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ONE STEP FORWARD, TWO STEPS BACK: *VASQUEZ* v. *HAWTHORNE* WRONGLY DENIED WASHINGTON'S MERETRICIOUS RELATIONSHIP DOCTRINE TO SAME-SEX COUPLES

Amanda J. Beane

Abstract: Washington's property-division scheme for unmarried couples is among the most progressive in the nation. The scheme has evolved from a time when courts treated unmarried couples unfavorably and generally refused to divide their property equitably. The Washington Supreme Court took a step forward from this approach when it created the meretricious relationship doctrine. Under this doctrine, courts may equitably divide unmarried couples' property at the termination of their relationship if the relationship was stable, marital-like, and the parties cohabited knowing they were not lawfully married. Now, however, the Washington Court of Appeals has restricted the application of this doctrine to heterosexual couples only, holding in *Vasquez v. Hawthorne* that same-sex relationships cannot qualify as meretricious relationships. *Vasquez* reasoned that because Washington law prevents same-sex couples from marrying, same-sex relationships cannot be "marital-like." The Washington Supreme Court has granted review and should reverse *Vasquez*. "Marital-like" has been and should be defined by the conduct of the parties and not by their legal status. The *Vasquez* decision unjustly denies to same-sex couples an opportunity to benefit from a property-division scheme for unmarried couples by violating public policy and reflecting heterosexist views.

Until recently, Washington courts had treated unmarried couples unfavorably. The presumption governing property division, known as the *Creasman* presumption, provided that property acquired by an unmarried couple belonged solely to the one who held title.¹ Recognizing the unfairness of this outcome, courts created certain exceptions to the *Creasman* presumption,² until the Washington Supreme Court overruled the presumption in 1984 and created the meretricious relationship doctrine.³

Under the meretricious relationship doctrine, unmarried couples may take advantage of the community property scheme for married couples.⁴ For example, a woman who sacrificed her career, worked in the home, and helped with the family business, but who never married her male

1. *Creasman v. Boyle*, 31 Wash. 2d 345, 351, 196 P.2d 835, 838 (1948).

2. *E.g.*, *Latham v. Hennessey*, 87 Wash. 2d 550, 553-54, 554 P.2d 1057, 1059 (1976).

3. *In re Lindsey*, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

4. *Connell v. Francisco*, 127 Wash. 2d 339, 351, 898 P.2d 831, 836-37 (1995). The term meretricious has a "demeaning connotation" but conveys a "specific legal meaning." *Id.* at 343 n.1, 898 P.2d at 832 n.1.

partner, would have a claim for her share of the house, business, and other assets should the relationship end by separation or death. The woman would have to prove that she and her male partner were involved in a meretricious relationship: a stable, marital-like relationship where the partners cohabited knowing they were not lawfully married.⁵

A man, however, who also worked in the home and helped with the business, could not currently make the same claim should his relationship with his male partner dissolve. In *Vasquez v. Hawthorne*,⁶ the Washington Court of Appeals held that same-sex relationships cannot be meretricious relationships as a matter of law.⁷ The court held that because the Washington statute on prohibited marriages bars same-sex couples from marrying,⁸ same-sex relationships cannot be marital-like.⁹ Thus, same-sex relationships fail to qualify under a key element of the meretricious relationship doctrine.¹⁰ The court's ruling denied Frank Vasquez his share of the estate he acquired with his male partner of twenty-eight years.¹¹

The Washington Supreme Court should reverse *Vasquez*. The Washington Court of Appeals should have followed Washington precedent and defined "marital-like" in relation to the conduct of the couple involved instead of deferring to an unrelated marriage statute.¹² The court confused marital-like conduct with marital-like status, ignoring that same-sex couples can and do engage in marital-like conduct and denying to Frank Vasquez what a Washington court would have granted to a woman in his place. The court also incorrectly applied marriage legislation to a property-division doctrine for unmarried couples and ignored the intent and purpose of the meretricious relationship doctrine.

In addition to being legally incorrect, the *Vasquez* decision reflects bad public policy and heterosexist bias. The *Vasquez* court violated public policy by deviating from just application of the law, the fair application of remedies, and the purpose underlying the meretricious

5. *Id.* at 346, 898 P.2d at 834.

6. 99 Wash. App. 363, 994 P.2d 240, *review granted*, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

7. *Id.* at 364, 994 P.2d at 241.

8. WASH. REV. CODE § 26.04.020(1)(c) (2000).

9. *Vasquez*, 99 Wash. App. at 367–68, 994 P.2d at 242–43.

10. *See id.*

11. *See id.* at 364–65, 994 P.2d at 241.

12. *See* WASH. REV. CODE § 26.04.020(1)(c).

relationship doctrine. Finally, the *Vasquez* decision is heterosexist because it assumes that because same-sex couples may not enjoy marital status, they do not engage in marital-like relationships.

Part I of this Note explains the property rights of married, unmarried, and same-sex couples in Washington. Part II addresses the application of the meretricious relationship test since its development. Part III discusses the facts, procedural background, and the court's opinion in *Vasquez v. Hawthorne*. Part IV argues that "marital-like" should be defined by conduct and not by legal status. Part V argues that *Vasquez* both violates public policy and is heterosexist. This Note concludes that *Vasquez* is a regressive, unjust step in Washington's property-division scheme for unmarried couples and should be reversed.

I. THE PROPERTY RIGHTS OF MARRIED, UNMARRIED, AND SAME-SEX COUPLES IN WASHINGTON

Washington's property-distribution scheme differs for married couples, unmarried heterosexual couples, and, after *Vasquez*, unmarried same-sex couples. Because Washington is a community property state, property of married couples is managed, characterized, and distributed according to principles of equality between husband and wife. For unmarried couples, courts may apply community property principles to the distribution of property at the termination of the relationship under the meretricious relationship doctrine.¹³ Property division at the end of a relationship that does not qualify as a meretricious relationship is dependent on contract, partnership and restitution remedies. Because same-sex couples may not marry,¹⁴ the *Vasquez* decision bars the only access same-sex couples have to community property principles.

A. *Married Couples' Property Rights Are Protected by Washington's Statutory Community Property Regime*

When a couple marries in satisfaction of the requirements of the Washington marriage statutes,¹⁵ the couple's legal status automatically

13. *Connell v. Francisco*, 127 Wash. 2d 339, 351, 898 P.2d 831, 836-37 (1995); *In re Lindsey*, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

14. WASH. REV. CODE § 26.04.020(1)(c).

15. *Id.* § 26.04.010 (stating marriage where husband or wife has not attained seventeen years of age is void except on showing of necessity); *id.* § 26.04.020 (stating marriage prohibited when either party has husband or wife living at time of marriage, husband and wife are of nearer relations

enables each individual to claim community property rights.¹⁶ Community property rests on the presumption that the marital relationship is analogous to a partnership, with each spouse equally contributing to and benefiting from the marriage.¹⁷ Washington is one of nine states that apply community property principles regarding the characterization, management, and disposition of property acquired during a marriage.¹⁸ Washington statutes define community property and separate property, and, with the common law, govern the distribution of all property at the end of the marital relationship.

Washington statutory law labels community property as that property acquired during marriage by labor, industry, or other valuable consideration.¹⁹ In Washington, courts presume that property acquired during the marriage is community property,²⁰ although each spouse may own property separately.²¹ Each spouse has equal management power over the community property and has testamentary²² power over his or her half of the community property.²³

Washington statutes define separate property as property acquired by gift, succession, inheritance, or other nonvaluable means.²⁴ The Washington Supreme Court has also held that proceeds from a personal-injury action are separate property.²⁵ Each spouse may manage his or her separate property as he or she desires.²⁶

Statutory schemes and common law govern the disposition of community property and separate property in the event of dissolution or

than second cousin, or parties are other than male and female); *id.* § 26.04.160 (describing license and oath requirements for marriage).

16. *Id.* § 26.16.030.

17. Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 WASH. L. REV. 13, 17–18 (1986); *see, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 840 (1997) (noting that community property “is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship”).

18. Cross, *supra* note 17, at 17 n.3. The other community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Wisconsin. *Id.*

19. *Id.* at 27–28.

20. *Id.* at 28.

21. WASH. REV. CODE §§ 26.16.010–.020; Cross, *supra* note 17, at 19.

22. “Testamentary” is defined as relating to a will or testament. BLACK’S LAW DICTIONARY 1484 (7th ed. 1999).

23. Cross, *supra* note 17, at 18–19, 92.

24. WASH. REV. CODE §§ 26.16.010–.020; Cross, *supra* note 17, at 27.

25. *In re Brown*, 100 Wash. 2d 729, 730, 675 P.2d 1207, 1208 (1984).

26. Cross, *supra* note 17, at 19.

death. In marital dissolution, courts convert community property to separate property because the marital community ceases to exist, and then make a just and equitable distribution.²⁷ If one spouse dies intestate,²⁸ the surviving spouse takes the decedent's one-half share of community property and retains his or her own one-half share.²⁹ Furthermore, the surviving spouse takes the entire separate estate of the decedent spouse if that spouse has no surviving children, siblings, or parents,³⁰ one-half of the separate estate if that spouse has surviving children,³¹ and three-quarters of the separate estate if that spouse has no offspring but has surviving parents or siblings.³²

B. Cohabiting, Unmarried Couples' Property Rights Are Protected by Washington Courts Through the Meretricious Relationship Doctrine

Property distribution for cohabiting, unmarried couples in Washington has evolved over the last two decades from a rigid rule to an equitable approach. Historically, courts had held that property acquired by an unmarried couple belonged only to the one who held title.³³ Although both in Washington³⁴ and elsewhere³⁵ courts developed various exceptions to the law, the Washington Supreme Court did not overturn the rule until 1984, when it created the meretricious relationship doctrine.³⁶ That doctrine, further developed in 1995,³⁷ dictates that parties to a stable, marital-like relationship who cohabit knowing they are not lawfully married may have their property justly and equitably distributed at the end of the relationship.³⁸

27. *Id.* at 113.

28. Intestacy occurs when one dies without a will. BLACK'S LAW DICTIONARY 827 (7th ed. 1999).

29. WASH. REV. CODE § 11.04.015(1)(a) (2000); Cross, *supra* note 17, at 92.

30. WASH. REV. CODE § 11.04.015(1)(d).

31. *Id.* § 11.04.015(1)(b).

32. *Id.* § 11.04.015(1)(c).

33. *Creasman v. Boyle*, 31 Wash. 2d 345, 351, 196 P.2d 835, 838 (1948).

34. *Latham v. Hennessey*, 87 Wash. 2d 550, 553–54, 554 P.2d 1057, 1059 (1976); *infra* notes 44–51 and accompanying text.

35. *See, e.g., Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976).

36. *In re Lindsey*, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

37. *Connell v. Francisco*, 127 Wash. 2d 339, 348, 898 P.2d 831, 835 (1995).

38. *Id.* at 349, 898 P.2d at 835–36.

1. *The Creasman Presumption: Parties Must Have Intended To Dispose of Their Property As They Actually Did*

Before 1984, the *Creasman* presumption governed the property rights of cohabiting, unmarried couples in Washington. In *Creasman v. Boyle*,³⁹ the Washington Supreme Court stated that the parties must have intended to dispose of their property as they actually did, such that property acquired by an unmarried couple belonged to the one who held legal title.⁴⁰ The *Creasman* presumption disregarded contributions a party may have made to the acquisition of property. This holding may have been motivated by something other than property equity: Harvey Creasman was an African-American man living with a white woman, Caroline Paul.⁴¹ Although Creasman earned the money for the home he and Paul shared, the couple held title in Paul's name only and made mortgage payments in Paul's name.⁴² When Paul died intestate, the court awarded the home to her estate—not Creasman.⁴³

Washington courts devised exceptions to the *Creasman* presumption in order to divide equitably property acquired during an unmarried couple's relationship.⁴⁴ Situations qualifying for an exception included those where one or both parties entered a marriage in good faith that later proved to be void⁴⁵ or where the title to property acquired during cohabitation could be traced to the separate property of one or both parties.⁴⁶ Alternate theories also provided for equitable division of property acquired during marital-like cohabitation, such as joint venture,⁴⁷ implied partnership,⁴⁸ resulting trusts,⁴⁹ and tenancy in com-

39. 31 Wash. 2d 345, 196 P.2d 835 (1948).

40. *Id.* at 356, 196 P.2d at 840-41.

41. At the very least, the holding ignored the social realities that may have discouraged an interracial marriage and kept the property in the white woman's name. For instance, in 1967, seventeen states still had anti-miscegenation laws. Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV 529, 544 n.58 (1999). The U.S. Supreme Court invalidated such statutes in 1967. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

42. *Creasman*, 31 Wash. 2d at 345-50, 196 P.2d at 836-38.

43. *Id.* at 358, 196 P.2d at 842.

44. *See, e.g.*, *Latham v. Hennessey*, 87 Wash. 2d 550, 553-54, 554 P.2d 1057, 1059 (1976).

45. *Creasman*, 31 Wash. 2d at 352, 196 P.2d at 838-39.

46. *Shull v. Shepherd*, 63 Wash. 2d 503, 507, 387 P.2d 767, 769-70 (1963); *West v. Knowles*, 50 Wash. 2d 311, 313, 311 P.2d 689, 691 (1957) (holding property acquired by both parties and held as tenants in common to be divided proportionally where separate property could be traced, otherwise divided equally).

47. *In re Thornton*, 81 Wash. 2d 72, 75, 499 P.2d 864, 865 (1972) (finding joint venture or implied partnership where woman contributed to success of business); *Poole v. Schrichte*, 39 Wash.

mon.⁵⁰ Furthermore, the Washington Supreme Court limited *Creasman* to its facts, where one party had died and the other was prohibited from testifying regarding the intent of the relationship because of the Dead Man's Statute.⁵¹

2. *Marvin v. Marvin: The California Supreme Court Recognizes the Property Rights of Unmarried Couples*

In 1976, California became the first state to recognize the property rights of unmarried couples. In California, as in Washington, courts historically looked unfavorably on cohabiting parties who sued for a share in property acquired during the relationship.⁵² The California Supreme Court, however, recognized in *Marvin v. Marvin*⁵³ the increasing number of couples living together without marrying⁵⁴ and determined that agreements between nonmarital partners should be

2d 558, 564–65, 236 P.2d 1044, 1048–49 (1951) (finding joint venture or implied partnership where woman contributed money and labor to business and made house payments from profits). A joint venture is a business undertaking by two or more people. *See, e.g., id.* at 564–65, 236 P.2d at 1048–49.

48. *Thornton*, 81 Wash. 2d at 73, 499 P.2d at 864–65; *Poole*, 39 Wash. 2d at 565, 236 P.2d at 1049. An implied partnership is a partnership implied by law when the actions and conduct of the parties demonstrate that they entered into a business relationship involving some combination of property, labor, skill, and experience. *Thornton*, 81 Wash. 2d at 79, 499 P.2d at 687–68.

49. *Walberg v. Mattson*, 38 Wash. 2d 808, 812–13, 232 P.2d 827, 829–30 (1951) (holding that Walberg owned property where evidence showed that Mattson only held title to avoid complications with Walberg's estranged spouse and that Walberg had contributed nearly all of money for purchase of property). A court imposes a resulting trust when one party transferred property under circumstances implying the party did not intend for the transferee to retain legal title to the property. *See, e.g., id.* at 812, 816, 232 P.2d at 829, 831. Compare a resulting trust to a "constructive trust," where a court imposes a trust on equitable grounds against one who obtained the property by wrongdoing. BLACK'S LAW DICTIONARY 1514 (7th ed. 1999).

50. *Iredell v. Iredell*, 49 Wash. 2d 627, 631, 305 P.2d 805, 807 (1957) (holding that property acquired by both parties and held as tenants in common should be divided proportionally where separate property can be traced, otherwise divided equally). A tenancy in common is a tenancy shared by two or more persons in equal or unequal undivided shares with each having a right to possess the entire property but no right of survivorship. BLACK'S LAW DICTIONARY 1478 (7th ed. 1999).

51. *In re Lindsey*, 101 Wash. 2d 299, 302, 678 P.2d 328, 330 (1984). Washington's Dead Man's Statute is codified at WASH. REV. CODE § 5.60.030 (2000), which excludes testimony by an interested party regarding transactions with deceased, incompetent, or disabled persons. *Id.*

52. *Dee Ann Habegger, Living in Sin and the Law: Benefits for Unmarried Couples Dependent Upon Sexual Orientation?*, 33 IND. L. REV. 991, 993 (2000).

53. 557 P.2d 106 (Cal. 1976).

54. *Id.* at 109.

enforced unless the contract is founded explicitly on consideration for sexual services.⁵⁵

3. *The Washington Supreme Court Overruled Creasman and Developed the Meretricious Relationship Doctrine*

Eight years after *Marvin*, the Washington Supreme Court expressly overruled *Creasman* and replaced the *Creasman* presumption with a new theory. Under *In re Lindsey*,⁵⁶ courts were required to “examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.”⁵⁷ The court gave few guidelines for determining the existence of a meretricious relationship, stating that courts should examine each relationship on a case-by-case basis.⁵⁸

The Washington Supreme Court refined the meretricious relationship doctrine in *Connell v. Francisco*⁵⁹ by further defining a meretricious relationship and explaining how courts must distribute the property acquired in such a relationship.⁶⁰ The court in *Connell* defined a meretricious relationship as having three elements: the relationship must be stable, marital-like, and both parties must cohabit with knowledge that a lawful marriage between them does not exist.⁶¹ *Connell* also listed five relevant factors for determining if a relationship is sufficiently stable and marital-like: continuous cohabitation, the duration of the relationship, the purpose of the relationship, any pooling of resources, and the intent of the parties.⁶²

Connell then explained how a court must distribute the property acquired during a meretricious relationship. A court first finds whether a meretricious relationship existed; then, if it did, a court determines the interest each party has in the property acquired in the relationship and,

55. *Id.* at 113. *Marvin* further held that in the absence of an express contract, a court should determine if the conduct of the parties created an implied contract, implied partnership, or joint venture or warranted the application of equitable remedies such as constructive trusts. *Id.* at 110.

56. 101 Wash. 2d 299, 678 P.2d 328 (1984).

57. *Id.* at 304, 678 P.2d at 331 (citing *Latham v. Hennessey*, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059 (1976)).

58. *Id.* at 305, 678 P.2d at 331.

59. 127 Wash. 2d 339, 898 P.2d 831 (1995).

60. *Id.* at 349, 898 P.2d at 835–36.

61. *Id.* at 356, 898 P.2d at 834.

62. *Id.* See *infra* Part II for further detail.

finally, justly and equitably divides it.⁶³ Courts should only consider property for distribution that would have been community property had the parties been married.⁶⁴ Community property legislation, however, is the only marriage legislation that may apply to meretricious relationships.⁶⁵ The *Connell* court warned that courts may not equate meretricious relationships with marriage in other ways, thereby creating a type of common law marriage.⁶⁶

With the meretricious relationship doctrine, Washington courts have developed an equitable-property doctrine from which any unmarried couple who has cohabited in a stable, marital-like relationship may benefit.⁶⁷ The parties to a meretricious relationship do not have to prove the existence of a business partnership or establish any wrongdoing for a constructive trust. Instead, the party suing for equitable division of the property must show that the relationship was stable and marital-like, and that the couple cohabited knowing they were not in a lawful relationship.⁶⁸ If these factors are met, the relationship is labeled “meretricious,” and the property is characterized as if it were community property and divided on a just and equitable basis.⁶⁹

C. *Same-Sex Couples’ Property Rights in Washington*

Same-sex couples may only benefit from those property rights available to unmarried couples. Same-sex couples may not legally marry in Washington, as a result of *Singer v. Hara*⁷⁰ and a 1998 amendment to the marriage statute defining prohibited marriages.⁷¹ Accordingly, same-sex couples must seek property remedies under the meretricious relationship doctrine or under contract and restitution remedies. If same-sex relationships cannot qualify as meretricious relationships, same-sex couples have more limited remedies than unmarried heterosexual

63. *Connell*, 127 Wash. 2d at 349, 898 P.2d at 835.

64. *Id.* at 352, 898 P.2d at 837.

65. *See id.* at 348–50, 898 P.2d at 835–36.

66. *Id.* at 349–50, 898 P.2d at 836.

67. *See id.* at 349, 898 P.2d at 835–36.

68. *Id.* at 346, 898 P.2d at 834.

69. *Id.* at 349, 898 P.2d at 835.

70. 11 Wash. App. 247, 522 P.2d 1187 (1974).

71. Act of Feb. 6, 1998, ch. 1, 1998 Wash. Laws 1 (codified at WASH. REV. CODE § 26.04.020(1)(c) (2000)).

couples when seeking equitable distribution of property at the termination of their relationships.⁷²

Same-sex couples may not legally marry in Washington, according to *Singer*, which upheld the denial of a marriage license to two men in 1974.⁷³ The court held that a plain reading of the marriage statute did not authorize same-sex marriages.⁷⁴ The court further denied the appellants' claims under the newly enacted state Equal Rights Amendment⁷⁵ and a federal equal protection claim,⁷⁶ finding that the fundamental nature of marriage requires a union between a man and a woman.⁷⁷

The Washington Legislature amended the marriage statute on prohibited marriages in 1998 explicitly to ban same-sex marriages.⁷⁸ In the Defense of Marriage Act of 1996,⁷⁹ Congress provided that a state shall not be required to recognize marriages between persons of the same-sex where such a relationship is treated as a marriage in another state.⁸⁰ Subsequently, the Washington Legislature passed the amendment to the marriage statute to ensure that Washington would not recognize same-sex marriages in the event they were legalized in other states.⁸¹ The marriage statute explicitly states that "[i]t is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution."⁸²

72. See *infra* note 83 and accompanying text.

73. 11 Wash. App. at 264, 522 P.2d at 1197.

74. *Id.* at 249, 522 P.2d at 1189 (noting that although marriage statute at time had gender neutral language, 1970 amendment merely eliminated different marrying age requirements for men and women).

75. *Id.* at 258-59, 522 P.2d at 1194; Equal Rights Amendment, WASH. CONST. art. 31, § 1.

76. *Singer*, 11 Wash. App. at 261, 522 P.2d at 1196.

77. *Id.* at 253, 522 P.2d at 1191.

78. Act of Feb. 6, 1998, ch. 1, 1998 Wash. Laws 1, codified at WASH. REV. CODE § 26.04.020(1)(c) (2000).

79. 28 U.S.C. § 1738C (Supp. IV 1998).

80. *Id.*

81. Act of Feb. 6, 1998, ch. 1, 1998 Wash. Laws 1, codified at WASH. REV. CODE § 26.04.020(1)(c)); E.S.H.B. 1130, 55th Leg., 1st Reg. Sess. (Wash.); see *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (holding that state had burden of proving that prohibiting same-sex marriages furthered compelling state interests and did not abridge constitutional rights).

82. WASH. REV. CODE § 26.04.010.

Without legal marriage, same-sex couples are denied numerous benefits available to heterosexual couples upon marriage.⁸³ Some of these benefits can be provided for by contract, such as creating decision-making powers by enacting durable powers of attorney, or distributing property by testamentary intent. However, without an express contract, same-sex couples will have to rely on equitable doctrines, such as constructive trust, resulting trust, or implied partnership, to determine property rights at the end of a relationship.⁸⁴ Moreover, same-sex couples might seek to have their property equitably divided under the meretricious relationship doctrine.⁸⁵

Washington's property-distribution scheme clearly differs for married and unmarried couples. Marriage offers the most equitable protection for the distribution of property because Washington adheres to the community property regime. Courts allow unmarried couples to take advantage of community property principles through the meretricious relationship doctrine. Before *Vasquez*, no court had distinguished Washington's property scheme on the basis of sexual orientation and no rule barred same-sex couples from seeking the same remedies as unmarried heterosexual couples. Instead, courts evaluated unmarried couples' property rights under the conduct-based meretricious relationship test.

II. WASHINGTON COURTS' APPLICATION OF THE MERETRICIOUS RELATIONSHIP TEST

Washington courts determine if an unmarried couple's relationship qualifies as a meretricious relationship by analyzing the couple's conduct. *Lindsey* and *Connell* defined a meretricious relationship as having three elements: stability, marital-like behavior, and cohabitation with the knowledge that a lawful marriage does not exist.⁸⁶ Courts analyze the couple's conduct in five areas to decide if a relationship is

83. See Jamie D. Pederson, *The RCW Project: An Analysis of the Benefits and Burdens of Marriage Contained in the Revised Code of Washington*, at <http://www.buddybuddy.com/marwa2.html> (last visited Nov. 9, 2000); see also *Baker v. Vermont*, 744 A.2d 864, 883-84 (Vt. 1999) (noting number of benefits marriage bestows).

84. See, e.g., *Vasquez v. Hawthorne*, 99 Wash. App. 363, 365, 994 P.2d 240, 241, review granted, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

85. See, e.g., *id.*

86. *Connell v. Francisco*, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995); see also *In re Lindsey*, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

“stable” or “marital-like”: continuous cohabitation, the duration of the relationship, the purpose of the relationship, the intent of the parties, and any pooling of resources.⁸⁷ In practice, courts tend to analyze the continuity and duration of the relationship to determine stability and evaluate purpose, intent, and pooling of resources to determine marital-like behavior.⁸⁸ These factors are not mutually exclusive; rather, courts view them as a whole to determine if a meretricious relationship exists.⁸⁹

A. *A Meretricious Relationship Is a Stable Relationship*

Courts examine the “stability” of a relationship to determine whether or not a relationship qualifies as meretricious.⁹⁰ The continuity and duration of cohabitation indicate stability.⁹¹ Washington courts have refused to develop a bright-line rule regarding the continuity or duration of cohabitation to determine if a meretricious relationship is sufficiently stable.⁹²

Washington courts have alternatively affirmed and denied the existence of a meretricious relationship where the cohabitation was not continuous. For example, the Washington Court of Appeals has found a meretricious relationship despite the couple experiencing periods of separation where the couple had children and acquired a home together.⁹³ Conversely, the Washington Supreme Court found that no meretricious relationship existed where in addition to the woman moving out twice and once living with another man, the parties did not share expenses for periods of time, did not mutually invest in a significant asset, and one refused to marry while the other wanted to.⁹⁴

Similarly, Washington courts have established no minimum time limit during which a couple must cohabit for the relationship to be

87. *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834; *Lindsey*, 101 Wash. 2d at 304, 678 P.2d at 331.

88. See, e.g., *In re Pennington*, 142 Wash. 2d 592, 603–05, 14 P.3d 764, 771–72 (2000); see also Gavin M. Parr, Note, *What is a “Meretricious Relationship”?: An Analysis of Cohabitant Property Rights Under Connell v. Francisco*, 74 WASH. L. REV. 1243, 1255–62 (1999).

89. *Pennington*, 142 Wash. 2d at 601–02, 14 P.3d at 770.

90. *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834; *Lindsey*, 101 Wash. 2d at 304, 678 P.2d at 331.

91. See *Pennington*, 142 Wash. 2d at 603–04, 14 P.3d at 771.

92. *Lindsey*, 101 Wash. 2d at 305, 678 P.2d at 331.

93. *Warden v. Warden*, 36 Wash. App. 693, 698, 676 P.2d 1037, 1039–40 (1984).

94. *Pennington*, 142 Wash. 2d at 603–08, 14 P.3d at 771–73.

sufficiently stable. The Washington Court of Appeals held that a four-month relationship was sufficient to establish a meretricious relationship.⁹⁵ Longer relationships may be helpful to prove the relationship was “meretricious,”⁹⁶ but a lengthy relationship is not required.⁹⁷

B. A Meretricious Relationship Is a Marital-Like Relationship

A relationship must be marital-like in order for the courts to recognize it as a meretricious relationship.⁹⁸ “Marital” is defined as “[o]f or relating to the marriage relationship,”⁹⁹ while the marriage relationship can be defined by legal status or by the conduct of the parties.¹⁰⁰ Therefore, when determining if a relationship is marital-like, courts can either evaluate the legal status or the conduct of the parties. Until *Vasquez*, Washington courts had used conduct to make this determination.

1. Marital Is Defined by Legal Status or the Conduct of the Parties

The word “marriage” can refer to a legal construct or to a social construct. As a legal construct, marriage refers to entrance into the marriage contract and to the assumption of legal benefits and obligations. As a social construct, marriage is defined by conduct befitting a marriage.

Legally, marriage is defined by its statutory requirements and a host of legal benefits and obligations.¹⁰¹ The essential requirements of a valid

95. *In re DeHollander*, 53 Wash. App. 695, 696–99, 770 P.2d 638, 639–41 (1989).

96. *See, e.g., Foster v. Thilges*, 61 Wash. App. 880, 885, 812 P.2d 523, 526 (1991) (finding meretricious relationship where couple cohabited for ten continuous years, acted like married couple, and pooled their resources for joint projects).

97. *Connell v. Francisco*, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995) (stating relationship need not be “long term”); *see also In re Marriage of Kinzer*, No. 16035-1-III, 1998 WL 151795, at *2–3 (Wash. App. Apr. 2, 1998) (finding cohabitation for twenty-three months before marriage sufficient to establish meretricious relationship); *Anderson v. Anders*, No. 14572-7-III, 1997 WL 6984, at *2 (Wash. App. Jan. 9, 1997) (finding cohabitation for thirty-seven months sufficient to establish meretricious relationship).

98. *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834; *In re Lindsey*, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

99. BLACK’S LAW DICTIONARY 980 (7th ed. 1999).

100. *See infra* notes 101–04.

101. *See supra* note 15.

marriage are parties being legally able to contract, having mutual consent, and actually contracting as prescribed by law.¹⁰² Once two people are married, hundreds of Washington statutes¹⁰³ and even more federal statutes¹⁰⁴ confer various benefits and obligations upon the married couple as a result of the couple's legal status.

Socially, marriage is manifested by the conduct between two people. For example, the act of marrying is often accompanied by a symbolic religious ceremony. In the marriage, the conduct typically includes living together and supporting each other physically, financially, and emotionally. The U.S. Supreme Court has recognized this conduct aspect of marriage by stating that marriage is "an association that promotes a way of life."¹⁰⁵

2. *Washington Courts Have Defined "Marital-Like" by Conduct*

Washington courts have defined "marital-like" by examining the way the parties conduct themselves.¹⁰⁶ Courts determine if a relationship is marital-like by examining the purpose of the relationship, the intent of the relationship, and the pooling of resources.¹⁰⁷ Therefore, "marital-like" in the meretricious relationship context refers to "promot[ing] a way of life."¹⁰⁸

Courts evaluate the purpose of a relationship to determine if a meretricious relationship is sufficiently marital-like.¹⁰⁹ The Washington Court of Appeals has described the "purpose of the relationship" as the intent to "create a 'long-term, stable, nonmarital family relationship.'"¹¹⁰ Evidence that the couple planned to spend the rest of their lives together is sufficient to establish this purpose.¹¹¹ Other courts have found a

102. See, e.g., WASH. REV. CODE §26.04.160 (2000) (indicating application for license, contents, and oath).

103. See Pederson, *supra* note 83.

104. Partners Task Force for Gay & Lesbian Couples, *What Rights Come With Legal Marriage*, at <http://www.buddybuddy.com/mar-wa.html> (last visited Nov. 9, 2000).

105. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

106. See *In re Pennington*, 142 Wash. 2d 592, 601-02, 14 P.3d 764, 770 (2000).

107. See *id.*; *Connell v. Francisco*, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995).

108. *Griswold*, 381 U.S. at 486.

109. See *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834.

110. *Anderson v. Anders*, No. 14572-7-III, 1997 WL 6984, at *2 (Wash. App. Jan. 9, 1997) (citing *Latham v. Hennessey*, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059 (1976)).

111. *Id.*

relationship to have a marital-like purpose if the relationship included elements like companionship, friendship, love, and mutual support.¹¹² Courts have also found a meretricious relationship where the parties mutually support each other in work and leisure activities.¹¹³

Courts also examine the intent to function as a family to determine if a meretricious relationship is sufficiently marital-like.¹¹⁴ Courts look for evidence that the couple intended to form a long-term, familial relationship such as intending to remain together as a couple.¹¹⁵ For example, the Washington Court of Appeals found that a meretricious relationship did not exist where the couple waited years to divorce their spouses and haphazardly shared a living space.¹¹⁶ The court could not determine from the evidence what the intent of the parties was regarding the relationship.¹¹⁷

A party¹¹⁸ may evidence intent to remain together by showing that the couple modeled themselves after married couples. Courts, however, are inconsistent regarding whether or not the couple must have publicly acted as if they were married. Older, pre-*Lindsey* and *Connell* cases examined whether or not the couple “held themselves out as husband and wife.”¹¹⁹ More recently, the Washington Court of Appeals rejected the proposition that the parties must have publicly appeared as a marital-like couple.¹²⁰

112. *Pennington*, 142 Wash. 2d at 605, 14 P.3d. at 772.

113. *See, e.g., In re Sutton*, 85 Wash. App. 487, 491, 933 P.2d 1069, 1071 (1997).

114. *See Connell*, 127 Wash. 2d at 346, 898 P.2d at 834.

115. *See, e.g., Pennington*, 142 Wash. 2d at 603–05, 14 P.3d at 771–72 (finding one party’s refusal to marry and other party’s absences and relationship with third party negated intent; also finding that one party’s marriage to another negated intent); *Zion Constr., Inc. v. Gilmore*, 78 Wash. App. 87, 90, 895 P.2d 864, 866 (1995) (finding meretricious relationship where couple cohabited, pooled resources, and intended to marry).

116. *Henry v. Henry*, No. 18128-6-III, 2000 WL 155093, at *2 (Wash. Ct. App. Feb. 10, 2000) (denying meretricious relationship where one party brought old couch and some clothes to other party’s apartment).

117. *Id.*

118. The meretricious relationship cases involve one member of the relationship seeking a community property-like distribution of assets.

119. *See In re Thornton*, 14 Wash. App. 397, 403, 541 P.2d 1243, 1247 (1975) (holding facts did not support that couple ever held themselves out as husband and wife); *Lalley v. Lalley*, 43 Wash. 2d 192, 194–96, 260 P.2d 905, 906–7 (1953) (denying claim to title of car where parties did not live together, have marital relations, or hold themselves out as married couple).

120. *Foster v. Thilges*, 61 Wash. App. 880, 884–85, 812 P.2d 523, 525 (1991) (“[I]t is not necessary for a couple to represent themselves as husband and wife to establish a pseudomarital relationship.”).

Finally, a party did not have to be free to marry in order for a court to find that he or she was part of a meretricious relationship. In fact, marriage to a third person is not a per se rule against finding a meretricious relationship.¹²¹ Courts have found that marriage to another person is a significant factor that a meretricious relationship may not exist because it is evidence that at least one party lacked the intent to form a long-term, familial relationship.¹²² Courts, however, recognize that certain circumstances may support a finding of a meretricious relationship when one of the parties is married.¹²³ Courts in at least three cases¹²⁴ have found meretricious relationships despite one party's marriage to a third party during a period of the meretricious relationship.

Courts also evaluate a couple's pooling of resources to determine if a meretricious relationship is sufficiently marital-like.¹²⁵ The pooling of resources may be tangible evidence that the couple existed in a mutually supportive, familial relationship.¹²⁶ Courts generally find a meretricious relationship existed where couples pooled their resources for household and personal expenses, worked to improve their home together, and worked for each other without salary.¹²⁷ The courts may look favorably upon couples having joint bank accounts,¹²⁸ but sharing a bank account is not necessary.¹²⁹

121. *In re Kinzer*, No. 16035-1-III, 1998 WL 151795, at *2 (Wash. Ct. App. Apr. 2, 1998).

122. *In re Pennington*, 142 Wash. 2d 592, 603-05, 14 P.3d 764, 771-72 (2000).

123. *In re Pennington*, 93 Wash. App. 913, 919, 971 P.2d 98, 101-02 (1998), *aff'd*, 142 Wash. 2d 592, 14 P.3d 764 (2000) (distinguishing and not disapproving of *Foster*, where Washington Court of Appeals found meretricious relationship existed when one party was married to third party). The Washington Supreme Court affirmed *Pennington* and did not disapprove of *Foster* nor the court of appeals's reading of *Foster*. *Pennington*, 142 Wash. 2d at 595-99, 14 P.3d at 767-69.

124. *Foster*, 61 Wash. App. at 884-85, 812 P.2d at 525-26 (finding meretricious relationship despite man being married to another woman in beginning of relationship); *Kinzer*, 1998 WL 15179, at *2 (same); *Warden v. Warden*, 36 Wash. App. 693, 694-98, 698, 676 P.2d 1037, 1037-40 (1984) (finding meretricious relationship despite man's marriage to another woman during last five years of relationship).

125. *Connell v. Francisco*, 127 Wash. 2d, 339, 346, 898 P.2d 831, 834 (1995).

126. *See id.*

127. *See, e.g., In re Sutton*, 85 Wash. App. 487, 491, 933 P.2d 1069, 1071 (1997); *In re Damon-Rau*, No. 19860-6-II, 1997 WL 671997, at *2 (Wash. Ct. App. Oct. 24, 1997); *Anderson v. Anders*, No. 14572-7-III, 1997 WL 6984, at *3 (Wash. Ct. App. Jan. 9, 1997); *Zion Constr., Inc. v. Gilmore*, 78 Wash. App. 87, 90, 895 P.2d 864, 866 (1995).

128. *See Fletcher v. Olmstead*, No. 19319-1-II, 1996 WL 734263, at *1 (Wash. Ct. App. Dec. 20, 1996) (denying meretricious relationship in part because parties maintained separate finances even though they pooled money for rent, utilities, and groceries).

129. *See Anderson*, 1997 WL 6984, at *3 (finding meretricious relationship despite fact couple did not have joint bank account).

The Washington Supreme Court recently reaffirmed in *In re Pennington*¹³⁰ that a meretricious relationship is defined by conduct. The court stated that “the term ‘marital-like’ is a mere analogy because defining meretricious relationships as related to marriage would create a de facto common-law marriage, which this court has refused to do.”¹³¹ Rather, courts evaluate factors such as the continuity of cohabitation and duration of the relationship, the purpose and intent of the parties, and the pooling of resources and services.¹³² One factor is not weighted more heavily than another.¹³³ Instead, the factors are looked at as a whole to determine if a relationship is meretricious.

III. *VASQUEZ v. HAWTHORNE*: THE WASHINGTON COURT OF APPEALS HELD THAT SAME-SEX RELATIONSHIPS CANNOT BE MERETRICIOUS AS A MATTER OF LAW

In *Vasquez v. Hawthorne*,¹³⁴ the Washington Court of Appeals held that one fact, the parties’ inability to marry, precluded the possibility of the couple existing in a meretricious relationship.¹³⁵ Accordingly, unlike the trial court, the court of appeals found that same-sex relationships cannot be meretricious as a matter of law and refused to analyze the facts of the case.¹³⁶ The decision is currently under review by the Washington Supreme Court.¹³⁷

A. *Factual Background*

The case stems from the long term relationship of Frank Vasquez and Robert Schwerzler;¹³⁸ however, the trial court and the court of appeals provided limited information about Vasquez and Schwerzler’s relationship. The trial court simply found that Vasquez and Schwerzler

130. 142 Wash. 2d 592, 14 P.3d 764 (2000).

131. *Id.* at 602, 14 P.3d at 770.

132. *Id.*

133. *See id.*

134. 99 Wash. App. 363, 994 P.2d 240, *review granted*, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

135. *Id.* at 364, 994 P.2d at 241.

136. *Id.*

137. *Vasquez v. Hawthorne*, *review granted*, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

138. *Vasquez*, 99 Wash. App. at 364, 994 P.2d at 241.

existed in a meretricious relationship.¹³⁹ The court of appeals found that same-sex relationships cannot be meretricious as a matter of law.¹⁴⁰ The court of appeals only noted the fact that Vasquez and Schwerzler cohabited for twenty-eight years, living together from 1967 until Schwerzler died in 1995.¹⁴¹

Vasquez's briefs, affidavits, and the affidavits of acquaintances and friends of Vasquez and Schwerzler support the view that Vasquez and Schwerzler existed in a marital-like relationship.¹⁴² These materials show that Vasquez and Schwerzler supported each other personally¹⁴³ and professionally.¹⁴⁴ Vasquez and Schwerzler also held themselves out in public as an intimate couple in certain circumstances.¹⁴⁵

Vasquez and Schwerzler extensively supported each other in their personal lives. Vasquez performed many household chores, such as cooking and cleaning,¹⁴⁶ and cared directly for Schwerzler by cutting Schwerzler's hair and nails.¹⁴⁷ He referred to Schwerzler as "my husband."¹⁴⁸ Vasquez did not have a bank account of his own¹⁴⁹ and relied on Schwerzler to take care of the finances.¹⁵⁰ Schwerzler was seventeen years older than Vasquez and frequently assured Vasquez that

139. See *Vasquez*, No. 96-2-07794-7, at 3-5 (Pierce County Super. Ct. Feb. 14, 1997) (order granting plaintiff partial summary judgment) [hereinafter Order].

140. *Vasquez*, 99 Wash. App. at 364; 994 P.2d at 241.

141. *Id.*

142. Because the trial court denied defendant Hawthorne's motion to strike the affidavits supporting plaintiff Vasquez's motion for summary judgment and therefore presumably relied upon this material in deciding that Vasquez and Schwerzler had a meretricious relationship, plaintiff's briefs and affidavits are relied upon here. Order, *supra* note 139, at 3.

143. Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment at 2-3, *Vasquez*, No. 96-2-07794-7 (Pierce County Super. Ct. Dec. 20, 1996) [hereinafter Plaintiff's Memorandum].

144. *Id.* at 3; Declaration of Brian Sword in Support of Motion for Partial Summary Judgment at 4, *Vasquez*, No. 96-2-07794-7 (Pierce County Super. Ct. Dec. 1, 1996) [hereinafter Sword Declaration]; Affidavit of Frank Vasquez in Support of Motion for Partial Summary Judgment at 4, *Vasquez*, No. 96-2-07794-7 (Pierce County Super. Ct. Dec. 20, 1996) [hereinafter Vasquez Affidavit].

145. Declaration of Richard Kinzner in Support of Plaintiff's Motion for Partial Summary Judgment at 1-2, *Vasquez*, No. 96-2-07794-7 (Pierce County Super. Ct. Nov. 27, 1996) [hereinafter Kinzner Declaration].

146. Plaintiff's Memorandum, *supra* note 143, at 2-3.

147. *Id.*

148. Kinzner Declaration, *supra* note 145, at 1.

149. Vasquez Affidavit, *supra* note 144, at 2.

150. Plaintiff's Memorandum, *supra* note 143, at 2-3. Vasquez suffered a childhood head injury that has rendered him barely literate. Vasquez Affidavit, *supra* note 144, at 4.

he would be taken care of if he died first,¹⁵¹ even offering to sell their home and give Vasquez half of the money.¹⁵²

Vasquez and Schwerzler also shared responsibilities in the bag-recycling business they managed from their home. Schwerzler bought and sold bags and managed the finances.¹⁵³ Vasquez performed the physical labor required for this business and took phone calls from clients.¹⁵⁴ Schwerzler never paid Vasquez for his work.¹⁵⁵

Schwerzler and Vasquez circulated as a couple among some friends,¹⁵⁶ but among Schwerzler's heterosexual friends and family, Schwerzler was apparently ambiguous or secretive about his relationship with Vasquez. For example, one of his friends assumed Vasquez and Schwerzler were a couple because of Schwerzler's conduct, such as always letting Vasquez know when he expected to be home and bringing Vasquez lunch during the working day.¹⁵⁷ Two of Schwerzler's siblings believe he was not gay,¹⁵⁸ perhaps because Schwerzler had been married and divorced three times.¹⁵⁹

Upon his death, Schwerzler left no will that was located.¹⁶⁰ The home, the checking account, and other assets including a life-insurance policy, an automobile, and proceeds from the sale of a second automobile were in Schwerzler's name.¹⁶¹ Schwerzler's life-insurance proceeds were paid to the personal representative of his estate.¹⁶²

151. Plaintiff's Memorandum, *supra* note 143, at 4; Vasquez Affidavit, *supra* note 144, at 6; Sword Declaration, *supra* note 144, at 3.

152. Vasquez Affidavit, *supra* note 144, at 6.

153. *Id.* at 4.

154. Plaintiff's Memorandum, *supra* note 143, at 3; Sword Declaration, *supra* note 144, at 4; Vasquez Affidavit, *supra* note 144, at 4.

155. Plaintiff's Memorandum, *supra* note 143, at 4; Vasquez Affidavit, *supra* note 144, at 5.

156. Kinzner Declaration, *supra* note 145, at 1-2.

157. Declaration of Robert Whitworth in Support of Motion for Partial Summary Judgment at 2, Vasquez v. Hawthorne, No. 96-2-07794-7 (Pierce County Super. Ct. Jan. 17, 1997).

158. Brief of Appellant Joseph Hawthorne at 29, Vasquez, 99 Wash. App. 363, 994 P.2d 240 (No. 96-2-07794-7).

159. *Id.* at 12.

160. Vasquez, 99 Wash. App. at 364, 994 P.2d at 241.

161. *Id.* at 364, 994 P.2d at 241; Order, *supra* note 139, at 4.

162. Plaintiff's Memorandum, *supra* note 143, at 19.

B. *Procedural Background and Status*

Because Schwerzler died intestate, his estate passed to his siblings under Washington's intestacy statute.¹⁶³ Vasquez sued for his share of Schwerzler's estate under the theories of meretricious relationship, implied partnership, and constructive trust.¹⁶⁴ The trial court awarded the entire estate to Vasquez under the meretricious relationship theory on Vasquez's motion for partial summary judgment.¹⁶⁵ Joseph Hawthorne, the estate's personal representative, appealed, and a unanimous court of appeals reversed, holding that a same-sex relationship could not be a meretricious relationship as a matter of law.¹⁶⁶

The Washington Supreme Court granted review of *Vasquez*.¹⁶⁷ The issue of whether or not same-sex couples can sue for property division under the meretricious relationship theory has never before been decided in Washington.¹⁶⁸ Vasquez's theories of implied partnership and constructive trust have not yet been tried.¹⁶⁹

C. *The Court of Appeals Opinion*

The Washington Court of Appeals unanimously reversed the trial court judgment, holding that same-sex relationships cannot qualify as meretricious relationships in Washington.¹⁷⁰ The court's brief opinion, after summarizing the development of the meretricious relationship doctrine, focused solely on the "marital-like" element of the meretricious relationship test.¹⁷¹ The court stated that "because persons of the same sex may not be legally married, a meretricious relationship cannot exist between members of the same sex."¹⁷² Thus, Vasquez received none of the property he acquired with Schwerzler during their twenty-eight year intimate relationship.

163. WASH. REV. CODE § 11.04.015(2)(c) (2000).

164. *Vasquez*, 99 Wash. App at 364–65, 994 P.2d at 241.

165. *Id.* at 364, 994 P.2d at 241.

166. *Id.* at 364–65, 994 P.2d at 241.

167. *Vasquez v. Hawthorne*, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

168. *Vasquez*, 99 Wash. App. at 365, 994 P.2d at 241.

169. *Id.* at 365, 994 P.2d at 241.

170. *Id.* at 364, 994 P.2d at 241.

171. *Id.* at 367–68, 994 P.2d at 242–43.

172. *Id.* at 365, 994 P.2d at 241.

The court first reviewed the history of the meretricious relationship doctrine. The court noted its creation in *Lindsey*, its further development in *Connell*, and that the doctrine overturned the *Creasman* presumption.¹⁷³ The court restated *Connell*'s holding that the only property that can be distributed upon a finding of a meretricious relationship is that property which would have been community property had the parties been married.¹⁷⁴

The *Vasquez* court then reasoned that if the only property available for distribution at the end of a meretricious relationship is property that would have been community property *if* the parties had been married, then a meretricious relationship must be one in which the parties *may* legally marry.¹⁷⁵ To the *Vasquez* court, only potentially marital relationships can benefit from quasi-marital protection.¹⁷⁶ Thus, the parties' legal status is a conclusive factor in determining whether or not the couple can exist in a meretricious relationship.

The *Vasquez* court then noted that Washington's marriage statute prohibits legal marriage between same-sex partners. The court concluded that this statutory definition of legal marriage prohibits the equitable doctrine of meretricious relationships from ever including same-sex relationships.¹⁷⁷ As support for this conclusion, the *Vasquez* court held that *Connell* and its progeny must have "implicitly assumed that a meretricious relationship can exist only between a man and a woman."¹⁷⁸ This implicit assumption led the *Vasquez* court to conclude that only the legislature could apply the judicial doctrine of meretricious relationship to same-sex couples.¹⁷⁹ As a matter of law, the court held that same-sex relationships could not be marital-like.¹⁸⁰

173. *Id.* at 366, 994 P.2d at 242.

174. *Id.* at 367.

175. *Id.* at 367, 994 P.2d at 242.

176. *Id.* at 369, 994 P.2d at 243. The *Vasquez* court used "quasi-marital" synonymously with "marital-like," calling a meretricious relationship a quasi-marital relationship. *See id.* at 368, 994 P.2d at 243.

177. *Id.* at 367–68, 994 P.2d at 242–43.

178. *Id.* at 367, 994 P.2d at 242.

179. *Id.* at 369, 994 P.2d at 243. The court noted that *Vasquez* had the recourses of constructive trust and implied partnership. *Id.*

180. *Id.* at 364, 994 P.2d at 241.

IV. THE *VASQUEZ* COURT ERRONEOUSLY CONCLUDED THAT THE MERETRICIOUS RELATIONSHIP DOCTRINE DOES NOT APPLY TO SAME-SEX COUPLES

The *Vasquez* court should have defined “marital-like” according to the conduct of the parties and not according to their legal status. In determining that, as a matter of law, same-sex relationships cannot qualify as meretricious relationships, the *Vasquez* court erred in three ways. First, the court strayed from precedent by crafting a bright-line rule that status determines who may benefit from the meretricious relationship doctrine. Second, the court erred in using the Washington marriage statute regarding prohibited marriages to modify the judicial doctrine of meretricious relationships. Third, in applying the statute, the court wrongly interpreted the intent and purpose of the meretricious relationship doctrine.

A. *The Vasquez Court Deviated from Precedent by Crafting a Bright-Line Rule*

The bright-line rule established in *Vasquez* deviates from all previous application of the meretricious relationship doctrine. In determining whether a meretricious relationship exists, courts must analyze all the relevant evidence of the parties’ conduct on a case-by-case basis.¹⁸¹ No one factor weighs more than another in importance.¹⁸² The *Vasquez* court strayed from precedent by deciding that the parties’ legal ability to marry outweighed the totality of the parties’ conduct.¹⁸³ The court further wrongly crafted a bright-line rule when deciding the parties must be male and female. Moreover, the *Vasquez* court misinterpreted precedent when it used marriage legislation to draw this bright-line rule.

Precedent does not support the *Vasquez* court’s conclusion that the marriage statute¹⁸⁴ determines who may enter into meretricious relationships. Courts have found meretricious relationships when one of

181. *In re Pennington*, 142 Wash. 2d 592, 601–02, 14 P.3d 764, 770 (2000); *In re Lindsey*, 101 Wash. 2d 299, 305, 678 P.2d 328, 331 (1984).

182. *Pennington*, 142 Wash. 2d at 602, 14 P.3d at 770.

183. *Vasquez*, 99 Wash. App. at 369, 994 P.2d at 243.

184. WASH. REV CODE § 26.04.020 (2000).

the parties has been married to a third party;¹⁸⁵ yet, the marriage statute does not allow marriage when one or both parties are married to another person.¹⁸⁶ In *Warden*,¹⁸⁷ *Kinzer*,¹⁸⁸ and *Foster*¹⁸⁹ the Washington Court of Appeals found meretricious relationships existed even when one party was married to another for a portion of the meretricious relationship. The Washington Court of Appeals has indicated that one party's marriage to a third party was not a dispositive factor where a relationship was long-term and the parties pooled their resources for many purposes.¹⁹⁰ The Washington Supreme Court recently noted that marriage to a third party may be evidence of one party's lack of intent regarding the relationship, but reaffirmed its commitment to determining the existence of meretricious relationship on a case-by-case basis and did not craft a bright-line rule regarding the parties' legal status.¹⁹¹ Before *Vasquez*, Washington courts did not look to the legal status of the couple to determine if the conduct was marriage-like.

Furthermore, no court before *Vasquez* had held that one of the requirements for a meretricious relationship is that the parties be one man and one woman. The *Vasquez* court was unable to point to any specific language in previous cases and could only find "that these courts implicitly assumed that a meretricious relationship can exist only between a man and a woman."¹⁹² Yet, because no fact scenarios had been presented other than those that dealt with opposite-sex couples, no cases had considered whether a meretricious relationship hinged on the gender of the parties. By giving legal significance to assumptions, the *Vasquez* court equated mind reading with the interpretation of precedent.

Finally, *Vasquez* misinterpreted *Connell* when it used marriage legislation to craft its bright-line rule that same-sex relationships could not be meretricious relationships. The *Vasquez* court reasoned that if

185. *In re Kinzer*, No. 16035-1-III, 1998 WL 151795, at *2 (Wash. Ct. App. Apr. 2, 1998); *Foster v. Thilges*, 61 Wash. App. 880, 884-85, 812 P.2d 523, 525-26 (1991); *Warden v. Warden*, 36 Wash. App. 693, 694, 698, 676 P.2d 1037, 1037-38, 1039-40 (1984).

186. WASH. REV. CODE § 26.04.020(1)(a).

187. *Warden*, 36 Wash. App. at 694, 698, 676 P.2d at 1037-38, 1040.

188. *Kinzer*, 1998 WL 151795, at *3.

189. *Foster*, 61 Wash. App. at 884-85, 812 P.2d at 525-26.

190. *In re Pennington*, 93 Wash. App. 913, 919-20, 971 P.2d 98, 101-02 (1998), *aff'd*, 142 Wash. 2d 592, 14 P.3d 764 (2000) (distinguishing *Foster* as appropriate finding of meretricious relationship where one party was married to third party).

191. *Pennington*, 142 Wash. 2d at 601-05, 14 P.3d at 770-72.

192. *Vasquez v. Hawthorne*, 99 Wash. App. 363, 367, 994 P.2d 240, 242, *review granted*, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

courts distribute property at the termination of a meretricious relationship based on what would have been community property if the parties had been married, then the parties must be legally able to marry in order to exist in a meretricious relationship.¹⁹³ Yet this reasoning inverts the logic of *Connell*. *Connell* requires that courts first find that a meretricious relationship existed; second, determine the interest each party has in the property; and third, distribute the property according to principles of community property.¹⁹⁴ Thus *Connell* called for the use of marriage legislation as a guide for the third prong. *Vasquez* found the marriage statutes not only determinative of how to distribute property, but determinative of whether to distribute the property at all, thus applying marriage legislation to the first prong.¹⁹⁵ The court in *Connell*, however, explicitly stated that “a meretricious relationship is not the same as marriage.”¹⁹⁶ Using marriage legislation to craft a bright-line rule for what constitutes a meretricious relationship finds no support in the *Connell* court’s recourse to community property statutes to make a just and equitable distribution of property.

The *Vasquez* decision is an anomaly among meretricious relationship cases that have used a case-by-case, factor-based approach and that have only used marriage legislation in determining how, not whether, to distribute the property. Courts have not established any bright-line rules when deciding if a relationship qualifies as meretricious. *Vasquez* is the first case to draw a bright-line rule, and it hides behind an irrelevant statute to do so.

B. The Vasquez Court Deviated from Statutory Interpretation by Applying a Washington Marriage Statute to the Common Law Doctrine of Meretricious Relationships

The *Vasquez* court, in holding that the statutory limitations on who may marry in Washington are determinative of who can engage in a

193. *Id.* at 367–68, 994 P.2d at 242–243.

194. *Connell v. Francisco*, 127 Wash. 2d 339, 349, 898 P.2d 831, 835 (1995).

195. *Vasquez*, 99 Wash. App. at 369, 994 P.2d at 243. Although the court claims that the “statutory limitations on who may marry . . . are relevant in determining whether a relationship is sufficiently ‘marital-like,’” the use of the word “relevant” is misleading. The court’s holding, that same-sex relationships cannot be marital-like because same-sex couples may not marry, renders the statutory limitations determinative. *Id.* at 367–68, 994 P.2d at 242–43.

196. *Connell*, 127 Wash. 2d at 349–50, 898 P.2d at 836.

meretricious relationship,¹⁹⁷ deviated from traditional statutory interpretation. Neither a plain reading of the marriage statute prohibiting certain marriages¹⁹⁸ nor the legislative history of the amendment prohibiting same-sex marriages suggests that the marriage statute modifies the judicially created doctrine of meretricious relationships. The *Vasquez* court's reliance on the Washington marriage statute was misplaced.

A plain reading of the marriage statute prohibiting certain marriages¹⁹⁹ does not support the *Vasquez* court's conclusion that the marriage statute determines who may enter into meretricious relationships. The statute is titled "Prohibited Marriages" and contains a list of who may not marry in Washington.²⁰⁰ The statute does not address any other legal rights or remedies, define who may cohabit together or form intimate relationships, or criminalize certain sexual relationships. The statute nowhere defines property rights. Rather, the plain language of the statute defines only who may undertake the legal rights and obligations of marriage.²⁰¹ The *Vasquez* court, however, applied the statute in deciding who may benefit from the meretricious relationship doctrine,²⁰² despite the Washington Supreme Court's statements that meretricious relationships are "wholly unrelated"²⁰³ to and "not the same as"²⁰⁴ marriage.

The legislative history of the subsection of the marriage statute that specifically prohibits same-sex marriages also does not support the *Vasquez* court's conclusion that the statute determines who may enter meretricious relationships. The Legislature adopted the amendment specifically prohibiting same-sex marriage in response to Congress's Defense of Marriage Act, which authorized states not to recognize same-sex marriages in other states.²⁰⁵ The Defense of Marriage Act affected marriage and not any common law doctrines.²⁰⁶ The legislative history of the Washington amendment shows no indication the Legislature

197. *Vasquez*, 99 Wash. App. at 369, 994 P.2d at 243.

198. WASH. REV. CODE § 26.04.020 (2000).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Vasquez*, 99 Wash. App. at 367–68, 994 P.2d at 242–43.

203. *In re Pennington*, 142 Wash. 2d 592, 600, 14 P.3d 764, 769 (2000).

204. *Connell v. Francisco*, 127 Wash. 2d 339, 349–50, 898 P.2d 831, 836 (1995).

205. Act of Feb. 6, 1998, ch. 1, 1998 Wash. Laws 1 (codified at WASH. REV. CODE § 26.04.020(1)(c)); 28 U.S.C. § 1738C (Supp. IV. 1998).

206. 28 U.S.C. § 1738C.

intended to restrict other types of rights and remedies applicable to same-sex couples.²⁰⁷ The amendment created a single legal disability: a limit on the right to marry. Neither a plain reading of the statute nor the legislative history supports the *Vasquez* court's conclusion that the marriage statute prohibiting certain marriages should determine that same-sex relationships cannot be marital-like.

C. *The Vasquez Court Deviated from the Intent and Purpose of the Meretricious Relationship Doctrine*

The *Vasquez* court deviated from the intent and purpose of the meretricious relationship doctrine when it held that in order to be marital-like parties must have the legal ability to marry.²⁰⁸ The meretricious relationship doctrine is a judicial remedy, created with the intent to protect the property rights of unmarried couples. The meretricious relationship doctrine's sole purpose, however, is to address property rights. This limitation explicitly prevents meretricious relationships from being common law marriages.²⁰⁹ Implicitly, it preserves the incentives for couples to marry.

Washington courts created the meretricious relationship doctrine to protect the property rights of people who are not legally married. When creating the meretricious relationship doctrine and overruling the *Creasman* presumption, the Washington Supreme Court recognized that the *Creasman* presumption unjustly rewarded the "cunning and the shrewd" who could deliberately hold title to all property at the end of a meretricious relationship despite the fact that the property may have been acquired through joint efforts.²¹⁰ The meretricious relationship doctrine balances the scales between the shrewd party and the party without title by dividing property justly and equitably without regard to who holds title.²¹¹ By excluding same-sex couples from the meretricious

207. Act of Feb. 6, 1998, ch. 1, 1998 Wash. Laws 1, codified at WASH. REV. CODE § 26.04.020(1)(c); E.S.H.B. 1130, 55th Leg., 1st Reg. Sess. (Wash.).

208. *Vasquez v. Hawthorne*, 99 Wash. App. 363, 364, 994 P.2d 240, 241, review granted, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

209. *In re Pennington*, 142 Wash. 2d 592, 600–01, 14 P.3d 764, 769–70 (2000); *Connell v Francisco*, 127 Wash. 2d 339, 349–50, 898 P.2d 831, 836 (1995).

210. *In re Lindsey*, 101 Wash. 2d 299, 303, 678 P.2d 328, 330 (1984) (citing *West v. Knowles*, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957) (Finley, J., concurring)).

211. *Connell v. Francisco*, 127 Wash. 2d 339, 346–57, 898 P.2d 831, 834–35 (1995).

relationship doctrine, *Vasquez* excludes those who the doctrine was meant to protect.

While the meretricious relationship doctrine protects unmarried couples, the doctrine addresses a much narrower spectrum of legal obligations and benefits than marriage. The meretricious relationship doctrine is solely an equitable property doctrine that distributes property acquired during a stable, marital-like relationship at the termination of that relationship.²¹² A meretricious relationship does not create a common law marriage,²¹³ as Washington does not allow common law marriages²¹⁴ and the court in *Connell* specifically held that couples in meretricious relationships may not be treated as if they were married.²¹⁵ The meretricious relationship does not establish rights of survivorship, affect tax status, or grant any decision-making power if one party to the relationship is debilitated. In contrast, legal marriage confers these benefits and many others upon the involved parties.²¹⁶

Because the intent and purpose of the meretricious relationship doctrine is to provide only limited rights for unmarried couples, the meretricious relationship doctrine does not detract from the state's role in encouraging couples to marry legally. The state values marriage as a "historical . . . institution."²¹⁷ Any fear the *Vasquez* court had that allowing same-sex couples to benefit from the meretricious relationship doctrine threatens the institution of marriage is unfounded. Same-sex marriage is already prohibited by statute;²¹⁸ it is only heterosexual couples who may choose whether or not to legally marry, and courts have not hesitated in applying the meretricious relationship doctrine to heterosexual relationships. Moreover, because the meretricious relationship doctrine provides only limited rights for unmarried couples as opposed to those conferred by marriage²¹⁹ and does not create a common law marriage,²²⁰ couples have more of an incentive to marry than to

212. *Id.*

213. A common law marriage is one where the couple is recognized as legally married after having cohabited for a certain period of time. Cross, *supra* note 17, at 20.

214. *Id.*

215. *Connell*, 127 Wash. 2d at 350, 898 P.2d at 836.

216. Pederson, *supra* note 83; Partners Task Force for Gay & Lesbian Couples, *supra* note 104.

217. Act of Feb. 6, 1998, ch. 1, 1998 Wash. Laws I (codified at WASH. REV. CODE 26.04.020(1)(c) (2000)); E.S.H.B. 1130, 55th Leg., 1st Reg. Sess. (Wash.).

218. WASH. REV. CODE § 26.04.020(1)(c) (2000).

219. *See Connell*, 127 Wash. 2d at 350, 898 P.2d at 836.

220. *Id.*

cohabit without legal marriage. In fact, same-sex couples have continually sought the legal right to marry and take on the many benefits and burdens of legally sanctioned marriage.²²¹

The *Vasquez* court ignored the intent and purpose of the meretricious relationship doctrine when it held that to create a meretricious relationship, the parties must be free to marry under Washington statutory law. The meretricious relationship doctrine is simply an equitable doctrine providing limited protection in the area of property distribution for unmarried couples. It is a judicially crafted doctrine that provides equity precisely where statutory definitions do not apply. The doctrine's purpose, statutory interpretation of the statute on prohibited marriages, and precedent support applying the meretricious relationship doctrine to same-sex couples. By looking solely to Frank Vasquez's statutory status, the *Vasquez* court neglected its equitable duty to define meretricious relationships on the basis of conduct.

V. THE *VASQUEZ* DECISION VIOLATES PUBLIC POLICY AND IS HETEROSEXIST

Because same-sex couples engage in marital-like conduct, the court should allow same-sex couples to benefit from the meretricious relationship doctrine. The *Vasquez* court violated public policy by denying the meretricious relationship doctrine to same-sex couples. The court further demonstrated its own heterosexism by holding that same-sex relationships cannot be marital-like.

A. *Public Policy Dictates that Same-Sex Couples Should Benefit from the Meretricious Relationship Doctrine*

The Washington Supreme Court should apply the meretricious relationship doctrine to same-sex couples because of public policy. The *Vasquez* court denied an equitable remedy to a group of Washington citizens. Public policy supports just applications of law, just remedies, and the protection of Washington citizens.

Just application of the law requires that same-sex relationships be eligible to qualify as meretricious relationships. *Vasquez* retains a right for unmarried couples who have the choice to marry but denies it to

221. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

couples who do not have the choice to marry but may wish to do so. Same-sex couples across the country desperately want to take advantage of both the rights and obligations offered by marriage.²²² Legislatures have exercised their power to deny such legal benefits to same-sex couples.²²³ *Vasquez* punishes a group of Washington state citizens who have already been excluded from the legal institution of marriage²²⁴ by denying them a simple property remedy *because* of that legal status. If the courts create a property doctrine for unmarried couples, that property doctrine should justly apply to all unmarried couples, and not just heterosexual couples who already have the benefit of legal marriage.

The court attempted to justify its decision by noting that Frank Vasquez might seek relief under alternate theories;²²⁵ however, not all parties to a same-sex relationship will be able to prove implied partnership or constructive trust. Constructive trust has traditionally required evidence of fraud, breach of fiduciary responsibility or contract, or overreaching.²²⁶ Implied partnership requires evidence of the intention of the parties either by direct evidence or from the circumstances.²²⁷ It may be difficult for someone in Vasquez's position to prove such intent where one partner is deceased. Under the meretricious relationship doctrine, intent is just one of the factors a court may rely on to find a meretricious relationship existed.²²⁸

Nor are the remedies under the implied-partnership or constructive-trust theories just when compared to the property-distribution principles of the meretricious relationship doctrine. Parties that could prove such remedies as constructive trust or implied partnership do not have the advantage of the presumptive one-half interest inherent in community property principles²²⁹ or the just and equitable division used under the meretricious relationship doctrine.²³⁰ Just and equitable division allows

222. See, e.g., *Baehr*, 852 P.2d 44; *Baker*, 744 A.2d 864; *Singer*, 11 Wash. App. 246, 522 P.2d 1187.

223. E.g., WASH. REV. CODE § 26.04.020(1)(c).

224. See *id.*

225. *Vasquez v. Hawthorne*, 99 Wash. App. 363, 369, 994 P.2d 240, 243, *review granted*, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

226. *In re Thornton*, 14 Wash. App. 397, 402, 541 P.2d 1243, 1246-47 (1975).

227. *Id.* at 401, 541 P.2d at 1246 (citing *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189, 191-92 (1915)).

228. *Connell v. Francisco*, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995).

229. See *supra* Part I.A.

230. *Connell v. Francisco*, 127 Wash. 2d 339, 347, 898 P.2d 831, 834 (1995).

courts to take into account the needs of the parties.²³¹ On the other hand, remedies such as constructive trust are restitution remedies, and simply restore the parties to the positions they formerly occupied.²³² For example, under a restitution remedy Vasquez might receive the equivalent of minimum wage for his labor in the bag business, but not the presumptive one-half interest in the assets acquired during the relationship that results when a couple has engaged in a marital-like partnership.

Finally, *Vasquez* rewards the “cunning and the shrewd.”²³³ The Washington Supreme Court specifically attacked the *Creasman* presumption for rewarding the “cunning and the shrewd” who may hold property in their name while acquiring it with an unmarried partner²³⁴ and later overturned the *Creasman* presumption.²³⁵ *Vasquez* reinstates the *Creasman* presumption for same-sex couples, requiring them to prove alternate contract or restitution theories. The meretricious relationship doctrine should protect same-sex partners who may not legally marry and may not possess the resources or legal knowledge to create contractual property rights.

B. *The Vasquez Decision Is Heterosexist*

Vasquez is a heterosexist decision because it holds that same-sex relationships cannot be marital-like. Heterosexism differs from homophobia. Homophobia implies an irrational fear and hatred of gay or lesbian people.²³⁶ Heterosexism “is the systematic implementation, through law, custom, and other vehicles, of the view that heterosexuality is ‘natural’ and that lesbian and gay sexuality are morally and socially inferior.”²³⁷ The *Vasquez* opinion reflects a belief that gay and lesbian relationships are inferior to heterosexual ones.

231. See *Poole v. Schrichte*, 39 Wash. 2d 558, 566–67, 236 P.2d 1044, 1049–50 (1951) (citing *Buckley v. Buckley*, 50 Wash. 213, 223, 96 P. 1081, 1083 (1908) (awarding one-quarter of property to ex-wife and innocent wife each and man one-half because man aged, feeble, and in need of medical support)).

232. RESTATEMENT OF RESTITUTION § 1 cmt. a (1937); see also *id.* § 160.

233. *West v. Knowles*, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957) (Finley, J., concurring).

234. *Id.*

235. *In re Lindsey*, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

236. Rhondon Copelon, *A Crime Not Fit to Be Named: Sex, Lies, and the Constitution*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 177, 191–92 n.2 (David Kairys ed., rev. ed. 1990).

237. *Id.*

Vasquez represents a heterosexist assumption that gay and lesbian couples are not capable of engaging in marital-like conduct. *Vasquez* referred to the marriage statute prohibiting certain marriages in order to hold that same-sex couples cannot exist in marital-like relationships, drawing a bright-line for the first time in the history of the meretricious relationship doctrine.²³⁸ The court thereby avoided a conduct-based analysis of the term “marital-like.”

By using the status-based construction of “marital-like,” the court assumed that status determines conduct. This is a false assumption. One can easily imagine an opposite-sex couple legally married for immigration reasons and acting both privately and publicly as if they are not married; or, alternatively, a couple acting privately and publicly as if they were married but not being legally married. This is also a false assumption as it applies to same-sex couples. Gay and lesbian couples can and do engage in marital-like relationships, holding commitment ceremonies, raising children, and staying together until death.²³⁹ Their status in society does not ultimately determine their ability to engage in such relationships.

Vasquez and *Schwerzler*’s relationship was an example of a meretricious relationship. A relationship must be stable and marital-like in order to be a meretricious relationship.²⁴⁰ By analyzing the duration and continuity of their cohabitation,²⁴¹ it is evident that *Vasquez* and *Schwerzler* had a stable relationship, as *Vasquez* and *Schwerzler* cohabited without interruption for twenty-eight years.²⁴² Furthermore, their conduct exemplified a marital-like relationship. *Vasquez* and *Schwerzler* mutually supported each other in a familial and business context, had an intent to form such a supportive relationship, and they pooled their resources.²⁴³

Neither state nor federal laws prevent heterosexist decisions by the courts. The court in *Singer* declined to extend Washington’s Equal Rights Amendment²⁴⁴ to provide marriage rights to same-sex couples.²⁴⁵

238. *Vasquez v. Hawthorne*, 99 Wash. App. 363, 367–68, 994 P.2d 240, 242–43, review granted, 141 Wash. 2d 1025, 11 P.3d 825 (2000).

239. See Partners Task Force for Gay & Lesbian Couples, *Vows: Marriage Ceremonies for Same-Sex Couples*, at <http://www.buddybuddy.com/vows.html> (last visited Apr. 7, 2001).

240. *Connell v. Francisco*, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995).

241. See *supra* Part II.A.

242. *Vasquez*, 99 Wash. App. at 364, 994 P.2d at 241.

243. See *supra* Part III.A.

244. WASH. CONST. art. 31 §1.

The supreme court has not labeled gays, lesbians, and bisexuals a protected class for the purposes of federal equal protection.²⁴⁶ Until federal equal protection includes gays, lesbians, and bisexuals as a protected class, or Washington's Equal Rights Amendment is interpreted to prohibit the denial of same-sex marriage, *Vasquez* represents a kind of decision that courts are technically free to make.

Reality, however, requires that the Washington Supreme Court recognize that gay and lesbian couples can and do engage in marital-like conduct. Justice, therefore, demands that same-sex couples be offered the limited protections of the meretricious relationship doctrine. Precedent,²⁴⁷ an interpretation of the statute prohibiting certain marriages,²⁴⁸ the intent and purpose of the meretricious relationship doctrine,²⁴⁹ and public policy²⁵⁰ support a conduct-based definition of marital-like that can and should apply to same-sex couples.

Creasman ignored the social realities of an interracial couple in 1948 and promulgated a presumption steeped in racism; *Vasquez* reinstates the *Creasman* presumption for same-sex couples because of heterosexual bias. The court should not impose the regressive *Creasman* presumption on same-sex couples. Rather, the court should remember what it said while admonishing lower courts' application of the *Creasman* presumption in the pre-*Lindsey* era: "Property rights are not determined on the basis of social relationships, moral or immoral."²⁵¹

VI. CONCLUSION

In 1948, the Washington Supreme Court ignored the social realities of an interracial couple and promulgated the *Creasman* presumption, holding that property acquired by an unmarried couple must belong to the one who holds title. For years, courts noted the injustice of this rule and created numerous exceptions. Finally, the Washington Supreme

245. *Singer v. Hara*, 11 Wash. App. 246, 250–52, 258–60, 522 P.2d 1187, 1190–91, 1194–95 (1974).

246. *See Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986). It is arguable that denying the meretricious relationship doctrine to same-sex couples violates the Fourteenth Amendment under *Romer v. Evans*, 517 U.S. 620 (1996). This Note does not reach this constitutional issue.

247. *See supra* notes 181–96 and accompanying text.

248. *See supra* notes 197–207 and accompanying text.

249. *See supra* notes 208–21 and accompanying text.

250. *See supra* notes 222–35 and accompanying text.

251. *Iredell v. Iredell*, 49 Wash. 2d 627, 630, 305 P.2d 805, 807 (1957).

Court recognized the need for a property doctrine that would equitably divide the property of unmarried couples upon the termination of their relationships, overruled the *Creasman* presumption, and created the meretricious relationship doctrine. In *Vasquez*, Washington took a step backward by withholding that doctrine from same-sex couples. By ignoring the social realities of same-sex couples, the *Vasquez* court denied to Frank Vasquez what a court would have given to a woman in his place, and it assumed that because same-sex couples may not be legally married, same-sex couples cannot engage in marital-like conduct.

The Washington Supreme Court should reverse *Vasquez* and hold that “marital-like” is determined by conduct and not by legal status. The previous application of “marital-like,” the plain language and history of the marriage statute prohibiting certain marriages, the intent and purpose of the meretricious relationship doctrine, public policy, and the need to combat heterosexist bias support such a holding. Moreover, same-sex couples can and do engage in marital-like conduct, just as Frank Vasquez and Robert Schwerzler did.

