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# LONG TERM RELATIONSHIPS, SHORT TERM MARRIAGES. IS IT TIME TO RECONSIDER *IN RE MARRIAGE OF BUKATY*?

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On September 19, 2016, actress Angelina Jolie shocked the world by filing for dissolution of her marriage to actor Brad Pitt. The Pitt-Jolie dissolution is likely to raise an issue that has been percolating in our family courts for some time: *how are courts to view a long term committed relationship coupled with a short-term marriage?* At the time of the dissolution filing, Jolie and Pitt had been together for twelve years but married for only two. They had publicly stated, up until 2012, that they would not marry until all loving couples were free to marry – a public stance in favor of marriage equality that they accompanied with a million-dollar donation to the campaign against California's Prop 8. They did not actually marry until August 2014, by which time Prop 8 had been overturned by the United States Supreme Court. (See *Hollingsworth v. Perry*, 133 S.Ct. 2652 (6/26/2014).)

By their stance in favor of marriage equality, Jolie and Pitt have thrown their lots in with the many lesbian and gay couples who have been in long term relationships for decades but only able to marry for a few years. It is likely that neither Pitt nor Jolie will need spousal support, given that each has his/her own illustrious acting career with high earnings (and hopefully healthy savings) that should allow either one of them to provide amply for their six children. But many (most!) lesbian and gay couples are far less fortunate; and it will be interesting to see how the courts view the longevity of the Jolie-Pitt union.

In *In re Marriage of Bukaty* (1986) 180 Cal.App.3d 143, the Court of Appeal (Fourth District) unequivocally endorsed the position that: "'The Family Law Act which divides community property of the husband and wife and provides spousal support does not apply to a nonmarital relationship…' [Citations omitted.] Any right to support attributable to the period of the parties' cohabitation would be a *Marvin* right and could be asserted only in a separate civil action, not in a proceeding under the Family Law Act.

*Bukaty* involved a man and woman who initially had married in 1942, but then divorced in 1954. Soon after the divorce, they once again began living together and continued to cohabit off and on for the next 27 years, until they finally remarried in May 1981. That marriage again was short-lived, and they again separated in December 1982. In dissolution proceedings, the wife – then in her mid-60's and disabled – argued that the 27 year period of cohabitation (and the overall 40 year duration of their intimate relationship) should be considered in determining the duration of spousal support. The court held otherwise, and only ordered support for a period of 3 years (which was generous, given that they refused to recognize anything other than the second 19-month marriage as a basis for support).

*Bukaty* subsequently has been modified to some extent by the Court of Appeal, First District in *In re Marriage of Chapman* (1987) 191 Cal.App.3d 1308. In *Chapman*, the couple initially had been married for 19 years, before divorcing and then remarrying less than a year later. When the couple dissolved their second marriage, the husband argued for application of *Bukaty* to limit his support obligation to only the duration of the second marriage. The Court of Appeal held that, under the facts of that case (and based on a public policy concern that holding otherwise would encourage supporting spouses to divorce their spouses and then re-marry

them for the sole purpose of minimizing support obligations), it was appropriate for the court to consider the duration of *both* marriages in determining support – but *not* the period of non-marital cohabitation between the two marriages. As stated by the *Chapman* court:

> The policy behind *Bukaty* does not preclude recognition of a couple's prior *marital* relationship. Here, parties whose relationship was apparently characterized by repeated separations and reconciliations were married for 19 years, divorced for three years, and remarried for three and a half months. In all this period, their longest physical separation was six months. As the parties' prior relationship was predominantly one fully recognized by the Family Law Act, it could be considered as a factor bearing on respondent's spousal support obligation without attaching rights and privileges to a relationship the Legislature did not intend to protect. (*In re Marriage of Chapman, supra,* 191 Cal.App.3d at 1314-1315.)

The fundamental premise of both *Bukaty* and *Chapman* rests on the notion that the courts should not – and arguably *cannot* – give legal significance to a period of non-marital cohabitation, because if the couple had wanted to be in a legally recognized union during that period, they could have accomplished that goal simply by marrying. In other words, why should the family courts waste time and resources second guessing a couple's decision about when they wanted to become a legally recognized unit, rather than simply looking at when they *did* become a legally recognized unit and going with that? This makes sense for couples who have not had any impediment to marrying – but does it make sense for the many same-sex couples in this state who were denied the opportunity to marry until well into their committed partnerships?

For those of us who represent same-sex couples in the family courts, it is very common to encounter long term couples in short term marital relationships. I have seen more than a few couples who have been in committed partnerships for 20-30 years, often with one providing primary financial support to the household while the other was primarily responsible for homemaking and/or childrearing tasks – exactly like a more traditional heterosexual married couple – but whose actual marriages only were of 2-3 years' duration because the couple was not offered the opportunity to marry before that time. Unlike the couples in *Bukaty* and *Chapman* – for whom factors *internal* to their relationship dictated when they married and when they divorced – for many same-sex couples of long duration the length of their marriages has been dictated by *external* factors, i.e. when the law allowed them to enter into a legally recognized union. Under these circumstances, family courts must be allowed the discretion to view the relationship in its entirety and make a factual determination – based on the evidence presented – as to the duration of the relationship to be considered by the court.

Legislative change would be needed to allow a family court to apply community property law to a period outside the boundaries of the legal marriage. ("Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." Family Code § 760. "Separate property of a married person includes all of the following: … All property owned by the person before marriage." Family Code § 770.) However, the law around spousal support already grants the courts significant discretion. (See, e.g., Family Code § 4320(n): "In ordering spousal support under this part, the court shall consider… [a]ny factors the court determines are just and equitable.") I submit that this discretion should be used to recognize the longevity of a couple's committed partnership – whether marital or not – if the facts of the case indicate an

intention to be married which intention could not be made operative due factors external to the marriage (e.g. the failure of the State to allow same-sex couples to marry).

Now back to Pitt and Jolie. This couple was together for approximately 12 years. They have 6 children together. They made a conscious (and very public) choice not to marry until 2014, out of their mutual commitment to stand in solidarity with lesbian and gay couples denied that opportunity. To the extent that support is an issue in their case (which, again, it may not be given the extraordinarily high earning capacity of each of them individually), should our family courts be granted the latitude to view the entirety of their committed partnership, not just their two years of marriage? While neither Pitt nor Jolie likely needs the support, the next couple that stands before the family court with a comparable story might. So, is it time to reconsider *In re Marriage of Bukaty*?