

**Redefining the Family in Wisconsin  
Joint Enterprise in Cohabitation Relationships**

**Linda Roberson  
Balisle & Roberson, S.C.**

**P.O. Box 870  
131 W. Wilson Street, Suite 802  
Madison, Wisconsin 53701-0870  
phone: 608.259.8702 fax: 608.259.0807  
email: [lr@b-rlaw.com](mailto:lr@b-rlaw.com)**

**I. Introduction**

Wisconsin, like most American states and most Western nations, has experienced a significant demographic shift as the number of its unmarried families has continued to increase. In the 1990-2000 decade alone, the number of Wisconsin households comprised of unmarried partners increased by 70 percent.<sup>1</sup> Of these households, 8,232 included same-sex partners.<sup>2</sup> Wisconsin's experience mirrors that of the United States as a whole: nationwide, barely half of U.S. households are headed by married partners.<sup>3</sup> In 2000, 51.7 percent of U. S. households included a married couple, down from 55 percent in 1990 and 60.8 percent in 1980.<sup>4</sup> Nationally, the number of households including unmarried couples increased from a mere 523,000 in 1970 to 4,236,000 in 1998.<sup>5</sup> These numbers make it clear that state law regulating marriage and divorce is simply irrelevant to a significant and growing number of American families.

---

<sup>1</sup>According to 2000 U.S. Census figures, the number of such households in Wisconsin increased from 69,311 in 1990 to 117,967 in 2000.

<sup>2</sup>2000 U.S. Census.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>Bureau of the Census, Current Population Reports.

Wisconsin, like most American states, does not recognize common law marriage<sup>6</sup> or marriage between partners of the same gender. When unmarried partners dissolve their relationship, Wisconsin statutes do not in general protect the partners' rights. The Wisconsin legislature has given limited protection to the rights of children of unmarried partners, in statutes relating to the determination of paternity, voluntary acknowledgment of paternity, child support, and determination of marital children (primarily for purposes of intestate succession).<sup>7</sup> But Wisconsin's statutes are silent regarding the rights of unmarried partners at dissolution of their relationship. To fill this gap, Wisconsin courts have evolved a variety of common law and equitable remedies available to unmarried partners at dissolution. In the most recent development, the Wisconsin court of appeals last year applied a theory of "joint enterprise" to unmarried partners, recognizing for the first time in Wisconsin an equitable property division in which an unmarried partner has a right to share in all property acquired during the joint enterprise, rather than merely those rights based on the partner's contribution to the creation or acquisition of specific items of property.<sup>8</sup> Under this rule, unmarried partners who can establish the existence of a joint enterprise have property rights at dissolution similar in scope to those the statutes afford married partners at divorce.

---

<sup>6</sup>WIS. STAT. § 765.21 (prohibition of marriages that do not conform to statutory requirements). As of 1998, the doctrine of common law marriage survived in only the District of Columbia and eleven states: Alabama, Colorado, Iowa, Kansas, Minnesota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas and Utah. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 6.02, at 914 (2003) (hereinafter "ALI PRINCIPLES").

<sup>7</sup>WIS. STAT. § 767.45 - .62 (1999-2000).

<sup>8</sup>Ulrich v. Zemke, 2002 WI App 246, 654 N.W.2d 458 (Ct. App. 2002), *rev. denied* 2003 WI 1, 655 N.W.2d 128 (2003).

Thus, with respect to property division, Wisconsin law approaches the model proposed by the American Law Institute (hereafter, “ALI”) in its recently published PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (hereafter, “ALI Principles”).<sup>9</sup>

## **II. The American Law Institute’s Principles of the Law of Family Dissolution**

The ALI Principles establish a model designed to resolve financial claims of domestic partners upon dissolution of their cohabitation relationship. They codify many of the methods (including both contractual and equitable principles) used by courts in Wisconsin and elsewhere to provide relief to such parties. Importantly, they also expand established case law of most states by providing both for equitable property division and for ongoing financial support to a disadvantaged “domestic partner” at the termination of the relationship.

A threshold question is the extent of the relationship required to entitle a domestic partner to a colorable financial claim. Chapter 6 of the ALI Principles defines “domestic partners” as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”<sup>10</sup> Whether a period of

---

<sup>9</sup>ALI PRINCIPLES, *supra* note 6, Chapter 6.

<sup>10</sup>ALI PRINCIPLES, *supra* note 6, at 916. The principles also qualify as “domestic partners” persons who “maintained a common household . . . with their common child . . . for a continuous period that equals or exceeds a duration . . . set in a rule of statewide application.” *Id.* The principles provide for a rebuttable presumption that a couple who has maintained a common household for a statutorily defined amount of time are “domestic partners”. *Id.* Therefore, it may not be necessary to reach the question of whether a couple shared a life together if they can meet duration requirements established in applicable state law.

time is significant is determined in light of the circumstances of the parties' relationship and "the extent to which those circumstances wrought change in the life of one or both parties."<sup>11</sup>

Whether a couple "shares a life together" is determined by all the circumstances, including those specifically set forth in the principles:

- (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
- (b) the extent to which the parties intermingled their finances;
- (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
- (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
- (e) the extent to which the relationship wrought change in the life of either or both parties;
- (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee benefit plan;
- (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
- (h) the emotional and physical intimacy of the parties' relationship;
- (i) the parties' community reputation as a couple;
- (j) the parties' participation in a commitment ceremony or registration as a domestic partnership;
- (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
- (l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child;
- (m) the parties' maintenance of a common household.<sup>12</sup>

The ALI comments describe these circumstances as those "that would typically lead such a court to find a contract."<sup>13</sup> Under the principles, the existence of these circumstances gives rise

---

<sup>11</sup>*Id.* at 917.

<sup>12</sup>ALI PRINCIPLES, *supra* note 6, at 917-18.

<sup>13</sup>*Id.* at 918-19.

to a “domestic partnership” which creates specified financial rights and obligations unless the partners have executed an enforceable contract to the contrary.<sup>14</sup>

Section 6.04 of the Principles provides that property is “domestic-partnership property if it would be marital property under [the chapter of the ALI Principles that governs marital relationships], had the domestic partners been married to one another during the domestic-partnership period.”<sup>15</sup> Section 6.05 provides that domestic-partnership property “should be divided according to the principles set forth for the division of marital property in [the sections of the principles governing property division upon dissolution of marital relationships].”<sup>16</sup>

The comments to the ALI Principles criticize the narrow contractual analysis currently used by many jurisdictions as unfairly burdening the disadvantaged party in a cohabitation dispute. In contrast, the proposed ALI system “places the burden of showing a contract on the party wishing to avoid such fairness-based remedies, rather than imposing it on the party seeking to claim them.”<sup>17</sup>

### **III. Wisconsin’s Approach to the Dissolution of Cohabitant Relationships**

Wisconsin does not recognize common law marriage.<sup>18</sup> Neither Wisconsin statutory nor case law has addressed the issue of whether to give full faith and credit to common law

---

<sup>14</sup>*Id.* at 919.

<sup>15</sup>*Id.* at 937.

<sup>16</sup>*Id.* at 940.

<sup>17</sup>*Id.* at 919.

<sup>18</sup> WIS. STAT. § 765.21 (prohibition of marriages that do not conform to statutory requirements).

marriages properly entered into in states that do recognize common law marriage.<sup>19</sup> Therefore, as in most states, the principles of property distribution at divorce do not apply to the dissolution of relationships between unmarried cohabitants in Wisconsin. But Wisconsin courts, like courts in other jurisdictions, have utilized contract theories and equitable remedies in order to provide financial relief for a disadvantaged cohabitant. The most recent case in this area, *Ulrich v. Zemke*,<sup>20</sup> signals not a departure from prior case law but rather another step in a progression that began nearly two decades ago.

**A. Watts v. Watts**

The leading Wisconsin case on property division at the dissolution of a cohabitation relationship is a 1987 decision, *Watts v. Watts*.<sup>21</sup> In *Watts*, the Wisconsin Supreme Court established the authority of the circuit court to grant equitable relief in an action brought by a disadvantaged cohabitant for unjust enrichment,<sup>22</sup> recognizing the right of unmarried cohabitants to sue under contract theories based on express or implied-in-fact contracts.<sup>23</sup> The *Watts* court held that an unmarried cohabitant may raise a claim of unjust enrichment

---

<sup>19</sup>See *Estate of Van Schaick*, 256 Wis. 214, 40 N.W.2d 588 (1949) (not reaching the question of whether the parties had a common law marriage in another jurisdiction, and hence, in Wisconsin as well).

<sup>20</sup>See *supra* note 8.

<sup>21</sup>137 Wis. 2d 506, 405 N.W.2d 303 (1987).

<sup>22</sup>*Id.* at 533.

<sup>23</sup>*Id.* at 529.

following the termination of a relationship in which the other party attempts to retain an unreasonable amount of the property acquired through both parties' efforts.<sup>24</sup>

In *Watts*, the parties cohabited for twelve years and had two children together.<sup>25</sup> When Sue Ann and James moved in together, James persuaded Sue Ann to quit her job and committed to providing for her.<sup>26</sup> The couple had a marriage-like relationship, holding themselves out as husband and wife.<sup>27</sup> Sue Ann and the parties' children used James' surname.<sup>28</sup> The couple filed joint income tax returns, maintained joint bank accounts as husband and wife, and purchased real and personal property as husband and wife.<sup>29</sup> Sue Ann contended that during the parties' relationship, and because of her domestic and business contributions, the business and personal wealth of the couple increased; that she was not compensated for her contributions; and that James had committed through his statements and conduct that she would share equally in the increased wealth.<sup>30</sup>

---

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 510.

<sup>26</sup>*Id.* at 512-13.

<sup>27</sup>*Id.* at 513.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 514.

The court concluded that the statute governing property division at divorce (Wis. Stat. § 767.255) does not apply to dissolution of cohabitant relationships,<sup>31</sup> reasoning that the intent of the legislature was to limit application of that section to dissolution of marriage.<sup>32</sup> However, the court determined that Sue Ann was entitled to sue based on any theory available to participants in a joint venture who did not cohabit, including express or implied contract, unjust enrichment, or partition of their jointly-held property.<sup>33</sup>

Contract Theory: The court recognized that Wisconsin courts had generally refused to enforce contracts for which the sole consideration is sexual relations (“meretricious” relationships).<sup>34</sup> However, the Wisconsin Supreme Court had previously held that:

a bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain.<sup>35</sup>

Legitimate adequate consideration that might support an agreement to share or transfer property (independent of the parties’ sexual relationship) might include money, property, housekeeping or child rearing services.<sup>36</sup> The court also recognized

---

<sup>31</sup>*Id.* at 519-20.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 538.

<sup>34</sup>*Id.* at 525-29.

<sup>35</sup>*Id.* at 525, *quoting* In Matter of Estate of Steffes, 95 Wis. 2d 490, 514, 290 N.W.2d 697 (1980).

<sup>36</sup>*Id.* at 528.

that joint acts of a financial nature can give rise to an inference that the parties intended to share equally.<sup>37</sup>

Unjust enrichment theory: Sometimes referred to as “quasi-contract” or contract “implied in law,” this theory is derived from the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.<sup>38</sup> Finding that Sue Ann had contributed to the couple’s financial success and the appreciation of their assets, the court applied the three elements that must be proved to establish an unjust enrichment claim: First, the plaintiff must have conferred a benefit on the defendant. Second, the defendant must be aware of the benefit. Third, the defendant must accept or retain the benefit under circumstances that make it inequitable for him or her to do so.<sup>39</sup>

The court also approved the imposition of a constructive trust on the assets acquired during the relationship.<sup>40</sup> In order for a constructive trust to be an available remedy, the complaint must state facts sufficient to show both unjust enrichment and abuse of a confidential relationship or other unconscionable conduct. The latter can be inferred from allegations evidencing a family relationship, a close personal relationship, or the parties’ mutual trust.<sup>41</sup>

---

<sup>37</sup>*Id.* at 529.

<sup>38</sup>*Id.* at 530.

<sup>39</sup>*Id.* at 531. The supreme court also noted that it had extended this sort of relief to a party to a cohabitation in *Estate of Fox*, 18 Wis. 369, 190 N.W. 90 (1922).

<sup>40</sup>*Id.* at 533-34.

<sup>41</sup>*Id.*

Partition: Anyone owning property “in common” with someone else can maintain an action for partition of personal property.<sup>42</sup> Anyone having an interest in real property jointly or in common with others may sue for judgment partitioning that interest unless an action for partition is prohibited elsewhere in the statutes.<sup>43</sup> The *Watts* court also cited an earlier Wisconsin case, *Jezo v. Jezo*, for the proposition that persons may sue for partition of jointly-owned property, regardless of their marital status.<sup>44</sup>

**B. Waage v. Borer**

The court of appeals clarified the *Watts* unjust enrichment holding in *Waage v. Borer*.<sup>45</sup> The court explained that *Watts* does not require compensation for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship.<sup>46</sup> Furthermore, the *Watts* holding does not allow a revival of actions for unfulfilled emotional expectations due to a breach of contract to marry, and foregone opportunities are not relevant to the *Watts* standard.<sup>47</sup>

Pursuant to *Waage*, proof of the elements of unjust enrichment set forth in *Watts* is demonstrated by showing: (1) the parties have accumulated assets during their period of cohabitation; (2) the assets were acquired through the efforts of both parties; and

---

<sup>42</sup>*Id.* at 533-34. WIS. STAT. § 820.01 (1999-2000).

<sup>43</sup>*Id.* WIS. STAT. § 842.02 (1) (1999-2000).

<sup>44</sup>*Id.* at 535, *citing* *Jezo v. Jezo*, 19 Wis. 2d 78, 81, 119 N.W.2d 471 (1964).

<sup>45</sup>188 Wis. 2d 324, 525 N.W.2d 96 (Ct. App. 1994).

<sup>46</sup>*Id.* at 330.

<sup>47</sup>*Id.*

(3) one party retained an unreasonable share of the assets.<sup>48</sup> In other words, the plaintiff must establish that the parties engaged in a joint enterprise or mutual undertaking and accumulated assets as a result. After the plaintiff demonstrates the existence of a joint enterprise, the principles of equity require that both parties be treated fairly and that the assets accumulated as a result of the joint enterprise be equitably divided between them.<sup>49</sup>

To this point in the development of Wisconsin law, courts had adopted only the narrow contractual analysis criticized by the ALI drafters as placing the burden of proof on the disadvantaged party rather than on the party who would benefit unfairly in the absence of legal intervention. However, a 2002 case moves toward the ALI approach by requiring an equitable division of *all* property – not just co-owned property, or property to which both partners contributed – accumulated by a couple during the period of cohabitation if the claimant can demonstrate the existence of a “joint enterprise.”<sup>50</sup>

### **C. Ulrich v. Zemke**

Susan Ulrich and Glenn Zemke lived together for seven years and had two children together.<sup>51</sup> During their cohabitation, they both worked outside the home and earned similar incomes. Although they maintained separate checking accounts, they shared living expenses including grocery and medical bills, life insurance costs, clothing expenses, mortgage payments, phone bills, utilities and other household

---

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Ulrich v. Zemke*, 2002 WI App 246, 654 N.W.2d 458 (Ct. App. 2002), *rev. denied* 2003 WI 1, 655 N.W.2d 128.

<sup>51</sup>*Id.* at ¶ 2.

expenses.<sup>52</sup> They also invested in three parcels of land during their cohabitation: their residence and two other properties.<sup>53</sup>

Glenn alone had purchased the residence prior to the parties' cohabitation.<sup>54</sup> However, he later re-deeded the house to himself and Susan as joint tenants, and the parties jointly refinanced and improved the house over the next six years.<sup>55</sup> The second parcel of land was purchased while the parties cohabited, but was titled to Glenn alone; however, both parties made monthly mortgage payments on the property. After the couple separated, Glenn sold part of the parcel and retained the proceeds of the sale.<sup>56</sup> The third parcel of land was also purchased while the parties cohabited and was titled to Glenn. He paid the interest on the mortgage debt associated with this property. He later sold part of the parcel and retained the proceeds.<sup>57</sup>

After the parties' separation, Susan brought an action against Glenn claiming unjust enrichment and requesting that the court partition the real and personal property.<sup>58</sup> The circuit court awarded Susan the residence and the second parcel of real estate, with an equalization payment from her to Glenn for transferring the property.<sup>59</sup> However, the

---

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at ¶ 3.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at ¶ 4.

<sup>57</sup>*Id.* at ¶ 5.

<sup>58</sup>*Id.* at ¶ 6.

<sup>59</sup>*Id.*

circuit court rejected Susan’s claim to the third parcel of real estate based on her failure “to demonstrate a shared enterprise between the parties to justify an award to her of part of the [third] real estate.”<sup>60</sup> Susan appealed.<sup>61</sup>

The court of appeals reversed the circuit court’s award of the third parcel of real estate to Glenn, holding that the court “erroneously applied the unjust enrichment standard to each parcel of land rather than considering the overall scope of their joint enterprise and dividing the property accordingly.”<sup>62</sup> In its analysis, the court cited both *Watts* and *Waage* for the proposition that “the party claiming unjust enrichment must show that the parties engaged in a joint enterprise or mutual undertaking to accumulate assets.”<sup>63</sup> The court set forth the proper legal standard for such a determination: “[W]hether the relationship was a joint enterprise which encompassed the accumulation of assets.”<sup>64</sup> The factors to be considered in such a determination include “the total circumstances of the parties’ relationship, specifically whether the parties contributed property and services to the relationship, producing an increase in wealth.”<sup>65</sup> All assets acquired during the existence of a joint enterprise must be divided equitably between the parties “unless the court determines that the contested asset was acquired by independent

---

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at ¶ 7.

<sup>62</sup>*Id.* at ¶ 9.

<sup>63</sup>*Id.* at ¶ 11.

<sup>64</sup>*Id.* at ¶ 12.

<sup>65</sup>*Id.* at 12.

means, outside the joint enterprise's domain.”<sup>66</sup>

Applying this legal standard, the court concluded that the parties had formed a joint enterprise “to raise a family and accumulate assets together” while cohabiting, and the circuit court had erred by analyzing Susan’s claim asset by asset.<sup>67</sup> In support of its conclusion the court pointed out that the parties “functioned as a family unit” – they maintained a house, cared for children, shared living expenses and continually acquired real and personal property.<sup>68</sup> Furthermore, proceeds realized from sales of the parties’ real estate were “continually reinvested into the relationship.”<sup>69</sup> In addition, the parties’ “financial relationship remained constant” during their cohabitation – they commingled their finances and shared expenses.<sup>70</sup> The court held it was immaterial that Susan did not directly participate in the acquisition and

maintenance of the third parcel of real estate, because “[her] contribution to the

---

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at ¶ 12, ¶ 14.

<sup>68</sup>*Id.* at ¶ 14.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at ¶ 15.

relationship enabled Glenn to purchase [the third parcel].”<sup>71</sup>

The Wisconsin court did not refer to the ALI Principles in crafting its opinion, but the result is consistent with the goals of the ALI proposal. Essentially, in the nearly two decades since the Wisconsin Supreme Court decided *Watts v. Watts*<sup>72</sup> Wisconsin courts have moved from the narrow concept of joint venture, requiring active participation in the acquisition of an asset to establish entitlement to share in its value, to the broader concept of joint enterprise, which recognizes financial claims based on the totality of the relationship including the parties’ expectations and respective nonfinancial contributions. In this way, Wisconsin courts have afforded a disadvantaged cohabitant protection extending beyond the legal remedies available to participants in a joint venture.

#### **D. Same-Sex Cohabitation**

No reported Wisconsin case law extends the theories espoused in *Watts* and subsequent cases to same-sex cohabitation cases. However, anecdotal evidence indicates a willingness of trial court judges to adjudicate property disputes between former same-sex cohabitants. Because the relevant case law does not restrict its analysis to heterosexual cohabitation, it seems appropriate to conclude that this line

---

<sup>71</sup>*Id.* But see *Ward v. Jahnke*, 220 Wis. 2d 539, 583 N.W.2d 656 (Ct. App. 1998), in which a female cohabitant failed to satisfy the *Watts* standard because she lacked evidence of a mutual undertaking. In *Ward*, the parties lived together and the woman paid most living expenses so that the man could save for a down payment on a house, which he then purchased alone, and which the parties moved into. *Id.* The court held that the parties engaged in a shared effort to accumulate a down payment for a home, supporting unjust enrichment theory. *Id.* However, the court also held that the nature of the relationship changed and no longer embodied a joint enterprise once the parties moved into the new home and did not show a mutual effort toward the accumulation of assets. *Id.*

<sup>72</sup>*See supra* note 19.

of reasoning should prevail in same-sex cohabitation cases. Accordingly, family law and estate planning attorneys in Wisconsin now draft cohabitation agreements for both heterosexual and gay/lesbian couples.

#### **IV. What is Next for Wisconsin's Cohabiting Couples?**

While the court's decision in *Ulrich v. Zemke*<sup>73</sup> represents a major step toward equitable resolution of financial claims in the context of dissolution of cohabitation relationships, the cohabiting partner who makes nonfinancial contributions to the joint enterprise still lacks important protections available to married partners. Significantly, Wisconsin courts have not addressed the disadvantaged cohabitant's entitlement to ongoing support in the form of alimony, maintenance (the Wisconsin term for alimony), or "compensatory payments" as provided in Section 6.06 of the ALI Principles.<sup>74</sup> Moreover, Wisconsin's case law protecting the property rights of unmarried cohabitants has not to date been explicitly applied to same-sex couples, in contrast to the ALI Principles' specific inclusion of such couples.<sup>75</sup> As a result, cohabiting residents of Wisconsin do not have the protections the law affords to similarly situated residents of states recognizing common law marriage,<sup>76</sup> or the protections available to cohabitants who form a "civil union" in Vermont.<sup>77</sup> It is to be hoped that the law of joint enterprise can and will be expanded to provide broader protections for Wisconsin's domestic partners.

C:\Documents and Settings\phager\Local Settings\Temporary Internet Files\OLK1D\RedefiningFamilyinWI-Joint Enterprise in Cohabitation Relationship.wpd.061703.06

---

<sup>73</sup>*See supra* note 8.

<sup>74</sup>ALI PRINCIPLES, *supra* note 6, at 941.

<sup>75</sup>ALI PRINCIPLES, *supra* note 6, at 916.

<sup>76</sup>*See supra* note 6.

<sup>77</sup>2000 Vermont Laws 91.