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The Enforcement of Cohabitation Agreements: Theories of Recovery for the Meretricious Spouse

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Comment

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I. INTRODUCTION

The family is the basic unit of American society. Our present-day notion of family is one which has evolved over time and varied across civilizations. Marriage is the foundation of the family and, as such, is accorded special recognition and protection by our legal system. While the legal incidents of marriage have been defined differently in past years,[1] the state has always been a "silent partner in every wedding of a woman and a man."[2]

Although the prevalence of divorce in this country[3] has generated public concern about the instability of modern-day American marriages,[4] approximately two-thirds of all adults in the United States today are married and living with their spouses.[5] This tends to support the view that marriage, as a social and legal institution, is still very much alive.[6]

Because of the importance of marriage in our society, the marital relation is accorded legal status. Individuals assume special legal obligations upon acquiring marital status[7] and are afforded special protections upon the dissolution of the union.[8]

Regardless of the popularity of marriage and its social and legal

1. For a discussion of the rights and obligations of married couples in the 19th century, see generally T. REEVE, THE LAW OF BARON AND FEMME (3d ed. 1862).
2. H. BASS & M. REIN, DIVORCE OR MARRIAGE, A LEGAL GUIDE 2-3 (1976).
3. In 1975, for example, there were more divorces than new marriages. *Id.* at 3.
4. Recent statistics demonstrate that over 35% of marriages end in divorce within 10 years. *Id.*
5. Shaffer, *Marriage: Changing Institution*, in EDITORIAL RESEARCH REPORTS ON THE WOMEN'S MOVEMENT 36 (1973). The number of marriages is in part attributable to the popularity of remarriage. *Id.* at 37.
6. H. GRUNEBAUM & J. CHRIST, CONTEMPORARY MARRIAGE: STRUCTURE, DYNAMICS, AND THERAPY 1 (1976). The authors note that although people today tend to marry later in life than did men and women 20 years ago, "they still marry in overwhelming numbers, and they marry again and again." *Id.*
7. *See* notes 14-19 & accompanying text *infra*.
8. *See* notes 14-19 & accompanying text *infra*.

endorsement, some men and women have chosen to cohabit without legally assuming the marital status and its corresponding duties and privileges. The tendency of couples to cohabit without legal marriage has been increasing in recent years.[9] Many of these relationships are stable family ones of long duration,[10] appearing in many respects like lawful marital relationships. However, the lack of a formal, legally binding commitment distinguishes the nonmarital from the marital relationship, and the unmarried couple does not legally assume the mutual rights and obligations which apply to the married couple under state law.[11]

As the tendency of couples to cohabit outside of marriage increases, so do social and legal concerns. Of particular concern to the legal system is how to define the rights of unmarried cohabitors to the property acquired by either or both of the parties during the relationship. The developing law should seek to enhance wise social policies by balancing society's need to encourage

9. As of March, 1978, there were over one million unmarried couples living together in the United States. Lorio, *Concubinage and Its Alternatives: A Proposal For a More Perfect Union*, 26 LOY. L. REV. 1, 3 (1980). The rapid growth in the number of nonmarital relationships has apparently been within the last 20 years. Between 1960 and 1970, the number of couples who cohabited outside of marriage increased 800%. Rhine & Staubus, *Workers Compensation and The Meretricious Spouse: Sixty-Two Years of Irreconciliable Differences*, 15 CAL. W.L. REV. 1, 18 (1979).

10. Many of the cases concerning the rights of meretricious spouses involve relationships of over 10 years duration. *See, e.g.*, Burgess Constr. Co. v. Lindley, 504 P.2d 1023 (Alaska 1972) (19 years); Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953) (33 years); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962) (18 years); Hill v. Westbrook's Estate, 39 Cal. 2d 458, 247 P.2d 19 (1952) (16 years); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932) (11 years); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975) (12 years); Lovinger v. Anglo Cal. Nat'l Bank, 243 P.2d 561 (Cal. App. 1952) (14 years); Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977) (18 years); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (15 years); Brown v. Tuttle, 80 Me. 162, 13 A. 583 (1888) (13 years); West v. Barton-Malow Co., 394 Mich. 334, 230 N.W.2d 545 (1975) (13 years); Joan S. v. John S., — N.H. —, 427 A.2d 498 (1981) (16 years); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950) (24 years); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (15 years); Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981) (20 years); Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980) (23 years); McCullon v. McCullon, 96 Misc. 2d 962, 410 N.Y.S.2d 226 (Sup. Ct. 1978) (28 years); Marum v. Marum, 21 Misc. 2d 474, 194 N.Y.S.2d 327 (Sup. Ct. 1959) (17 years); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976) (19 years); Latham v. Hennessey, 87 Wash. 2d 550, 554 P.2d 1057 (1976) (15 years); *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972) (16 years); Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974) (20 years); Smith v. Smith, 255 Wis. 96, 38 N.W.2d 12 (1949) (11 years). Note that when compared to the present duration of many *legal* marriages, *see* note 4 *supra*, at least some of the nonmarital relationships are more stable.

11. However, the nonmarital spouses may have the same rights and obligations as to children born of the union. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979).

legal marriage with the individual's need for equitable results. This Comment will explore the developing legal protections available in nonmarital relationships, and the corresponding problems and public policy concerns arising from the legal recognition, and *non*recognition, of the property rights of unmarried cohabitors.

II. DEFINING THE PROBLEM: THE LEGAL DISTINCTIONS BETWEEN MARRIED SPOUSES, PUTATIVE SPOUSES, AND MERETRICIOUS SPOUSES

In order to promote public policies regarding marriage, lawmakers have created legal distinctions between the property rights of cohabiting couples depending upon the classification of the relationship. These distinctions become significant if one of the cohabitors dies or if the couple decides to terminate the relationship. In either event, the definition of the couple's legal status largely governs whether state inheritance laws or marriage and divorce acts apply in determining the rights of the parties.

There are three classifications of relationships which define the legal status of a man and a woman who live together as spouses: legally married spouses, putative spouses, and meretricious[12] spouses. The distinctions between these three classifications are important, as each carries with it differing potential property rights of the parties.[13]

Legally married spouses are those who are considered to be married under the laws of the state.[14] The marital relation and its incidents are largely defined by statute.[15] An agreement between legally married persons to change the statutory incidents of marriage is void and unenforceable on public policy grounds.[16] Such an agreement may also be unenforceable for failure of consideration, as the spouses have pre-existing statutory duties to one another.[17] Thus, while the marital contract is *voluntarily* assumed

12. The term "meretricious" is defined as "[o]f the nature of unlawful sexual connection. The term is descriptive of the relation sustained by persons who contract a marriage that is void by reason of legal incapacity." BLACK'S LAW DICTIONARY 1140 (4th rev. ed. 1968).

13. Comment, *Property Rights of Unmarried Cohabitants—A Proposal*, 14 CAL. W.L. REV. 485, 487 (1979).

14. Comment, *That Was No Wife, That Was My Lady: Is Marvin v. Marvin Appropriate For Kentucky?*, 66 KY. L.J. 707, 707 (1977-78).

15. H. BASS & M. REIN, *supra* note 2, at 2.

16. Hunter, *Essay On Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1067-69 (1978). However, the author noted that express contracts between married persons concerning a subject outside of the marital relationship may be enforceable. *Id.* at 1070-71.

17. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1259-60 (1974). Weitzman noted that particularly those contracts

by husband and wife, it may also be considered *publicly* imposed, because of the inability of the parties to significantly alter their statutory rights and obligations.[18] The marital relationship is consequently viewed as a *status*-contract, due to the state's third-party interest in the marriage agreement.

Public policy considerations play an important role in defining the legally binding rights and obligations which are assumed by parties entering into a marital relationship. Certain public policies, such as promoting the stability of relationships, the proper care of children, and the duties of support, can be enhanced by statutory manipulation of the parties' rights and obligations during marriage and upon termination of the relationship. Among the rights and obligations of married couples are: (1) the right to live together in marital cohabitation, (2) the power to confer legitimacy on children, (3) the assumption of mutual obligations of marital and child support, (4) the power to declare a marital homestead, (5) the right to file joint income tax returns, (6) the right to legal redress against third parties who interfere with the marital relationship, (7) the rights to spousal and child support and child custody upon the termination of the marriage, and (8) the right to claim certain benefits and interests upon the death of a spouse, including family and homestead allowances, wrongful death damages, and government benefits.[19]

A second type of spousal relationship is that involving the putative spouse. A putative spouse is a person who erroneously, but reasonably and in good faith, believed himself to be validly married under the laws of the state.[20] Some states have statutorily recognized the rights of putative spouses in property acquired during the relationships.[21] Other states have recognized the property rights of putative spouses by case law.[22] Putative spouses have

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which attempt to limit the sexual relations of the parties or the spousal duty of support are illegal on public policy grounds. *Id.* at 1260.

18. *See* Hunter, *supra* note 16, at 1067. Hunter concluded that because the state has a strong interest in the continued stability of marital relations, the state has an interest in defining those relations. *Id.* at 1068-69.
19. Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937, 939-40 (1977).
20. *Id.* at 940-41; Comment, *supra* note 14, at 707.
21. *See, e.g.*, CAL. CIV. CODE § 4452 (West Supp. 1980); COLO. REV. STAT. § 14-2-111 (1973); MONT. REV. CODES ANN. § 40-1-404 (1979).
22. *See* Albae v. Harbin, 249 Ala. 201, 30 So. 2d 459 (1947); Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E.2d 801 (1942); Fuller v. Fuller, 33 Kan. 582, 7 P. 241 (1885); Donnelly v. Donnelly, 198 Md. 341, 84 A.2d 89 (1951); Batty v. Greene, 206 Mass. 561, 92 N.E. 715 (1910); Allen v. Allen, 47 Mich. 74, 10 N.W. 113 (1881); Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624 (1951); Reed v. Reed, 516 S.W.2d 568 (Mo. App. 1974); Fowler v. Fowler, 97 N.H. 216, 84 A.2d 836 (1951); Conkling v. Conkling, 126 N.J. Eq. 142, 8 A.2d 298 (1936); Lawrence

also been accorded other types of rights traditionally reserved for only legally married spouses.[23]

In contrast to the putative spouse, a meretricious spouse is one who is a party to a marital-like relationship where both parties know they are not validly married.[24] Traditionally, the parties to this type of relationship have been barred from enforcing property rights in court, due to the "illicit" nature of their relationship.[25] On the breakup of the relationship (or its termination by the death of one of the spouses), the law generally left these parties where they found themselves based on the rationale that any agreements between the parties concerning property rights were unenforceable and void on public policy grounds. This refusal to recognize contractual agreements between unmarried, non-putative cohabitors is generally known as the "meretricious spouse rule."

Under the meretricious spouse rule, the court presumes that any contract between unmarried couples is tainted by the illicit sexual relations of the parties. The illicit sexual services by the meretricious spouse are presumed to constitute part of the consideration exchanged for the contract rights. Therefore, because of the illegality of the consideration, the contract is rendered void and unenforceable.[26]

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v. Heavner, 232 N.C. 557, 61 S.E.2d 697 (1950); Walker v. Walker, 84 N.E.2d 258 (Ohio C.P. 1948); Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920); Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908); Philips v. Philips, 106 W. Va. 105, 144 S.E. 875 (1928); Siskoy v. Siskoy, 250 Wis. 435, 27 N.W.2d 488 (1947).

The property rights of putative spouses arise regardless of the spouse's proportional contribution to the acquisition of the property. Comment, *supra* note 14, at 709.

23. *See, e.g.*, Adduddell v. Board of Administration, Pub. Employees Retirement Sys., 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970) (the right to workmen's compensation and retirement fund); Kunakoff v. Woods, 166 Cal. App. 2d 59, 332 P.2d 773 (1958) (the right to sue for the wrongful death of a spouse); *In re* Krone's Estate, 83 Cal. App. 2d 766, 189 P.2d 741 (1948) (the right to a share of the spouse's property upon death).
24. Comment, *supra* note 14, at 707.
25. *See, e.g.*, Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948).

However, there has been a tendency to *allow* enforcement of workmen's compensation claims by unmarried cohabitors upon the death of their meretricious spouses, by considering them to be "de facto" spouses under state compensation laws. *See, e.g.* Burgess Constr. Co. v. Lindley, 504 P.2d 1023 (Alaska 1972); Kendell v. Housing Auth., 196 Md. 370, 76 A.2d 767 (1950); West v. Barton-Malow Co., 394 Mich. 334, 230 N.W.2d 545 (1975); Parkinson v. J.&S. Tool Co., 64 N.J. 159, 313 A.2d 609 (1974). Oregon allows a meretricious spouse to recover workmen's compensation if there are children born of the union and the parties have lived together at least one year. *See* OR. REV. STAT. § 656.226 (1979).
26. Hunter, *supra* note 16, at 1091.

III. LIMITING THE APPLICATION OF THE "MERETRICIOUS SPOUSE RULE"

The case of *Creasman v. Boyle*[27] illustrates the application of the meretricious spouse rule to deny property rights asserted by an unmarried cohabitor. In *Creasman*, the plaintiff sued to establish title to real property following the death of his meretricious spouse. Mr. Creasman and Mrs. Paul cohabited for seven years prior to Mrs. Paul's death and purchased a home under an installment land contract during their cohabitation. All payments under the contract were made by Mr. Creasman; however, the deed to the property was executed solely to Mrs. Paul. Because the plaintiff provided the consideration for the purchase of the property, he claimed relief under a resulting trust theory.[28] The court denied relief, finding the resulting trust doctrine inapplicable where the property accumulated by the meretricious spouses "was all acquired during and in pursuance of their meretricious relationship."[29] Thus, the meretricious spouse rule effected the result that property acquired by an unmarried couple while living together legally belonged to the party who had legal title upon termination of the relationship.

At the opposite end of the spectrum of cases examining the effect of the meretricious spouse rule on cohabitors' property rights is *In re Marriage of Cary*.[30] In *Cary*, a man and a woman cohabited for eight years without marrying. Their relationship was outwardly similar to a traditional marriage. The man worked outside of the home and the woman performed household services. Four children were born of the union.

The court held that the meretricious spouse rule should not be used to bar the application of state laws governing marital property rights to unmarried, cohabiting couples.[31] As a result, all property accumulated during the relationship was to be equally divided. In deciding that the relationship should be treated as a legal marriage for purposes of property division, the court stated:

> By the Family Law Act the Legislature has announced it to be the public policy of this state that concepts of "guilt" . . . and "innocence" are no longer relevant in the determination of family property rights, whether

27. 31 Wash. 2d 345, 196 P.2d 835 (1948).
28. Generally, if property is put in the name of someone other than the person who provides the consideration for the purchase of the property, a resulting trust arises in favor of the person who provided the consideration. For a discussion of the resulting trust doctrine and its application in suits by meretricious spouses, see notes 87-94 & accompanying text *infra*.
29. 31 Wash. 2d at 353, 196 P.2d at 839.
30. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). For a discussion of *Cary*, see Comment, *supra* note 13, at 492-93; Comment, *supra* note 14, at 711.
31. 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 866.

there be a legal marriage or not, and, if not, regardless of whether the deficiency is known to one, or both, or neither of the parties.[32]

The California Supreme Court, in *Marvin v. Marvin*,[33] took a compromise approach in addressing the applicability of the meretricious spouse rule in a property dispute between unmarried cohabitors. In *Marvin*, a woman sued a man with whom she had lived for seven years without marrying. The plaintiff sought to enforce an oral contract, claiming a contractual right to one-half of the property accumulated by the defendant during the relationship.

The court rejected the *Cary* rationale[34] as a basis for recovery and expressly stated that the California Family Law Act did not govern the distribution of property acquired by unmarried cohabitors during their relationship.[35] Therefore, the *Marvin* court refused to accord marital status to the meretricious relationship and grant unmarried cohabitors rights *identical* to married or putative spouses under California law.[36] However, the court also rejected the *Creasman* approach of applying the meretricious spouse rule so as to totally bar recovery.[37]

In contrast to the two extreme positions reflected in *Cary* and *Creasman*, the *Marvin* court held that the meretricious spouse could recover by establishing an express oral agreement between the parties.[38] Recovery was limited, however, to that portion of the contract which was not based upon meretricious sexual services. In dicta, the court suggested other theories, such as implied contract, partnership or joint venture, quantum meruit, or constructive and resulting trust doctrines, upon which a meretricious spouse could base recovery.[39] Presumably, the California Supreme Court will at least entertain suits based on these theories, to the extent that sexual services do not form the consideration for the right of recovery.[40]

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32. *Id.* at 352-53, 109 Cal. Rptr. at 866.

33. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

34. Hunter, *supra* note 16, at 1083; Comment, *supra* note 14, at 712.

35. 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829. *See* Kay & Amyx, *supra* note 19, at 958; Comment, *supra* note 13, at 496-97; Comment, *supra* note 14, at 713.

36. *See* Lorio, *supra* note 9, at 20.

37. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. For a discussion of *Creasman*, see notes 27-29 & accompanying text *supra*.

38. 18 Cal. 3d at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

39. *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32. For a discussion of these theories, see notes 75-102 & accompanying text *infra*.

40. Hunter, *supra* note 16, at 1084.

IV. THEORIES OF RECOVERY

There are several potential juridical bases for the legal assertion of property rights by unmarried cohabitors.[41] Among the possible theories of recovery are: (1) a legal equivalence to marital status;[42] (2) an express oral agreement;[43] (3) an express written agreement;[44] (4) a contract implied-in-fact, including a contract for services and partnership or resulting trust theories;[45] and (5) a contract implied-in-law, including quantum meruit or constructive trust theories.[46]

A. Marital Status

A marital status theory of recovery would afford the meretricious spouse recovery under, and in accordance with, state laws defining the property rights of legally married spouses. Under this theory, upon termination of the nonmarital relationship, the state statutes governing the division of marital property would govern the property rights of an unmarried, cohabiting couple. Thus, the property rights which married and putative[47] spouses now enjoy would be extended to include meretricious spouses.

As indicated above, the theory of "marital status" has been rejected by the California Supreme Court.[48] Other states have also expressly refused to recognize that property rights of meretricious spouses derived from state laws applicable to marital relationships.[49] An important result of such a determination is that the

41. Zuckerman, *Formality and the Family—Reform and Status Quo*, 96 L.Q. REV. 248, 252 (1980).
42. *See* notes 47-54 & accompanying text *infra*.
43. *See* notes 55-72 & accompanying text *infra*.
44. *See* notes 73-74 & accompanying text *infra*.
45. *See* notes 75-94 & accompanying text *infra*.
46. *See* notes 95-102 & accompanying text *infra*.
47. In many states, putative spouses have rights to share in their spouse's property, despite the invalidity of the marriage. *See* notes 21-23 & accompanying text *supra*.
48. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). In *Marvin*, the court held that the Family Law Act did not govern distribution of property acquired during a nonmarital relationship. *See* note 35 & accompanying text *supra*. Earlier California decisions had applied the California Community Property Act to the division of property between meretricious spouses. *See* Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975); *In re* Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). *But see* Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975) (all holding the provisions of the Family Act inapplicable to the meretricious relationship).
49. *See, e.g.*, Joan S. v. John S., — N.H. —, 427 A.2d 498 (1981); Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948). The *Creasman* court stated:

meretricious spouse is unable to claim alimony upon dissolution of the relationship[50] or to recover attorneys' fees.[51]

Although commentators have suggested that state legislatures should expand the laws governing marital relationships to deal with the property rights of unmarried cohabitors,[52] no state to date has done so.[53] Therefore, the current status of the law is that marital property acts are not applicable to the division of property of meretricious spouses.

> It has been declared to be a rule of law in this state that property acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and, *in the absence of some trust relation*, belongs to the one in whose name the legal title to the property stands.

31 Wash. 2d at 351, 196 P.2d at 838 (emphasis in original). *Accord*, Hinkle v. McColm, 89 Wash. 2d 769, 575 P.2d 711 (1978); *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972). Although in both of these cases, the Washington Supreme Court held that the state laws governing marital property rights did not apply to meretricious spouses, one commentator noted that the *Thornton* decision indicated the court's willingness to impose a *marital-like* status for the purpose of dividing property interests between partners who have a serious and intimate relationship. Hunter, *supra* note 16, at 1088.

50. In Davis v. Misiano, 373 Mass. 261, 366 N.E.2d 752 (1977), the Massachusetts Supreme Court refused to recognize the right of a meretricious spouse to alimony, stating: "Cohabitation within this commonwealth, in the absence of a formal solemnization of marriage, does not create the relationship of husband and wife. Without the existence of a marriage relation, a woman has no right to receive support." *Id.* at 262, 366 N.E.2d at 754. *See also* Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979). *But see* McCullon v. McCullon, 96 Misc. 2d 962, 973-74, 410 N.Y.S.2d 226, 232-33 (Sup. Ct. 1978), where the court suggested in dictum that statutes governing the marital division of property may apply to the division of property between meretricious spouses where the relationship is of long duration and is, in all outward appearances, similar to a traditional marriage.

51. *See, e.g.*, Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981).

52. *See, e.g.*, Comment, *supra* note 13, at 505-08. The author suggested extending the Family Law Acts by amending them to include unmarried cohabitors if they have an ostensible marriage relationship and an actual family relationship.

53. However, the New Hampshire legislature has protected meretricious spouses from disinheritance by cohabitors where the parties lived together for the three years preceding the death of the cohabitor. N.H. REV. STAT. ANN. § 457:39 (1968).

In states where common-law marriages are legally recognized, the relationship of the unmarried cohabitors may constitute a legally valid marriage so that the rules of marriage, along with the attendant property rights, would apply. *See* Lorio, *supra* note 9, at 19. However, in order to contract a common-law marriage, the following elements must exist: (1) there must be a present understanding that the parties are husband and wife, (2) the parties must assume the marriage relation with the intent to continue it throughout their lives, and (3) the parties must in good faith believe that they are husband and wife and hold themselves out as such. *See* Bracken v. Bracken, 45 S.D. 430, 433, 188 N.W. 46, 46 (1922).

Several arguments support the continuation of this policy. In view of the apparent intent of meretricious spouses to *not* marry, the imposition of a marital status on such relationships would run counter to the intentions of the parties in most instances. Although the creation of status-rights may result in more certainty, it may also be contrary to the public policy of encouraging legal marital unions. By endowing a nonmarital relationship with marital rights, the state would remove one important incentive to marry. Such an action would also, in effect, constitute a reinstatement of common-law marriage since the rights of the parties would be enforced due to their status.

An alternative to equating the meretricious relationship with legal marriage could be the state imposition of a *different* status on the relationship. However, as one commentator noted, it would be difficult to define a new status for nonmarital cohabitation that would "sit comfortably with the definition of marriage."[54] Such state action could result in a hierarchy of types of marriages, with resulting confusion in the law and, perhaps, injustice to the parties.

B. Express Oral Agreement

In many instances in which a meretricious spouse has sought recovery, the basis for the suit has been an alleged express oral agreement asserted against a cohabitor[55] or against a cohabitor's estate.[56] This theory of recovery has been applied in attempts to

54. Zuckerman, *supra* note 41, at 278.

55. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932); Feldman v. Nassi, 111 Cal. App. 3d 881, 169 Cal. Rptr. 9 (1980); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975); Hewitt v. Hewitt, 77 Ill. 2d 49, 397 N.E.2d 1204 (1979); Roznowski v. Bozyk, 73 Mich. App. 405, 251 N.W.2d 606 (1977); Kinkenon v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981); Warren v. Warren, 94 Nev. 309, 579 P.2d 772 (1978); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981); Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976); Ireland v. Flanagan, 51 Or. App. 837, 627 P.2d 496 (1981); Mullen v. Suchko, — Pa. Super. —, 421 A.2d 310 (1980); Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

This theory of recovery has also been used by and against a paramour, where the parties have not actually cohabited. *See, e.g.*, Cougler v. Fackler, 510 S.W.2d 16 (Ky. 1974); Naimo v. La Fianza, 146 N.J. Super. 362, 369 A.2d 987 (Ch. Div. 1976).

56. *See, e.g.*, Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Hill v. Westbrook's Estate, 39 Cal. 2d 458, 247 P.2d 19 (1952); Lovinger v. Anglo Cal. Nat'l Bank, 243 P.2d 561 (Cal. App. 1952); Williams v. Payne, 515 S.W.2d 618 (Ky. 1974); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950); Bridgman v. Stout, 10 Or. App. 474, 500 P.2d 731 (1972).

recover property of the cohabitor[57] or the reasonable value of services rendered[58] or both.[59] Under this theory of recovery, the property rights of unmarried cohabitors derive solely from the contractual intent of the parties and not their status under state law;[60] thus, recognition of those property rights would not constitute a judicial reinstatement of common-law marriage.[61]

Actions based upon an express oral agreement have met with mixed success.[62] There are two hurdles which a plaintiff seeking recovery on the basis of an express oral agreement must over-

57. *See, e.g.*, Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932); Feldman v. Nassi, 111 Cal. App. 3d 881, 169 Cal. Rptr. 9 (1980); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); Williams v. Payne, 515 S.W.2d 618 (Ky. 1974); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Kinkenon v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981); Warren v. Warren, 94 Nev. 309, 579 P.2d 772 (1978); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976); Ireland v. Flanagan, 51 Or. App. 837, 627 P.2d 496 (1981); Bridgman v. Stout, 10 Or. App. 474, 500 P.2d 731 (1972); Mullen v. Suchko, — Pa. Super. —, 421 A.2d 310 (1980); Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

58. *See, e.g.*, Hill v. Westbrook's Estate, 39 Cal. 2d 458, 247 P.2d 19 (1952); Lovinger v. Anglo Cal. Nat'l Bank, 243 P.2d 561 (Cal. App. 1952); Roznowski v. Bozyk, 73 Mich. App. 405, 251 N.W.2d 606 (1977); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980); Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

59. *See, e.g.*, Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

60. For a discussion of contract versus status conflicts in the context of spousal relations, see Hunter, *supra* note 16, at 1039.

61. *But see* Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979), in which the court equated a recognition of property rights of a meretricious spouse based on contract to a judicial recognition of common-law marriage. The court failed to acknowledge the distinction between property rights based on contract and property rights based on a legally valid marriage. *See* notes 115-21 & accompanying text *infra*. It has been stated that the *Hewitt* court viewed the recognition of contract rights of cohabitors as an equivalent to conferring a legal *status* on the meretricious relationship. S. KATZ & M. INKER, FATHERS, HUSBANDS AND LOVERS: LEGAL RIGHTS & RESPONSIBILITIES 531 (1979).

62. For cases where a cohabitor was successful in a suit based on an express oral agreement, see Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Kinkenon v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976); Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

For cases in which recovery based on an express oral agreement was denied, see Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Hill v. Westbrook's Estate, 39 Cal. 2d 458, 247 P.2d 19 (1952); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d

come. First, the plaintiff must be able to show sufficient evidence that there was actually an express agreement between the parties. The plaintiff may have difficulty establishing the existence of such an agreement.[63] Where services have been performed in the context of an intimate relationship, it may be assumed that the services were rendered gratuitously, without expectation of payment.[64] Therefore, the plaintiff must establish that the services were actually performed in consideration for the cohabitor's promise of property rights or payment.

Even if the plaintiff establishes the existence of a contractual arrangement, recovery may be denied on the ground that the contract is unenforceable because it falls within the Statute of Frauds[65] or because it would be contrary to state public policy to enforce it.[66] This latter rationale stems from the concern that a

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1204 (1979); Williams v. Payne, 515 S.W.2d 618 (Ky. 1974); Warren v. Warren, 94 Nev. 309, 579 P.2d 772 (1978); Gauthier v. Laing, 96 N.J. 80, 70 A.2d 207 (1950).

63. For cases where recovery was denied because of a lack of evidence of an express oral agreement, see Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975); Williams v. Payne, 515 S.W.2d 618 (Ky. 1974); Warren v. Warren, 94 Nev. 309, 579 P.2d 772 (1978).

64. *See* Hill v. Westbrook's Estate, 39 Cal. 2d 458, 461, 247 P.2d 19, 21 (1952).

65. Although this argument may be raised, part performance by the plaintiff would take the agreement out of the Statute of Frauds. Kinkenon v. Hue, 207 Neb. 698, 704, 301 N.W.2d 77, 81 (1981). *But see* Bridgman v. Stout, 10 Or. App. 474, 500 P.2d 731 (1972), where the court held that the Statute of Frauds barred recovery on an oral promise to convey property.

Minnesota recently enacted a Statute of Frauds provision which is specifically directed toward the enforceability of contracts between unmarried cohabitors. MINN. STAT. § 513.075 (Cum. Supp. 1980) provides as follows:

> If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if:
>
> (1) the contract is written and signed by the parties, and
>
> (2) enforcement is sought after termination of the relationship.

66. *See, e.g.*, Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950).

The Minnesota legislature has declared that any contract between unmarried cohabitors which is not in writing and signed by the parties shall be deemed contrary to public policy and unenforceable. The relevant statute provides:

> Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals have lived together in contemplation of sexual relations and out of wedlock within or without this state.

MINN. STAT. § 513.076 (Cum. Supp. 1980). See note 65 *supra* for the text of MINN. STAT. § 513.075.

contract based upon meretricious sexual services is illegal, and therefore, the meretricious spouse rule completely bars recovery. Courts which apply this reasoning are those which refuse to view the contract as severable.[67] Thus, even though only a portion of the contract may be based on the sexual relations of the parties, the meretricious spouse rule bars recovery on an express contract theory because the illicit sexual relations of the parties lends illegality to the entire contract.[68]

In contrast, where the fiction of severability is applied, the contract between the unmarried cohabitors is divided into enforceable and unenforceable portions. The meretricious spouse rule only negates that portion of the contract based upon sexual services.[69] By *limiting* the application of the meretricious spouse rule, the plaintiff is not totally precluded from recovery.[70]

Of course, even if the fiction of severability is recognized, the plaintiff will still have the initial burden of proving the existence of the oral agreement. The plaintiff may also have to demonstrate the inapplicability of the Statute of Frauds if this defense is raised.[71] However, once such burdens are met, the remaining focus would not be *whether* the contract was unenforceable on public policy grounds, but rather, *how much* of the contract was unenforceable. Thus, the inquiry would shift from the *ability* to recover to the *amount* of recovery.[72]

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67. In Gauthier v. Laing, 96 N.H. 80, 84, 70 A.2d 207, 209 (1950), the New Hampshire Supreme Court denied recovery on the ground that the bargain between the cohabitors was "an entire and indivisible one and . . . the meretricious part is inseparable from the meritorious part."

68. This rationale was applied to deny recovery in Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). For a discussion of the Illinois Supreme Court's reasoning concerning the severability theory, see Note, *Hewitt v. Hewitt—Property Rights of Unmarried Cohabitors Upon Dissolution of the Relationship*, 1980 U. ILL. L.F. 525, 531-32. However, the *Hewitt* court stated in dictum: "It is true, of course, that cohabitation by the parties may not prevent them from forming valid contracts about independent matters, for which it is said the sexual relations do not form part of the consideration." 77 Ill. 2d at 59, 394 N.E.2d at 1208. While this statement seems to imply that *some* contracts concerning property rights may be enforceable in Illinois against a nonmarital cohabitor, it appears from the rest of the opinion that this possibility is fairly remote. *See* notes 115-27 & accompanying text *infra*.

69. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976).

70. Hunter, *supra* note 16, at 1077. The author stated: "Courts are more likely to enforce agreements between unmarried couples when they need not pass any moral judgment on the affair. The doctrine of severability itself provides a ground for judges to avoid condoning the conduct of the couple." *Id.* at 1091.

71. *See* notes 65-66 & accompanying text *supra*.

72. However, regardless of the proof of an oral agreement, if the *entire* consideration for the contract is sexual services, the plaintiff will be precluded from recovery even in jurisdictions which recognize the doctrine of severability.

C. Express Written Agreement

Another alternative for asserting the rights of an unmarried cohabitor is a suit based on a written contract.[73] Of course, this alternative presupposes that the parties drafted a formal written contract regarding their respective property rights when they entered into a cohabitation arrangement. Such an occurrence may be rare. However, the existence of a written contract would add certainty in defining the expectations of the parties and would avoid the proof problems which arise with respect to an alleged oral agreement. Additionally, a written contract would preclude later arguments that the parties entered into an oral agreement contrary to the terms of the written contract.[74]

However, incorporating the terms of the parties' agreement into a written document does not necessarily ensure that the parties' rights and expectations under the agreement will be protected. The enforceability of a written contract in lieu of marriage would still be subject to question on public policy grounds. For example, the entire agreement would fail if the court were unwilling to apply the severability doctrine and allow enforcement of the part of the contract which was not based upon meretricious sexual consideration. In addition, even where severability is recognized, the written contract may fail in part if there is a determination that a portion of the rights asserted were actually given in consideration for sexual services. Thus, while the use of a written agreement would lend greater certainty in establishing the existence and the extent of the *agreement* between meretricious spouses, the extent of *recovery* in a suit on the written agreement would not necessarily be more predictable than in a suit on an oral agreement.

D. Contracts Implied-In-Fact

In many instances, the recognition of alternative theories to the express agreement may be essential to adequately protect the property rights of the meretricious spouse. Because of the diffi-

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This is particularly true in the case of noncohabiting sexual partners. *See, e.g.*, Cougler v. Fackler, 510 S.W.2d 16 (Ky. 1974); Naimo v. La Fianza, 146 N.J. Super. 362, 369 A.2d 987 (Ch. Div. 1976) (where the court denied recovery on an agreement to make a testamentary gift for the benefit of an illegitimate child).

73. One commentator suggested that the business partnership under the Uniform Partnership Act could provide a suitable model for express agreements between unmarried cohabitors. Weitzman, *supra* note 17, at 1255-58.

74. Walzer & Walzer, *A Guide to Drafting Non-Marital Partnership Agreements and Premarital Agreements*, in MARITAL AND NON-MARITAL CONTRACTS: PREVENTIVE LAW FOR THE FAMILY 23 (J. Krauskopf ed. 1979). The authors emphasized that "nonmarital partnership agreements are not a matter of choice but of necessity if the parties are to avoid later overwhelming claims." *Id.*

culty of proving the existence of an express oral agreement,[75] a meretricious spouse may be left without a remedy in the absence of alternative grounds of recovery. Often cohabitors may simply fail to expressly agree on the terms of their arrangement,[76] resulting in possible inequities for one party upon the termination of the relationship.

As a result, some courts have allowed recovery based upon an implied-in-fact contract theory.[77] This basis of recovery has been viewed by some to amount to the creation of a marital status for unmarried cohabitors.[78] However, the rights of the parties under the application of this theory are not derived from the state marital acts, but rather from the reasonable expectations of the parties, as determined by examining their conduct.[79]

Implied-in-fact contracts are those which a court may infer by examining the actions of the parties to it. The types of implied-in-fact agreements which could be found in the context of a cohabitation arrangement include: (1) implied-in-fact contracts for services, (2) implied-in-fact partnership agreements, and (3) implied-

75. *See* notes 63-64 & accompanying text *supra*.

76. One commentator posed the following possible reasons for the failure of cohabitors to enter into express agreements: (1) they are ignorant of the legal consequences of either marriage or nonmarriage, (2) they are under the assumption that some legal protections are available, or (3) they enter into the relationship with no thoughts concerning the legal consequences of their relations. Bruch, *Property Rights of De Facto Spouses Including Thoughts On The Value of Homemakers' Services*, 10 FAM. L.Q. 101, 135 (1976). This commentator contended that standards of good faith and fair dealing should be applied to these relationships to correct inequities arising from the lack of an express agreement. *Id.* at 318.

77. In Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122-23, 134 Cal. Rptr. 815, 831-32 (1976), the California Supreme Court acknowledged the potential enforceability of implied-in-fact agreements between meretricious spouses. This was the first California decision to do so. Comment, *supra* note 13, at 497. *See, e.g.*, Lovinger v. Anglo Cal. Nat'l Bank, 243 P. 561, 569 (Cal. App. 1952), where the court stated there could be no implied contract between meretricious spouses. Two commentators noted that the *Marvin* court stated that it would allow implied-in-fact remedies based on the presumption that the parties intended to deal fairly with each other. Levin & Spak, *Judicial Enforcement of Cohabitation Agreements: A Signal To Purge Marriage From The Statute of Frauds*, 12 CREIGHTON L. REV. 499, 508-09 (1979).

78. *See* Marvin v. Marvin, 18 Cal. 3d 660, 685-86, 557 P.2d 106, 123-24, 134 Cal. Rptr. 815, 832-33 (1976) (Clark, J., concurring and dissenting); Hewitt v. Hewitt, 77 Ill. 2d 49, 57-58, 394 N.E.2d 1204, 1207 (1979). *But see* Hunter, *supra* note 16, at 1084-85, where the author noted that allowance of implied contract theories does not result in a judicial imposition of a marital status on the parties, as property rights are expressly stated to *not* be determined by marital property acts.

79. Comment, *supra* note 13, at 496-97.

in-fact resulting trusts.[80] As with an express agreement between meretricious spouses, the enforceability of an implied-in-fact agreement would depend upon the recognition that the portion of the agreement attributable to the illicit consideration of the sexual relations is severable from the rest of the agreement.[81] In that event, the implied-in-fact agreement would be enforceable to the extent that sexual services did not constitute the consideration for the contract.

An implied-in-fact contract for services based upon the conduct of the cohabiting parties was found by the New York Superior Court in *McCullon v. McCullon*.[82] In that case, the defendant had supported the plaintiff for twenty-eight years, during which time the plaintiff had performed household services and had raised three children born of the union. The court held that the conduct of the plaintiff constituted an implied promise to "forbear employment and provide household services for the defendant over 28 years in consideration for his implied conduct and promise to provide a home and future support."[83]

Implied-in-fact partnership and pooling agreements may also be asserted as a basis for recovery where the parties have cohabited outside of marriage. To prevail on this theory, the cohabitor must introduce evidence that the parties intended that property accumulated during the relationship would be jointly owned.[84] While some jurisdictions have been unwilling to recognize implied-in-fact partnership agreements in nonmarital relationships,[85] others have been willing to allow recovery where the evidence indicated that the parties intended to pool their resources for their common benefit.[86]

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80. For a discussion of these possible remedies, see Bruch, *supra* note 76, at 299-305.

81. For a discussion of the severability doctrine in the enforcement of contracts between meretricious spouses, see notes 67-70 & accompanying text *supra*.

82. 96 Misc. 2d 962, 410 N.Y.S.2d 226 (Sup. Ct. 1978).

83. *Id.* at 974, 410 N.Y.S.2d at 233. In light of a recent decision by the New York Court of Appeals, however, it does not appear that New York courts will continue to recognize implied-in-fact theories of recovery for meretricious spouses. *See* Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980).

84. For cases in which the plaintiff failed to establish an intent to form a partnership arrangement with respect to property held by the defendant or the defendant's estate, see Warren v. Warren, 94 Nev. 309, 579 P.2d 772 (1978); Latham v. Hennessey, 87 Wash. 2d 550, 554 P.2d 1057 (1976).

85. *See, e.g.*, Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Smith v. Smith, 255 Wis. 96, 38 N.W.2d 12 (1949). *See also* Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980). Although the *Morone* court dismissed the plaintiff's cause of action on an implied contract theory, it recognized the plaintiff's cause of action on an express contract theory. *Id.* at 486-87, 413 N.E.2d at 1155.

86. *See, e.g.*, Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978); Ireland v. Flanagan, 51

Another implied-in-fact theory of recovery which may be used by the meretricious spouse is the resulting trust doctrine. This doctrine has been asserted to recover property accumulated during the meretricious relationship which was put solely in the name of one of the cohabitors.[87] In order to recover under the resulting trust doctrine, the plaintiff must prove that the parties intended that the property accumulated during the relationship would be held by one party in trust for the other.[88] The plaintiff must also establish that she contributed toward the accumulation of the property impressed with the trust.[89]

In asserting a right to recover property under a resulting trust theory, the meretricious spouse may have difficulty in establishing the intent of the parties to create a trust relation. Although, generally, if property is put in the name of someone other than the person who provided the consideration for it, a resulting trust will arise in favor of the person who furnished the consideration,[90] the intimate relationship of the parties may preclude this result. Some courts have held that there is no inference that meretricious spouses intend to create a trust relation, and, in the absence of evidence to the contrary, it is presumed that the parties intended to dispose of the property in the manner in which they did.[91]

A second problem faced by a meretricious spouse in asserting property rights on a resulting trust theory is in proving that she contributed toward the purchase of the property. This may be difficult for the plaintiff who has contributed nothing in the way of *monetary* value toward the purchase price of property but has contributed household services throughout the duration of the relationship.[92] Courts have denied recovery where there was a lack of

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Or. App. 837, 627 P.2d 496 (1981); *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972).

87. *See, e.g.*, Sugg v. Morris, 392 P.2d 313 (Alaska 1964); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Williams v. Bullington, 159 Fla. 618, 32 So. 2d 273 (1947); Cluck v. Sheets, 141 Tex. 219, 171 S.W.2d 860 (1943); Hinkle v. McColm, 89 Wash. 2d 769, 575 P.2d 711 (1978); Latham v. Hennessey, 87 Wash. 2d 550, 554 P.2d 1057 (1976); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948). This doctrine has also been used in attempts to recover property from sexual partners where there has been no cohabitation. *See, e.g.*, Taylor v. Frost, 202 Neb. 652, 276 N.W.2d 656 (1979); Adams v. Jensen-Thomas, 18 Wash. App. 757, 571 P.2d 958 (1977).

88. *See* Bruch, *supra* note 76, at 121-22.

89. *See id.* at 122-23.

90. See *id.*

91. *See, e.g.*, Hinkle v. McColm, 89 Wash. 2d 769, 575 P.2d 711 (1978); Latham v. Hennessey, 87 Wash. 2d 550, 554 P.2d 1057 (1976); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948).

92. One commentator suggested expanding the resulting trust theory to recognize the economic value of the homemaker's services and thereby allowing relief under these circumstances. *See* Bruch, *supra* note 76, at 303-05.

evidence of the plaintiff's actual monetary contributions toward the purchase of the property claimed to be impressed with the trust.[93] However, where the plaintiff was able to establish an actual advancement of money to the cohabitor which was used toward the purchase of property, some courts have found that the property was impressed with a trust in favor of the plaintiff.[94]

E. Contracts Implied-In-Law

The purpose of agreements implied-in-law is to provide a remedy to avoid inequitable results.[95] Recovery is not based upon actual contractual rights derived from the parties' intent, but rather on principles of justice based on the circumstances of the case. The remedies of constructive trust and quantum meruit are available in some jurisdictions if there has been fraud, overreaching, or inequitable conduct on the part of the meretricious spouse.[96]

Although courts may be willing to infer a contractual arrangement between cohabitors where the factual circumstances indicate that this inference would accord with the parties' apparent intent, there is a greater reluctance to imply agreements in law where there is no evidence that the parties ever intended to contract.[97] Nevertheless, the theories of constructive trust and quantum meruit have been applied in these circumstances in order to prevent unconscionable results.[98]

One of the major obstacles to recovery by a meretricious spouse on a contract implied-in-law theory is the presumption that services rendered in an intimate relationship are performed gratui-

93. *See, e.g.*, Sugg v. Morris, 392 P.2d 313 (Alaska 1964); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

94. *See, e.g.*, Williams v. Bullington, 159 Fla. 618, 32 So. 2d 273 (1947). *See also* Cluck v. Sheets, 141 Tex. 219, 171 S.W.2d 860 (1943), where the court held that although a resulting trust could not arise from payments made *after* title had vested, there was an express trust between the cohabitors due to their agreement that the land be taken in one name for the benefit of both. *Id.* at 222, 171 S.W.2d at 862.

Recovery under a resulting trust theory was allowed by the Nebraska Supreme Court where the parties had an intimate relationship, but never cohabited. Taylor v. Frost, 202 Neb. 652, 276 N.W.2d 656 (1979).

95. See Bruch, *supra* note 76, at 306-08, for a general discussion of implied-in-law agreements in the meretricious spouse context.

96. *See, e.g.*, Omer v. Omer, 11 Wash. App. 386, 393, 523 P.2d 957, 960-61 (1974).

97. *See, e.g.*, Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); Williams v. Payne, 515 S.W.2d 618 (Ky. 1974); Roznowski v. Bozyk, 73 Mich. App. 405, 251 N.W.2d 606 (1977).

98. *See, e.g.*, Marum v. Marum, 21 Misc. 2d 474, 194 N.Y.S.2d 327 (Sup. Ct. 1959); Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974). However, the Washington courts have been unwilling to apply the same equitable remedies where the parties to an intimate relationship have not cohabited. *See* Adams v. Jensen-Thomas, 18 Wash. App. 757, 571 P.2d 958 (1977).

tously.[99] This presumption is particularly difficult to overcome when there is no evidence of a contractual arrangement, and it has been the basis for denial of recovery for the meretricious spouse in several cases.[100]

The presumption that services rendered to a cohabitor are gratuitous is derived from an analogy between the marital relationship and the meretricious one. However, the analogy is not a sound one. Married couples cannot contract concerning the incidents of the marital relationship and the rights and obligations afforded by state law.[101] The parties to a marital relationship have voluntarily assumed a legally imposed status, with all of its attendant duties and obligations, including duties to render services to each other. Under those circumstances, a contract implied-in-law to pay for services would be inappropriate. In addition, unjust enrichment does not appear so "unjust" in the context of the marital relationship, since the married spouse has remedies and protections under state law.

Unlike the married spouse, the unmarried cohabitor does not assume legal duties to the other party upon entering into the relationship. In addition, the unmarried cohabitor does not have the legal protections of the married spouse under state laws and must look to contract theories upon which to base the assertion of rights. Implied-in-law contract theories are therefore much more appropriate in the context of nonmarital cohabitation than in the context of the marital relationship, and the presumption that services are rendered gratuitously should not be applied to bar recovery by the meretricious spouse. Allowing recovery based upon an implied-in-law contract would avoid injustice without sanctioning the meretricious relationship by giving it marital status.[102]

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99. Levin & Spak, *supra* note 77, at 507.

100. *See, e.g.*, Roznowski v. Bozyk, 73 Mich. App. 405, 251 N.W.2d 606 (1977). In *Roznowski*, the court held that the trial court erred in granting relief to a meretricious spouse based on unjust enrichment. The court stated: "In order to recover, the plaintiff must establish a contract implied in fact. Without proof of the expectations of the parties, the presumption of gratuity will overcome the usual contract implied by law to pay for what is accepted." *Id.* at 408-09, 251 N.W.2d at 608. *See also* York v. Place, 273 Or. 947, 544 P.2d 572 (1975).

101. *See* notes 15-18 & accompanying text *supra*.

102. *But see* Hunter, *supra* note 16, at 1092-93. Hunter argued:

> To allow recovery for domestic services on a theory of quantum meruit in the context of a meretricious affair is to give partners to such an affair a somewhat different, and perhaps more desirable, status than that given to married couples. Normally, quantum meruit is only available where payment is generally to be expected . In a domestic or family situation, most people do not generally expect that parties will be paid for doing the ordinary chores of life. . . . Allowing a quasi-contractual recovery for the monetary value of such

Although it may be argued that allowing recovery to an unmarried cohabitor on the theory of a contract implied-in-law encourages meretricious relationships by providing rights without proof of the parties' intentions, it is possible that the opposite may be true. If a cohabitor realizes that the lack of a legal marriage or an agreement with the meretricious spouse will not remove the legal obligations to pay for the benefits received from the relationship, he may be less likely to view nonmarital cohabitation as a positive alternative to marriage.

V. AMOUNT OF RECOVERY

If the meretricious spouse is successful in asserting a theory of recovery, the extent of recovery must be determined. This determination may be subject to some uncertainty. It is unlikely that the amount of recovery will be determined by state statutes controlling the division of marital property, as meretricious spouses do not attain the status of married persons under state law.[103] Rather, the extent of recovery will depend upon two factors: (1) the legal theory used for recovery, and (2) the extent that illicit sexual services provided the consideration for the agreement.

The influence of the first factor on the amount of recovery is apparent. If the basis of the suit is a breach of promise, the amount of damages awarded should be equivalent to the damages caused by the breach. If the basis is in quantum meruit, the amount of recovery should be equivalent to the value of the services rendered to the defendant. This factor, therefore, is not the cause of the uncertainty.

However, the second factor, the limited application of the meretricious spouse rule, injects uncertainty into the amount of recovery. As stated by the *Marvin* court: "Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services."[104] The application of the second factor, therefore, results in a severance of the cohabitation agreement into void and enforceable portions by the application of the meretricious spouse rule to the portion of the contract based on sexual services. The amount of recovery will thus depend upon the extent an agreement is based upon a consideration of sexual services. This determination necessarily will be ex-

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> services implies . . . a recognition that the services are beyond the ordinary call of duty . . . .

Id. (footnotes omitted).

103. *See* Marvin v. Marvin, 18 Cal. 3d 660, 681, 557 P.2d 106, 120, 134 Cal. Rptr. 815, 829 (1976).

104. *Id.* at 670-71, 557 P.2d at 113, 134 Cal. Rptr. at 822.

tremely difficult to make, with the result that recoveries could vary widely, with possible unjust results.

In many instances, the cohabiting parties have a marital-like relationship,[105] with all of the normal attributes of marriage. In addition to sexual relations, the cohabitation may involve household services, companionship, child-rearing, etc. It would be relatively rare that sexual relations were nonexistent in a cohabitation arrangement. It also would be relatively rare that sexual relations would provide the sole consideration for the arrangement. Yet it is only at these two ends of the broad spectrum of possible nonmarital cohabitation arrangements that the parties have any reasonable certainty as to the extent their agreement would be voidable by application of the meretricious spouse rule. Thus, even if the parties to a meretricious relationship entered into an express agreement at the beginning of their relationship, they could not be certain of their legal rights upon the termination of the relationship.

This uncertainty of recovery may promote the public policy of encouraging marriage. If parties are allowed to outline their legal rights and obligations at the beginning of a meretricious relationship, nonmarital cohabitation could well appear more attractive to many couples than legal marriage. Unlike marriage, where the status-contract is imposed upon the couple by the state, the cohabitation agreement could be negotiated by the parties and molded to suit their individual needs and desires. The attractiveness of such an arrangement, particularly in light of the current atmosphere of lessened social sanctions against nonmarital cohabitation, may encourage nonmarital cohabitation. Such a result would lessen the state's ability to control family relations between those who are in all respects, other than legally married, husband and wife.

On the other hand, although the limited application of the meretricious spouse rule results in uncertainty in the rights of recovery of cohabitors, it also provides flexibility in determining amounts of recovery. Due to the equities which may well exist in favor of one party to the relationship, this flexibility may be important in assuring that recoveries accord with the factual circumstances of each case.

The use of the meretricious spouse rule in a limited form therefore seems to provide the best solution to a difficult balancing of

105. Commentators have cited the permanence of the relationship and the mutual commitment of the parties as important factors in determining whether property rights should be granted to meretricious spouses, since the more firm the commitment, the more likely it will be that the granting of rights will accord with the expectations of the parties. *See* Zuckerman, *supra* note 41, at 255; Comment, *supra* note 13, at 505-08.

two important interests: (1) the interest in encouraging legal marriage, and (2) the interest in promoting equitable results. Both interests are protected by the flexibility of recovery. The uncertainty of recovery makes cohabitation agreements not overly attractive as an alternative to marriage. However, flexibility ensures that the amount of recovery will accord with the equity of the factual circumstances.

VI. ENFORCEMENT OF AGREEMENTS BETWEEN UNMARRIED COHABITORS IN NEBRASKA

In *Kinkenon v. Hue*,[106] the Nebraska Supreme Court recognized the right of a meretricious spouse to recover on an express oral agreement. The plaintiff and the defendant in this case had lived together for over six years without marrying. During this period, the plaintiff provided household and nursing services to the defendant and aided in the operation of the defendant's farm. The plaintiff claimed an entitlement to a life estate in a house built on the defendant's property during the relationship on the basis of an express oral agreement between the parties that, in exchange for the plaintiff's services, the defendant would take care of the plaintiff for the rest of her life.[107]

The court held that despite admitted sexual relations between the parties, sexual services did not form the basis of the agreement; therefore, the enforcement of the agreement did not violate public policy.[108] Additionally, the court found that although the contract was oral, part performance by the plaintiff had taken the agreement outside the Statute of Frauds, and the agreement was therefore enforceable despite the lack of a writing.[109] The defendant was ordered to pay the plaintiff the value of the plaintiff's life estate in the house.[110]

The *Kinkenon* case marked the first recognition in Nebraska that an unmarried cohabitor may enforce property rights based upon an express oral agreement.[111] It is thus apparent that the Nebraska courts will follow the *Marvin* line of cases which recognize the enforceability of express oral agreements between unmarried cohabitors. However, the *Kinkenon* decision did not address

106. 207 Neb. 698, 301 N.W.2d 77 (1981).
107. *Id.* at 699-700, 301 N.W.2d at 79. The plaintiff also claimed joint ownership of property held in the name of both parties. *Id.* at 699, 301 N.W.2d at 78-79.
108. *Id.* at 704, 301 N.W.2d at 81.
109. *Id.*
110. *Id.*
111. However, in 1979, the Nebraska Supreme Court allowed recovery under a resulting trust theory where the parties had had an intimate relationship, but had never cohabited. Taylor v. Frost, 202 Neb. 652, 276 N.W.2d 656 (1979).

the issue of whether implied-in-law theories of recovery for a meretricious spouse will be recognized in Nebraska. It is therefore unclear whether such theories of recovery will be successful in Nebraska.

VII. RECOMMENDATIONS FOR LEGISLATIVE ACTION

Differences in state laws regarding family relations tend to influence the potential rights of recovery of meretricious spouses in the various states. Because the recognition of a right of recovery may have a major influence on public policy concerns, the courts are reluctant to recognize a cohabitor's rights where the court determines that such recognition will interfere with legislative prerogatives in the area of marital relations.

Of major concern to the judiciary is the avoidance of rendering decisions which run counter to expressed legislative intent and policy. In inquiring into legislative policy, courts tend to examine the status of the law in three specific areas: (1) divorce law, (2) common-law marriage, and (3) fornication statutes. Rights of meretricious spouses have been recognized as according with legislative policies in these areas.[112] Hence, legislative action is sometimes viewed as an indicator of the propriety of judicial action in granting rights to meretricious spouses, or as justification for making new inroads in the enforcement of such rights.[113]

Legislative action or inaction has also been utilized as proper grounds for the denial of recovery for meretricious spouses.[114] If legislative action indicates an intent to uphold the traditional family structure, in contrast to condoning or ignoring sexual and family relations outside of marriage, courts are reluctant to recognize rights which may run counter to what seems to be express legislative policy.

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112. *See, e.g., In re* Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973) (citing divorce and property division laws); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (stating that since the New Jersey fornication statute had been declared unconstitutional in 1977, there was no legal impediment to the parties cohabiting); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976) (citing the repeal of Oregon's fornication and cohabitation statutes).

113. *See, e.g., In re* Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). In *Cary*, the court cited recent changes in state laws concerning the division of property upon divorce as grounds for extending rights under those laws to nonmarital cohabitors. *Id.* at 352-53, 109 Cal. Rptr. at 865-66.

114. *See, e.g.*, Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953) (citing the illegality of fornication in Arizona); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (citing requirement of fault grounds for divorce, prohibition of common-law marriages, and fornication statute); Naimo v. La Fianza, 146 N.J. Super. 362, 369 A.2d 987 (Ch. Div. 1976) (citing the illegality of adultery in New Jersey); Bracken v. Bracken, 45 S.D. 430, 188 N.W. 46 (1922) (citing the fact that cohabitation was criminal).

For example, in *Hewitt v. Hewitt*,[115] the Illinois Supreme Court denied recovery to a meretricious spouse based on the rationale that the determination of rights between meretricious spouses was a legislative, not a judicial decision, particularly in view of recent legislative action.[116] In this case, a woman sued a meretricious spouse with whom she had cohabited for fifteen years, seeking to recover an equal share of the properties accumulated by the parties during their relationship. The plaintiff had provided household services throughout most of the years of cohabitation and had cared for the three small children born of the union.

Although the equities in *Hewitt* appeared to require relief for the plaintiff, the Illinois Supreme Court applied the meretricious spouse rule to totally bar recovery, stating: "Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage."[117] The court cited several public policy concerns as justification for its decision. First, the court decided that the recognition of contractual rights of meretricious spouses would weaken the institution of marriage.[118] The court examined recently enacted state law and determined that the legislative intent was to strengthen and preserve the integrity of marriage.[119] The court expressed concern that recognition of plaintiff's claim would judicially reinstate common-law marriage in Illinois and, therefore, would run counter to legislative intent.[120]

The basis for this concern would appear to be groundless. Although the recognition of property rights of meretricious spouses may appear to be similar to according marital privileges, the theory under which these rights are asserted and the remedies sought are contractual. Thus the basis for recovery is entirely different than would be recovery for a legally married spouse under similar circumstances. The property rights of the unmarried cohabitor are not derived from marital status and are therefore not controlled by state law governing marital property rights. Rather, they stem from the intentions of the parties to the relationship.[121]

115. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).
116. *Id.* at 58-65, 394 N.E.2d at 1208-10.
117. *Id.* at 58, 394 N.E.2d at 1207.
118. *Id.* at 62, 394 N.E.2d at 1209.
119. *Id.*
120. *Id.* at 62, 394 N.E.2d at 1209-10. A small group of states, including Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, and South Carolina, as well as the District of Columbia, recognize the validity of common-law marriages. Lorio, *supra* note 9, at 19 n.109.
121. There is some disagreement among commentators as to whether the recognition of property rights of meretricious spouses actually amounts to a de facto recognition of common-law marriage. *See* Hunter, *supra* note 16, at 1093 (ar-

A second factor cited by the *Hewitt* court in denying recovery was that Illinois required an element of fault for divorce.[122] The court found implicit in this requirement an expression of legislative policy to strengthen the marital institution.[123]

Finally, the court concluded that recognition of the rights of meretricious spouses would be contrary to the state public policy because of the illegality of fornication.[124] To allow the recovery of property rights based upon a contract stemming from an illegal relationship would contravene the state's prohibition of extra-marital sexual relations. This rationale clearly runs counter to current trends in the law.[125] Particularly in view of the fact that the United States Supreme Court has recognized some rights of single people to sexual privacy,[126] this rationale for denying recovery appears questionable.[127]

There are two ways in which the law is currently developing in the area of protecting the rights of meretricious spouses: (1) the passage of legislation defining the rights of meretricious spouses similar to those governing the marital relation, and (2) the enforcement of cohabitors' rights on a contractual basis. As previously discussed, a major problem with the contractual approach is uncertainty in recovery because of the limited application of the meretricious spouse rule. In addition, the contractual approach fails to address whether other rights may be accorded to the meretricious spouse, such as workmen's compensation benefits, inheritance rights, causes of action for the wrongful death of a spouse, social security benefits, and spousal support.[128] Other questions left unanswered by contractual theories include the right of the unmarried cohabitor to tax benefits upon inheritance[129] and the right to recover attorneys' fees in suits against the meretricious

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guing that it does). *But see* Note, *The Old Morality Lives On In Illinois*, 56 CHI-KENT L. REV. 1197, 1207 (1979), where the author stated in referring to the *Hewitt* decision: "[W]hile the remedy of a property settlement would be the same in this case for both common law marriage and contract, the actions have a different basis and can have differing consequences."

122. 77 Ill. 2d at 63, 394 N.E.2d at 1210.

123. *Id. See* Note, *supra* note 68, at 525-30. Only Illinois and North Dakota have not adopted no-fault divorce. *See* ILL. REV. STAT. ch. 40, § 401 (1977); N.D. CENT. CODE § 14-05-03 (1971).

124. 77 Ill. 2d at 59, 394 N.E.2d at 1208.

125. The tendency is toward repealing cohabitation and fornication statutes. *See, e.g.*, CAL. PENAL CODE § 269(a) (West 1970) (repealed 1975); OR. REV. STAT. § 167.010 (Supp. 1969) (repealed 1971); PA. STAT. ANN. tit. 18, § 4505 (Supp. 1971-72) (repealed 1972).

126. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting single persons from obtaining contraceptives held unconstitutional).

127. *See* Bruch, *supra* note 76, at 290.

128. *See* Comment, *supra* note 13, at 498-99.

129. This issue was addressed in Estate of Edgett, 111 Cal. App. 3d 230, 168 Cal.

spouse.[130]

The importance of the interrelationship of legislative policies and the recognition of property rights of meretricious spouses suggests that an alternative to contractual theories of recovery may be statutorily defined rights. Legislation expressly directed at the unmarried cohabitation relationship could both clarify the reasonable expectations of the parties and aid the courts by outlining specific legislative policies.

For example, the legislature could create status rights for meretricious spouses similar to those legislatively created for married spouses.[131] This result could be accomplished by either including meretricious spouses under the family law acts or by creating new legislatively defined status rights for them.

Some states have created status rights for meretricious spouses, similar to specific rights normally granted to married spouses, when the equities are in favor of granting such rights. Oregon, for example, allows a meretricious spouse to collect workmen's compensation as though the parties had been married, providing there are children born of the union and the parties lived together at least one year.[132] Similarly, New Hampshire has protected meretricious spouses from disinheritance by cohabitors where the parties have lived together for the three years preceding the death of the cohabitor.[133] Particularly with respect to rights such as these, where the meretricious spouse would not be protected by the availability of contractual theories of recovery, state legislatures should at least consider including the meretricious spouse as a recipient of the status rights accorded to the married spouse. The legislature could, of course, limit by definition the extent to which such benefits would apply to meretricious spouses.

Although legislatively extending particular status rights to meretricious spouses may be appropriate in certain circumstances, the meretricious spouse should not be afforded property rights upon termination of the relationship based upon a status theory.[134] To

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Rptr. 686 (1980), where the court held that the unmarried cohabitor was an unrelated person for inheritance tax purposes.

130. In Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981) the court held that a meretricious spouse could not recover attorney's fees which were statutorily authorized under similar circumstances for a legally married spouse.

131. Some states have granted putative spouses status rights. *See, e.g.*, CAL. CIV. CODE § 4452 (West Supp. 1980); COLO. REV. STAT. § 14-2-111 (1973); MONT. REV. CODES ANN. § 40-1-404 (1979).

132. OR. REV. STAT. § 656.226 (1979).

133. N.H. REV. STAT. ANN. § 457:39 (1968).

134. Such a creation of status rights as proposed by the *Cary* decision, *see* notes 30-32 & accompanying text *supra*, was rejected by the subsequent decision of Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

give a meretricious relationship the status of marriage would not only undermine public policies, but also would be contrary to the intent of the parties to the relationship.[135] It therefore appears that the contractual analysis, as enunciated in *Marvin*,[136] may be the better approach to the problem of defining the rights of the meretricious spouse to property acquired during the relationship upon termination of the relationship. By recognizing property rights of unmarried cohabitors on a contractual basis, the state would not put the relationship on a par with legal marriage. Although the *amount* recovered by the meretricious spouse may in some cases be equivalent to the type of property settlement to which a legally married spouse would be entitled, the *basis* for recovery would not be state-created status rights, but contractual rights, available to all persons under the law.

Another legislative alternative, which may create more certainty in the determination of the enforceability of property rights of unmarried cohabitors, would be action similar to that taken recently by the Minnesota legislature.[137] The new Minnesota legislation requires that all contracts between unmarried cohabitors be in writing and signed by the parties.[138] By designating any contract which does not meet these requirements as void and contrary to public policy,[139] the legislature has effectively circumvented the argument that part performance has taken such an agreement out of the Statute of Frauds.

The Minnesota legislation promotes certainty by determining which contracts between unmarried cohabitors will be enforceable. In addition, the requirement of a writing should aid the courts in ascertaining the extent of the rights of recovery under such a contract. On the other hand, the Minnesota legislation could result in inequities where there has been an express oral agreement between the parties on which one party has relied to his detriment. Unlike other Statute of Frauds provisions, the requirement of a writing in such a case is not tempered by the doctrine of part performance.

The state has important interests in regulating the marital relationship: promoting public morality, ensuring family stability, assuring support obligations, and ensuring the proper care of children.[140] To further these policies, traditional marriage rela-

135. *See* Hunter, *supra* note 16, at 1094-95; Lorio, *supra* note 9, at 30; Zuckerman, *supra* note 41, at 279-80.
136. *See* notes 33-39 & accompanying text *supra*.
137. MINN. STAT. §§ 513.075-.076 (Cum. Supp. 1980). For the text of the statutes, see notes 65 & 66 *supra*.
138. MINN. STAT. § 513.075 (Cum. Supp. 1980).
139. *Id.* § 513.076.
140. *See* Weitzman, *supra* note 17, at 1241-43.

tions should be strengthened. However, long and stable nonmarital unions pose no threat to these social policies. It therefore is particularly unjust to deny recovery to meretricious spouses where the union appears, in all outward respects, to resemble the legal marriage relationship.[141]

Rather than prohibiting recovery by meretricious spouses as a means of furthering the above policies, perhaps lawmakers should make marriage a more attractive alternative.[142] There has been some concern that the recognition of property rights in the meretricious relationship places it in a preferred position over marriage.[143] Because marital partners cannot contract concerning the marital relationship, their relationship lacks the flexibility of a meretricious one. However, the proper resolution to this problem may be not in disallowing the meretricious spouse's claim, but rather, in allowing more flexibility in the marital relationship.

The best alternative to ensure certainty of the rights of meretricious spouses upon termination of the relationship is for the parties to put property in the names of both parties if it is intended to be jointly owned. In cases where property is held jointly by the parties, the intent to share in the property is clear and the right of the meretricious spouse to one-half of the property is generally upheld.[144]

VIII. CONCLUSION

Despite the uncertainty of the legal rights of the parties in a cohabitation relationship, it is clear that this uncertainty and, in some instances, the disallowance of property rights for unmarried cohabitors, has not discouraged de facto marriages. On the contrary, it is widely recognized that nonmarital cohabitation is increasing.[145]

Prohibiting recovery by a meretricious spouse is most detrimental when the relationship is of long duration and closely re-

141. *See* Bruch, *supra* note 76, at 284-85; Comment, *supra* note 14, at 723; Note, *supra* note 68, at 538-40.
142. Lorio, *supra* note 9, at 23.
143. *See, e.g.*, Levin & Spak, *supra* note 77, at 510-15.
144. *See, e.g.*, Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Kinkenon v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981).
145. Bruch, *supra* note 76, at 284; Zuckerman, *supra* note 41, at 248. Just *why* nonmarital cohabitation is increasing is open to speculation. One commentator posed five possible reasons for the increasing number of persons who cohabit outside of marriage: (1) marriage is no longer viewed as the only socially acceptable context for sexual activity, (2) the trend is toward smaller families and a later age of childbearing, (3) the increased divorce rate, (4) economic considerations, and (5) disillusionment with the structures of marriage. Lorio, *supra* note 9, at 3-5.

sembles the traditional marital union. The result is that one party to the relationship suffers greatly,[146] while the other party, who is equally "guilty" of the same conduct, is unjustly enriched.[147] To promote equity between the parties to such a relationship, the legal system has an obligation to recognize the existence of the relationship and, in the proper circumstances, protect the reasonable expectations of the parties to the extent that legislative policies will not be undermined.

Wise legal policies should not only promote equity but should also recognize social realities. Legislative action is suggested as a means whereby, under appropriate circumstances, certain rights may be extended to the meretricious spouse. However, legislative action is not recommended as a means to resolve property disputes upon termination of the meretricious relationship. The better approach to the resolution of such disputes is the contractual approach proposed by *Marvin*, which balances the policy of encouraging legal unions with the policy of promoting equitable results. In the context of such disputes, the contractual analysis protects the interests of the parties, without sanctioning nonmarital cohabitation.

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146. It is generally women who are hurt by the refusal to recognize property rights of meretricious spouses since the woman's contribution to the union is frequently in a nonmonetary form.

147. *See* Bruch, *supra* note 76, at 316; Note, *supra* note 121, at 1199.