciliaries and then moved to Washington where they cohabited for 34

Bender 1984, reprinted 1986), and authorities there cited. If the divorcing spouses had a formal agreement concerning property adopting the division law of a different jurisdiction related to the parties, the forum would likely honor this clause. Forum law also applies at divorce to all the other issues such as alimony, child support, child custody, and grounds for divorce. *See* Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Conflict of Laws*, 32 CREIGHTON L. REV. 1085 (1999) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971)).

115. *See* LA. CIV. CODE ANN. art. 3525 (West 1994); Grappo v. Coventry Fin. Corp., 286 Cal. Rptr. 714 (Ct. App. 1991) (California law applied to Nevada land); Ford v. Ford, 80 Cal. Rptr. 435 (Ct. App. 1969) (farm in Illinois classified as community property under law of the marital domicile, California); Chirekos v. Chirekos, 338 N.E.2d 140 (Ill. Ct. App. 1975) (equitable lien based on forum law imposed on Arizona land, rejecting claim situs law should apply). The forum will declare under its own law of division of property at divorce any rights the non-owner spouse should obtain at divorce in land in the situs state but will not purport directly to change the title. If the aggrieved spouse will not sign a deed to the land or to the share thereof awarded to the other divorcing spouse, the benefited party is expected to take the decree to the situs state and sue to have full faith and credit given to it insofar as it creates an equitable right in the party, who will ask the situs state to convert that right into a legal interest in the chain of title in the situs state.

116. Martin v. Martin, 752 P.2d 1026 (Ariz. Ct. App. 1986); Ismail v. Ismail, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

117. *See, e.g.*, Camara, v. Camara, 330 So. 2d 818, 820 (Fla. Dist. Ct. App. 1976).

118. *See, e.g.*, WIS. STAT. ANN. § 766.31 (West 1993 & Supp. 2000); Addison v. Addison, 399 P.2d 897 (Cal. 1965).

119. *See* Choate v. Ransom, 323 P.2d 700 (Nev. 1958); Pittsburgh Corning Corp. v. Walters, 1 S.W.3d 759, 769 (Tex. App.—Corpus Christi 1999, writ denied).

120. *See* Lake County Trust Co. v. Two Bar B, Inc., 606 N.E.2d 258, 262 (Ill. Ct. App. 1992); James v. Powell, 225 N.E.2d 741, 745 (N.Y. 1967).

months before breaking up and proceeding to litigate property issues.[121] Almost certainly Nevada law had recognized an implied contract existing between the two before they moved to Washington, but the possibility of applying Nevada law was not alluded to.

In a West Virginia case,[122] M and F began cohabitation while domiciliaries of that state. After three years they moved to the negative status state of Georgia and cohabited there. At least one of the pair must have reclaimed a West Virginia domicile after their breakup, because that state used status theory to award property to F rather than rely on a contract made when they began cohabiting that M would support F. No mention was made of Georgia law, although it would have denied relief, especially with respect to misacquisitions while he and F were domiciled in Georgia.

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121. Connell v. Francisco, 898 P.2d 831 (Wash. 1995). These figures draw inferences from the stated facts that provide the shortest period of time in Nevada and the longest in Washington, i.e., the pair came to Washington on the first day of June 1986, and separated on the last day of March 1990. If their move to Washington was at the end of June and their separation at the beginning of March, they were domiciled for 32 months in Nevada and 32 months in Washington.

If the court had classified the case as sounding in contract, it would have applied the Second Restatement's method for choice of law, possibly resulting in Nevada law being applied. *See* Nelson v. Kaanapali Properties, 578 P.2d 1319, 1321 (Wash. Ct. App. 1978) (applying sections 188 and 196). *See also* Fluke Corp. v. Hartford Acc. & Indem. Co., 7 P.3d 825, 832 (Wash. Ct. App. 2000).

In another Washington case, *Warden v. Warden*, 676 P.2d 1037 (Wash. Ct. App. 1984), the couple met in Canada in 1961, and at M's request F went with him in 1963 to California where they cohabited for some four years, holding themselves out as husband and wife. Very likely California law recognized a pooling contract between them. In 1967 M "was transferred," *id.* at 1037, to New York, and F returned to Canada where their daughter was born. Sometime in 1967 or 1968 the pair moved to Arizona and then in 1969 to Washington. In 1972 M went back to California and married someone else. F sued M in Washington "to establish . . . ownership of the property" they had acquired. *Id.* at 1038. M's appeal from the judgment in her favor concerned only land in Washington. The court held that "certain meretricious relationships of long and durable standing may give rise to community property rights similar to those which prevail between married persons." *Id.* at 1039. This seems to apply Washington law on the theory of status regulation, not because it was the situs of the land.

122. Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990). Although the opinions from California seem to use contract law as the theoretical basis for granting or denying relief to the cohabitant plaintiff, we have seen that in the case of some, if not all cohabiting couples, the law of that state adds into the contract terms M and F could not have agreed on. *See* note 72 and text accompanying notes 75, 77 and 81, *supra*. California could assert that status theory is the true basis for dividing up property between cohabitants. Status theory could explain why the court in *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Ct. App. 1986), did not see a potential choice of law issue before it. There, M and F began cohabiting in Oregon and settled in California after at least 2 and 1/2 years of Oregon domicile. After their breakup following 12 years of cohabitation F sued M in California on a theory of implied-in-fact contract and prevailed under California law. The court did not consider the possibility that an earlier implied-in-fact contract had arisen under Oregon law. See also *Western States Construction, Inc. v. Michoff*, 840 P.2d 1220 (Nev. 1992), where the couple began their cohabitation in California and then moved to Nevada. Nevada law was applied, and a Nevada implied-in-fact contract found to exist without consideration of the possibility of an earlier such contract created in California. Like California, Nevada attaches to a pooling contract made by cohabitants status-like incidents the parties could not obtain solely by contract. *See* text accompanying notes 70 and 80.

2. Minority Rules

a. Apply Law of Former Domicile Where Property Was Acquired in Certain Situations

There are two distinct minority rules. The first approach by which a choice of law rule points to law other than that of the forum to divide property at divorce—used in Idaho and Nevada and less frequently in Louisiana and Texas[123]—selects the law of the former domicile of the spouses, where they lived when the property was acquired.[124] It has been noted that although Nevada begins with contract theory in dealing with property rights of cohabitants, its law builds on the contract by casting on cohabitants rights or obligations that are status-based. If at post breakup litigation over property rights in Nevada the court sees the law there as status-based, it could apply the law of a former domicile to property acquired there in certain circumstances. Nevada divides only that property of cohabitants that would have been community property had the pair been lawfully married. An acquisition by one or both of them in a former domicile that is not a community property state would not have been community but owned separately by the acquiring cohabitant. However, if it was acquired as a result of the earnings of one or both of the cohabitants during their relationship it is the type of property Nevada thinks

123. Berle v. Berle, 546 P.2d 407 (Idaho 1976); Braddock v. Braddock, 542 P.2d 1060 (Nev. 1975). Arizona invented this "borrowed law" approach to division of property at divorce in *Rau v. Rau*, 432 P.2d 910 (Ariz. Ct. App. 1967), but it was abrogated there by statute adopting the majority rule that applies forum law based on the source of acquisition. ARIZ. REV. STAT. ANN. § 25-318(A) (West 1999 & Supp. 2002). In Louisiana, cases adopting the borrowed law method were also superceded by statute, but it uniquely retains the benefits of borrowed law theory for a spouse who can claim a right to division under the law of the former domicile where the spouses lived at the time of acquisition of the property at issue, but who is not entitled to division of the asset under Louisiana law. LA. CIV. CODE ANN. art. 3526 (West 1994). The pros and cons of this combination method are discussed in William A. Reppy, Jr., *Viewpoint: Louisiana's 'Hybrid' Quasi-Community Property Statute Could Cause Unfairness*, 13 COMMUNITY PROP. J., pt. 3, 1 (1986); Symeon C. Symeonides, *Louisiana's Draft on Successions and Marital Property*, 35 AM. J. COMP. L. 259, 266-85 (1987); Symeon C. Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics*, 13 COMMUNITY PROP. J., pt 3, 11 (1986). A similar approach is used in California — but not with respect to out-of-state realty — when a marriage has terminated by death of a spouse. CAL. PROB. CODE § 28(b) (West 1991).

A Texas statute applicable only at divorce, *see* Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987), calls on its face for application only of Texas law concerning division of assets that were acquired while the spouses lived in a former domicile. TEX. FAM. CODE § 7.002. However, in *Cameron v. Cameron*, 641 S.W.2d 219 (Tex. 1982), the Texas Supreme Court held that the by virtue of the due course of law clause of the Texas Constitution, the division law of the former domicile where the spouses lived when the property at issue was acquired provides the maximum share of the property that a spouse may receive in a Texas divorce in excess of his or her ownership interest. To the extent Texas law would allow more, it is displaced. Thus, Texas also has a hybrid choice of law method under which both forum law and former-domicile law are applied.

124. No reported divorce case involving the borrowed law method has involved a situation where husband and wife were domiciled in different states at the time of acquisition of an asset considered for division at divorce. I predict in this situation the division of law of the domicile of the acquiring spouse would be used. *See* CAL. PROB. CODE § 28(b) (West 1991).

ought to be divisible. Nevada then could well apply to that property, for lack of any Nevada rule applicable to it, the division law of the cohabitants' former domicile, which may or may not result in a recovery for the cohabitant asking for a division.

If the former domicile where the cohabitants lived at the time of acquisition was a community property state but did not recognize a status under which acquisitions became automatically co-owned or did not treat a pooling contract as self-executing, the technical basis for applying the division law of the former domicile in a Nevada court is present. It is faced with an acquisition by labor during the relationship that is not co-owned as it would be in Nevada.

No case applying this borrowed law approach to choice of law has held it applicable at divorce to property acquired in a former domicile that would be divisible there but that would be nondivisible separate property in the forum. An example would be a Nevada forum dealing with dividends on corporate stock inherited by M or F while cohabiting as domiciliaries of Idaho or Texas. Such assets are community property in the domicile of acquisition subject to equitable distribution.[125]

With respect to earnings during marriage owned solely by the acquiring spouse, Nevada uses the division law of the former domicile because that kind of property does not exist in Nevada and the state has no rule for it. Community classification of rents and profits of separate property also is not recognized in Nevada, so a case can be made for applying to such paradoxical property the division law of the former domicile. Such an approach could be carried over by analogy to choice of law in post-breakup litigation over property between cohabitants.

Suppose in the case of cohabitants the law of the former domicile holds that acquisitions during cohabitation by M or F become tenancy in common property. This is technically not community property, yet the quantum of ownership, 50-50, is the same as it would be under Nevada's self-executing express or implied contracts between cohabitants. I predict in this case Nevada will apply its own notions of what constitutes an equitable division in post breakup litigation rather than the division law of the former domicile.

b. Apply Law of the Last Common Marital Domicile

The second minority approach that uses a law other than that of the forum to divide property at divorce of lawfully married spouses chooses the law of the last common marital domicile but only in cases where but one of the divorcing parties has taken up domicile in the forum state. If both have moved to D2 it applies its own law. In three such cases from

125. *E.g.*, Wife already owns half the dividends paid on husband's inherited stock, but she can ask the divorce court to award her some of Husband's half share.

the District of Columbia[126] and one from California,[127] courts have held that in this fact pattern, where only one spouse is domiciled in the forum state, the state where the husband and wife last lived together as married persons has a greater interest in how their property is to be divided at divorce than does the domicile of one of the pair who departed from the last marital domicile.

In each of the four cases apparently one of the divorcing spouses still lived in the last marital domicile. The same choice of law probably would be made if both spouses had moved to new and different states by the time the divorce action was tried. Suppose, however, that after separation in D1 both Husband and Wife moved independently to the District of Columbia or to California. The forum now has double the interest at the time of divorce as it did in the four reported cases. I predict the forum would apply its own law.

None of the four cases involved an asset acquired in the forum by the spouse who moved and established a new domicile there.[128] As to such an asset the lack of interest by the forum state is not as clear as it is with assets acquired in the last marital domicile. However, the same policy that favors unity of succession[129] in dealing with a decedent who leaves realty in a state other than his domicile could propel the forum to want to apply only one system of division law at divorce.[130] That would cause it

126. Gabrielian v. Gabrielian, 473 A.2d 847 (D.C. 1984) (using law of last marital domicile to divide realty situated there, accounts receivable of a business located there, and the husband's pension acquired by laboring there, although he had moved to the forum jurisdiction to file the divorce action); Anderson v. Anderson, 449 A.2d 334 (D.C. 1982) (real property in marital domicile); Williams v. Williams, 390 A.2d 4 (D.C. 1978) (realty). In each case the last marital domicile apparently happened to be the domicile of the spouses at the time of acquisition of the assets, but that was not the theory for applying its division law. Under this minority approach D3 applies D2 law (last marital domicile) to divide assets acquired while the spouses lived in D1.

127. Marriage of Roesch, 147 Cal. Rptr. 586 (Ct. App. 1978) (appellant wife's complaint concerning trial court's method of applying forum law of division rejected because trial court should have applied law of last marital domicile under which she would have received far less property than she did).

128. In the California case, *Marriage of Roesch*, the out-of-state wife would not have brought to the attention of the court the existence of any such property. *Id.* She was asking California to apply its quasi community property law, CAL. FAM. CODE § 125 (West 1994), to her benefit. Since she and the husband were almost certainly living separate and apart after he took up his California domicile, *see* CAL. FAM. CODE § 771 (West 1994 & Supp. 2001), his acquisitions in California would not have been quasi community property and would not have been divisible. In a future case, however, if the last marital domicile state, like most American states, divides property acquired by a spouse even after separation, the out-of-state spouse will ask the California forum to apply the *Roesch* choice of law method to the assets the new California domiciliary spouse acquired after his move to California.

129. *See* Robby Alden, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEXAS L. REV. 585, 604-610 (1987).

130. Suppose D1 and D2 each require a 50-50 division of marital property. In D2 rents and profits of separate property are marital, but nonvested employee benefits rights are not. In D1 it is just the opposite. Like the District of Columbia, *see* Powell v. Powell, 457 A.2d 391 (D.C. 1983), each jurisdiction classifies acquisitions by either spouse after separation and before trial of the divorce action as marital property subject to division. After separation from his wife, husband moves to D2, where his employer awards him very valuable (but not yet vested) stock options. Over the years of marriage, Wife who still lives in

to apply D1 law to the D2 acquisition if there existed D1 acquisitions as well.

III. APPLICATION OF CHOICE OF LAW METHODS IN NINE CONCRETE FACT-LAW PATTERNS INVOLVING COHABITANTS WHO MOVE FROM ONE DOMICILE TO A SECOND, THE FORUM, WHICH MUST LITIGATE PROPERTY ISSUES

This section of the Article closely examines issues that may arise in a number of fact-law patterns where cohabitants move from a state, D1, which uses a different rule of law in dealings with cohabitants than does D2, the new domicile and forum. At this stage, I assume it makes no legal difference whether the positive status approach is of the "pure" type like Washington's where the law does not view M and F as having made any contract concerning property, or whether positive status is achieved by the domicile state's casting on the cohabitants who have made a contract rights and obligations that could not be contracted for. Additionally, in laying out the fact-law patterns I am in this section combining into one "approach category"—the contract approach—states that recognize only express contracts and states that recognize both express and implied-in-fact contracts.

To make the analysis manageable I do not address rare cases where the cohabitants were domiciled in more than two states consecutively[131] and where the contract between them concerning property was made in a state in which they were not domiciled.[132] I also assume that when the

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D1 has accumulated hundreds of thousands of dollars of dividends from inherited property in her investment account. Applying D2 law to the options and D1 to the dividends gives Husband far more than either state thinks he ought to get under the overall scheme of division in each state. The solution to this problem is to apply either the majority rule (law of D2, the forum) to all assets or the law of the last marital domicile to all assets.

131. Of the scores of cases I read, in only one did the facts suggest a real possibility of three consecutive domiciles for the cohabitants. In *Warden*, 676 P.2d 1037, discussed at note 121, *supra*, between their California and Washington domiciles, M and F lived together in Arizona for some time. It is not apparent from the reported facts whether the couple understood that Arizona was only a temporary residence and not a domicile. In that case M was transferred by his employer to New York for a while, and F went back to her domicile of origin in Canada to have a baby. It is unlikely that either of these jurisdictions were a fourth domicile of both or of one cohabitant alone.

In *Knauer*, 470 A.2d 553, M and F dated in Pennsylvania but did not cohabit there before cohabiting in Delaware and then Maryland. *See* text accompanying notes 91-94 *supra*.

132. None of the cases read fits definitively into this fact-pattern. The best candidate is the case that established Illinois as a negative status jurisdiction, *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979). M and F made their express contract while college students in Iowa but soon ended up litigating in Illinois. Most out-of-state college students don't take up domicile in the state where they are educated, and in *Hewitt* it could be that both M and F were Illinois domiciliaries. In *O'Farrill v. Gonzales*, 974 S.W.2d 237 (Tex. App.—San Antonio 1998, writ denied), F was a Texas domiciliary, assuming a deportable alien can obtain domicile in Texas. The contract between the cohabitants was finalized in Mexico apparently after M had decided he would not regularly cohabit with F any more in Texas. Whether he had changed his domicile to Mexico by the time the contract was made is unknown.

forum is a positive status state it is not one of the minority jurisdictions that at divorce of a lawfully wedded couple might apply the property division law of a state other than the forum.[133] Thus, in each scenario analyzed the forum's choice of law under any of the four methods can be only to a state where M and F were domiciled. If there was a contract between them, it could be a choice of the law of the state of domicile when the contract was made or to a subsequent state of domicile, D2. Unless specifically noted, the discussion of each fact-law pattern assumes both M and F have moved from D1 to D2.

This section considers for the first time in this Article the possibility that the forum would apply D1 law to some assets and that of D2 to others along with the related question of how it should deal with a mass of commingled assets, some traceable to D1 acquisitions, some to acquisitions in D2.

With just three approaches and two jurisdictions involved, there are nine fact-law patterns to examine. If P stands for a positive status state, N for a negative status state, and C for a state that employs contract law and the first letter of the following pairs describes D1 law and the second that of D2, the nine combinations are: NN, NP, NC, PP, PN, PC, CC, CN and CP.

A. D1 Is a Negative Status State, D2 a Negative Status State

Here there is no conflict of laws. Neither jurisdiction will grant any relief under contract or status theories.[134]

B. D1 Is a Positive Status State, D2 a Positive Status State.

Assuming there is no contract between the spouses, D2 will apply its own law concerning division of property.[135] D2 understands D1 is using

133. Nevada applies a minority rule choice of law in divorce cases where its theory of regulation is status-based, see text at and following notes 124-25, *supra*, and Nevada can be viewed as a positive status state when dealing with cohabitants despite reliance on contract law because it implies into the contract terms the cohabitants did not have the power to contract for, see text accompanying notes 71 and 79-81, *supra*. California in some divorce cases uses a minority rule of choice of law, see text notes 127-28, *supra*. Also California in some cases involving cohabitants will imply into a contract terms the cohabitants could not have agreed on, see note 82 and text at note 76, *supra*. Nevertheless, this part of the Article treats Nevada and California as contract theory states.

134. That would not be the case if this section of the Article had not excluded consideration of situations in which cohabitants domiciled in D1, a negative status state, made a pooling contract while temporarily in state X, where it was valid, and later moved to D2, also a negative status state, which uses the *lox loci* choice of law method. D2 might find the contract not contra public policy and enforce it, see text accompanying notes 10 and 11, *supra*, although D1 as a forum might not because it did not use the *loci* method of choice of or law or, if it did, because it found the contract made in X contra to the public policy of D1.

135. If D2 is Nevada and Nevada considers itself a positive status state, it would apply D1 law to assets acquired by the spouses while domiciled in D1 that would have been community property by analogy had they been acquired while the spouses were domiciled in D2. If D2 is California, and if California considers itself a positive status state and if

the choice of law method applicable in cases of lawfully married spouses obtaining a divorce after leaving their D1 domicile under which D1 has no expectation that its law of division of property will apply after the couple have obtained a new domicile upon removal from D1.

D2 will apply its own law as to how specific an express[136] contract between the cohabitants must be with respect to property matters in order to displace D2's status-based rules for division. Even if that contract was made in D1 while the couple were domiciled there and D1 courts would hold it sufficiently specific to displace D1's status-based rules, D2 will apply its own stricter standard under which the contract is unenforceable.[137] D2 does apply the contract law of D1—as any choice of law method will select D1 law on that issue—and does recognize that a contract was made, but the issue of what degree of specificity in the contract on the issue of division of property after the breakup of the relationship is required to displace the division law of D2 is a matter of D2 law.

If D2 considers the contractual provisions on division of property sufficiently specific to displace its status-based rules on division of property, D2 will still apply the rest of its status-based laws—such as whether F can recover for loss of M's consortium—to the exclusion of the status-based rules of D1.

C. D1 IS A NEGATIVE STATUS STATE, D2 A POSITIVE STATUS STATE

D2 will apply its law of division to all the assets acquired by M and F during their relationship. Borrowing its methodology from cases dealing with lawful spouses who have changed domicile, D2 finds it irrelevant that D1 law would not consider assets acquired while the couple were domiciled there divisible at the breakup of the relationship.

D2's status-based laws will yield to a contract made while M and F were domiciled in D2 that meets the specificity test of D2 law. The D2 court must decide whether the parties to the specific contract made after the move to D2 intended it to apply to all assets acquired during their relationship, including those acquired while they were domiciled in D1.

If the specific contract made in D2 was intended to apply only to post-contract acquisitions and the terms of the contract are more restrictive concerning division of assets than is D2 law, the D2 court may face a commingling problem. Fungible assets, such as money acquired while the pair were D1 domiciliaries, divisible under the status-based laws of D2, may have been mixed with similar assets acquired in D2 after the contract was made, which are not divisible according to the terms of the contract. I would expect D2 to create a presumption that its status-based laws ap-

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only one cohabitant has become a D2 domiciliary, the forum will apply the division law of D1.

136. It was noted above, *see* text following note 39, *supra,* that a positive status state will not create under its law an implied-in-fact contract.

137. Whether doing so unconstitutionally denies full faith and credit to D1 law or denies due process to the cohabitant invoking the contract is considered in Part IV of this Article.

ply unless a party establishes all facts necessary to displace that law. This would put the burden on the cohabitant relying on the contract to bar division of certain properties to "uncommingle." The community property states in dealing with mixes of fungible community and separate properties have developed many rules of law on uncommingling[138] that could be applied by analogy.

Suppose M and F made a specific agreement concerning division of property at the end of their relationship while domiciled in D1 and did not reiterate it after moving to D2 because they were unaware that it was invalid under D1 law. D2 can treat the contract as void under D1 law, or D2 can apply its own contract law to validate the contract as of the date the pair acquired domiciliary status in D2. The validated contract could be applied to acquisitions of the pair while domiciled in D1 after the attempt to contract was made or to all assets acquired while the pair were domiciled in D1, if that was the intention of the originally abortive contract.

The theory of automatic validation of a failed contract upon change of domicile by the parties to it was applied in a Montana case involving cohabitants who sought to marry.[139] The pair while domiciled in Washington exchanged vows there seeking to attain a common law marriage. Washington does not recognize common law marriage, but Montana does. The Montana Supreme Court held that as soon as M and F took up domicile in Montana they became lawful spouses even though they did not repeat the promises to be husband and wife when in Montana that are essential to a common law marriage. The theory was validation by Montana law of the ineffective attempt to contract in Washington a common law marriage.

D. D1 Is a Positive Status State, D2 Is a Negative Status State

If M and F did not make a pooling agreement while domiciled in D1, the court in D2 will apply its own law under which no relief is granted. If such a contract was made in D1, the D2 court must decide if it is contra public policy in D2 and thus unenforceable although valid in D1, a topic discussed in more detail below.[140] D2 will apply its own standard as to how specific the contract must be in order to displace the law of D2 denying any division of property among cohabitants.

E. D1 Is a Contract Theory State, D2 a Positive Status State

This Article has already considered how D2 as a positive status state will deal with an express contract made while M and F were domiciled in

138. *See* William A. Reppy, Jr. & Cynthia Samuel, Community Property In The United States ch. 10 (2000 ed.).

139. Estate of Murnion, 686 P.2d 893 (Mont. 1984).

140. *See* text accompanying notes 149-156, *infra*.

D1 or D2.[141] The fact pattern where D1 is a contract theory state requires consideration of how D2 as a positive status state will deal with an implied-in-fact contract created by D1 law. Assume D1 contract law implies a very specific[142] term addressing how property acquired during the relationship will be divided in litigation following the termination of the relationship. Such a term might be mandatory 50-50 division or equitable division applying the same standards as applied to equitable division of property of lawful spouses at divorce.[143] If D1 law did not imply a term of the contract to the effect that it extended to acquisitions of M and F after they had given up their D1 domicile, D2 could apply the contract only to acquisitions of M and F while domiciled in D1.[144]

Another response of a D2 court to the implied-in-fact contract made specific by D1 caselaw is to declare that D2 views what D1 was doing as creating a status even if that was not D1's legal theory and even though D1 did not create any implied terms that M and F could not expressly contract for (such as one cohabitant's entitlement to sue a third party for loss of consortium when the other cohabitant was tortiously injured). D2 then would apply only D2 law.

Ordinarily by careful pleading of the law of the state the party would like the forum to apply, a litigant can educate the forum about a legal theory unknown in the forum but which the party must get the forum to use to classify the party's claim in order to get a selection of the other state's law.[145] Thus, the cohabitant relying on D1 law will plead in D2 the specific terms that D1 law implies into the contract and will further

141. *See* text accompanying and following notes 41-45, *supra*. If D1 is a contract theory state that implies into the contract terms for which the parties could not contract, D2 is not likely to accept them as terms of the contract it will enforce but will substitute its own corresponding status-based rules. *See* text accompanying notes 70-81, *supra*. That would mean that if an agreement to be equal co-owners of acquisitions by either cohabitant during the relationship made while the pair were D1 domiciliaries was self executing under the law of D1, but a similar contract made in D2 by domiciliaries of D2 is not self executing, the self-executing feature terminates upon the change of domicile.

142. If D1 implied contract law was vague and undeveloped with respect to an implied term concerning how property would be divided after termination of the relationship, D2 would likely hold that contract between M and F not specific enough to displace D2's status-based rules for division of property.

143. *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220 (Nev. 1973).

144. *See* text accompanying note 138, for the suggestion that such a rule be accompanied by a presumption against use of D1 law placing the burden on the party invoking it to identify the D1 acquisitions.

145. "The plaintiff may plead whatever law he desires" and the court will determine if the law of the other state is actually as described by the party. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2486 (1999). Example: P and D have a contract that for three years P will perform specified services for $10,000 a month. While attending a convention in New Orleans, P tells D a competitor is paying $15,000 per month for similar work, and D says that will be P's salary henceforth. In a suit on the revised contract in a common law court that uses the *lex loci contractus* rule of choice of law, pleading mere facts will not lead the court to consider any contract was made in Louisiana due to lack of consideration. P should specifically plead the Louisiana rule that in any contract, not just one governed by the Uniform Commercial Code, preexisting duty is good consideration. *See* Hibernia Nat'l Bank v. Sarah Planting & Ref. Co., 31 So. 1031, 1034 (La. 1901); Dunham v. Dunham, 174 So. 2d 898 (La. Ct. App. 1965).

demonstrate to the D2 court that D1 law does not imply any term that could not be contracted for.

Nevertheless, D2 courts must have ultimate control over the choice of law process in D2.[146] I believe a D2 judge can fairly hold that although D1 caselaw declares its theory of recovery to be implied-in-fact contract, a study of the D1 cases reveals that in every case of cohabitation without an express contract the implied contract has exactly the same terms, and sexual taint is never a problem because D1 finds the interaction of spouses living together is an independent consideration. This is similar to the law of Washington, a positive status state, with a different label. The forum thus treats D1 law as having created a status between M and F and proceeds in dealing with couples formerly domiciled in D1 who made no express contract as if D1 were a positive status state.

F. D1 AND D2 ARE BOTH CONTRACT THEORY STATES BUT WITH DIFFERENT RULES OF LAW

Consider first the situation where D1 law recognizes a contract made there by D1 cohabitants that would be unenforceable under the law of D2. Perhaps D1 recognizes an implied-in-fact contract, but only express contracts between cohabitants are enforceable under the law of D2. Or D2 might find sexual taint voids the contract, while D1 sees independent consideration present. D2's choice of law method points to applicability of D1 law, and hence D2 will enforce the contract so long as it is not

146. For example, in deciding whether an out-of-state statute of limitations is substantive or procedural for choice of law purposes, the forum uses its own definitions and may hold the statute substantive even though courts in the enacting state have classified it as procedural. *See* Bournais v. Atl. Mar. Co., 220 F.2d 152 (2d Cir. 1955) (forum not concerned with how Panama classifies a Panamanian statute of limitations); Tanges v. Heidelberg N. Am., Inc., 710 N.E.2d 250, 252 (N.Y. 1999) (forum classifies statute of repose as substantive although enacting state had classified it as procedural). *Cf.* Midwest Grain Prods. of Illinois, Inc. v. Productization, Inc., 228 F.3d 784 (7th Cir. 2000) (although Oklahoma law governed substance of contract case in Illinois forum, Oklahoma's classification of right to attorneys' fees as substantive or procedural is irrelevant to forum).

I believe two New Jersey cases erroneously let plaintiffs prevail by making an unrealistic classification of the cause of action based on language in D1 caselaw that does not hold up to scrutiny. *Cutts v. Najdrowski*, 198 A. 885 (N.J. 1938), and *Estate of Damato*, 206 A.2d 171 (N.J. Super. Ct. App. Div. 1965), involved pay-on-death bank accounts set up by a New Jersey decedent out of state. Under New Jersey law they were invalid for failure to satisfy the statute of wills. Caselaw existed in the states of deposit that these accounts constituted "tentative" inter vivos trusts: *In re* Totten 71 N.E. 748, 752 (N.Y. 1904) (relied on in *Cutts*) and *Seymour v. Seymour*, 85 So. 2d 726, 727 (Fla. 1956) (quoting *Totten* and relied on in *Damato*). On that basis the courts accepted the plaintiffs' theories that the legal issues should be classified as involving inter vivos gifts, subject to the law of the situs of the gift, rather than succession of personal property at death subject to the law of the decedent's domicile, New Jersey. A close analysis of out of state law would have revealed nothing happened inter vivos—no trust duties were imposed when the deposit was made, for example. The New Jersey courts should have rejected the pleaded theory and classified the bank accounts as will substitutes. *See* ROGER CRAMPTON ET AL., CONFLICT OF LAWS 89-90 (4th ed. 1987). After *Cutts* was decided, New York conceded this to be the proper classification in a choice of law case. *See* Campbell's Will, 144 N.Y. S.2d 515 (Surr. 1955). *See also* Kleinberg v. Heller, 345 N.E.2d 592, 596 n. 3 (N.Y. 1976) ("These accounts are regarded by people in modest circumstances as a poor man's will.")

contra public policy (e.g., D2 thinks sex was too central to the consideration). If by the express or implied terms of the D1 contract it was to continue to apply after the couple moved out of D1 and took up domicile elsewhere, D2 will enforce the contract with respect to all property at issue including that acquired in D2, unless D2 finds M and F rescinded the contract after the change of domicile.

If the D1 contract was implied-in-fact and D2 recognizes implied-in-fact contracts but implies a different set of terms than those implied under the law of D1, D2 could quite reasonably hold that by beginning to cohabit in D2 the couple rescinded their D1 implied contract and replaced it with a D2 implied contract. D2's implied rescission law could find the D1 contract rescinded prospectively only so that it still applied to assets that could be identified as acquired by M or F while domiciled in D1; or the implied rescission could be retroactive so that the D1 contract ceased to have any applicability. The theory of implied rescission arising out of cohabitation in D2 could even be applied to an express contract made in D1 by M and F while domiciled there.

If M and F made an express contract after taking up domicile in D2, the law of D2 could imply into it an additional term that any prior contract was rescinded retroactively as to previously acquired property. Another way, less logical in my view, D2 could achieve the same result is to find an implied contract arising out of their cohabitation in D2 that applied to the D1 property not covered by the couple's express contract made after they became D2 domiciliaries.

Finally, as was discussed in the context of D2 as a positive status state,[147] D2 could validate an attempt by M and F in D1 while domiciled there to make a contract although it had failed under D1 contract law (e.g., for lack of a writing). Still another possibility is that D2 would recognize that the attempt to contract in D1 failed under D1 law and hold that an express or implied contract made in D2 covered only post-contract acquisitions, leaving the D1 acquisitions nondivisible.

G. D1 Is a Negative Status State, D2 a Contract Theory State

If M and F, having moved to D2, a contract theory state, make an express pooling agreement that is silent as to whether it applies to acquisitions while domiciled in D1, D2 law can imply into the express contract a provision that it covers pre-contract acquisitions. That could be a term of an implied contract recognized as arising out of the conduct of the couple in D2. Or the express or implied contract made after the change of domicile could be inapplicable to prior acquisitions in D1, leaving them nondivisible. As discussed above where D1 was a contract theory state and the attempt to contract D1 failed, D2 could validate the abortive at-

147. *See* text preceding note 141, *supra.*

tempt in D1, a negative status state, upon the change of domicile if the contract would be valid under D2 law.

H. D1 Is a Positive Status State, D2 a Contract Theory State

Oddly the situation here is legally the same as that just discussed, where D1 was a negative status state. D1 has no law on division of property that can be applied in D2. Under its own theory of choice of law, D1's division rules ceased to have any application to M and F when they gave up their D1 domicile. The major issue in D2 is whether an express or implied contract made there will be construed to apply to all assets acquired during the relationship including those acquired while the pair was domiciled in D1.

I. D1 Is a Contract Theory State, D2 a Negative Status State

Assume that an express contract made in D1 by M and F while domiciled there was not limited in scope temporarily or geographically. The pair intended it to apply to acquisitions made outside D1 and after they had given up their D1 domiciles. Or, if the contract between them is implied under D1 law, its implied terms are similarly unrestricted in time and territory.

Even though it is a negative status state, D2 will enforce the express or implied D1 contract unless enforcement would offend the public policy of D1.[148] It by no means follows that just because D2 holds its own domiciliaries lack capacity to make a certain kind of contract, all contracts of that type are invalid in D2 courts.[149] Under a widely accepted test, the D1 contract will be enforced unless doing so would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of" D2's.[150] Is the high court of D2 going to de-

148. D2 could hold that enforcement with respect to acquisitions of M and F while domiciled in D1 is not contra public policy of D2, whereas enforcement as to acquisitions after the pair began to cohabit in D2 is.

149. In what may be the nation's most famous conflict of laws case, a forum enforced against its own domiciliary a contract made elsewhere which she lacked capacity to make under its own protective laws. *See* Milliken v. Pratt, 125 Mass. 374 (1878). The negative status state of Louisiana recognizes common law marriages—void under Louisiana family law—contracted by a man and woman in their domicile where such marriages are lawful. *See* Netecke v. State *ex rel.* Dep't of Transp. & Dev., 715 So. 2d 449 (La. Ct. App. 1998).

150. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918). *Accord*, Restatement (Second) of Conflict of Laws § 612, cmt. c (1971). The hypothetical case is not one where domiciliaries of the forum state make a pooling contract elsewhere and the forum, stuck with use of the *lex loci contractus* method, expands the concept of contra public policy to escape from applying the law of an essentially disinterested state. As I have noted elsewhere, jurisdictions that have gone through the choice of law revolution and settled on modern methods that assure the laws of an interested state will apply have no reason to "cheat" in applying the *Loucks* test. William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 Ind. L.J. 591, 613 n.104 (2000). *See also* Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1015 (Mont. 2000) ("A 'public policy' exception to the most significant relationship test would be redundant. . . .

clare it against prevalent good morals to let two people who have a sexual relationship outside marriage make a contract concerning property, especially when a large majority of American jurisdictions do enforce such contracts? This seems unlikely.

As a commentator noted in discussing the contra public policy doctrine as applied to recognition of same-sex marriages, the doctrine should not bar application of laws dealing with "social problems which are controversial in nature."[151] "Controversial" aptly describes cohabitation by unmarried couples in negative status states. The author was speaking of courts assessing public policy based on their understandings of public opinion. If, on the other hand, the state legislature has expressly declared a matter against the public policy of the state, its courts are likely to follow the legislative lead even if the strict judicially-created definition of contra public policy is not met.[152]

The negative status state of Georgia has enacted a "little DOMA"[153] that provides that it is declaring the public policy of that state. It bars recognition of same-sex marriages celebrated elsewhere and concludes: "Any contractual rights granted by virtue of such [marriage] license shall be unenforceable in the courts of this state[;] and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage."[154]

This is strong language, and a cohabiting same-sex couple is not far removed from a same-sex couple who become parties to a civil union in Vermont or in a European country that recognizes same-sex marriages.[155]

[C]onsiderations of public policy are accounted for under the analysis contained in the Restatement (Second) of Conflict of Laws.").

151. Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 73 (1996) (quoting Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941)). *See also* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEXAS L. REV. 921 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

152. *See* J.S. Alberici Constr. Co. v. Mid-West Conveyor Co., 750 A.2d 518 (Del. 2000).

153. GA. CODE ANN. § 19.3-3.1(b) (1999). The federal Defense of Marriage Act, 1 U.S.C. § 7 (1996), is popularly called the DOMA. Since state statutes restricting political activity by state employees are called "little Hatch Acts," *see* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 n. 27 (1977), state statutes copying the anti-gay policies of the federal DOMA can be called "little DOMAs."

154. GA. CODE ANN. § 19.3-3.1(b) (1999).

155. *See* VT. STAT. ANN. tit. 15, § 1202 (Supp. 2000). Although the status is called "civil union," for purposes of choice of law analysis it is no different than marriage, as the parties to the civil union get all the benefits under Vermont law accorded to persons lawfully married. Denmark and Norway have civil-union type statutes for same-sex couples that, like Vermont's, create a status so similar to marriage that for choice of law purposes it should be treated the same as marriage. *See* Nancy D. Polikoff, *Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 719-21 (2000). The Netherlands is the only jurisdiction where marriage law is exactly the same for same-sex and opposite-sex couples. Wet van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde

Perhaps, then, a Georgia court, as D2, will not enforce pooling contracts made in D1 by persons of the same sex.[156] Similar treatment of the contracts of heterosexual couples would be inappropriate, however.

IV. CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW IN CASES INVOLVING PROPERTY RIGHTS OF COHABITANTS: DUE PROCESS AND FULL FAITH AND CREDIT[157]

A. CONSTITUTIONAL QUESTIONS ARISING WHEN D2 APPROACHES THE ISSUES AS MATTERS OF CONTRACT LAW

1. Analysis When Both M and F Move from D1 to D2

If M and F together change their domicile to D2 and cohabit there, constitutional commands to provide due process and give full faith and credit to sister state law should not bar D2—even though it had no connection at all to the couple before their change of domicile—from completely changing the legal relationship (or lack of one) that D1 had recognized based on their promises or cohabitation while domiciliaries of D1. This is based on the assumption that caselaw or statutes are in effect when their cohabitation in D2 begins that adequately advises the couple that the effect of such cohabitation will be to eliminate the law of D1 as regulating any property rights between them while substituting the law of D2.

If D1 law recognized an express or implied-in-fact agreement between M and F, D2 can change its terms or hold the D1 contract rescinded and replaced by a D2 contract, even though this necessarily decreases the property rights of one of the cohabitants. D2 can hold the D1 contract rescinded and not replaced by any contract at all because D2 finds a sexually tainted consideration that D1 did not. If D1 was a negative status state, D2 can apply its law to retroactively validate an attempt by M and F in D1 to form a pooling agreement and even make it self-executing so that F upon continuing to cohabit with M on change of domicile becomes co-owner of M's acquisitions while they previously lived in D1. In each

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geslacht (Wet openstelling huwelijk) [Act on the Opening Up of Marriage], Stb. nr. 9 (2001), *translation available at* http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/translmarr.html.

156. *Vasquez v. Hawthorne*, 994 P.2d 240 (Wash. Ct. App. 2000), held that Washington's status of meretricious relationship was not available to a same-sex couple, relying on Washington's little DOMA. The Washington Supreme Court, reversed, 33 P.3d 735 (Wash. 2001), in an opinion suggesting the same law applied to same-sex and opposite-sex cohabiting couples.

157. According to a majority of the justices in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), constitutional limits on a forum's power to make a choice of law are identical whether considered under the due process clauses of the Fourteenth or Fifth Amendments or the Full Faith and Credit Clause of Article IV of the constitution. *Id.* at 308 n.10 (plurality opinion) and 332 (dissenting opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J., agreeing with the portion of the plurality opinion, including n. 10, "which sets forth the basic principles that guide us in reviewing state choice-of-law decisions under the Constitution.").

such instance D2 can apply its law even to assets M and F left physically present in D1.

D2 has the constitutional power to take any of these steps because, by becoming D2 domiciliaries and cohabiting there, M and F have submitted themselves to the law of D2. Any due process issue arising must involve the content of the D2 law—e.g., a claim of total arbitrariness—not its source in the D2 legislature or judiciary. Consider a case where D1 had recognized a self-executing pooling agreement under which F became fifty percent owner of assets M had acquired in D1 while they were domiciled there. M and F bring these assets to D2 when the pair change domicile. D2 contract law considers the D1 contract tainted by immoral sex, and for this reason at litigation in D2 after the pair break up the D2 court holds that title in M's name controls who owns the asset now. That the D2 law works an unconstitutional taking of F's property rights may be a basis for overturning the judgment; that D2 lacks sufficient contacts to M and F and their property is not.

In *Allstate Insurance Co. v. Hague*,[158] the change of domicile by a third party beneficiary of a contract caused the liability of the insurer to be trebled—effectively a taking of $30,000. The United States Supreme Court found no due process or full faith and credit violation when the forum—lacking enough contacts to apply its own law when the contract was made and when the insured was killed by an uninsured motorist—invoked the newly acquired domicile as an essential contact for application of forum law.

It is true that in *Hague*, unlike the hypothetical case of the migratory cohabitants under consideration, the new domicile did have contacts to the contract when it was made, although not enough to serve as a basis for application of its own law. The insurer in *Hague* was doing unrelated business in D1, and the insured worked there. In the case of the cohabitants we are now considering, the state of D2 was involved when the D1 contract was made only as a potential place for performing—sharing gains—should the couple move there and as a place of potential performance in the sense that if D1 domiciliary M went to D2 and worked there for earnings, F would ultimately become half owner of them. But the whole world was a place of performance in both such ways, so such a generalized contact of D2 to the agreement when it was made is probably not significant for purposes of constitutional analysis under *Hague*.

It is also true that in *Hague* the party changing domicile acquired as a result a beneficial law.[159] In the hypothetical case of D2's refusing to

158. 449 U.S. 302 (1981).

159. A curious aspect of *Hague* is the suggestion that if a state relies on nontraditional contacts of a party to a state as the basis for applying its law to that party, it can do so only if the law is favorable to that party. The conflict was between the law of Wisconsin—where the insurance contract at issue was made, where the insured was domiciled at all pertinent times, and where the insured was injured and died—which construed an uninsured motorist's clause as requiring payment of $15,000 to the surviving widow and Minnesota law, which would award her $45,000. The Minnesota contacts were that the insured worked

there, the insurer did business there not related to the contract at issue, and the widow moved there after her husband died.

Early in part II of its opinion—which addresses general principles of due process and full faith and credit as these concepts may restrict the power of a forum to apply its own law—the *Hague* plurality says that the Supreme Court will "invalidate[ ] the choice of law of a state which has had no significant contact or significant aggregation of contacts, *creating state interests* . . . ." 449 U.S. at 308 (emphasis added); *see also id.* at 308 n.10 (referring to "relevant contacts and resulting *interests of the State* whose law was applied." (emphasis added)). Under interest analysis, as described by Brainerd Currie, a state has no interest in a case if its law is harmful to its domiciliary litigant and also has no interest if it is involved not as the domicile of a party but only as the place of injury, the place of making of a contract, place of performance, etc. *See* BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS 152-53 (1953). In discussing general principles restricting a forum's choice of law, *Hague* cannot be using the term "interest" in Currie's sense, for such a usage would make unconstitutional such traditional choice of law approaches as *lex loci deliciti* and *lex loci contractus* (except where by fortuity that state was also the domicile of a party to the litigation and had law favorable to that party). The phrase "creating state interests" probably just reiterates what was already conveyed by the term "significant." I.e., the contacts must be relevant in the sense that historically courts have considered them a basis for application of the law of the state having such a contact.

In part III of it's *Hague* opinion—which considers specifically the three nontraditional contacts that Minnesota relied on as a basis for applying its pro-recovery law—the plurality assesses state interests in the same manner Professor Currie would, with respect to two of the three nontraditional contacts. The first one discussed—and said by the plurality to be "a very important contact" (449 U.S. at 313)—was that the plaintiff's deceased husband, the insured, was employed in Minnesota. "The State's interest in its commuting nonresident employees," says the plurality, "reflects a state concern for the safety and well-being of its work force and the concomitant effect on Minnesota employers." *Id.* Discussing Minnesota law as favoring the greatest recovery against the insured, the plurality goes on to say that "[i]f Mr. Hague had only been injured and missed work for a few weeks the effect on the Minnesota employer would have been palpable and Minnesota's *interest in having its employee made whole* would be evident." *Id.* at 315 (emphasis added). If Minnesota law denied recovery and did not make its employee whole, apparently the fact that Mr. Hague worked there would not create a Currie-style interest and would not be a relevant nontraditional contact Minnesota could invoke as a basis for applying its law.

Going on to deal with the fact that Mr. Hague actually died and could not return to work, the plurality says that "Minnesota's work force is surely affected by the *level of protection* the State extends to it either directly or indirectly. *Id.* (emphasis added). I.e., the employees work harder because they know state law is favorable to their dependents should they die. If the "level of protection" in Minnesota were very low compared to that accorded in the other state whose law is in contention, does not the fact of Mr. Hague's employment in Minnesota become irrelevant because its law is unfavorable to him?

The third nontraditional contact the plurality held to be relevant was the post-accident move to Minnesota of the surviving widow. The opinion declares that her change of domicile "gives Minnesota an interest in [her] *recovery*, an interest which the court below identified as *full compensation*" that would keep her "'*off welfare rolls.*'" *Id.* at 319 (emphasis added). It seems, then, that this third contact based on post facto change of domicile would not be relevant if Minnesota law denied recovery or awarded only a small sum compared to what Wisconsin would give.

In discussing the second nontraditional contact—the insurer did unrelated business in Minnesota—the plurality's use of the term "interest" is peculiar. Since Minnesota law was unfavorable to the defendant, Currie would have found its presence in Minnesota did not create any state interest. The opinion instead says that the insurer's "presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court-appointed representative—respondent [widow]—and a long standing member of Minnesota's work force." *Id.* at 318. In essence this seems to say that the two nontraditional contacts that did create Currie-style interests in favor of a $45,000 award — the husband's Minnesota employment and the widow's post-accident domicile — are enough to bind the insurer to application of Minnesota law. The quoted passage does not say that Minnesota had an interest in seeing a party doing business there lose the case.

enforce a D1 contract, at least one of the cohabitants who has taken up domicile in D2 is going to be harmed by application of the law of the new domicile. But since the constitutional right to travel[160] seems not to be implicated because the new arrival gets the same law as is applied to natives of D2 who are cohabiting there,[161] this difference may not be of constitutional significance.

I think the facts that M and F became D2 domiciliaries and performed acts there related to property claims each might have against the other—i.e., they cohabited—eliminate the need for any contacts of D2 at the time the pre-move contract was made by D1 domiciliaries in order to qualify D2 to apply its law to alter contract and property rights existing under D1 law.[162] Suppose, however, after the pair break up in D1, each

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If the laws were reversed so that Minnesota protected the insurer, analysis of the three nontraditional interests in Currie fashion would have revealed two of the three were irrelevant. Only the insurer's presence created a state interest. Whether Minnesota would have been allowed to apply its own law with just one interest-creating nontraditional contact is certainly doubtful.

Suppose the defendant was not the insurer but the tortfeasor, who had no Minnesota contacts but was served with process in a wrongful death suit while changing planes at a Minnesota airport. The action was brought in Minnesota because the statute of limitations had run in other potential fora. The issue was measure of damages, and Wisconsin—domicile of all parties and place of the accident—would give three times what Minnesota would award. The first two of three nontraditional contacts to Minnesota in the wrongful death action were as in *Hague* on the original facts that the decedent worked there and that his widow moved there after he died. The *Hague* facts are changed so that the decedent, after being injured in Wisconsin, was taken to a Minnesota hospital, where he died. Under traditional choice of law rules, the law of the place of initial injury, and not that of the place of death, governs in wrongful death suits. RESTATEMENT OF CONFLICT OF LAWS § 391, cmt. b (1934). Thus in the hypothetical version of *Hague*, the third contact to Minnesota—place of death—is also a nontraditional contact. In dictum in *Hague*, the plurality said that if the decedent after being injured in Wisconsin had been taken to a Minnesota hospital and died there, it would be "obvious" that Minnesota law—which was there favorable to the widow—could constitutionally be applied. 449 U.S. at 316 n.22. Is it less obvious that such a contact could not be invoked as a basis for applying Minnesota law highly unfavorable to the widow? In this version of the case, are not all three nontraditional contacts irrelevant because unrelated to Minnesota's interest in protecting a Minnesota defendant from a high level of damages?

160. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). According to *Saenz v. Roe*, 526 U.S. 489, 502 (1999), a right not to be penalized in D2 as a new arrival there is the "third aspect of the right to travel."

161. The person changing domicile does not suffer abridgement of her constitutional right to travel if she is "treated equally in her new State of residence." Saenz v. Roe, 526 U.S. 489, 490 (1999). Cohabitant F, who under D2 law loses property rights previously vested in her under a self-executing pooling agreement made while she was domiciled in D1, may contend that no native-born citizen of D2 who begins cohabiting suffers any forfeiture of property rights as a result. Nevertheless, the same law is being applied to the native of D2 who cohabits and the newcomer. The former simply was never in a position where she could acquire assets as a result of cohabitation that could be subject to the D2 forfeiture law.

162. There is a split of authority in the United States as to what law governs the validity of an antenuptial agreement made by persons who lawfully marry in their domicile and then move to another state, where they are divorced. Some jurisdictions test the antenuptial agreement for unconscionability based on the needs of and wealth owned by the parties when the contract is made under the law of D1. Others test conscionability based on facts existing at the time of divorce under the law of D2. Although not discussing the issue of constitutional power of D2 to void a contract valid when made under D1 law, the D2 courts that look to the equities as they exist at the time of divorce seem to assume the

independently moves to D2. Other than moving into the state, neither does any act in D2 that it can seize upon as a basis for applying its law concerning property rights of cohabitants. If D1 had created a status between M and F not based on a contract between them, D2 probably can constitutionally apply its contract-based rules for dividing up property at their breakup. If D2's property-division laws are status-based, there can be no question as to its power to apply them to the new domiciliaries by analogy to the long-accepted power of D2 to apply its division-at-divorce rules to a couple who attained the status of lawfully married while living in D1. If no D1 contract-based claim is defeated by application of D2 law, can there be a constitutionally significant distinction when D2's theory for acting is contract law rather than status law? I think not.

If the cohabitants—while domiciled in D1—had made a pooling contract that is invoked by M or F in post-migration litigation in D2 over their property rights, it is unclear whether D2 has the power to ignore that contract when the pair did not cohabit in D2, i.e., the only D2 contacts are that M and F moved into the state. No decision by the United States Supreme Court involving constitutional restrictions on choice of law sheds any light on whether the change of domicile of both parties to a contract to a state that previously had no contacts to either of them or to the subject matter of the contract makes the law of the new domicile eligible as a basis for declaring in D2 litigation the rights and obligations between them in a manner not consistent with the terms of the contract. Given the broad freedom to make a choice of law accorded to the states by *Hague*, my guess is that D2 law can constitutionally be applied in this situation.

2. *Analysis When Only One Cohabitant Moves to D2*

If only one cohabitant, say F, moves to D2, M never enters the state, and the state has no other contact,[163] it is clear from *Hague* and cases such as *John Hancock Mutual Life Insurance Co. v. Yates*,[164] that D2 may not apply its contract law to alter the contract-based relations between her and M existing under the law of D2 when she moved to D2. On the other hand, if F changes her domicile to D2, and M, while retaining his D1 domicile, enters D2 and cohabits for some period of time with F there,[165] this action by M should provide D2 the basis for applying its contract law to him.

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domiciliary status of both divorcing spouses allows them to do just that. *See* Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988); Stalb v. Stalb, 719 A.2d 421 (Vt. 1998); *see also* Lakin v. Lakin, 1999 Conn. Super. LEXIS 3475 (Conn. Super. Ct/ Dec. 6th 1999).

163. D2 might well be able to apply its law to assets earned by M while working in D2 at a time he was domiciled in D1 and cohabiting there with F.

164. 299 U.S. 178 (1936). In both *Hague* and *Yates*, the person moving to D2 was a third party beneficiary of the contract, not a signatory. However, the tenor of each decision is to the effect that the post-contract acquired domicile of one signatory would not give D2 sufficient contacts to apply its own law to the contract.

165. This is the fact pattern of *Bowers*, discussed in text accompanying notes 100-103, *supra*.

B. Issues Arising When D2's Theory for Dealing With Properties of Cohabitants Is Regulation of a Status

1. D2 Recognizes a Positive Status

The conclusion above that D2 as a contract theory state can apply its own law when both M and F have become D2 domiciliaries and cohabited there applies when D2's theory for acting is that it is regulating a status. Rather than complaining about lack of contacts D2 to has to the couple, the party aggrieved by failure to apply D1 law will have to couch his or her constitutional argument in terms of a taking of vested contract or property rights.[166] In ignoring a contract M and F may have made while domiciled in D1, and even property interests created by a self-executing feature of that contract, D2 concedes it is taking property of one cohabitant and awarding it to the other but urges that it is doing so in proper exercise of its police power.[167]

Returning to the issue of sufficient contacts of D2 to apply its own law, my guess that as a contract theory state it can do so when M and F independently move to D2 but do not cohabit there extends to the case where D2's theory in dividing up property in post break-up litigation is regulation of a status.

In the discussion above concerning a D2 whose theory for dividing up the cohabitants' property was contract law, I was confident it lacked the power to apply its own law when its only contact was that one cohabitant moved her domicile to D2. In the situation where one cohabitant moves to D2 after their breakup and D1 law did not recognize a status between M and F creating rights and obligations, it seems probable that the presence of one cohabitant in D2 does not authorize it to cast upon the nondomiciliary cohabitant over whom it has obtained personal jurisdiction a status by virtue of the law of D2. If the pair have not permanently separated when one cohabitant moves to D2, and thereafter the nondomiciliary party enters D2 and lives there with the other cohabitant for some period of time while retaining his D1 domicile, D2 should be held to have the necessary contacts to apply its status-based law to the nondomiciliary litigating in its courts.

Let us now consider the situation where one cohabitant, say F, moves to D2, M never cohabits in D2 with F, and D1 law had created a status

166. If D1 were a positive status state, and M and F had not made a contract there, the cohabitant benefited by the status-based rules of D1 loses only a "mere expectancy" on change of domicile, United States v. Mitchell, 403 U.S. 190, 195 (1971), and cannot even complain that D2 law works a taking.

167. *See* Addison v. Addison, 399 P.2d 897 (Cal. 1965). Most of the express contracts that have been sued on in litigation between cohabitants are vague as to whether the agreement is to continue without any change of terms if the couple change their domicile. The litigant asking for application of D1 law is going to have a hard time showing frustrated expectation interests when D1 law is not applied in the litigation in D2. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 328-330 (1981) (Stevens, J., concurring) (application of Minnesota law based on minimal contacts did not violate due process because Wisconsin contract was vague on issue contested).

between them with mutual rights and obligations.[168] In this posture, D2 cannot apply its contract law to divide up property in a manner not in accord with what D1 would do.[169] However, if its theory for acting is application of status-based rules and it has personal jurisdiction over the nondomiciliary M, a strong argument can be made that concepts of due process and full faith and credit do not bar application of D2 law. I am assuming that M and F, having acquired a status while domiciled in D1, did not in addition make a contract while domiciled in D1 that specifically provides for how their property will be divided at the breakup of their relationship.[170]

This constitutional issue has arisen when the status involved was lawful marriage, and the courts are divided as to the power of D2 to constitutionally apply its law on division of divorce based solely on the contact that one spouse is domiciled there. In *Marriage of Roesch*,[171] a California court held the fact that one lawfully married spouse had taken up domicile in the state was not sufficient contact to enable the state to constitutionally apply its quasi-community property statutes, even though it had personal jurisdiction over the nondomiciliary spouse, and it was the domiciliary spouse who would have been aggrieved by application of forum law. In similar situations, courts in Texas and Arizona have disagreed.[172] In all three of these cases, the spouses had not made a contract concerning how their property would be divided at divorce; only status-based laws were at issue.

That the forum in this situation has the constitutional power to apply its own law as to the grounds for divorce is not controlling in analyzing whether it has the power to apply its property division statutes. That is so because the United States Supreme Court has held that states may constitutionally treat the marriage as a res present in the domicile of the husband and of the wife, when they have separated.[173] Granting a divorce is

168. Recall that D2 can fairly declare that D1 created a status shared by M and F when D1 law begins with finding a contract made by the pair but, as a matter of D1 law, adds to it a term for which the parties could not have contracted. *See* text following note 144, *supra*. If the contract is not specific enough to displace the status-based rules of D2 law, D2 can proceed as if both the former and present domiciliaries states were positive status jurisdictions.

169. *See* text accompanying notes 163-64, *supra*.

170. If there were such a contract but the courts of D1 would not enforce it in derogation of the D1 status-based rules for dividing up property, probably D2 could constitutionally invoke the nonenforceability rule of D1 and then apply D2's status-based rules for dividing up the property.

171. 147 Cal. Rptr. 586 (Ct. App. 1978). For criticism of the *Roesch* analysis of constitutional issues, including the suggestion that perhaps the nonapplication to the non-Californian spouse of California law favorable to her was a denial of her privileges and immunities protected by Article IV, section 2, of the federal constitution, see William A. Reppy, Jr. *Conflict of Laws Problems in the Division of Marital Property* in 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 10.02[3] (Matthew Bender 1984, reprinted 1986).

172. Martin v. Martin, 752 P.2d 1026 (Ariz. Ct. App. 1986); Ismail v. Ismail, 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

173. Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977) ("We do not suggest that jurisdictional doctrines other those discussed in text [*Harris v. Balk*-style quasi in rem jurisdic-

an act operating solely on that res.

If Texas and Arizona are correct and *Hague*, dealing with constitutional power to rewrite a contract, is not controlling when the forum's basis for acting is application of forum law regulating status, it is because the time of contact or time of interest is different in the two types of cases. In tort cases, the time at which a state must have a contact sufficient for the United States constitution to authorize it to apply its own law is the time of the tort. It has been held that a state which is at this time the domicile of but one of the involved parties, the tort victim or the tortfeasor, has the constitutionally required connection to make its own tort law eligible even though the wrongful act and the subsequent injury occurred elsewhere.[174]

In contract cases, the United States Supreme Court has to date[175] required the state wishing to apply its own law to have some connection to the contract at the time of its making, which, although not enough then to make the state's law constitutionally eligible, can be "boosted" up to the required level of contacts when aggregated with contacts subsequently arising in the state.[176] A newly acquired domicile can be such a boosting

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tion], such as the particularized rules governing adjudications of status, are inconsistent with the standards of fairness" required in quasi in rem cases.)

174. Rosenthal v. Warren, 475 F.2d 438, 446-47 (2d Cir. 1973); Hopkins v. Lockheed Aircraft Corp., 358 F.2d 347, 349 (5th Cir. 1966); Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 559 (2d Cir. 1962).

According to *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), naked domicile in a state of one party to a contract at the time it was made is not a sufficient contact to permit application to the contract of that state's law; it is residence in the state that will suffice. There two Mexican parties made in Mexico an insurance contract to be performed there which named Dick as a third party beneficiary. He would be payee of proceeds if he acquired title to the insured vessel, as he did. Home Ins. Co. v. Dick, 8 S.W.2d 354, 357 (Tex. Civ. App. — Galveston, 1928), *aff'd*, 15 S.W.2d 1028 (Tex. Comm'n App. 1929). "At the time the policy was issued, when it was assigned to him, and until after the loss, Dick actually resided in Mexico, although his permanent residence was in Texas." 281 U.S. at 403-04. "The fact that Dick's permanent residence was in Texas is without significance [in determining if Texas could constitutionally apply its law to the contract]. At all times here material, he was physically present and acting in Mexico. Texas was therefore without power to affect the terms of contracts so made." *Id.* at 408.

Dick was decided before *Alaska Packers Assoc. v. Industrial Accident Comm.*, 294 U.S. 532 (1935), in which the United States Supreme Court greatly broadened the power of a court to apply its own law. Any pre-1935 decision holding a choice of law unconstitutional is suspect as viable precedent today, but *Dick* is referred to as good law in *Allstate Ins.. Co. v. Hague*, 449 U.S. 302, 309-10 (1981).

175. It will be recalled that I am merely guessing that in a future case the Court will dispense with the requirement that D2 have some contact at the time of the contract's making to make its law eligible where, after the making of the contract, all of the parties have moved into D2. *See* text following note 162, *supra.*

176. In addition to *Hague*, see *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964) and *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). In these two cases the forum's sole connections to a contract of insurance when it was made were that the insurer had qualified to do business there and that the contract covered losses by the insured that might occur there. *See* Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735 (Fla. 1961) (clarifying an ambiguity in the United States Supreme Court's opinion as to when the insurer began doing business in Florida). In *Clay* the post-contract events that together with the insurer's presence allowed the forum to void the time-to-sue clause of the contract by applying forum law were the insured's taking up domicile in the state and suffering in the state a loss covered by the contract. In *Watson,* the post-contract event which enabled the forum to

contact.

Where status-based law is being applied to divide property at divorce, the time of interest would seem to be the moment at which the equities favoring husband and wife are weighed. At earlier points in time—such as when they marry, when an asset before the divorce court is acquired—the facts creating equities that will control division of property may not exist.[177] By analogy to the tort cases, domicile of one spouse at this pertinent time is sufficient contact.

There is a practical reason in support of the Texas-Arizona holdings as well. In the *Roesch* case the California court indicated that the law to be applied to divide property where one spouse alone had come to California was that of the former marital domicile. In *Roesch* it happened that the non-Californian spouse still lived there. But in the next case raising the issue, the second spouse could also have left the marital domicile and be living in a third state at the time of divorce. *Roesch* would then require applying the law of a state with no present connection to the litigants. I appreciate that this must occasionally happen in tort and contract cases where after the tort occurs or after the contract is made the parties each change domicile to a new and different state. If this somewhat illogical result can be avoided by holding that the time-of-interest is different in status-regulation cases, courts should be comfortable doing so.

In sum, then, by analogy to cases involving application of status-regulating laws at divorce of lawfully married persons, D2, to which but one of the cohabitants has moved, can constitutionally apply its status-based rules on the division of the cohabitants' property if it has personal jurisdiction over the nondomiciliary cohabitant, if D1 recognized a positive status between them, and if the division of property made under D2 law is not in derogation of an express contract between the parties as to how their property should be divided at the breakup of their relationship.

2. *D2 Is a Negative Status State*

When cohabitants made a contract while domiciled in D1, which is valid there, and one sues the other in D2 to enforce the contract, if D2 adheres to the negative status theory, it can dismiss the action on the ground that the relief sought is contra to the public policy of D2, entering a judgment that is not a bar to litigating rights under the contract in another forum.

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void a provision of the contract requiring a tort victim of the insured to obtain a judgment against the insured before suing the insurance company as a third party beneficiary was the entry into the forum state of a product made by the insured which caused injury to a person in the state.

177. Spouses have little need to know when they marry and when they acquire assets how their property will be divided at divorce. They cannot rely on the law then in place, as enactment of new legislation or the overruling of cases could change it. Nor can the spouses be sure they will remain domiciled in the state where they now live. Spouses who from the outset want certainty as to how their property will be divided at divorce will make a contract detailing how this will be done.

If D2 as a negative status jurisdiction wishes to enter a judgment conclusively establishing that the plaintiff is not entitled to any relief against the defendant, it should have the same power to do so as did D2 in the discussion above where D2 treated the cohabitants as sharing a positive status with enforceable rights and obligations. That is, it can do so if both cohabitants have moved to the state, or one has taken up domicile in D2 and the other has cohabited there with the new domiciliary. It also can apply its negative status law if one cohabitant has become a D2 domiciliary and the D2 court has personal jurisdiction over the other so long as the denial of relief is not inconsistent with a contract between the pair. That could be the case where D1 recognized a contract with a self-executing provision that gains during the relationship would be co-owned 50-50 with no express term addressing division of such property at litigation following the breakup of the relationship. In that case, D1 law could imply as a term of the contract the parties would submit themselves at the breakup of their relationship to a court to deal with their property in an equitable manner. As a negative status state, D2's notion of equity requires that each cohabitant be confirmed as owner of the assets he or she acquired during the relationship unless the acquiring cohabitant obtained a document of title stating that the other spouse was the owner or the pair were co-owners, in which case the negative status forum would confirm such a title.

C. Issues Arising When D2 Deals With Property Located in the State

In most instances, the presence of real or tangible personal property[178] in a jurisdiction will be the only contact needed to empower the state to deal with that property under its own laws in litigation attending the breakup of a relationship between cohabitants. The situs state's power over its realty is so great that it should be able to void a contract concerning that realty made elsewhere by the cohabitants without having any other contacts to M and F or the contract.[179] I am not suggesting, however, that the presence in D2 of a lot of contested property (real or personal) is a contact that, combined with the domicile of one cohabitant in D2, empowers the courts there to enter a judgment affecting other assets not located in D2.

On the other hand, unfairness rising to the level of a due process violation might result if a forum applied its own law to divest a nondomiciliary party who had acquired an item of tangible personalty of his interest by application of forum law on the basis of the prevailing party's domicile in the forum plus presence of the property when it was the prevailing party who brought the property into the state. If one cohabitant, say M, brought personalty owned by F into the forum state without her consent,

178. *See* Clark v. Williard, 294 U.S. 211, 213 (1935).

179. *See* Mazza v. Mazza, 475 F.2d 385, 390 (D.C. Cir. 1973) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 59 (1971)).

concepts of fundamental fairness might bar the courts of the situs state from relying on its presence as a basis for application of D2 law to it.[180] If the asset brought to D2 by M was co-owned by him and F as tenants in common or joint tenants, he would not have management power over her half, and her consent should be required to vitiate the fairness problem as to that half interest. If D1 were California, Washington or Nevada, and the D1 contract for pooling of gains was self executing and governed by analogy to community property laws, M would have equal management over an acquisition subject to the contract, even if the asset was acquired due to the labor of F.[181] F can be viewed as assuming the risk that M will exercise equal management power by taking the community-by-analogy property out of D1 to a state with law unfavorable to her.

With respect to intangibles where the issue is quasi in rem or in rem jurisdiction, the forum state cannot simply declare property there. Generally the contacts needed for long-arm service in personam are required for it to have the constitutional power to do so.[182] But that rule should not apply when the issue is whether presence of property is a contact that can be considered in deciding if a forum—having in personam jurisdiction over both cohabitants—can apply its own law to that property. If the forum has a reasonable basis for declaring intangible property present in the state, a good case can be made that this creates a contact for due process and full faith and credit purposes, which, combined with the domicile of one cohabitant, empowers the forum to apply its law to the intangible property located there under a reasonable rule of law.

For example, suppose F alone has moved to D2 taking with her[183] certificates of title for stocks bought with her earnings during her relationship with M while they were domiciled in D1. A court in D2, having personal jurisdiction over nondomiciliary M, wishes to apply D2 contract law to the stock in a manner inconsistent with D1 law but needs some contact other than the post-contract newly-established domicile of F in order to do so. D2 declares that the stock is present in D2 under either the doctrine of *mobilia sequuntur personam*[184] (F in D2 is the "personam") or the theory that the intangible property right of stock owner-

180. *Compare* Dawson-Austin v. Austin, 968 S.W.2d 319, 327 (Tex. 1998), where a husband moved to D2 bringing with him personalty from D1 that he owned but which was divisible at divorce under D1 law. The court held it would be unfair to the wife to treat the presence of such property as a basis for obtaining long-arm jurisdiction over the wife.

181. CAL. FAM. CODE § 1100(a) (West 1994); NEV. REV. STAT. ANN. § 123.230 (Michie 1998 & Supp. 1999); WASH. REV. CODE ANN. § 26.16.030 (West 1997).

182. Rush v. Savchuk, 444 U.S. 320 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977).

183. Of course, the hypothesized presence of the stock in D2 could precede F's arrival. A broker in D2 could be holding the stock certificate for F or M in its D2 office, with the law of D2 locating the intangible property right with the certificate. Or while living in D1, M or F could have invested in stock in a D2 corporation with the law of D2 assigning a situs to the stock in the state of incorporation. *See* Morson v. Second Nat'l Bank, 29 N.E.2d 19 (Mass. 1940).

184. This common law rule locates intangible property rights with the owner. *See* Pennsylvania v. New York, 407 U.S. 206, 217-18 (1972).

ship is "tangibilized" into the stock certificate.[185] If either of these theories for locating intangible property is the law of D1, D2's use of it to create a contact in D2 is reasonable.

Suppose, however, that D1's rule is that corporate stock has its situs in the state of incorporation, which is not D2, but that D2's rule has long been that which finds a situs for the corporate stock ownership at the place where the stock certificate is. Can D2 use its own law to locate the asset in D2 and then rely on that contact as part of an aggregation of contacts sufficient to meet the due process and full faith and credit constitutional threshold for application of D2 law?

This seems at first like bootstrapping. However, the forum does not need any contacts to the parties or the subject matter of litigation in its courts to apply its own procedural law.[186] Cannot the rule finding a situs for the stock with the certificate be classified as part of the body of D2 law known as conflicts of laws or choice of law? Choice of law is procedural,[187] and this enables a forum with no contacts at all to a case to apply substantive laws that lead to a result that neither of two states that do have all of the contacts would reach. Thus P and D of state X may be involved in a tort in state Y, with D later moving to state Z, where P sues her. The tort laws of both X and Y may constitutionally be applied; Z law cannot be. As a *lex loci* state, forum Z may select Y law with a resulting victory for D even though both X and Y, where interest analysis is the choice of law method, would apply X law, which we shall assume is favorable to P.

In any event, physical presence of real and tangible property in D2 will usually be a significant contact bolstering the contention that D2 can constitutionally apply its own law in dividing the property of cohabitants. The case for creating such a contact for intangible property by use of D1 law for locating intangibles is very strong.

CONCLUSION

The many and complex choice of law issues that burden litigation between migratory cohabitants over property rights will continue for a long time. There may be a trend among the states to move to a positive status-regulation approach, but only three or four states now take that position. As more join this camp, the chances of encountering problems because only one of the states involved takes the status approach and the other

185. *See* Hutchison v. Ross, 187 N.E. 65 (N.Y. 1933); Bergeron v. Loeb, 675 P.2d 397, 401 (Nev. 1984), *cert. denied*, 469 U.S. 1212 (1985).

186. *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (accepting for purposes of applying the rule that a forum needs no contacts at all to apply its procedural rules a state's characterization of its statutes of limitations as procedural).

187. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). There the Court held Kansas had acted unconstitutionally due to lack of contacts in applying its own law to all of the parties involved in the litigation in a Kansas court, but remanded the case leaving Kansas discretion in deciding whether to apply the law of Oklahoma, principal place of business of the defendant lessor, or to break the group of plaintiffs into subclasses based on their states of domicile and to apply the plaintiffs' home state law to each subclass.

uses something different, such as contract law, will actually increase until the positive-status group of states is as large as those using other approaches.