Hastings Law Journal

Volume 54 | Issue 3 Article 5

1-2003

Divorce without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners through a Comparative Analysis of European and American Domestic Partner Laws

Jessica A. Hoogs

Notes

Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partner Laws

by
JESSICA A. HOOGS*

Introduction

No couple in the first throes of love wants to consider the possibility that their "perfect" relationship may someday fall apart. The unfortunate reality is, however, that over forty percent of marriages today end in divorce.[1] Divorce, while painful, can provide individuals a sense of finality, even accomplishment, at having made it through a difficult emotional, legal and psychological event.[2] However, for same-sex couples who are not legally entitled to formalize their relationships through the institution of marriage, the legal procedure of divorce is simply not available. Are couples in same-sex relationships less likely to break up than opposite-sex couples? Although gay couples may feel pressure from the gay community to stay together to show the world that same-sex

* J.D. Candidate, University of California, Hastings College of the Law, 2003; B.A. University of California, Berkeley. Special thanks to my family, especially my husband Jeff, for their support.

1. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 18 (2002).

2. Paul Bohannon, *The Six Stations of Divorce*, *in* DIVORCE AND AFTER 29, 32 (Paul Bohannon ed., 1970) (1968).

relationships are "just as good as their heterosexual counterparts,"[3] several recent high-profile gay breakups, such as that of comedian Ellen DeGeneres and actress Anne Heche, have pushed the issue of "gay divorce" into the mainstream consciousness.[4]

If same-sex couples are not entitled to any of the legal benefits and protections of marriage, what legal protections are available to them when they decide to dissolve their relationship? While no state has legalized same-sex marriage, currently three states (California, Hawaii and Vermont) have established statewide domestic partnership registries that extend varying benefits and protections to, and impose certain obligations on, registered same-sex couples.[5] Only Vermont's civil union law, however, imposes any affirmative obligations on same-sex couples should they choose to dissolve their relationship.[6] This is in stark contrast to the more progressive European registered partnership acts, which generally extend all the rights, benefits and obligations of marriage to same-sex registered partners.[7] These European registered partnership acts recognize the potential for dissolution in same-sex relationships, and establish that dissolution of a registered partnership should be treated exactly the same as dissolution of a marriage, so that issues of support, property division and child custody/visitation can be judicially determined.[8]

This Note seeks to compare the legal options for dissolution for same-sex couples in those U.S. jurisdictions that have some form of domestic partnership acts, with those available in several European registered partnership acts. A uniform dissolution proceeding should be established in the United States for non-marital, same-sex relationships that will effectively address such contentious issues as support, property division and child custody/visitation rights. Part I of this Note will briefly examine the history of the same-sex marriage movement in the United States and Europe. Part II will compare the current dissolution procedures available for same-sex couples through U.S. domestic partnership acts and European registered partnership acts. Part III will discuss why there is a need for formal dissolution proceedings for same-sex couples. The Note concludes by proposing

3. Kathleen O'Brien, *Separation Anxiety—For Same-Sex Partners, a Breakup Is Emotionally Isolating and Legally Confusing*, STAR-LEDGER (Newark), May 6, 2001, *available at* 2001 WL 19752793.

4. *Id.*

5. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141, 198–99 (2001).

6. Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 42–43 (2000).

7. Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform*, 7 INT'L J.L. & FAM. 282–83 (1993).

8. *Id.* at 302.

a uniform model that could be adopted by individual states in conjunction with the enactment of domestic partner legislation that would provide a process for addressing support, property division, and child custody/visitation issues in the context of a formal family court proceeding.

I. The History of the Same-Sex Marriage Movement in the United States and Europe

The gay rights movement in the United States has come a long way since the 1969 Stonewall "riot" in which New York police raided a gay nightclub and the patrons were forced to resort to self-defense to protect themselves against police harassment.[9] Although there were several court cases in the 1970s challenging the denial of marriage licenses to same-sex couples (none of which were successful), it wasn't until the 1990s that the same-sex marriage question really became a heated topic of debate in legal, academic and political circles.[10] Since 1990, four states, New York, Hawaii, Alaska, and Vermont, as well as the District of Columbia, have heard cases involving same-sex couples suing for the right to marry.[11] Both the New York and D.C. courts held that under the applicable statutes, marriage exists only as between a man and a woman, and that petitioners had no fundamental right to marry a person of the same sex.[12] However, since 1993, two state supreme courts, Hawaii and Vermont, have held that denying plaintiffs the right to marry is discriminatory under their state constitutions,[13] and an Alaskan trial court found that same-sex couples may have a fundamental right to marry under the Alaska Constitution.[14]

The Alaska superior court found the issue to be not whether the right to marry a person of the opposite sex is a fundamental right, but held that the right to choose a life partner, regardless of sex, is an individual right subject to privacy protections.[15] The court also found that denying plaintiffs the right to a marriage license violated the Alaska constitution's equal protection provision, which prohibits discrimination on the basis of gender.[16] In 1998, however, Alaska voters enacted a constitutional amendment providing, "To be

9. Maxwell, *supra* note 5, at 163.

10. *Id.* at 168–69.

11. *Id.*

12. *Id.* at 169–70.

13. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baker v. State, 744 A.2d 864 (Vt. 1999).

14. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998).

15. *Id.* at *4.

16. *Id.* at *6.

recognized in this state, a marriage may exist only between one man and one woman."[17] This amendment effectively ended the same-sex marriage debate in the state of Alaska.

The seminal Hawaii case of *Baehr v. Lewin*[18] received more national attention than *Brause*. In *Baehr*, the state supreme court held that the state statute listing the requirements of a valid marriage contract was presumed to be invalid and that the Plaintiff's complaint, stating that the statute was "unconstitutional insofar as it [was] of the same sex," should not have been dismissed.[19] The court, while denying that there was a fundamental privacy right to marry a person of the same sex,[20] held that petitioners' rights under the equal protection clause of the state constitution were violated. Petitioners were discriminated against in the exercise of their civil rights on the basis of sex.[21] As groundbreaking as this decision seemed at the time, the voters of Hawaii followed the lead of their Alaskan counterparts by enacting an amendment to their state constitution requiring that marriage be reserved for opposite-sex couples only.[22]

Partly in response to the decision in *Baehr*, the federal government weighed in on the issue by passing the Defense of Marriage Act ("DOMA"), which President Clinton signed into law in 1996.[23] This act provides that;

> [n]o state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[24]

The effect of the DOMA is that should a state extend rights and benefits to same-sex couples, neither the federal government nor any other state is required to give "full faith and credit" to such law. While the DOMA severely limits the ability of couples who may gain certain marital-like rights in one state to enjoy those rights in another state, the Act has consequences in the dissolution realm as well, as will be seen later in this Note.

Finally, in 1999 the Vermont Supreme Court heard a case challenging the denial of marriage licenses to same-sex couples.[25] The

17. ALASKA CONST. art. I, § 25.
18. 852 P.2d 44.
19. *Id.* at 48–49.
20. *Id.* at 57.
21. *Id.* at 60.
22. HAW. CONST. art. I, § 23.
23. 28 U.S.C. § 1738C (2002).
24. *Id.*
25. Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

court held that under the Common Benefits Clause of the state constitution, plaintiffs had been deprived of the "statutory benefits and protections afforded persons of the opposite sex who choose to marry."[26] Unlike Alaska and Hawaii, however, the Vermont legislature responded to the *Baker* decision by enacting a comprehensive civil union act which, while falling short of legalizing same-sex marriage, extended to same-sex couples all the "benefits, protections, and responsibilities" associated with marriage that the state could offer.[27]

It should be noted that California has also enacted a domestic partnership statute that gives same-sex couples the right to register with the state in order to receive various benefits, including group health insurance coverage,[28] the right to recover damages for wrongful death,[29] and the right to adopt a partner's child.[30] Although there have been no court decisions in California ordering the legislature to extend benefits to same-sex couples, California followed the lead of many of its cities, such as San Francisco, when it adopted domestic partner legislation at the state level. Like Alaska and Hawaii, the voters of California weighed in on the same-sex marriage debate and in 2000 enacted a statute that limits recognition of marriage to opposite-sex couples.[31]

Legal protections for same-sex couples in Europe appeared earlier and have been more far-reaching than the limited rights accorded same-sex couples in the United States. Denmark was the first European country to extend most of the benefits, protections and obligations of marriage to same-sex couples in 1989.[32] It was followed by Norway (1993), Sweden (1995), Iceland (1996), the Netherlands (1998), France (1999), and Belgium (2000).[33] Similar legislation is currently being considered in several other European countries.[34] Most recently, on April 1, 2001, a new law took effect in the Netherlands which changed the legal definition of marriage to include same-sex couples.[35] This makes the Netherlands the first and only country in the world to recognize same-sex marriage.[36]

26. *Id.* at 867.

27. Johnson, *supra* note 6, at 16; *see* VT. STAT. ANN. tit 15, §§ 1201–07 (Supp. 2001).

28. CAL. HEALTH & SAFETY CODE § 1374.58 (Deering 2001).

29. CAL. CODE CIV. PROC. § 377.60 (Deering 2001).

30. CAL. FAM. CODE § 9000 (Deering 2001).

31. *Id.* § 308.5.

32. Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62, 80 (2000).

33. *Id.*

34. *Id.*

35. Maxwell, *supra* note 5, at 157.

36. *Id.*

The Danish Registered Partnership Act, which served as a model for the countries that followed it, says that, (subject to certain enumerated exceptions), "the registration of a partnership shall have the same legal effects as the contracting of marriage,"[37] and "the provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners."[38] This law gives same-sex registered partners the same inheritance, tax deduction, and social service rights enjoyed by married couples.[39] It also imposes the same obligations on same-sex couples, such as tax liabilities and spousal support upon dissolution, as are imposed on married couples.[40] The only areas in which registered partners do not enjoy equal rights with opposite-sex married couples are adoption and custody rights.[41] Registered partners cannot jointly adopt a child, nor can they have joint custody of a child born or brought into the partnership upon dissolution of the partnership.[42] However, an amendment to the Danish act in 1999 allows a registered partner to adopt the child of the other partner.[43]

The Netherlands has gone the furthest by formally legalizing same-sex marriages.[44] Although the Dutch courts refused to interpret the Dutch marriage statute as including same-sex couples and refused to find violations of the Netherlands Constitution or international law, same-sex couples in the Netherlands were successful in lobbying the legislature for change.[45] In 1997, the Dutch established a system of registered partnerships similar to the Danes.[46] Like the Danish act, the Netherlands' registered partnership act extended all the rights, benefits and obligations of marriage to same-sex couples, with a few exceptions.[47] Only Dutch citizens or residents could register, there was no formal divorce procedure, and there was no presumption of parentage for children born into the partnership.[48] An amendment to the act was added in 2000 to allow same-sex couples to adopt children together.[49]

However, almost as soon as the registered partnership act became law, the Dutch Parliament began studying the possibility of

37. Registered Partnership Act § 3(1), No. 372 (1989) (Den.).
38. *Id.* § 3(2) No. 372.
39. Henson, *supra* note 7, at 284.
40. *Id.*
41. *Id.*
42. *Id.* at 294–95.
43. Waaldijk, *supra* note 32, at 82.
44. Maxwell, *supra* note 5, at 157.
45. *Id.* at 143–46.
46. *Id.* at 151–52.
47. *Id.* at 152.
48. *Id.*
49. *Id.*

simply opening civil marriage to same-sex couples.[50] In December 2000, a bill was signed into law that changed the definition of marriage to include persons of the same sex.[51] Same-sex couples in the Netherlands now enjoy all the benefits of marriage, with the exception that there is no presumption of parentage of any children born during the marriage of a same-sex couple.[52] In addition, same-sex couples married in the Netherlands cannot expect international recognition of their marriage.[53]

Examining the history of the same-sex marriage movement in the United States and Europe, it is striking that while same-sex couples in the United States have had some recent courtroom successes in fighting for the right to marry, their efforts have been stymied by the federal and state legislatures.[54] In Europe, on the other hand, reform has been almost exclusively legislative in nature.[55] As U.S. states and cities continue to enact domestic partnership statutes and ordinances, it will be important for them to look to the successful European statutes for guidance in crafting specific provisions. This is especially true in the area of dissolution where nearly every European country requires "divorcing" same-sex couples to formally dissolve their union in a court proceeding that is specifically designed to address the same contentious issues that arise in conventional divorces. The next section will examine the existing procedure for dissolving domestic partnerships in the United States and registered partnerships in Europe.

II. Current Dissolution Procedures for Same-Sex Couples

There are only three states that currently extend benefits and protections to same-sex couples at the state level: California (domestic partnerships), Hawaii (reciprocal beneficiaries) and Vermont (civil unions). Each of these acts has a different requirement to dissolve the partnership. In California, the family code provides that a domestic partnership can be terminated by one of the following means: (1) one partner gives or sends to the other partner a written notice by certified mail that he or she is terminating the partnership; (2) one of the partners dies; (3) one of the partners

50. *Id.* at 153.

51. *Id.* at 155, 157; Kees Waaldijk, *Unofficial Summary and Translation, Text of Dutch Law on the Opening Up of Marriage for Same-Sex Partners (Plus Explanatory Memorandum)*, *available at* http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=86&garb=0.12929753255937826&session= (last visited March 25, 2002) (on file with the Hastings Law Journal).

52. Maxwell, *supra* note 5, at 155.

53. *Id.*

54. *Id.* at 200.

55. *Id.*

marries; or (4) the partners no longer have a common residence.[56] The partnership is legally terminated once one partner sends a Notice of Termination of Domestic Partnership that is received and filed by the Secretary of State.[57] There are no other requirements. If the parties to the domestic partnership have purchased real estate together or acquired sizeable personal property holdings during the course of their domestic partnership, the law will only intervene to help divide the property in the event the parties have a formal separation agreement in place.[58] This is in sharp contrast to married couples in California, each of whom can expect fifty percent of the family assets upon dissolution of the marriage as a matter of law under California's community property scheme.[59]

Even the existence of a formal written agreement may not necessarily guarantee divorcing domestic partners in California an equitable division of assets. In 2000, former E*TRADE Chief Operating Officer Kathy Levinson, and her partner Jennifer Levinson, broke up after a 20-year relationship.[60] At the time of their split, Kathy's net worth was approximately $40 million.[61] Jennifer felt that as Kathy's de facto spouse, she deserved half of the family assets, as she had given up her job to take care of the women's home and their two children.[62] However, the partnership agreement the women had drawn up while both were still working and before Kathy's stock options became worth millions, will apparently control and leave Jennifer with practically nothing.[63] Their dissolution will be governed solely by California business and contract law, rather than family law, because Kathy and Jennifer's domestic partnership is not viewed as a "family."[64] According to Jennifer, "Mine is the perfect example of why we need all the rights of marriage—including divorce."[65]

In Hawaii, the process for dissolution of a reciprocal beneficiary relationship is almost identical to that of California. Hawaii Revised Statute section 572C-7(a) reads: "Either party to a reciprocal beneficiary relationship may terminate the relationship by filing a signed notarized declaration of termination of reciprocal beneficiary relationship by either of the reciprocal beneficiaries with the

56. CAL. FAM. CODE § 299(a) (Deering 2001).
57. *Id.* § 299(b).
58. Mubarak Dahir, *Breaking Up Is Hard To Do*, ADVOC., Sept., 11, 2001, at 30.
59. *Id.*; *see* CAL. FAM CODE §§ 760, 2550 (West 2003).
60. Dahir, *supra* note 58.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

director."[66] Again, like California, the law assumes that once the parties have decided to break up, there is no reason for the courts to have anything to do with the once-couple, absent some form of separate contractual agreement between the parties. Hawaii, like California, recognizes cohabitation agreements which can be drafted to set forth the terms of property division[67] or even include support provisions.[68] While these agreements, similar in nature to prenuptial agreements, are generally enforceable in Hawaii (as well as California), they require couples to plan for the possibility of dissolution while the relationship is still apparently strong, something many couples would rather not think about.[69]

Unlike California and Hawaii, which implicitly treat domestic partnerships as relatively insignificant by failing to include any substantive procedures for dealing with the break up of potentially long-term, marital-like relationships, where partners may have accumulated property or had children, Vermont's civil union law is extremely progressive in that dissolution for same-sex partners is treated identically to divorce for married couples.[70] The statute provides that "[t]he law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union."[71] In the case of Kathy and Jennifer Levinson, for example, under Vermont law, Jennifer would be able to rely on the courts to craft an equitable division of property that would take into account the sacrifices she made for the family that put her in a weaker economic position.

Vermont's position that the dissolution of same-sex relationships should be treated the same as traditional divorces is in line with what many European countries with registered partnership statutes have been doing for years. The Danish registered partnership act provides that the "Danish Marriage (Formation and Dissolution) Act . . . shall apply similarly to the dissolution of a registered partnership."[72] This means that a couple seeking dissolution must obtain a legal separation and/or divorce through the same administrative or judicial

66. HAW. REV. STAT. § 572C-7(a) (2001).

67. Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 249 (1998).

68. Brett A. Barfield, *Are Same-Sex Prenuptial Agreements Enforceable in Florida?* Posik v. Layton, *Law and Policy*, 10 ST. THOMAS L. REV. 407 (1998).

69. Gordon, *supra* note 67, at 245.

70. VT. STAT. ANN. tit. 15, § 1204(d) (2001).

71. *Id.*

72. Registered Partnership Act § 5(1), No. 372 (1989) (Den.).

channels as married couples and more financially secure partners are liable for support.[73]

The Dutch registered partnership act allows registered partners to dissolve their union by mutual consent, outside of court.[74] However, unlike California and Hawaii, certain obligations still exist. For example, Dutch co-parents are liable for supporting a child born into or adopted by the registered partners, until such child reaches the age of twenty-one.[75] In addition, while the parties can dissolve their partnership by mutual agreement, "a deed must be drawn up by a *notaris* or advocate regulating financial and other matters."[76] When children are involved, however, the court must become involved to determine questions of custody.[77] With the opening of civil marriage to same-sex couples in the Netherlands, however, things may become more rigid. The Dutch bill extending marriage to same-sex couples specifically did not abolish registered partnerships as an option, but has provisions for a reevaluation of registered partnerships after five years.[78] It remains to be seen whether mandatory judicial divorce proceedings will become the norm, as in Denmark, or whether the institution of registered partnerships will continue to exist with the option of a more informal dissolution procedure.

III. The Importance of a Formal Dissolution Procedure

After examining how same-sex couples can dissolve their relationships in the United States and Europe, it remains to be discussed why a formal dissolution procedure, monitored by the courts, is important for same-sex couples. According to Bettijane Levine of the *Los Angeles Times*, writing about the break-up of Hollywood stars Ellen DeGeneres and Anne Heche, "[E]ven with its heartaches, formalized divorce does offer heterosexuals a public and final split. A closure of sorts, so they can move on with their lives."[79] Gay and lesbian couples who split up, often after long-term relationships, have no such public support structure available. Couples who may not have been open about their sexual orientation to their family, friends and/or co-workers, may not be able to ask for

73. Henson, *supra* note 7, at 295.

74. Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J. FAM. L. 371, 391 (2000).

75. *Id.* at 402.

76. *Id.* at 435.

77. *Id.* at 436.

78. Maxwell, *supra* note 5, at 155.

79. Bettijane Levin, *Stars' Split Pushes Gay Breakups into the Limelight*, L.A. TIMES, Sept. 4, 2000, at E1.

emotional support while they work through a difficult break up, unlike straight couples going through a divorce.[80]

Gay "divorces" tend to drag out longer and are generally more expensive than traditional divorces from a legal standpoint, because each dissolving couple has to craft a unique settlement that is specifically tailored to their circumstances.[81] There are no boilerplate forms that can be filled out and filed by an attorney for a set fee.[82] Family law attorneys and judges are perfectly familiar with the basic rules that govern divorce for heterosexual couples, but with no such rules for same-sex couples, every decision is liable to be debated at great length by all parties.[83] The longer this debate continues, the higher the attorneys' fees.[84] Frederick Hertz, a California lawyer who specializes in same-sex dissolutions, illustrates how the absence of any rules in this arena can make even the most straightforward dissolution messy.[85] He represented a man who was breaking off a ten-year relationship with his partner.[86] Although the men had drafted an agreement indicating how their assets, including a home they had purchased jointly, were to be divided, difficulties arose immediately.[87] Hertz's client had agreed to buy out his ex-partner, but unlike married couples who look to the date of legal separation to determine the point at which the responsibilities for expenses related to the sale or upkeep of the home are shifted, the two men had no legal separation date since they could never legally marry.[88] The real estate or family law rules that would govern these questions in a traditional divorce did not apply to unmarried couples, and even today, there is very little case law to help sort out all the legal issues.

Commentators have written extensively about the need for unmarried partners to enter into so-called "cohabitation agreements" in order to create enforceable rights in the event of dissolution.[89] For example, although states do not routinely award alimony to unmarried partners upon dissolution of their relationship,[90] same-sex couples can provide for support payments in cohabitation agreements should their relationship dissolve.[91] The Florida courts upheld such

80. O'Brien, *supra* note 3.
81. *Id.*
82. *Id.*
83. Frederick Hertz, *Rules of Disengagement*, CAL. LAW., May 1997, at 27.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See, e.g.*, Gordon, *supra* note 67; Barfield, *supra* note 68.
90. *See, e.g.*, Davis v. Misiano, 366 N.E.2d 752, 754 (Mass. 1977).
91. *See, e.g.*, Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997); Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998).

an agreement, similar to a prenuptial agreement, in the case of a failed lesbian relationship.[92] The two women had an agreement that included a provision that Dr. Layton would pay "liquidated damages" of $2,500 a month to her partner should their relationship dissolve due to Layton's abusive, harassing or abnormal behavior.[93] When Layton moved in with another woman several years later, Ms. Posik sued to enforce the support provision terms in their agreement.[94] Although the trial court denied Posik's request on the ground that the support provision was an unenforceable penalty, the appellate court reversed, finding that Posik's economic losses were "reasonably ascertainable."[95] The appellate court held that parties to a non-marital relationship are free to provide rights and obligations as might stem automatically from marriage through contract.[96] The court quoted the seminal California case, *Marvin v. Marvin,*[97] which held that "as long as the agreement does not rest upon illicit meretricious consideration, the [unmarried, cohabitating] parties may order their economic affairs as they choose."[98] However, because the agreement did not specifically address the issue of division of property, the court refused to grant Ms. Posik's request for an equitable division of the property accumulated by the women based on the fact that their relationship was "like a marriage," holding that "property division, *per se*, applies only to marriages."[99]

The *Posik* case illustrates the problems inherent in a system that requires couples not able to take advantages of the legal protections of marriage to anticipate every contingency that might arise in the event of dissolution and articulate them in a formal cohabitation agreement.[100] While Dr. Layton and Ms. Posik had made provisions for support payments because Posik was giving up her job to go and live with Layton, they failed to include provisions for division of the property they accumulated during the several years they lived together.[101] Therefore Ms. Posik had no legal remedy available to her.[102] If this case had arisen in California or Hawaii, despite the existence of domestic partner registries, the result would undoubtedly have been the same because neither state provides any substantive

92. *Posik*, 695 So. 2d at 760.
93. *Id.*
94. *Id.*
95. *Id.* at 760–61.
96. *Id.* at 761.
97. 557 P.2d 106 (Cal. 1976).
98. *Id.* at 116.
99. *Posik*, 695 So. 2d at 761 (quoting Seward v. Mentrap, 622 N.E.2d 756, 757 (Ohio App. 3d 1993)).
100. *Id.*
101. *Id.*
102. *Id.*

rights upon dissolution of a domestic partnership.[103] If the case had arisen in Vermont, however, the situation may have been quite different. Because the Vermont civil union law makes provisions for a formal dissolution proceeding in family court, all of the issues surrounding the couple's dissolution could have been addressed at one time in an equitable fashion.[104]

Finally, and perhaps most importantly, there are the difficult and highly contentious issues of child custody and visitation rights when two unmarried partners split up. Same-sex couples may form families in a variety of ways. One partner may have a biological child from a former marriage that their partner has adopted through a second-parent adoption procedure; the two partners may have adopted a child (although only one member of the couple may be legally recognized as the parent) and raise that child together; or the couple may have used artificial reproduction technology to have a child "together" (either through artificial insemination or surrogacy).[105] The most likely scenario is that both partners will have a strong relationship with the child, have participated fully in parenting activities, but only one partner, the biological or adoptive partner, will be recognized as the "legal" parent with any legal rights respecting the child.[106] Should the couple split up, the "de facto" parent may have a difficult time convincing a court to grant him or her custody or visitation rights with the child. While recent cases have started to acknowledge the reality of same-sex families and have granted visitation rights to de facto parents, these non-legal parents still face numerous legal barriers to receiving such rights.[107]

Courts have long applied a "parental preference standard" which presumes that it is in the best interests of the child to grant custody to the natural parent.[108] In the context of divorce, where joint custody is not awarded, courts routinely award visitation rights to the non-custodial parent (unless, of course, the safety or best interests of the child preclude this).[109] Most states require an underlying action that affects the family, such as divorce, before a petition for visitation is

103. *See* CAL FAM. CODE § 299 (Deering 2001); HAW. REV. STAT. § 572C-7 (2001).

104. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1204 (2001).

105. 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, 730–31 (2000).

106. *Id.*

107. *See, e.g.*, E.N.O. v. L.M.N., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

108. Amy Persin Linnert, *In the Best Interests of the Child: An Analysis of Wisconsin Supreme Court Rulings Involving Same-Sex Couples with Children*, 12 HASTINGS WOMEN'S L.J. 319, 322 (2001).

109. *Id.* at 323.

considered.[110] It is this requirement that often stands in the way of same-sex partners seeking visitation rights. Because same-sex couples cannot marry, they cannot bring an action for divorce. Therefore courts often assert that the non-custodial parent lacks standing to bring a claim for custody or visitation based on the lack of this underlying action affecting the family.[111] In a recent New Jersey case, however, the state supreme court held that it had jurisdiction to hear a claim for custody by a non-biological or adoptive parent under the "exceptional circumstances" doctrine where the third party could prove that she had established de facto parental status.[112] A "de facto" parent has been described by the courts as one who "has participated in the child's life as a member of the child's family . . . resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent."[113] Despite the recent victories for some non-legal parents seeking visitation when their same-sex relationship dissolved, the law in this area is still uncertain. Those non-legal parents seeking to enforce their rights would be greatly benefited by having a formal legal proceeding that not only dissolved their relationship, but could serve as the "underlying action" for purposes of custody and visitation determination.

IV. Proposed Uniform Dissolution Proceeding for Same-Sex Couples

As discussed in the preceding section, there are several reasons why a formal, legal dissolution proceeding would be beneficial to same-sex couples in a non-marital relationship. In this final section, I will outline the features of such a proceeding, drawing from the existing Vermont civil union provisions, as well as from provisions of the Danish and Dutch registered partnership acts. I will then discuss how this model proceeding could be adopted by various jurisdictions in the United States, drawing comparisons to the process of adoption of no-fault divorce laws in the United States in the 1960s and 1970s.

In order to protect the economic and property rights of lesbians and gay men, as well as their rights respecting their children, states should extend the obligations of same-sex couples upon dissolution by requiring them to undergo a formal dissolution proceeding in the court system. When adopting domestic partner legislation, termination of such domestic partnerships should require more than the simple filing of a notice of dissolution as currently provided by

110. *Id.*
111. *Id.* at 324.
112. V.C. v. M.J.B., 748 A.2d at 550.
113. E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999).

California and Hawaii state law.[114] In essence, there should be consequences attached to dissolution that emphasize the underlying importance of the relationship in the first place.[115] Parties seeking a termination of their partnership should be required to obtain a legal "divorce" through a judicial proceeding, such as is required by the Vermont Civil Union law and the Danish Registered Partnership Act.[116]

A formal judicial dissolution proceeding would in practice be almost identical to current divorce proceedings. Regardless of the existence of a cohabitation, or "prenuptial" agreement, the courts would be able to use their equitable powers to award support payments where there is a gross disparity in incomes. This proceeding would be a proper forum for all the individual circumstances surrounding a couple's relationship and living arrangements to be brought forth and taken into account. From the standpoint of awarding support, a case where one partner gave up his or her job to stay at home and manage housekeeping and child care responsibilities while the other partner climbed the corporate ladder, could be treated very differently from a case in which both partners continued their respective careers and contributed equally to domestic responsibilities. The same would be true with regards to property division. By formalizing the dissolution proceeding, the courts would be able to look to established rules and case law to determine how to divide the couple's assets.

In the realm of child custody and visitation rights, the proceeding would differ slightly from the general rules followed in divorce proceedings. Instead of a presumption of joint custody, the presumption would remain that it is in the best interests of the child to remain with the legal parent.[117] However, since the courts would already have jurisdiction over the dissolution, it would be much easier for the non-legal parent to assert his or her status as a de facto parent and, again taking into account all the circumstances of the individual case, either be awarded joint custody or some form of visitation rights with the child. This would preserve bonds formed by the child with both parents, and would allow the courts to consider the emotional and psychological needs of the child in order to further that child's "best interests."[118] Because the statute authorizing this form of dissolution proceeding would be narrowly drawn to include only same-sex couples, this would not open the door to claims for child

114. *See* CAL FAM. CODE § 299 (Deering 2001); HAW. REV. STAT. § 572C-7 (2001).

115. Johnson, *supra* note 6, at 42.

116. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1204 (2001); Registered Partnership Act § 5(1), No. 372 (1989) (Den.).

117. *See* Linnert, *supra* note 108, at 322.

118. *Id.* at 323.

custody or visitation rights by non-parental third parties such as day care providers.[119] Unmarried, cohabitating opposite-sex couples would also be excluded as they already have the option of marriage, with all the legal benefits, protections and obligations that it entails.[120]

Obviously the greatest obstacle to implementing such a scheme will be the pervasive reluctance to legitimize same-sex relationships by many Americans who fear that this will lead inevitably to legalizing same-sex marriage *per se*. This is why a formal dissolution proceeding for same-sex couples should be attached to and adopted with some form of domestic partner or civil union legislation. It has been argued that this type of system simply establishes a "separate but equal" environment where gays and lesbians are relegated to their "own" form of marriage.[121] However, this should be seen as a "political compromise,"[122] and a step on the road to full equality for gays and lesbians. Extending dissolution obligations, as well as other benefits, such as hospital visitation rights and the right to inherit from a partner, is an important step in legitimizing same-sex relationships. Making termination of a relationship more difficult also provides a couple with more incentives to stay together, furthering the admittedly important societal goal of preserving stability in the family unit.[123]

In the context of the same-sex marriage debate, one of the prevailing questions has been whether or not individual states would have to recognize same-sex marriages under the Full Faith and Credit Clause[124] if they were performed in a state that had legalized same-sex marriage. This question has for the moment been resolved by the Defense of Marriage Act ("DOMA")[125] which relieves states of the requirement that they give full faith and credit to "any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same-sex that is treated as a marriage."[126] The Supreme Court held in *Williams v. North Carolina,* however, that divorces are "judgments" subject to recognition by sister states under the Full Faith and Credit Clause.[127] It seems therefore, that while states may have the option whether or not to recognize same-sex

119. *Id.* at 327.

120. *Id.*

121. Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)equal*, 25 VT. L. REV. 113, 134 (2000).

122. Johnson, *supra* note 6, at 18.

123. Henson, *supra* note 7, at 303.

124. U.S. CONST. art. IV, §1 ("Full faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.").

125. 28 U.S.C. § 1738C (2002).

126. *Id.*

127. 317 U.S. 287 (1942).

marriages (which, under the language of the DOMA would include marital-like relationships such as civil unions and possibly domestic partnerships as well), they probably do not have the option of recognizing dissolution proceedings, even if such proceeding involves two persons of the same sex. In this case, same-sex couples could enforce support or visitation rights outside of the state in which they were granted a judicial decree of dissolution which would make such rights even more meaningful where one or both partners leave the original home state.

Comprehensive social change in the United States rarely begins at the federal level, but rather is nurtured and grows in communities, then at the state level, and perhaps, finally at the national level. The process can be compared to the adoption of no-fault divorce laws in the United States in the 1960s and 1970s that changed our national value system.[128] California led the no-fault revolution in the late 1960s when it established a commission to study the problem of divorce.[129] As part of its study, the commission looked to what was happening simultaneously in Europe, particularly in England where no-fault divorce was just being adopted.[130] In 1969, the enactment of the California Family Leave Act established a new ground for divorce, "irreconcilable differences."[131] In the wake of California's revolutionary legislation, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Marriage and Divorce Act to incorporate the concept of no-fault divorce.[132] By 1985, all states had added some form of no-fault provision to their divorce laws.[133]

In the case of same-sex divorce, Vermont can be compared to California's role in promulgating no-fault divorce laws. After studying the problem, the Vermont legislature enacted its civil union law in 2000, extending the benefits, protections and obligations of marriage to same-sex couples, including the obligation to undergo a formal dissolution proceeding in order to terminate the relationship.[134] The Vermont legislature surely looked to the examples set by various European countries in establishing registered partnership acts (in fact, the term "civil union" was coined originally by the French in

128. Henson, *supra* note 7, at 298.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. Johnson, *supra* note 6, at 42–43.

1992).[135] California and Hawaii, states with existing domestic partner acts, are logically the next states to extend their laws to include obligations upon termination of a domestic partnership. The endorsement and promulgation of a uniform act, similar to the Uniform Marriage and Divorce Act, would help to spread this form of domestic partnership, with tangible benefits, protections and obligations, specifically the obligation to formally dissolve the relationship through a judicial proceeding throughout the states.[136]

Conclusion

Same-sex couples lack most of the benefits, protections and obligations of marriage that are granted to opposite-sex couples in the United States. Unlike many European countries, especially in Scandinavia, where legislatures have been extremely progressive in extending rights to same-sex couples, either by legalizing same-sex marriage or providing for substantive rights through a system of registered partnerships, most states in the U.S. have been reluctant to provide any formal rights to same-sex couples. However, as in Europe, gay men and lesbians in the United States form meaningful unions which often result in the joint acquisition of property, one partner depending on the other for financial support, and/or the introduction of children to the relationship.

Unfortunately, like many marriages, same-sex relationships sometimes fail and the partners are left without any legal means to protect their rights to property, support, or access to their children. A formal dissolution proceeding for same-sex couples who are currently denied the right to marry would protect these rights. Modeled after the Vermont Civil Union law,[137] the Danish Registered Partnership Act,[138] and the marriage law of the Netherlands (which has been amended to include same-sex couples),[139] this act would require same-sex couples to receive a formal judicial decree of dissolution in order to terminate their relationship. In the course of this proceeding, the court would assist in crafting an equitable division of the couple's assets, imposing support provisions on one partner if so required by equity, and making child custody and visitation determinations. Because the court would have the benefit of relying on existing divorce statutory and case law, there would be less room for any

135. *Id.* at 44–45. The French "Civil Solidarity Pact," as it came to be known, does not contain a requirement that couples face a formal judicial proceeding in order to terminate their relationship, however, unlike the Danish Registered Partnership Act.

136. Henson, *supra* note 7, at 298-99.

137. VT. STAT. ANN. tit. 15, § 1204 (2001).

138. Registered Partnership Act § 5(1), No. 372 (1989) (Den.).

139. *See* Wet van 21 December 2000, Stb. 2001, 9 *in* Maxwell, *supra* note 5, at 155 n.55.

personal biases against homosexuals on the part of the presiding judge to interfere with the final dissolution decree. In addition, the entire process would be less expensive and time-consuming for the parties because attorneys could rely on the boilerplate forms that govern most issues in traditional divorces.[140]

Until the public at large in the United States determines it is time to extend equal protection of the laws to homosexuals and legalize same-sex marriage, same-sex couples will have to depend on the narrower rights available under domestic partnership laws. A formalized dissolution proceeding will ensure that those rights are accompanied by responsibilities as well, strengthening the importance of the domestic partnership. Finally, besides the logistical and financial benefits, formalized dissolution will offer couples an emotional sense of closure, enabling them to move on with their lives after a painful break-up in the same way that divorce serves as both an actual and a symbolic end to a marriage.[141]

140. O'Brien, *supra* note 3.
141. Levin, *supra* note 79.

***