

IN RE TENANCY BY THE ENTIRETY—  
MARRIED COUPLES, COMMON LAW MARRIAGES,  
AND SAME-SEX PARTNERS:  
*ORTH V. ORTH*

JOHN V. ORTH\*

I. BACKGROUND

An article in a recent issue of the North Dakota Law Review recommends the traditional version of tenancy by the entirety for married couples, common law marriages, and same-sex partners, and defends the tenancy against critics who advocate that it should be “abolished, altered, or limited.”<sup>1</sup> The author, Damaris Rosich-Schwartz, reviews the characteristics of the three modern concurrent estates—tenancy in common, joint tenancy, and tenancy by the entirety—and concludes that tenancy by the entirety is “the best alternative for couples owning property” because it provides both “asset protection and probate avoidance.”<sup>2</sup>

Each tenant in common has a share that is alienable inter vivos, devisable at death, and inheritable in the absence of a valid will. By contrast, each joint tenant has a share that is alienable, but neither devisable nor inheritable. Alienation by a joint tenant has the effect of withdrawing the alienated share from the joint tenancy and converting the title to that share into a tenancy in common. If not alienated, the share of a dying joint tenant does not pass by devise or inheritance, but inures to the benefit of the surviving joint tenant or tenants by right of survivorship, thereby avoiding probate. The peculiar character of an interest in joint tenancy—an interest in fee simple that is alienable, but neither devisable nor inheritable—is both its chief advantage and its most serious drawback. As one court recently observed:

The right of survivorship makes joint tenancies a popular form of property ownership. Yet, the concomitant right of each joint tenant to destroy the joint tenancy, and thus the right of survivor-

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1. Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partners*, 84 N.D. L. REV. 23, 49 (2008).

2. *Id.* at 34.

ship, is not always popular, particularly for the surviving joint tenant. As Hamlet observed in a different context, “ay, there’s the rub.”<sup>3</sup>

Unique among the concurrent estates, the traditional tenancy by the entirety, limited to married couples, does not permit alienation by either tenant; that is, neither tenant acting alone can sever the tenancy by sale or partition thereby destroying the right of survivorship. Nor can either tenant individually encumber the property. For this reason, Rosich-Schwartz concludes that the traditional tenancy by the entirety is not only the best alternative for married couples, but also that it should be extended to couples joined by common law marriage and to same-sex partners.

Rosich-Schwartz identified me, Professor John V. Orth, as the principal critic of the traditional tenancy by the entirety.<sup>4</sup> According to Rosich-Schwartz, I believe that the tenancy by the entirety “should be abolished.”<sup>5</sup> Rosich-Schwartz also (somewhat inconsistently) asserts that I believe it should be expanded “to make it available to all individuals.”<sup>6</sup> Rosich-Schwartz maintains that “[as] stated by Professor Orth, one of the main criticisms of the tenancy by the entirety is that it looks more like a joint tenancy than the original tenancy by the entirety ever appeared.”<sup>7</sup> Rosich-Schwartz states as my position that the tenancy should be abolished because it is now practically indistinguishable from a joint tenancy<sup>8</sup> and that “the tenancy by the entirety does not provide the ‘easy escape hatch’ that is currently provided to joint tenants in the form of partition or alienation of the property.”<sup>9</sup> While Rosich-Schwartz cites only my article, she states that “[o]ther critics argue that current judicial decisions confuse and complicate the application of tenancy by the entirety, creating the need for improvisations of the traditional version of the tenancy.”<sup>10</sup> According to Rosich-Schwartz, I state that manipulation by a large majority of jurisdictions “signals the demise of the tenancy.”<sup>11</sup> “Another criticism of the tenancy by the

3. *In Re Estate of Johnson*, 739 N.W.2d 493, 493 (Iowa 2007).

4. Rosich-Schwartz, *supra* note 1, at 49. The other principal critic identified by Rosich-Schwartz is Professor Peter Carrozzo. *Id.* at 50. The present author is speaking only for himself and not for Professor Carrozzo.

5. *Id.* at 51 n.188 (citing John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 47-48 (1997)).

6. *Id.*

7. *Id.* at 52 (citing Orth, *supra* note 5, at 48).

8. *Id.*

9. *Id.* at 53 (citing Orth, *supra* note 5, at 44). If this is a criticism, Rosich-Schwartz is also a critic. She advocates for the traditional tenancy by the entirety precisely because it prevents “unilateral conveyances.” *Id.* at 52.

10. *Id.* at 53 (citing Orth, *supra* note 5, at 46).

11. *Id.* at 54 n.206 (citing Orth, *supra* note 5, at 46).

entirety concerns the unilateral creditors' rights upon the property."<sup>12</sup> Relying again only on my article, Rosich-Schwartz argues that "[m]ost critics believe that this is the biggest flaw of the tenancy by the entirety, because the tenancy denies attachment of creditors' rights based on a false belief that marriage is a unity of two becoming one."<sup>13</sup>

The only reservation I have in wholeheartedly agreeing with Rosich-Schwartz is that I am Professor Orth! Rather than advocating that the tenancy by the entirety should be "abolished, altered, or limited,"<sup>14</sup> I simply recounted "the strange career of the common-law marital estate" in my 1997 article repeatedly cited by Rosich-Schwartz.<sup>15</sup> In fact, I expressly recognized in that article that at least one reason some states retain the traditional tenancy by the entirety is "to provide protection to marital property"<sup>16</sup> and that recognition of the traditional tenancy by the entirety in many states compensates for "a miserly homestead exemption."<sup>17</sup> Like Rosich-Schwartz, I considered the possibility that the tenancy would someday be extended to couples that are not, "for one reason or another, legally united" (that is, to same-sex partners) and concluded that the tenancy by the entirety could "probably survive the shock."<sup>18</sup> Indeed, I ended my article with the observation that the tenancy was a hardy survivor for the simple reason "that people are familiar with it and that, by and large, it works."<sup>19</sup> So convinced am I of the advantages of the traditional tenancy by the entirety, that my wife and I have held our marital residence for the last thirty years in that form of concurrent ownership.<sup>20</sup>

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12. *Id.* at 54 (citing Orth, *supra* note 5, at 46).

13. *Id.* (citing Orth, *supra* note 5, at 46). Rosich-Schwartz notes that I wrote in my 1997 article that treating two persons as one requires "Alice-in-Wonderland logic." *Id.* at n.211. The problem I had in mind could just as easily be demonstrated by a Gilbert and Sullivan operetta, *The Gondoliers*, in which two claimants to the throne are treated as one king until the correct monarch can be identified:

Now, although we act as *one* person, we are, in point of fact, *two* persons. . . . It is a legal fiction, and legal fictions are solemn things. . . . It's all very well to say we act as one person, but when you supply us with only one ration between us, I should describe it as a legal fiction carried a little too far.

W.S. Gilbert, *The Gondoliers*, in *THE COMPLETE ANNOTATED GILBERT AND SULLIVAN* 921 (Ian Bradley ed., 1996).

14. *Id.* at 49 (citing Orth, *supra* note 5, at 47-48).

15. Orth, *supra* note 5, at 35.

16. *Id.* at 42.

17. *Id.* at 48.

18. *Id.*

19. *Id.* at 48-49.

20. Deed from Thomas Bain Kirchner and wife, Genevieve O. Kirchner to John V. Orth and wife, Noreen Nolan Orth, (Feb. 26, 1979) (recorded at Orange County, N.C., Registry of Deeds, Book 306, page 663). By law in North Carolina any conveyance of real property to a husband and

In defiance of my supposed criticisms of the traditional tenancy by the entirety, Rosich-Schwartz argues that “[m]ost couples need asset protection against unilateral conveyances and unilateral creditors, due to the permanent aspect of their relationship.”<sup>21</sup> She assumes that this “permanent aspect” exists only in “quasi-matrimonial relationships similar to marriage,” and that “married couples, common law marriages, and same-sex partners . . . are the only quasi-matrimonial relationships currently in existence.”<sup>22</sup> “[U]nmarried individuals owning property outside of any type of permanent relationship do not need the asset protection available to married couples and mutual beneficiaries, because most of this property is later devised, sold, or otherwise encumbered as they wish.”<sup>23</sup> For these couples, Rosich-Schwartz seems to think that the alternatives of joint tenancy or tenancy in common are adequate.

Tenancy by the entirety is only one of the many advantages the law offers to married couples, and while extending its availability to same-sex partners may be desirable, it would not alone be sufficient to make such partnerships the legal equivalent of marriage. In a 2003 article that Rosich-Schwartz did not cite, I reflected on the debate concerning same-sex marriage.<sup>24</sup> I reviewed the consequences of legal marriage, particularly the property consequences, including the availability of tenancy by the entirety, and observed that same-sex partners, if excluded from legal marriage, can by other arrangements approximate only some of these consequences. I then considered whether legal recognition of some form of parallel legal

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wife vests title in them as tenants by the entirety “unless a contrary intention is expressed in the conveyance.” N.C. GEN. STAT. § 39-13.6(b) (2007).

21. Rosich-Schwartz, *supra* note 1, at 51. While I actually agree with Rosich-Schwartz concerning the desirability of protecting couples against “unilateral conveyances,” I am less comfortable with the blanket protection afforded by the traditional tenancy by the entirety against “unilateral creditors.” As to creditors who voluntarily extended credit to one spouse under circumstances where the marital status of the debtor was known or knowable, I agree with her; but I am uneasy where the creditor is a tort creditor, who had no opportunity to examine the creditworthiness of the tortfeasor.

22. *Id.* at 50. I am not sure why Rosich-Schwartz describes married couples as in a “quasi-matrimonial relationship.” Married couples are in the only “matrimonial relationship” known to the law. Common law marriages, where recognized, also create a “matrimonial relationship.” In fact, the only difference between “married couples” and “common law marriages” concerns the formality necessary to enter into the legal relationship, although the lack of documentary evidence of the relationship complicates the recognition of tenancy by the entirety. *See, e.g., In Re Venezia*, 267 B.R. 695, 699 (Bankr. E.D. Pa. 2001) (concerning whether a couple established common law marriage). In the remainder of this article, I will not discuss common law marriages, focusing instead on same-sex partners.

23. Rosich-Schwartz, *supra* note 1, at 51.

24. John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage*, 3 NEV. L.J. 560 (2003) [hereinafter Orth, *Night Thoughts*].

relationship—“reciprocal beneficiary relationship,”<sup>25</sup> “civil union,”<sup>26</sup> “domestic partnership,”<sup>27</sup> “civil partnership”<sup>28</sup>—providing all the consequences of legal marriage (including tenancy by the entirety) would eliminate the objections to excluding same-sex partners. In other words, I wondered whether there is independent significance to the label “marriage.” Finally, I asked how, if we decide to extend the consequences of legal marriage, we should decide which same-sex partners to include. In other words, are all same-sex partners the same?

The last question was prompted by a story I told about two sisters, Maud and Mary, who lived together for 93 years.<sup>29</sup> Their relationship entitled them to no legal benefits. They could not take title to real property as tenants by the entirety (where that estate is recognized) or hold it as community property (where married persons hold property under that regime). As a result, they lost valuable protections from creditors’ claims and advantages with respect to inheritance and estate taxation. They could not check the box “married filing jointly” on their state and federal income tax returns, which would have entitled them to reduced rates of taxation.<sup>30</sup> They were denied survivors’ benefits from private pension plans and from Social Security. I concluded that, although their relationship was as permanent as humanly possible, “[t]he law simply ignored the fact that they had lived together as a couple for nearly a century.”<sup>31</sup>

I realized at the time that my original reflections were not “likely to please all the participants in the debate concerning same-sex marriage.”<sup>32</sup>

25. HAW. REV. STAT. § 572C-2 (2007). The consequences of marriage under the Hawaiian statute are available to all couples “who are legally prohibited from marrying”—not only “two individuals who are of the same gender” (that is, same-sex partners), but also “two individuals who are related to one another.” The statute expressly includes “a widowed mother and her unmarried son”—an example, as I recognized in my earlier reflections, that implicates a “common stereotype of the male homosexual.” Orth, *Night Thoughts*, *supra* note 24, at 570 n.59.

26. CONN. GEN. STAT. § 46b-38nn (2006); N.H. REV. STAT. ANN. § 457:A (2007); N.J. REV. STAT. ANN. § 37:1-29 (2006); VT. STAT. ANN. tit. 15 § 1201 (1999).

27. CAL. FAM. CODE §§ 297-299.6; 2006 D.C. Law 16-79; 2007 Or. Laws Ch. 99; *see also* Me. Legis. Serv. ch. 672 (H.P. 1152; L.D. 1579); *id.* ch. 347 (H.P. 1256; L.D. 1703).

28. Civil Partnership Act, c. 33 2004 (Eng. & Wales); *see* Andrew Flagg, Note, *Civil Partnership in the United Kingdom and a Moderate Proposal for Change in the United States*, 22 ARIZ. J. INT’L & COMP. L. 613, 614 (2005) (analyzing the British Civil Partnership Act and advocating similar legislation in the United States).

29. Orth, *Night Thoughts*, *supra* note 24, at 560-61.

30. *Id.* at 564-65. In my original reflections, I recognized that for some taxpayers marriage is actually a disadvantage, incurring the so-called “marriage penalty.” *Id.*

31. *Id.* at 561.

32. *Id.* at 569. I was surprised to see that a prominent opponent of same-sex marriage included my reflections in a list of articles supporting, lauding, or endorsing the argument in favor. Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 BYU J. PUB. L. 309, 309 & app. A (2003-04). Professor Wardle admitted that he had not read all the articles he mentioned. *Id.* He must have skipped my article.

To the extent that the demand of same-sex partners was a demand for broad social acceptance of their sexual relationship, I recognized that it might not be satisfied by permitting euphemistic substitutes, even if the property consequences of these new legal arrangements were identical to the property consequences attached to marriage.<sup>33</sup> And by asking whether couples not bound by a sexual relationship might also in fairness have a claim to the same legal consequences as marriage (or its substitute), I wondered whether the debate was “about fairness in general or about fairness to a particular sexual minority?”<sup>34</sup> My proposal, in other words, was to expand the discussion to include all partners who were excluded for whatever reason. “If sex could be disregarded,” I wrote, “the debate concerning same-sex marriage could be transformed into a discussion concerning proper criteria for admission to a legal relationship involving social and economic support: less sexy, but perhaps thereby more productive.”<sup>35</sup> Two cases decided by prominent courts within weeks of one another in 2008 deal with some of the issues I raised in that article.<sup>36</sup>

## II. ILLUSTRATIVE JUDICIAL OPINIONS

### A. *IN RE* MARRIAGE CASES

On May 15, 2008, the California Supreme Court decided *In re Marriage Cases*, holding that the state could not constitutionally limit legal marriage to opposite-sex couples.<sup>37</sup> The California Constitution’s guarantees of privacy and due process<sup>38</sup> encompassed a constitutional right to

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33. As a property lawyer, I am perhaps more concerned with consequences than with names. Whether easement or irrevocable license, inter vivos gift or declaration of trust, real covenant or equitable servitude, will or will substitute—in property law, if it comes to the same thing, the label does not really matter. But as a legal historian, I am uncomfortably aware that arguing that the label does not matter may, when social relations are concerned, be reminiscent of the United States Supreme Court’s dismissal of the claim that a statute requiring “separate but equal” facilities for the black race was a “badge of inferiority.” “If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

34. Orth, *Night Thoughts*, *supra* note 24, at 569-70.

35. *Id.* at 571.

36. *In re Marriage Cases*, 183 P.3d 384, 384 (Cal. 2008); *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. (2008), available at <http://echr.coe.int/echr/en/hudoc>.

37. *In re Marriage Cases*, 183 P.3d at 402. On November 4, 2008, California voters adopted Proposition 8 adding Section 7.5 to Article I of the California Constitution: “Only marriage between a man and a woman is valid or recognized in California.”

38. CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”); *id.* § 7(a) (“A person may not be deprived of life, liberty, or property without due process of law. . . .”). While basing its decision on the state constitution, the California Supreme Court found support for its

marry, that is, “the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.”<sup>39</sup> The constitutional guarantee of equal protection<sup>40</sup> meant that a legal distinction could not be drawn without justification between couples essentially similar. Because the majority found that both same-sex and opposite-sex couples “wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities,”<sup>41</sup> they held that both were entitled to the legal status of marriage.<sup>42</sup>

Although California’s Domestic Partnership Act conferred nearly identical legal consequences on registered same-sex domestic partners as on married couples,<sup>43</sup> it was constitutionally inadequate because it denied same-sex partners the label “marriage.”<sup>44</sup> Assigning a different designation to same-sex partners while reserving the historic designation of “marriage” exclusively for opposite-sex couples posed, the court held, “a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.”<sup>45</sup> In 2004, the Massachusetts Supreme Judicial Court reached the same conclusion on similar facts,<sup>46</sup> as did the Connecticut Supreme Court in 2008<sup>47</sup>

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reasoning in federal cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), the birth control case, which it referred to as “seminal.” *In re Marriage Cases*, 183 P.3d at 432.

39. *In re Marriage Cases*, 183 P.3d at 399 (emphasis added).

40. CAL. CONST. art. I, § 7(a) (“A person may not be . . . denied equal protection of the laws . . .”).

41. *In re Marriage Cases*, 183 P.3d at 435.

42. *See id.* at 402.

43. *See id.* at 416 (describing nine minor differences that remained).

44. CAL. FAM. CODE § 297 (b)(5)(B). The California Domestic Partnership Act also made domestic partnership available to opposite-sex couples if either is eligible for Social Security and over 62 years of age. It is unclear whether this part of the Act is still valid.

45. *In re Marriage Cases*, 183 P.3d at 435. The majority thought a different label was particularly likely to imply second-class citizenship “because of the widespread disparagement that gay individuals historically have faced.” *Id.* at 401-02.

46. Opinion of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”); *see also* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding state marriage laws unconstitutional insofar as they denied marriage to same-sex couples).

47. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 407, 412 (Conn. 2008) (holding Connecticut’s civil union statute, CONN. GEN. STAT. § 46b-38nn, unconstitutional).

and the Iowa Supreme Court in 2009,<sup>48</sup> although a number of other state courts have reached the contrary conclusion about the constitutional necessity of recognizing same-sex marriage.<sup>49</sup>

In my earlier reflections, I suggested that “[t]heoretically the simplest, but practically the most difficult, solution to the problem would be the elimination of the legal status of marriage.”<sup>50</sup> But the California Supreme Court held that not only is there a constitutional “right to marry” but also that it obligates the state to take “at least some affirmative action to acknowledge and support the family unit.”<sup>51</sup> California must, the court held, “take affirmative action to grant official, public recognition to the couple’s relationship as a family.”<sup>52</sup>

#### B. BURDEN V. UNITED KINGDOM

Only a few weeks earlier, on April 29, 2008, the Grand Chamber of the European Court of Human Rights decided *Burden v. The United Kingdom*, holding that the United Kingdom, which recognizes same-sex civil partnerships, can refuse legal recognition to a couple formed by two co-habiting sisters.<sup>53</sup> Like Maud and Mary in my original reflections, the Burden sisters have lived together “in a stable, committed and mutually supportive relationship all their lives.”<sup>54</sup> For the last thirty-one years, they have shared a house built on land they inherited from their parents, real property that has significantly appreciated in value.<sup>55</sup> They hold title to the house and adjoin-

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48. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (“the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken”).

49. *See generally* *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App.); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App.). *But see* *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006) (holding that constitutional guarantee of equal protection required that legislature either amend marriage statutes to admit same-sex couples or grant domestic partnerships same rights as married couples).

50. Orth, *Night Thoughts*, *supra* note 24, at 567.

51. *In re Marriage Cases*, 183 P.3d 384, 426 (Cal. 2008). The Court did not decide whether the label “marriage” is a “core element of the state constitutional right to marry” or whether the state could constitutionally “assign a name other than marriage [as the official designation of the family . . . relationship] for all couples.” *Id.* at 434.

52. *Id.* at 427.

53. *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 65-66 (2008), available at <http://echr.coe.int/echr/en/hudoc>. The case, filed on March 29, 2005, had previously been heard by a Chamber within the Fourth Section of the Court, which also had ruled against the sisters. *Burden and Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 4 (Chamber 2006), available at <http://echr.coe.int/echr/en/hudoc>.

54. *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 10 (2008), available at <http://echr.coe.int/echr/en/hudoc>.

55. *Id.*

ing land as joint tenants with the right of survivorship.<sup>56</sup> Each has savings and investments in her sole name, and each has executed a will leaving all her property to the other.<sup>57</sup> Age eighty-three and ninety, the sisters have an “awful fear” that on the death of the first to die, the survivor will be forced to sell the real estate to satisfy the inheritance tax, requiring her to move from her familiar surroundings.<sup>58</sup> By contrast, the United Kingdom allows married couples and registered civil partners to pass property tax-free to the survivor, but civil partnership is not available to the sisters because they are “within the prohibited degrees of relationship.”<sup>59</sup>

The sisters’ suit was based on the argument that they will be treated differently at the death of the first to die from other persons “in relevantly similar situations” and that this constitutes unlawful discrimination in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>60</sup> In other words, the sisters argued that they were like a couple formed by marriage or civil partnership, but denied the legal consequences of those relationships. A majority of judges who heard the case at first instance in a Chamber within the Fourth Section of the Court agreed with the applicants that they were indeed similarly situated, but deferred to

56. *Id.* para. 11.

57. *Id.*

58. *Id.* para. 32. One of the dissenting judges in the Chamber was moved by the fact that “[t]his house is not simply a piece of property—this house is something with which they have a special emotional bond, this house is their home.” *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 1-2 (2006) (Pavlovski, J., dissenting), available at <http://echr.coe.int/echr/en/hudoc>. Of course, the sisters’ financial advisor should have recommended insurance on each sister’s life in an amount sufficient to satisfy the tax. Given the sisters’ advanced ages, this is now probably impracticable as a solution. In any event, married couples and civil partners do not need to bear the expense of insurance in order to protect the survivor from a forced sale.

59. *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 17 (2008), available at <http://echr.coe.int/echr/en/hudoc>. The Civil Partnership Act 2004 provides that “[a] couple is eligible to form a civil partnership if they are (i) of the same sex (ii) not already married or in a civil partnership (iii) over the age of 16 [and] (iv) not within the prohibited degrees of relationship.” *Id.*

60. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221. “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

*Id.*

the government on the design of its system of taxation.<sup>61</sup> In terms of European jurisprudence, the United Kingdom was entitled to a “wide margin of appreciation.”<sup>62</sup> At the sisters’ request, the case was heard anew by the Grand Chamber of the Court.

The legal representative of the United Kingdom denied that there is a “true analogy” between the sisters and legal couples, because the sisters are “connected by birth rather than by a decision to enter into a formal relationship recognised by law.”<sup>63</sup> When the Civil Partnership Bill was in progress of passage through parliament, a government supporter declared that “[t]his Bill is about same-sex couples whose relationships are completely different from those of siblings.”<sup>64</sup> In response, the sisters argued that they “had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners.”<sup>65</sup> Furthermore, they claimed that their choice was “just as much an expression of their respective self-determination and personal development as would have been the case had they been joined by marriage or a civil partnership.”<sup>66</sup>

The Grand Chamber concluded, on the contrary, that “the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners.”<sup>67</sup> The essential difference, according to the majority of judges in the Grand Chamber, is that siblings are

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61. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

62. *Burden and Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 61 (2006), available at <http://echr.coe.int/echr/en/hudoc>. Two dissenting judges in the Chamber, while agreeing that states were entitled to a “wide margin of appreciation,” nonetheless thought that “once the legislature decides that a permanent union of two persons could or should enjoy tax privileges, it must be able to justify why such a possibility has been offered to some unions while continuing to be denied to others.” *Id.* para. 1-2 (Bonello and Garlicki, JJ., dissenting).

63. *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 61 (2008), available at <http://echr.coe.int/echr/en/hudoc>. The government of the United Kingdom detailed the differences between the sisters and legal couples:

The very essence of their relationship was different, because a married or Civil Partnership Act couple chose to become connected by a formal relationship, recognised by law, with a number of legal consequences; whereas for sisters, the relationship was an accident of birth. Secondly, the relationship between siblings was indissoluble, whereas that between married couples and civil partners might be broken. Thirdly, a married couple and civil partners made a financial commitment by entering into a formal relationship recognised by law and, if separated, the court could divide their property and order financial provision to be made by one partner to the other. No such financial commitment arose by virtue of the relationship between siblings.

*Id.* para. 49.

64. *Id.* para. 20 (quoting Lord Alli, a Labour peer).

65. *Id.* para. 53.

66. *Id.*

67. *Id.* para. 62.

joined by consanguinity, while marriage and civil partnership is forbidden to persons “within the prohibited degrees of relationship.”<sup>68</sup> According to the majority, “[r]ather than the length or the supportive nature of the relationship, what is determinative, is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature.”<sup>69</sup> Since the sisters did not have such a publicly recognized contract, they were more similar to an unmarried heterosexual couple or an unregistered civil partnership. The sisters’ argument that they did not have “a publicly recognized contract” because the public would not recognize their contract was unavailing, leading one of the dissenting judges to say that he found the majority’s argument “circular, or I might even say concentric.”<sup>70</sup>

Although the majority discreetly avoided mentioning the sexual basis of marriage and civil partnership, two judges writing separately did. Judge Björgvinsson, concurring in the result, recognized the “sexual nature of the relationship” as one of the “important differences” between the sisters and a married or civil partnership couple but nonetheless thought the sisters had more in common than not with such couples for purposes of inheritance tax.<sup>71</sup> Like the Chamber, however, he would have allowed the state discretion to decide when and to what extent to provide exemptions.<sup>72</sup> Judge Zupančič, dissenting, bluntly asked whether it was the nature of the physical relationship that distinguished the couples: “Is it having sex with one another that provides the rational relationship to a legitimate government interest?”<sup>73</sup>

### III. CONCLUSION

It is, of course, a bit unfair to read the opinion of the European Court of Human Rights together with the opinion of the California Supreme Court

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68. *Id.* para. 17.

69. *Id.* para. 62, 65.

70. *Id.* para. 3 (Borrego Borrego, J., dissenting). It is at least possible that the result in the case would have been different if the sisters had begun by seeking, and being denied, registration as a civil partnership. In explanation of their failure to take this step, the sisters stated that “[t]hey had not raised a general complaint about their preclusion from entering into a civil partnership, because their concern was focused upon inheritance tax discrimination and they would have entered into a civil partnership had that route been open to them.” *Id.* para. 53. On the other hand, because the majority found that “the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners,” that complaint too would probably have been rejected. *Id.* para. 62.

71. *Id.*

72. *Id.* (Björgvinsson, J., concurring).

73. *Id.* (Zupančič, J., dissenting). Judge Borrego Borrego added that “[t]his judgment of the Grand Chamber will no doubt be described as politically correct.” *Id.* (Borrego Borrego, J., dissenting).

because courts properly answer only the questions asked. The California Supreme Court was not asked whether it was a violation of privacy, due process, or equal protection to exclude cohabiting sisters from the benefits of marriage or domestic partnership.<sup>74</sup> The court did, however, emphasize that its conclusion that “the constitutional right to marry properly must be interpreted to apply to gay individuals and gay couples does not mean that this constitutional right similarly must be understood to extend to polygamous or incestuous relationships.”<sup>75</sup> The court recognized a “strong and adequate justification” for denying state recognition to such relationships “because of their potentially detrimental effect on a sound family environment.”<sup>76</sup> Marriage between siblings may continue to be prohibited in California, even presumably between sisters who did not have (or desire) an incestuous relationship. But, then, the English sisters were not asking to be allowed to marry, only to secure the economic benefits accorded married couples and same-sex partners. Rather than sex, they were concerned about those other perennials, death and taxes.

Like the California Supreme Court, the European Court of Human Rights did not have to decide whether denial of the label “marriage” to same-sex partners was discriminatory.<sup>77</sup> As a dissenting judge in the Grand

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74. The California Domestic Partnership Act defined “domestic partners” as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” CAL. FAM. CODE § 297(a) (Deering 2006). The partners may not be “related by blood in a way that would prevent them from being married to each other in this state.” *Id.* § 297(b)(3). The Act also made domestic partnership available to opposite-sex couples if either is eligible for Social Security and over 62 years of age. *Id.* § 297(b)(5)(B). It is unclear whether such couples must now accept the label “marriage.” If domestic partnership remains available for such couples, perhaps room could be made for the elderly sisters by eliminating the restriction on blood relatives. Counsel for the sisters pointed out to the Chamber of the European Court of Human Rights that “there was no requirement in the 2004 [Civil Partnership] Act for those wishing to enter into a civil partnership to be in a sexual relationship with each other.” *Burden and Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 50 (2006), available at <http://echr.coe.int/echr/en/hudoc>. The Hawaii statute extends the legal consequences of marriage to all couples “who are legally prohibited from marrying”—not only “two individuals who are of the same gender” (that is, same-sex partners), but also “two individuals who are related to one another.” HAW. REV. STAT. § 572C-2 (2006).

75. *In re Marriage Cases*, 183 P.3d 384, 434 n.52 (Cal. 2008).

76. *Id.*

77. The majority of judges on the California Supreme Court thought that “there is no question but that these two categories of individuals [opposite-sex couples and same-sex couples] are sufficiently similar to bring into play equal protection principles that require a court to determine whether distinctions between the two groups justify the unequal treatment.” *Id.* at 435 n.54 (quoting from *People v. Hofsheier*, 129 P.3d 29, 37 (Cal. 2006)). Two dissenting judges in the Chamber of the European Court of Human Rights agreed. *Burden and Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 61 (2006), available at <http://echr.coe.int/echr/en/hudoc>. See *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. (Borrego, Borrego, J., dissenting) (2008) available at <http://echr.coe.int/echr/en/hudoc>.

Chamber pointed out, the sisters were already a “same-sex couple.”<sup>78</sup> The difficulty they faced was not their sex, but their family relationship. Since marriage was not involved, the incest taboo was not implicated in the European case. The United Kingdom seemingly had the opportunity to open civil partnership to sisters in appropriate cases.<sup>79</sup> In fact, an amendment actually adopted in the House of Lords during the Civil Partnership Bill’s passage through parliament would have done just that: extend civil partnership and the associated inheritance tax concession to family members “within the ‘prohibited degrees of relationship’” if they (i) were over 30 years of age, (ii) had co-habited for at least 12 years, and (iii) were not already married or in a civil partnership with another person.<sup>80</sup> But the House of Commons dropped the amendment because the Bill was “not the appropriate legislative base” on which to deal with the “concerns of relatives.”<sup>81</sup>

The California Supreme Court held that “marriage” was the proper label for the “official family relationship of same-sex couples”<sup>82</sup> and insisted upon the need for “official, public recognition” of same-sex partners’ “relationship as a family.”<sup>83</sup> The European Court of Human Rights seemed to agree that a family could be formed only by choice; the sisters were bound by consanguinity, not by “a public undertaking, carrying with it a body of rights and obligations of a contractual nature.”<sup>84</sup> Family by choice is a novel concept, at least in the common law, which long based its family law on relationships of blood—on consanguinity.<sup>85</sup> In a paradox worthy of a

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78. *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. (Borrego Borrego, J., dissenting) (2008), available at <http://echr.coe.int/echr/en/hudoc>.

79. Orth, *Night Thoughts*, *supra* note 24, at 569 (footnote omitted) (observing in my earlier reflections that “[t]wo siblings living together for a lifetime could be added without too much trouble. But what if there were three—or more?”). The Irish government, in its submission to the Grand Chamber of the European Court of Human Rights, seems to have been concerned about the same thing: “It would be truly extraordinary if the enactment of legislation conferring rights upon same-sex couples who chose to register their relationship could have the effect of requiring the State to extend the entitlements thereby conferred to a potentially infinite class of persons in cohabiting relationships.” *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 57 (2008), available at <http://echr.coe.int/echr/en/hudoc>.

80. *Id.* para. 19.

81. *Id.* para. 20 (quoting Jacqui Smith, M.P., Deputy Minister for Women and Equality). I do not know whether the amendment adopted in the House of Lords—or the Burden sisters’ lawsuit—was the product of political maneuvering.

82. *In re Marriage Cases*, 183 P.3d 384, 434 (Cal. 2008).

83. *Id.* at 427.

84. *Burden v. The United Kingdom*, App. No. 13378/05 Eur. Ct. H.R. para. 65 (2008), available at <http://echr.coe.int/echr/en/hudoc>.

85. For centuries inheritance was limited to blood relatives. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 208-36 (1765) (listing canons of inheritance). Except for the addition of surviving spouses, it generally still is, which is why, in the absence of a will, sisters can inherit from one another. See also Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971) (noting that until legal adoption was

Gilbert and Sullivan operetta,<sup>86</sup> the European Court's holding was that the sisters could not form a family because they already were one!—albeit one that carried none of the legal consequences of a family of choice, formed by marriage or civil partnership.

Despite modern society's openness about the biological facts of life, the judges in these cases, both in California and in Europe, seem surprisingly reticent on the subject, preferring to talk about family, rather than about sex. Yet the obvious explanation of the results in both cases seems to be a positive judgment about the sexual basis of same-sex partnerships, civil and domestic. If the partners' sex life is qualitatively the same as that of a traditional married couple's, then "marriage" is not only the right name, but the only name, for their relationship. And if a sexual bond is essential to a marriage or civil partnership, then the sisters' relationship, however "stable, committed and mutually supportive" but asexual, is qualitatively different.

Rather than defending the traditional tenancy by the entirety against imagined critics, Rosich-Schwartz could more profitably have labored to defend her argument that the tenancy should be extended to same-sex partners, but no further. In light of the frequency of divorce among married couples and separation among same-sex partners, as well as the lifelong relationship of certain siblings, the answer might not have been as simple as the conclusory statement that only couples in "quasi-matrimonial relationships, similar to marriage" have "any type of permanent relationship."<sup>87</sup>

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recognized—in England by statute in 1926, in America by state legislation beginning around the middle of the nineteenth century—"children by choice" were unknown).

86. Cf. W.S. Gilbert, *The Pirates of Penzance* (1879), in THE COMPLETE ANNOTATED GILBERT AND SULLIVAN 239-41 (Ian Bradley ed. 1996) ("a paradox, a paradox, A most ingenious paradox!"—referring to articles of apprenticeship expiring on the apprentice's twenty-first birthday when he was born on "leap day," Feb. 29).

87. Rosich-Schwartz, *supra* note 1, at 51.