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The Relevance of Premarital Cohabitation to Property Division Awards in Divorce Proceedings: An Evaluation of Present Trends and a Proposal for Legislative Reform

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THE RELEVANCE OF PREMARITAL COHABITATION TO PROPERTY DIVISION AWARDS IN DIVORCE PROCEEDINGS: AN EVALUATION OF PRESENT TRENDS AND A PROPOSAL FOR LEGISLATIVE REFORM†

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I. INTRODUCTION

Changing societal values regarding the propriety and acceptability of nonmarital cohabitation have been reflected in the law. State officials often do not enforce criminal statutes that prohibit fornication and adultery,[1] and several states have responded directly to changing mores by repealing such statutes.[2] Similarly, in the area of family law, numerous courts have reexamined traditional public policy rationales that proscribe the recognition of mutual property rights between nonmarital cohabitants.[3] These courts

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[1] Clark, *The New Marriage*, 12 WILLAMETTE L.J. 441, 445 (1976); Weisberg, *Alternative Family Structures and the Law*, 24 THE FAMILY COORDINATOR 549, 551 (1975).

[2] *See, e.g.*, CAL. PENAL CODE §§ 269a-269b (West 1970) (adultery) (repealed 1975); ME. REV. STAT. ANN. tit. 17, § 1551 (1964) (fornication) (repealed 1975); N.H. REV. STAT. ANN. § 632:2 (1974) (deviate sexual relations) (repealed 1975); N.J. STAT. ANN. § 2A:110-1 (West 1969) (fornication) (repealed 1978); OR. REV. STAT. §§ 167.005, .015 (adultery, lewd cohabitation) (repealed 1971); Law of June 24, 1939, No. 375, § 505, 1939 Pa. Laws 872, 906 (adultery) (repealed 1972).

[3] *See, e.g.*, Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978); *In re* Estate of Steffes, 95 Wis. 2d 490, 290 N.W.2d 697 (1980); Kinnison v. Kinnison, 627 P.2d 594 (Wyo. 1981).

Some states still refuse to grant remedies to nonmarital cohabitants upon the termination of their relationship. *See, e.g.*, Roach v. Button, 6 FAM. L. REP. (BNA) 2355 (Tenn. Ch. Feb. 29, 1980) (claim for equity relief for contributions made during 15-month cohabitation refused because plaintiff entered into a relationship "not sanctioned by Natural or Divine law"); Boyles v. Boyles, 6 FAM. L. REP. (BNA) 2379 (Md. Cir. Ct. Nov. 8, 1979) (female cohabitant's claims for support and property award unenforceable because they contravene public policy disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants).

realize that a lifestyle now so prevalent in our society[4] cannot be ignored if the law is to remain responsive to the needs of society. Guided by the well-publicized *Marvin* case[5] in California, many courts have revised their positions with respect to the rights of nonmarital cohabitants upon the termination of their relationship.[6]

The change in sexual and social mores, which led to the rising popularity of nonmarital cohabitation as an alternative to marriage, also has led to a growing trend toward premarital cohabitation, i.e., nonmarital cohabitation as a prelude to marriage.[7] Yet, the proliferation of both judicial opinions and legal commentary defining the rights of nonmarital cohabitants[8] has not been

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[4] In the 10 year period between 1970 and 1980, the number of unrelated unmarried heterosexual couples living together rose from 523,000 to 1,560,000, an increase of approximately 200%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS SERIES P-20, NO. 365, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1980, at 5 (1981). These statistics may include living arrangements outside the scope of the term "nonmarital cohabitation," as that term is utilized in this Article, such as an elderly woman who rents a room to a male college student. The 1980 statistics, however, indicate that only 1% of unmarried-couple households had a person 65 years or older sharing living quarters with an unrelated person under 35 who was of the opposite sex. Rather, 63% of all unmarried couples involved two adults under the age of 35. *Id.* at 4.

[5] Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

[6] *See* cases cited *supra* note 3.

[7] Some studies have shown that more cohabitants perceive the period of nonmarital cohabitation as a trial period or prelude to marriage than as a chosen alternative to marriage.

> Cohabitation, as it seems to be practiced today by middle-class college students, is defined as a replacement for marriage by only a small minority of the participants. As . . . others have concluded, cohabitation in most cases is a stage in the courtship process. Cohabitants seem not to be rejecting marriage itself, but merely adding to some of the processes by which the marriage bond is formed.

Bower & Christopherson, *University Student Cohabitation: A Regional Comparison of Selected Attitudes and Behavior*, 39 JOURNAL OF MARRIAGE AND THE FAMILY 447, 450-51 (1977).

Although the above study may not be representative of all cohabitants in that it was restricted to college students, a Swedish study involving a more randomly selected sample also suggests that nonmarital cohabitation is utilized by many as a prelude to marriage rather than as a deliberately chosen alternative. Of all the unmarried cohabitants surveyed, about two thirds intended or believed that they would marry. J. TROST, UNMARRIED COHABITATION 92 (1979). A group of newly married couples who had lived together before marriage were asked why they did not marry in connection with moving in together. Forty-six percent of the men and 57% of the women answered that they either "wanted to try it first" or "didn't know each other well enough." *Id.* at 81. Both responses suggest use of the period of cohabitation as a trial period or prelude to marriage. *See also infra* note 113.

[8] Accompanying the proliferation of judicial opinions redefining the property rights to be accorded cohabitants, *see supra* note 3, was a great increase in the

paralleled by a similar growth in either area with respect to the effect of premarital cohabitation in dividing property at divorce. A period of premarital cohabitation should influence not only which property is subject to division upon divorce but also how that property ultimately is divided. Most divorce courts faced with the dilemma of fashioning a remedy in such situations, however, have not distinguished premarital cohabitation claims from nonmarital cohabitation claims.[9] Consequently, divorce courts have utilized a patchwork scheme for dealing with premarital cohabitation claims that does not adequately address the distinct policy considerations raised by such claims. This patchwork scheme leaves divorcing couples with a cumbersome remedy ill-suited to an equitable solution to their problem, or even worse, with no solution at all.

This Article will examine current judicial treatment of premarital cohabitation in the context of two major types of property division statutes applicable to divorce proceedings. After discussing several problems with the current approach, the Article explores judicial and legislative alternatives. Although the judicial alternative—recognition of the premarital cohabitation period through broad interpretation of existing statutory language or through

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number of law review articles evaluating current trends. *See, e.g.*, Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453 (1976); Kay & Amyx, Marvin v. Marvin: *Preserving the Options*, 65 CALIF. L. REV. 937 (1977); Comment, *Property Rights upon Termination of Unmarried Cohabitation:* Marvin v. Marvin, 90 HARV. L. REV. 1708 (1977); Comment, Marvin v. Marvin: *Five Years Later*, 65 MARQ. L. REV. 389 (1982) [hereinafter cited as Marquette Comment]; Comment, *The Enforcement of Cohabitation Agreements: Theories of Recovery for the Meretricious Spouse*, 61 NEB. L. REV. 138 (1982) [hereinafter cited as Nebraska Comment].

[9] *See, e.g., In re* Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (App. Ct. 1981) (relying on nonmarital cohabitation cases to reject wife's claim that supporting her husband during a period of premarital cohabitation should be considered in determining appropriate property settlement); *In re* Marriage of Crouch, 88 Ill. App. 3d 426, 410 N.E.2d 580 (App. Ct. 1980) (denying wife's claim to art objects acquired during a period of premarital cohabitation because similar claims in palimony cases are without remedy in Illinois); Grishman v. Grishman, 407 A.2d 9 (Me. 1979) (stating that real estate acquired during a period of premarital cohabitation cannot be classified as marital property); Bereman v. Bereman, 645 P.2d 1155 (Wyo. 1982) (relying on nonmarital cohabitation cases, and fact that palimony is not accepted in Wyoming, to deny wife relief); *cf.* Hager v. Hager, 553 P.2d 919 (Alaska 1976) (although court rejects a relation-back theory under which a period of premarital cohabitation is relevant in determining property division awards pursuant to divorce, it achieves the same result by looking at the manner of acquisition of the property); Vine v. Vine, 7 FAM. L. REP. (BNA) 2765 (Conn. Super. Ct. Sept. 29, 1981) (considering the unmarried and married period of the parties' relationship "in order to fairly determine the ultimate rights of the parties"); Jiminez v. Jiminez, 68 Ill. App. 3d 651, 386 N.E.2d 647 (App. Ct. 1979) (holding that Illinois statute, now repealed, does not limit the court's power to distribute property acquired solely during the marital period).

transmutation—is preferable to current judicial treatment, this Article concludes that legislation is needed. The legislative proposal, a modification of existing state divorce statutes, *directly* responds to the special problems encountered by the litigants, the courts, and the state when parties who have lived together before marriage are divorced.

II. PROPERTY DIVISION AWARDS IN DIVORCE PROCEEDINGS: CURRENT JUDICIAL TREATMENT OF PREMARITAL COHABITATION

A. *Basing Recognition of Premarital Cohabitation on Nonmarital Cohabitation Remedies*

A divorce court in a dissolution of marriage proceeding[10] seeks to fashion relief that will separate the lives of the divorcing spouses equitably and in a manner designed to give both spouses the resources to lead an independent life.[11] Litigants in increasing numbers are petitioning divorce courts to give

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[10] The words "divorce" and "dissolution of marriage" are used interchangeably in this Article. Some states, however, in conjunction with a revision of their divorce statutes to encompass "no-fault" bases for divorce, also discarded the word "divorce" as a term connoting the previous fault system. Instead, they substituted the term "dissolution of marriage." *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 301 commissioners' notes (1979). When a court considers a petition for the dissolution of marriage, it also may be asked to determine property division, custody, child support, and alimony.

[11] Although theoretically speaking, alimony rather than property division is the vehicle through which divorce courts provide for a spouse in need of support, in practice, courts use both property division awards and alimony to furnish spouses with sufficient resources to become independent. *See* H. CLARK, LAW OF DOMESTIC RELATIONS §§ 14.5, 14.8 (1968); Fain, *The Effect of Property Distribution on Alimony Awards in a Community Property Jurisdiction (California)*, in ECONOMICS OF DIVORCE 35 (1978); Inker, Walsh & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, in FATHERS, HUSBANDS AND LOVERS: LEGAL RIGHTS AND RESPONSIBILITIES 237, 246-47 (1979); *see also* Gugliotta v. Gugliotta, 160 N.J. Super. 160, 388 A.2d 1338 (Super. Ct. Ch. Div.) (stating that alimony serves (1) to prevent the wife from becoming a public charge; and (2) to allow her to share in the accumulation of marital assets and in the economic rewards made possible by her husband's income level, which was reached through their combined efforts), *aff'd*, 164 N.J. Super. 139, 395 A.2d 901 (Super. Ct. App. Div. 1978).

Statutes themselves may muddle the distinction between the purposes of alimony and property division. To illustrate, New York's property division statute provides that courts should consider, *inter alia*, the income and property of each party at the time of the marriage, and at the time of the commencement of the action, the age and health of both parties, any award of maintenance, and the probable future financial circumstances of each party. N.Y. DOM. REL. LAW § 236 pt. B(5)(d) (McKinney Supp. 1981). Conversely, in determining the amount and duration of maintenance, the statute directs courts to consider, *inter alia*, the income and property of the

some recognition to the period of premarital cohabitation in fashioning such relief, particularly in the context of property division awards.[12] Although state statutes circumscribe the courts' power to divide property by delineating which property may be divided and by providing guidelines for making the actual property division, statutes often leave the judiciary with broad discretionary powers to fashion the award.[13] Nonetheless, courts are not examining in depth the phenomenon of premarital cohabitation and its proper relationship to property division remedies. Instead, courts assume that any relief accorded to parties based upon the period of premarital cohabitation must derive from and be governed by the rights of nonmarital cohabitants.

Property division statutes in most states recognize two categories of property—separate property and marital property—and limit the courts' power of division to the latter category.[14] In states with this statutory scheme, referred to in this Article as "separate/marital" property states,

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parties, including that distributed pursuant to the property division award. *Id.* § 236 pt. B(6).

[12] These requests for recognition are taking a variety of forms, including: (1) requests that property acquired during premarital cohabitation be considered marital property, *In re* Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (App. Ct. 1981); (2) requests that activities of a spouse during the period of premarital cohabitation be considered in fashioning an alimony award, *id.*; and (3) requests that claims regarding property interests of one spouse in the property of the other spouse allegedly acquired during premarital cohabitation be joined with the divorce action, Vine v. Vine, 7 FAM. L. REP. (BNA) 2765 (Conn. Super. Ct. Sept. 29, 1981).

[13] *See, e.g.*, IND. CODE § 31-1-11.5-11 (Supp. 1981); MASS. ANN. LAWS ch. 208, § 34 (Michie/Law. Co-op. Supp. 1982); N.Y. DOM. REL. LAW § 236 pt. B(5) (McKinney Supp. 1981).

[14] Twenty-three states and the District of Columbia can be generally classified as "separate/marital" property states as of September, 1982: Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Illinois, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Virginia, and Wisconsin. *See* Freed & Foster, *Family Law in the Fifty States: An Overview as of September, 1982*, 8 FAM. L. REP. (BNA) 4065, 4079-83. *E.g.*, ARK. STAT. ANN. § 34-1214 (Supp. 1981); DEL. CODE ANN. tit. 13, § 1513 (1981); KY. REV. STAT. § 403.190 (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 722-A (1981).

Eight states and Puerto Rico follow the civil law institution of community property: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Freed & Foster, *supra*, at 4079. In community property states, property acquired during the marriage through the efforts of the parties belongs to both spouses, and upon divorce, the court is authorized to divide only the community property. *See, e.g.*, CAL. CIV. CODE § 4800 (West Supp. 1982); NEV. REV. STAT. § 125.150 (1979); TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1981). Thus for purposes of this Article, these states are similar to those common law states authorizing division of only marital property.

marital property usually is defined as all property acquired by the parties during the marriage, regardless of how title to that property is held.[15] Separate property generally includes property acquired by gift, bequest, devise, descent, property excluded by valid agreement of the parties, and property acquired before the marriage.[16]

Although a few "separate/marital" property statutes give the court discre-

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[15] *See, e.g.*, MINN. STAT. ANN. § 518.54(5) (West Supp. 1982).

Straightforward as this definition may seem, questions do arise, even in cases not involving premarital cohabitation, as to whether a particular piece of property was acquired before or after the marriage. Jurisdictions have split, for example, on the characterization of property when prior to the marriage one spouse takes title subject to an outstanding mortgage, and during the marriage the mortgage balance is reduced from marital funds. Some states subscribe to a title test which dictates that when title to property is taken prior to marriage, the property is the separate property of the titleholder despite the contribution of marital funds to reduce the indebtedness. *See, e.g.*, Cain v. Cain, 536 S.W.2d 866, 870, 875 (Mo. Ct. App. 1976) (use of marital property to pay mortgage does not affect status of the farm as husband's separate property; however, it is a relevant factor in dividing the marital property); Colden v. Alexander, 141 Tex. 134, 148, 171 S.W.2d 328, 334 (1943). Other states follow a source-of-funds rule whereby the source of funds used to satisfy the indebtedness and clear title determines the characterization of the property. If both marital and nonmarital funds contributed to the equity in the property, courts may consider a percentage of the property to be separate property and a percentage to be marital property. *See In re* Jafeman, 29 Cal. App. 3d 244, 256, 105 Cal. Rptr. 483, 491 (Ct. App. 1972); Tibbets v. Tibbets, 406 A.2d 70, 75 (Me. 1979).

Another question that frequently arises involves the proper characterization of appreciation of separate property. Although some statutes address this question directly, *see, e.g.*, Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 503(a)(6) (Smith-Hurd Supp. 1982), other states rely on judicial interpretation to determine the proper characterization. *See generally* Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157 (1978).

These problems differ from the problems addressed by this Article in that the proper characterization of property in the situations discussed above involves circumstances occurring during the marriage. In contrast, claims made by premarital cohabitants involve circumstances arising prior to the marriage, a time period previously of virtually no significance to divorce courts in fashioning property division awards.

[16] Separate property—sometimes called "nonmarital property"—often is defined in statutes only in terms of exceptions to the definition of marital property. *See, e.g.*, ARK. STAT. ANN. § 34-1214(B) (Supp. 1981):

(B) For the purpose of this statute "marital property" means all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired by gift, bequest, devise or descent; (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent; (3) Property acquired by a spouse after a decree of legal separation; (4) Property excluded by valid agreement of the parties; and (5) The increase in value of property acquired prior to the marriage.

tion to invade one spouse's separate property for the benefit of the other spouse when the balancing of equities so requires,[17] most provide that "the court shall assign each spouse's nonmarital property to that spouse."[18] Even in those states, however, a court could conceivably expand the definition of divisible property to include property acquired during a period of premarital cohabitation. Alternatively, by liberally interpreting existing statutory language, a court might be able to consider the period of cohabitation as a factor in deciding *how* to divide marital property.[19]

In *In re Goldstein*,[20] a recent Illinois case, the trial court failed to consider either alternative and excluded evidence that the wife in a divorce action had supported her husband during a period of premarital cohabitation while he was in medical school. The appellate court affirmed, citing *Hewitt v. Hewitt*,[21] a prior Illinois case that denied recovery between unmarried cohabitants because judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the Marriage and Dissolution of Marriage Act.[22] By relying on a case dealing with nonmarital cohabitation, the Illinois court failed to consider that theories applicable to the termination of a nonmarital relationship might not be appropriate to a situation involving the dissolution of a marriage.[23]

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[17] *See, e.g.*, ALASKA STAT. § 09.55.210(6) (Supp. 1981); MINN. STAT. ANN. § 518.58 (West Supp. 1982).

[18] Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 503(d) (Smith-Hurd Supp. 1982); *accord* ME. REV. STAT. ANN. tit. 19, § 722-A (1981); MO. ANN. STAT. § 452.330 (Vernon Supp. 1982).

[19] *See infra* notes 81-94 and accompanying text.

[20] 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (App. Ct. 1981). Mrs. Goldstein asked the court first to characterize her husband's increased earning potential, derived from his medical degree, as marital property, and second, to consider her husband's capacity for increased earnings in determining an appropriate maintenance award. The Illinois Appellate Court denied both requests.

[21] 77 Ill. 2d 49, 61-64, 394 N.E.2d 1204, 1209-11 (1979).

[22] *Goldstein*, 97 Ill. App. 3d at 1028, 423 N.E.2d at 1205.

[23] Several other courts have made similar errors in analysis. *See In re* Marriage of Crouch, 88 Ill. App. 3d 426, 410 N.E.2d 580 (App. Ct. 1980); Grishman v. Grishman, 407 A.2d 9 (Me. 1979). In *Crouch*, Mrs. Crouch unsuccessfully claimed that art objects acquired during a period of nonmarital cohabitation should be characterized as marital property. The Illinois Appellate Court affirmed the trial court's rejection of her claims:

> Mrs. Crouch has predicated her claims against Mr. Crouch in the context of a dissolution of marriage proceeding and has based her claims upon their premarital cohabitation relationship. While we might acknowledge that she was both a domestic associate and business associate of Mr. Crouch during their live-in relationship, the arguments she has used are strikingly similar to those of the so-called palimony cases. Our Supreme Court has expressly declined to sanction such pre-marital property rights even when very persuasive arguments were presented. . . . The heart of the petitioner's claims to the disputed property is that she was in some form a partner in the art gallery business and in equity and

In another group of states, referred to in this Article as "all property" states,[24] the court has authority to divide all property owned by the parties regardless of in whose name it is titled or when it was acquired.[25] Although property acquired both prior to and during the marriage is subject to division in "all property" states, the statutorily-prescribed factors that courts are directed to consider in actually dividing the property do not deal adequately with a divorce situation involving premarital cohabitation.[26]

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good conscience should be compensated for her work benefiting the business prior to their marriage. Her plight, however compelling, has no available remedy under the Illinois Marriage and Dissolution of Marriage Act.

88 Ill. App. 3d at 430-31, 410 N.E.2d. at 583.

In *Grishman*, the Supreme Court of Maine reversed a trial court's classification of real estate acquired by a couple during a period of premarital cohabitation as marital property. The court held the plain language of the state's definition of "marital property" to be controlling.

[24] There are 16 "all property" states: Connecticut, Florida, Hawaii, Indiana, Iowa, Massachusetts, Michigan, Montana, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Utah, Vermont, and Wyoming. *See* Freed & Foster, *supra* note 14, at 4079-83. *E.g.*, CONN. GEN. STAT. ANN. § 46-51 (West 1978); IND. CODE § 31-1-11.5-11 (Supp. 1981); IOWA CODE ANN. § 598.21 (West 1981); VT. STAT. ANN. tit. 15, § 751 (Supp. 1982).

[25] There is a third group of states, referred to in this Article as "title states," in which only property held jointly by the parties may be divided. Mississippi and West Virginia are the only states presently fitting squarely within this category. Freed & Foster, *supra* note 14, at 4079. South Carolina also is a title state, but only with respect to real property. Personal property is distributed equitably. *Id.* In title states, any property in which title is taken in the name of only one spouse remains the property of that spouse; the court has no power to transfer that property to the other spouse. *See, e.g.*, Bond v. Bond, 355 So. 2d 672, 673 (Miss. 1978).

Doctrines of gift, constructive trust, and tracing of equitable title may mitigate the harshness of the rule in title states. *See* Patterson v. Patterson, 277 S.E.2d 709, 714 (W. Va. 1981) (although state divorce statute was restrictive regarding the transfer of title, court permitted wife to join an equitable claim of constructive trust with the divorce proceedings to achieve the same result). Three major exceptions to the "title" rule in South Carolina also substantially liberalize the rule: (1) a resulting trust is recognized when one spouse has title to the property but the nontitled spouse paid a specific sum for it; (2) an equitable remedy is recognized when nontitled spouse materially contributed to the acquisition of the property; and (3) an equitable interest in property is recognized when a homemaker spouse sacrificed career opportunities to remain at home and rear children, Parrot v. Parrot, 292 S.E.2d 182 (S.C. 1982). *See* Freed & Foster, *supra* note 14, at 4079.

Absent judicial creativity, property acquired during a period of premarital cohabitation is not divisible in "title" states unless held jointly by the parties.

[26] *See, e.g.*, Vine v. Vine, 7 FAM. L. REP. (BNA) 2765 (Conn. Super. Ct. Sept. 29, 1981); Bereman v. Bereman, 645 P.2d 1155 (Wyo. 1982). In both of these cases, the plaintiffs pursued their premarital cohabitation claims separately from their requests

Problems arise, for example, when "all property" statutes direct the court to consider who brought particular property into the marriage in deciding who should be awarded the property.[27] Prior to the growth in premarital cohabitation, it was relatively simple to determine who brought a particular piece of property into the marriage; couples generally did not unite their economic lives until the date of their marriage.[28] Today, however, parties who precede their marriage by a period of cohabitation may have functioned as an economic unit in much the same way as if they were married; the parties may have acquired a considerable amount of property during this premarital period. In such cases, it may not be clear whether only one party brought a particular piece of property into the marriage or whether both parties have some claim to the property. Courts may not be willing, however, to take into account the fact that the parties acquired the property during a period of premarital cohabitation. Rather, they may view the statutory reference to "who brought the property into the marriage" as an indication of legislative intent that events occurring prior to the marriage not be considered.

Thus, instead of dealing directly with the particular problems of divorcing parties who have lived together before marriage, courts have premised the recognition of the premarital period in a divorce proceeding upon the existence of remedies to nonmarital cohabitants. By placing all persons who cohabit without benefit of marriage into a single category, courts have not acknowledged the potential differentiating factor of the marriage itself. Rather, they have treated parties who have lived together uniformly, whether or not their cohabitation resulted in marriage. Courts have assumed that both the form and availability of relief to nonmarital cohabitants should be determinative of that available to premarital cohabitants upon the dissolution of marriage.

B. *Remedies Available to Nonmarital Cohabitants*

Many of the problems involved in relegating divorcing parties to the remedies available to nonmarital cohabitants derive from the nature of those remedies. Therefore, an understanding of those remedies is necessary to an appreciation of the problems that arise. Because of a long-standing policy

for property division pursuant to the dissolution, indicating uncertainty on the part of these litigants as to whether the dissolution statute itself could serve as the basis of relief.

[27] *See, e.g.*, IND. CODE § 31-1-11.5-11(b)(2) (Supp. 1981); IOWA CODE ANN. § 598.21(1)(b) (West 1981); VT. STAT. ANN. tit. 15, § 751(b)(10) (Supp. 1982).

[28] Although there are certain problems with respect to the proper characterization of property as separate or marital, *see supra* note 15, those problems generally revolve around the effect of circumstances occurring during the marriage. Prior to the growth in premarital cohabitation, however, if the property was purchased completely before marriage, few questions were raised regarding the characterization of the property itself, although questions regarding the proper characterization of appreciation of property may have existed.

encouraging marriage, states have been reluctant to accord nonmarital cohabitants the same status as married individuals by granting them relief under their respective marriage and divorce laws. Instead, most states have based remedies available to nonmarital cohabitants on contractual or intent-based theories, or alternatively, on fairness theories.[29]

1. Intent-Based Theories

A growing number of jurisdictions are enforcing express contracts by nonmarital cohabitants that set forth their intentions with respect to their economic relationship during or at the termination of their relationship.[30] The major bar to enforcing such agreements in the past was the general rule that agreements based upon illegal consideration are unenforceable.[31] Courts assumed that part of the consideration for agreements between nonmarital cohabitants was the provision of sexual services, an illegal form of consideration that barred the enforceability of the agreement.[32]

Some courts still rely on the doctrine of illegal consideration to bar enforcement of contracts between nonmarital cohabitants.[33] However, many courts either have rejected the doctrine as applied to nonmarital cohabitants[34] or have utilized other legal doctrines such as severability[35] to strike down the part of the contract supported by illegal consideration while leaving the remainder of the contract intact and enforceable.[36]

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[29] *See generally* Marquette Comment, *supra* note 8; Nebraska Comment, *supra* note 8.

[30] *See, e.g.*, Fernandez v. Garza, 88 Ariz. 214, 219, 354 P.2d 260, 263 (1960); Marvin v. Marvin, 18 Cal. 3d 660, 674, 557 P.2d 106, 116, 134 Cal. Rptr. 815, 825 (1976); Tyranski v. Piggins, 44 Mich. App. 570, 573-74, 205 N.W.2d 595, 596 (Ct. App. 1973); Kozlowski v. Kozlowski, 80 N.J. 378, 385-88, 403 A.2d 902, 906-08 (1979); Latham v. Latham, 274 Or. 421, 421-27, 547 P.2d 144, 144-47 (1976).

[31] 6A A. CORBIN, CONTRACTS §§ 1373-75 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981); 15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1745 (3d ed. 1972).

[32] *See* Freed & Foster, *supra* note 14, at 4099.

[33] *See, e.g.*, Rehak v. Mathis, 239 Ga. 541, 543, 238 S.E.2d 81, 82 (1977); Roach v. Buttons, 6 FAM. L. REP. (BNA) 2355, 2355 (Tenn. Ch. Feb. 29, 1980).

[34] *See, e.g.*, Levar v. Elkins, 604 P.2d 602, 602-04 (Alaska 1980) (court implicitly rejected the doctrine by holding that jury could reasonably have found mutual assent and consideration to support a contractual obligation between the parties, who had cohabited for 20 years); Beal v. Beal, 282 Or. 115, 123, 577 P.2d 507, 510 (1978) (court implicitly rejected doctrine by holding that property of man and woman living together in a nonmarital relationship should be distributed according to the express or implied intent of the parties).

[35] Under the doctrine of severability, the court severs the part of the contract supported by illegal consideration, leaving the balance of the contract enforceable. *See* 6A A. CORBIN, *supra* note 31, § 1476; 15 S. WILLISTON, *supra* note 31, §§ 1752, 1782.

[36] *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 672, 557 P.2d 106, 114, 134 Cal.

Most cases dealing with the enforceability of express contracts between nonmarital cohabitants involve allegations of an oral contract rather than a formal written contract.[37] Accordingly, evidentiary problems often arise regarding the existence of such an agreement. In addition, questions regarding the actual terms of such contracts are prevalent because the oral contracts themselves often do not represent a comprehensive, considered attempt at negotiation by the parties. Instead, they consist of one-sentence representations exhibiting an intent to share property acquired during the period of cohabitation, such as "what is mine is yours."[38]

If an express contract cannot be shown, nonmarital cohabitants may seek relief under an implied-in-fact contract.[39] In considering the appropriateness of recovery under this theory, the court examines the conduct of the parties during their cohabitation to determine whether that conduct represents an implied agreement between the parties with respect to their economic relationship.[40] Courts consider the way in which household finances were handled,[41] the existence of joint bank accounts,[42] the provision by one party and

Rptr. 815, 823 (1976); Glasgo v. Glasgo, 410 N.E.2d 1325, 1331 (Ind. Ct. App. 1980); Tyranski v. Piggins, 44 Mich. App. 570, 573, 205 N.W.2d 595, 596 (Ct. App. 1973); Kozlowski v. Kozlowski, 80 N.J. 378, 385, 403 A.2d 902, 906 (1979).

[37] *See, e.g.*, Glasgo v. Glasgo, 410 N.E.2d 1325, 1328 (Ind. Ct. App. 1980); Tyranski v. Piggins, 44 Mich. App. 570, 570-77, 205 N.W.2d 595, 595-99 (Ct. App. 1973); Kozlowski v. Kozlowski, 80 N.J. 378, 384, 403 A.2d 902, 906 (1979); Morone v. Morone, 50 N.Y.2d 481, 487, 413 N.E.2d 1154, 1156-57, 429 N.Y.S.2d 592, 595 (1980); Kinnison v. Kinnison, 627 P.2d 594, 595-96 (Wyo. 1981).

If the action alleges an oral agreement to convey real property or an oral agreement regarding lifelong companionship and services, the Statute of Frauds may bar recovery. *See, e.g.*, Rubenstein v. Kleven, 261 F.2d 921 (1st Cir. 1958); Wilke v. Oldenburg, 6 FAM. L. REP. (BNA) 2086 (N.Y. Sup. Ct. Nov. 20, 1979), *rev'd on other grounds*, 78 A.D.2d 808, 434 N.Y.S.2d 647 (App. Div. 1980). Several states have proposed legislation specifically requiring contracts between nonmarital cohabitants to be in writing. *See* Freed & Foster, *supra* note 14, at 4103 (listing recent proposals).

However, mitigating doctrines sometimes may remove the agreement from the constraints of the Statute of Frauds or these state statutes. *See, e.g.*, Jiminez v. Jiminez, 68 Ill. App. 3d 651, 386 N.E. 647 (App. Ct. 1979) (full performance removes agreement from Statute of Frauds); Muller v. Sobol, 277 A.D. 884, 97 N.Y.S.2d 905 (App. Div. 1950) (enforcing agreements with respect to real property, despite the lack of a writing, in order to prevent unjust enrichment).

[38] Glasgo v. Glasgo, 410 N.E.2d 1325, 1326 (Ind. Ct. App. 1980).

[39] 1 A. CORBIN, CONTRACTS § 18 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981); 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 3 (3d ed. 1979).

[40] *See, e.g., In re* Estate of Donley, 3 Mich. App. 458, 461-62, 142 N.W.2d 898, 900 (Ct. App. 1966); Carlson v. Olson, 256 N.W.2d 249, 255 (Minn. 1977); *In re* Estate of Thornton, 81 Wash. 2d 72, 80, 499 P.2d 864, 868 (1972); *In re* Estate of Steffes, 95 Wis. 2d 490, 505, 290 N.W.2d 697, 704 (1980).

[41] *See, e.g.*, McCullon v. McCullon, 96 Misc. 2d 962, 973, 410 N.Y.S.2d 226, 233 (Sup. Ct. 1978).

[42] *Id.*

acceptance by the other of household services,[43] and the manner in which title was taken to certain property acquired during the relationship.[44]

Another possible intent-based theory of recovery for nonmarital cohabitants is resulting trust, an equitable theory of recovery similar to implied-in-fact contract in that the intention of the parties is ascertained from circumstantial evidence. In order to justify the imposition of a resulting trust on property, the court must find: (1) that one party purchased property with consideration furnished entirely or in part by another party;[45] and (2) that the circumstances surrounding the purchase demonstrate an intent that the titleholder hold the property or an interest in the property in trust for the party providing the consideration.[46] This remedy is usually narrower than those previously mentioned because it focuses on the intent of the parties with respect to a particular piece of property rather than with respect to their entire economic relationship.

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[43] *See, e.g., In re* Estate of Donley, 3 Mich. App. 458, 461, 142 N.W.2d 898, 899 (Ct. App. 1966).

[44] *See, e.g.*, Carlson v. Olson, 256 N.W.2d 249, 255 (Minn. 1977).

[45] *See, e.g.*, Albae v. Harbin, 249 Ala. 201, 202-03, 30 So. 2d 459, 460 (1947); Padilla v. Padilla, 38 Cal. App. 2d 319, 319-21, 100 P.2d 1093, 1093-94 (Dist. Ct. App. 1940); Walberg v. Mattson, 38 Wash. 2d 808, 812, 232 P.2d 827, 829 (1951).

[46] *See* G.G. BOGERT & G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 74 (5th ed. 1973). The doctrine of resulting trust usually leads to a presumption that the payor intended the grantee to be only a trustee for the payor. This presumption can be rebutted by proof that the payor intended a gift to the grantee or it can be confirmed by evidence that the parties expressly agreed that the payor should have an equitable interest in the property. *Id.*

However, a presumption arises that the conveyance was a gift, and that the titleholder—the grantee—is the beneficial owner, when the grantee is the husband or parent of the payor or natural object of the payor's bounty, or when the payor and grantee are nonmarital cohabitants. In all these instances, the burden of demonstrating a resulting trust is on the payor. *Id. See* Walberg v. Mattson, 38 Wash. 2d 808, 812-13, 232 P.2d 827, 829-30 (1951).

At least one court has suggested that a resulting trust theory might be used in a premarital cohabitation claim as well. In Grishman v. Grishman, 407 A.2d 9 (Me. 1979), the Supreme Court of Maine stated in a footnote that its decision left "the way clear for the presiding justice to determine upon the evidence before him whether or not [the property] was impressed with a resulting trust for the benefit of the wife." *Id.* at 12 n.7. At issue in this divorce proceeding was the disposition of land, one half interest of which was bought by the man prior to cohabiting and the other half bought with money from a joint checking account during a period of premarital cohabitation. The Supreme Court of Maine did not explore any of the potential problems involved in dealing with a resulting trust theory when it is not raised by the parties, nor did it discuss the problems of an independent claim in the context of a divorce action, *see infra* notes 63-74 and accompanying text.

2. Fairness Theories

The remedies discussed above all turn upon the intention of the parties, either expressed in words or inferred from their conduct. Quasi-contractual remedies, by contrast, focus not on intent, but on an evaluation of the circumstances from the viewpoint of justice and fairness. If the facts demonstrate that one party has been enriched to the detriment of another, the law may imply a contract to rectify the perceived unjust enrichment.[47]

The availability of a remedy based on quasi-contract, although not dependent upon the intentions of both parties, may to a certain extent be contingent upon whether the provider of benefits expected compensation.[48] In a nonmarital cohabitation situation, one party may provide homemaker services on an extended basis to the other party, leaving the recipient free to commit resources to the acquisition of property. Absent evidence to the contrary, the court may imply an expectation of compensation, and consequently, a contract to compensate the homemaker for his or her services.[49]

The equitable remedy of constructive trust, like the quasi-contractual remedy, is concerned not with the intention of the parties, but with rectifying a situation involving the unjust enrichment of one party at the expense of another.[50] If one nonmarital cohabitant acquired property through the contribution of either services or funds of the other cohabitant, the law may impose a constructive trust whereby the former holds the property in trust for the contributor.[51] Again, the contributor's expectations in providing the benefit are relevant to whether the enrichment involved was unjust.[52]

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[47] J. CALAMARI & J. PERILLO, CONTRACTS § 1-12 (2d ed. 1977); RESTATEMENT OF RESTITUTION § 1 (1937).

[48] *See generally* RESTATEMENT OF RESTITUTION §§ 15-28, 39-43, 56-58 (1937) (discussing appropriate and inappropriate circumstances for restitution, many of which depend upon the intent and expectations of the person providing the benefit).

[49] *See* Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937); Edgar v. Wagner, 572 P.2d 405 (Utah 1977); Doyle v. Giddley, 3 FAM. L. REP. (BNA) 2730 (Dane County Ct. Wis. Oct. 4, 1977).

[50] G.G. BOGERT & G.T. BOGERT, *supra* note 46, § 77, at 287; RESTATEMENT OF RESTITUTION § 1 (1937).

[51] *See, e.g.*, Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (Ct. App. 1974). In *Omer*, the plaintiff and defendant were divorced at the suggestion of the defendant, who represented to plaintiff that the change in marital status would aid them in obtaining United States citizenship. The couple cohabited for 10 years following their divorce, and the plaintiff's earnings were used in part to purchase real property, title to which was taken in defendant's name. The Court of Appeals of Washington affirmed the trial court's imposition of a constructive trust, pointing to the defendant's initiation of the divorce as a factor making his retention of the property "grossly inequitable." *Id.* at 393, 523 P.2d at 961. Although either fraud, misrepresentation, or overreaching is traditionally necessary to recovery under a constructive trust theory, the Washington court in *Omer* did not require such a finding. It based its decision upon the "clear element of unconscionability inherent in the findings of the trial court which, in our view, justifies application of the doctrine of constructive trust." *Id.*

[52] *See supra* note 48 and accompanying text.

III. Problems with Current Judicial Treatment of Premarital Cohabitation in Divorce Proceedings

A. *Intent-Based Theories*

The assumption of divorce courts that present theories provide an adequate remedy to divorcing spouses who have engaged in a period of premarital cohabitation fails to consider the effects of the intervening marriage on the ability of spouses to prove the necessary elements of the cause of action. Central to the success of a complaint alleging express contract, implied-in-fact contract, or resulting trust is proof of the intention of the parties at the time the agreement was made.[53] When nonmarital cohabitants utilize these theories at the termination of their relationship, evidence of intent is often fresh in the minds of the parties and others who might be called to testify.[54] However, if the nonmarital period has been followed by marriage, the time period from which the evidence supporting the claim must be gathered may be far-removed from the time of the litigation, and the problems of proof thus would multiply.

The intervening marriage poses yet another problem to the likelihood of recovery under any theory that depends on the intentions of the parties. Unless the parties entered into the period of cohabitation with the firm intention of later marrying, an agreement by the parties may be framed solely in terms of their property rights should the nonmarital relationship terminate. An express agreement may not deal specifically with the effect of marriage on property rights that accrued during the nonmarital relationship; the terms of such an agreement, therefore, may not be operative where marriage rather than termination of the relationship occurred.

The doctrine of waiver also may limit recovery under contract theories. Waiver has been defined as "the intentional or voluntary relinquishment of a known right."[55] Because the marital relationship is accompanied by a highly regulated statutory scheme regarding property rights, marriage may have an effect on any property rights that accrued during the period of premarital cohabitation. A court may find that parties who marry without seeking clarification of their property rights have waived any rights which accrued during that premarital period.[56]

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[53] *See supra notes* 30-46 and accompanying text.

[54] Intent may be difficult to ascertain even when the action is brought immediately upon termination of the nonmarital relationship, because cases frequently involve only informal words of assurance or inferences from the conduct of the parties. *See supra* notes 37-38 and accompanying text. The difficulty of proving intent may increase in proportion to the length of the nonmarital relationship: in addition to the problem of fading memories, the intent of the parties may change over time and, therefore, the court may have to decide which period is most relevant.

[55] Black's Law Dictionary 1417 (rev. 5th ed. 1979).

[56] This is particularly true in "separate/marital" property division states, which dictate that the property a spouse brings into the marriage be assigned to that spouse upon divorce. *See supra* note 18 and accompanying text.

Similarly, modification of contract and superseding contract doctrines may impede the enforceability of cohabitation contracts by parties who have married. Marriage itself is frequently characterized as a contract[57] and consequently, may affect the enforceability of a prior premarital contract. Both contracts have as part of their subject matter the regulation of the economic relationship between the parties. If the marriage contract has provisions that contradict the premarital contract with respect to allocation of certain property upon termination of the relationship, the court might find that the more recent contract, the marriage contract, either modified[58] or superseded[59] the premarital contract. The application of either of these doctrines would substantially affect the success of claims based on alleged premarital contracts.[60]

B. *Fairness Theories*

Problems also arise in applying fairness theories to premarital cohabitation claims. When a period of nonmarital cohabitation is followed by marriage,

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[57] "Marriage is a personal relationship between a man and a woman arising out of a civil contract to which consent of the parties is essential." UNIFORM MARRIAGE AND DIVORCE ACT § 201 (1970). The marriage contract, however, is not solely a private matter. State regulation limits the freedom of the parties to dictate the terms of that contract and interjects the state as a party to the contract; states regulate the requirements for entering into marriage and the rights and duties of the parties both during marriage and at its dissolution. *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978); Maynard v. Hill, 125 U.S. 190, 210-11 (1888). *See generally* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974). For a proposal to increase the freedom of parties to contract with respect to marriage, see Note, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROBS. 607 (1973).

[58] The parties may make oral modifications to a contract except as otherwise provided by statute. 6A A. CORBIN, *supra* note 31, § 1294, at 201-02. "Further, innumerable cases show that the fact that a contract has been put into express words does not prevent the meaning and legal operation of those words from being affected by a process of 'implication' from the conduct of the parties and from surrounding circumstances." 3 *id.* § 564, at 293-95. Thus, the act of marrying with knowledge, either actual or imputed, of the property division schemes upon divorce, might be held to be an implied modification of a premarital contract.

[59] "An existing claim can be instantly discharged by the subsitution of a new executory agreement in its place." 6 *id.* § 1293, at 185. The subsitution can take place either before or after the prior claim has matured. *Id.* at 186. As with modification, a substituted contract may be implied from the conduct of the parties. *Id.* at 197.

[60] The extent to which a court would hold that the marriage contract modified or superseded the premarital contract would depend upon the terms and breadth of the premarital contract. If the terms of the premarital contract were held to be consistent with the terms of the marriage contract, those terms would remain in force. Thus, if the premarital contract dealt with matters other than division of property or support, those terms would remain enforceable.

with its statutory imposition of property and support rights, a court might find that the contributor's expectations of compensation are fulfilled by the statutory rights obtained in conjunction with marriage, or alternatively, by the very marriage itself. Furthermore, to the extent that recovery under these theories is based on "fairness and justice" concerns, a court might hold that the need for court intervention in the context of a divorce action is not as compelling as it is in nonmarital cohabitation proceedings.[61] The nonmarital cohabitant would be left with no remuneration absent judicial intervention. By contrast, a premarital cohabitant who later marries is eligible to receive alimony or a property division award pursuant to the divorce action regardless of judicial recognition of the premarital period.[62] Thus, the marriage arguably can be considered to negate any prior inequity resulting from the couple's premarital relationship.

C. *Treating Premarital Cohabitation as a Separate Action*

The courts' suggestion that spouses seeking recognition of the premarital period in a divorce proceeding utilize remedies devised for nonmarital cohabitants does not sufficiently consider the procedural problems arising from that suggestion. Several problems may arise in joining the cohabitation action and the divorce action in the same court. Some domestic relations courts are courts of limited jurisdiction that may not have the power to hear contractual claims or claims for general equitable relief not tied to the divorce claim.[63] Even if jurisdiction does exist, a party may prefer a jury

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[61] In Latham v. Hennessey, 13 Wash. App. 518, 535 P.2d 838 (Ct. App. 1975), *aff'd*, 87 Wash. 2d 550, 554 P.2d 1057 (1976), a husband filed a creditor's claim against the estate of his deceased wife claiming either a partnership interest or a community property interest in certain property acquired during a period of premarital cohabitation. In affirming the trial court's denial of the claim, the Court of Appeals of Washington emphasized that the husband would be provided for through a bequest in his wife's will:

> Moreover, the use of exceptions to avoid the "harshness" of the *Creasman* rule suggests the influence of equitable considerations which are not present here . . . . The record establishes that appellant is assured of a one-half interest of the property in question by operation of the decedent's will. There was no error.

Id. at 524, 535 P.2d at 842.

[62] Of course, practically speaking, if little or no divisible property exists, the need for equitable intervention of the court remains as compelling as in nonmarital cohabitation proceedings.

[63] *See, e.g.*, CAL. R. CT. § 1212 (neither party may assert any cause of action or claim for relief other than as provided in rules of court or Family Law Act); DEL. CODE ANN. tit. 13, § 1504(a) (1981) (family court has jurisdiction over all actions for divorce and annulment); MINN. STAT. ANN. § 484.64, subd. 2 (West Supp. 1982) (family court shall hear and determine all matters involving divorce, annulment or legal separation); *cf.* Banks v. Banks, 22 Del. (6 Penne.) 442, 444-46, 67 A. 853, 854 (1907) (denying defendant's request to file a crossbill in divorce proceedings because not within the jurisdicion granted by 1907 divorce statute).

trial on the nonmarital cohabitation claim; however, the state statute may not provide for jury trials in the domestic relations court.[64] Finally, the joinder of claims provision in some states might prevent joinder of the nonmarital claim with the divorce claim unless the court determines that both claims arise from one transaction.[65]

These problems may force the parties to try the nonmarital cohabitation claim and the divorce action in two separate courts as two separate actions. In addition to thwarting judicial economy concerns, this would increase litigation expenses and thus deplete the economic resources available for distribution as spousal or child support.[66]

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[64] *See, e.g.*, Steiwer v. Steiwer, 112 Or. 485, 492-95, 230 P. 359, 361 (1924) (legislature has full control over form of divorce proceedings); WASH. REV. CODE ANN. § 26.09.010(1) (Supp. 1982) (trial by jury dispensed with for actions under Washington's Uniform Marriage and Divorce Act). For a discussion as to how these considerations may influence a nonmarital cohabitant in framing a complaint, see Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 128-29 (1976).

[65] In Vine v. Vine, 7 FAM. L. REP. (BNA) 2765 (Conn. Super. Ct. Sept. 29, 1981), a wife responded to her husband's complaint for dissolution of marriage with a cross complaint, one count of which alleged that during a 14-year period of premarital cohabitation, her husband expressly and impliedly agreed to share with her the income and assets he acquired during that period. The husband moved to strike that count claiming that it was not the proper subject of a dissolution of marriage action and that it was not properly joined under a Connecticut statute limiting joinder of claims to those claims "arising out of the same transaction or transactions connected with the same subject of action." *Id.* at 2765. The Connecticut Superior Court permitted joinder of the claims, finding "the unmarried period of the parties' relationship and the married period of the marriage to be one transaction." *Id.*

The court's opinion does not explain clearly how the joinder will affect its deliberations. The plain language of the holding implies that, although both the divorce and nonmarital claims will be considered together in one action, they will be based upon different theories. The court later states, however, that "the total time of [the couple's] relationship should be considered in order to fairly determine the ultimate rights of the parties that may have accrued over their entire time together." *Id.* at 2766. This statement appears to foresee a single determination of the couple's rights *vis-à-vis* one another. The Court's confusion may be indicative of its recognition that a single determination rather than two separate actions will better reflect the realities of the relationship and will better serve the goals of the divorce court.

[66] Both statutes and case law recognize that a major task of divorce courts is to provide for a distribution of resources by which the divorced spouses can function as independent individuals. *See, e.g.*, Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 102 (Smith-Hurd 1980) (The underlying purposes of the Illinois Dissolution of Marriage Act include: "(4) mitigat[ing] the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; [and] (5) mak[ing] reasonable provision for spouses and minor children during and after litigation."); *In re* Marriage of Lee, 78 Ill. App. 3d 1123, 1133, 398 N.E.2d 126, 133 (App. Ct. 1979) (goal of courts in dividing property is to leave parties in indepen-

Another problem arising from the necessity of litigating the nonmarital claim separately from the divorce action is that of delay in the resolution of the divorce proceeding. Because the nonmarital claim involves clarification of the title of property held at the beginning of the marriage, divorce courts in states requiring knowledge of who brought property to the marriage[67] must await decision on the nonmaritial claim before fashioning a division of property award. The alimony award also may be contingent upon the final outcome of the nonmarital cohabitation claim. In determining the entitlement to, and the amount and duration of alimony, many states consider the financial circumstances of the parties at the time of the divorce, including the amount and nature of property awarded to each spouse.[68] Moreover, many jurisdictions do not allow a divorce court to dissolve a marriage until decisions involving property division, support, or child custody have been resolved.[69] Accordingly, the actual dissolution of marriage would, of necessity, be postponed until a final decision was rendered on the nonmarital claim.[70] This delay is contrary to the policy of encouraging prompt resolution of marital status to allow parties to proceed with their lives.[71]

In addition to procedural problems, conceptual and practical problems arise in fashioning an appropriate remedy when a nonmarital action is brought after an intervening marriage. Because the claimant in an ordinary nonmarital cohabitation case can pursue a claim immediately upon termination of the relationship, the property acquired during the nonmarital relationship frequently still exists. The court can issue a temporary restraining order prohibiting the other cohabitant from disposing of the property *pen-*

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dent position). To the extent that protracted and complicated litigation will deplete the resources of the couple, these goals will be frustrated.

[67] *See supra* note 27 and accompanying text.

[68] *See, e.g.*, N.Y. DOM. REL. LAW §§ 236 pt. B(5)(d), 236 pt. B(6) (McKinney Supp. 1981). For a general discussion of alimony, see *supra* note 11.

[69] *See, e.g.*, Leeds v. Leeds, 114 Misc. 2d 555, 557, 452 N.Y.S. 2d 271, 272-73 (N.Y. Sup. Ct. 1982); Little v. Little, 96 Wash. 2d 183, 194-96, 634 P.2d 498, 504-06 (1981).

Illinois, by contrast, recently amended its Marriage & Dissolution of Marriage Act to allow bifurcated judgments. Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 401(3) (Smith-Hurd Supp. 1981). Case law under the prior act had allowed bifurcated judgments only under "appropriate circumstances," such as when the court lacked personal jurisdiction over one of the parties. *In re* Marriage of Cohn, 94 Ill. App. 3d 732, 736-38, 419 N.E.2d 729, 732-34 (App. Ct. 1981) (superseded by statute as stated in *In re* Marriage of Davies, 105 Ill. App. 3d 661, 434 N.E.2d 357 (App. Ct. 1982)).

[70] The period of delay could include a lengthy period of appeal in addition to the delay caused by the trial in the nonmarital action.

[71] "Certainly a desirable objective of domestic litigation is prompt and equitable resolution of marital difficulties rather than their bitter prolongation." *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113, 113 Cal. Rptr. 58, 71 (Ct. App. 1974).

dente lite.[72] When the period of nonmarital cohabitation is followed by a period of marriage, however, it is much more likely that at least some of the property owned at the termination of the nonmarital relationship will have been disposed of or exchanged for other property. The mere fact that the exchange occurred during marriage does not necessarily transform the exchanged property into marital property.[73] Therefore, asserting a premarital cohabitation claim might involve difficult problems of tracing the proceeds from the disposition of property acquired during the premarital period.[74]

D. *Policy Implications: Premarital Cohabitation as Distinct From Nonmarital Cohabitation*

The problems that may confront a spouse seeking judicial recognition of a period of premarital cohabitation in a divorce proceeding suggest that it may be more difficult for spouses to obtain recovery at the time of divorce than it is for persons who bring an action upon the termination of a strictly nonmarital relationship. It is not consonant with public policy to penalize those who have attempted to comport with societal norms through marriage by relegating them to remedies that will make it more difficult for them to recover than if they had never married.

Furthermore, the availability and form of relief to premarital cohabitants at the dissolution of marriage should not be based on that available to nonmarital cohabitants. Dissolving a marriage and terminating a nonmarital relationship implicate different policy considerations. In a dissolution of marriage, the court is engaged in fashioning relief designed by law to separate the lives of the divorcing spouses in an equitable manner, giving both

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[72] *See, e.g.*, IND. CODE ANN. § 31-1-11.5-7(b)(1) (Burns Supp. 1982) ("[E]ither party may request the court to issue a temporary restraining order . . . [r]estraining any person from transferring, encumbering, concealing, or in any way disposing of any property except in the usual course of business or for the necessities of life.").

[73] *See, e.g.*, ARK. STAT. ANN. § 34-1214(B)(2) (Supp. 1979); DEL. CODE ANN. tit. 13, § 1513(b)(1) (1981) (property acquired in exchange for property acquired prior to the marriage not marital property); MINN. STAT. ANN. § 581.54, subd. 5(c) (West Supp. 1982) (similar statute).

[74] Most reported cases involving requests for recognition of the premarital period in divorce proceedings revolve around property acquired during the premarital period that is still in existence at the time of the divorce action. However, claims have been brought for recognition of premarital property interests framed in more general terms. *E.g.*, Vine v. Vine, 7 FAM. L. REP. (BNA) 2765 (Conn. Super. Ct. Sept. 29, 1981) (wife alleged husband expressly and impliedly agreed to share with her the income and assets acquired by him during a 14-year premarital cohabitation period). In such cases, if the property acquired during premarital cohabitation has been sold, the court would not only have to trace the proceeds of the sale to determine how they were used during the marriage, it would also have to determine whether the property acquired from the proceeds was separate or marital and the interest of each party in that property.

spouses the resources to lead an independent life.[75] Although courts considering claims for relief at the termination of a nonmarital relationship may have similar concerns, it is often difficult for them to separate the question of whether relief is appropriate in a particular situation from the broader question of the morality of nonmarital relationships. Because recognition of the premarital period in the context of divorce does not directly involve granting property rights to nonmarital cohabitants, it can be justified as an appropriate tool to better accomplish the recognized goals of the court in a divorce proceeding. Such recognition does not amount to an independent determination of the propriety of relief to all nonmarital cohabitants.

Courts have relied on the differentiating factor of marriage to award relief that might not otherwise have been available in a number of other contexts. For example, in *Burgess Construction Co. v. Lindley*,[76] a woman sought workmen's compensation benefits upon the death of the man with whom she was cohabiting. The Supreme Court of Alaska awarded her the benefits as a "surviving wife" under the Alaskan workmen's compensation statute despite the fact that she and the deceased had been divorced and that the deceased had subsequently been married and divorced two times prior to cohabiting with her again.[77] By defining the claimant's eligibility in terms of her prior marriage to the deceased, the court limited the availability of benefits to cohabitants who had previously been married to each other. This limitation has both economic appeal and appeal to those who would be offended by the extension of such remedies to all nonmarital cohabitants.

In *Glasgo v. Glasgo*,[78] the fact that two nonmarital cohabitants previously were married to each other also appears to have been a significant factor in the Indiana Court of Appeals decision. In affirming the award of contractual and equitable relief to the female claimant, the court carefully limited its holding to the "unique circumstances" of the case:

> We believe that it ill behooves courts to categorize . . . the Glasgos' relationship . . . as "meretricious" or "illicit" in any sense of those terms. . . . There are still situations to which such terms apply, but this case is not one of them. Here the specific facts which might give rise to a description of meretricious relationship are conspicuously absent: *the parties had been married formerly,* they sought to raise their children in a family setting, they conducted themselves for a significant period of time as a conventional American family . . . .[79]

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[75] *See supra* notes 10-11 and accompanying text.

[76] 504 P.2d 1023 (Alaska 1972).

[77] *Id.* Justice Erwin, author of the concurring opinion, found the majority's holding to be in clear contradiction of a plain reading of the statute. *Id.* at 1025-26. He upheld the benefits to the claimant as a common law wife. It is unclear from the facts in the opinion, however, whether the claimant would have satisfied all the requirements for a common law marriage. *See generally* H. CLARK, LAW OF DOMESTIC RELATIONS 47 (West 1968).

[78] 410 N.E.2d 1325 (Ind. Ct. App. 1980).

[79] *Id.* at 1330 (emphasis added).

In both of these examples, the courts emphasized the parties' marriage in granting relief, even though the cohabitation period followed dissolution of the marriage.[80] Stronger reasons exist for giving substantial weight to the fact of the marriage in awarding relief when the period of cohabitation occurs before the marriage, even if the jurisdiction does not grant relief to nonmarital cohabitants. The parties in the latter situation progressed from the premarital relationship, not recognized by law, to the legally recognized institution of marriage. This progression is more consonant with societal expectations and preferences than the progression in cases where the legally recognized union was dissolved and followed by cohabitation. Parties who cohabit after divorce move in the "wrong" direction; yet the law affords those parties the benefits of the prior marriage. Certainly, the law should accord similar benefits when the marriage follows the period of cohabitation.

IV. JUDICIAL ALTERNATIVES FOR RECOGNITION OF THE PREMARITAL PERIOD

The substantive and procedural problems that arise when nonmarital cohabitation remedies are used in the context of divorce proceedings, as well as underlying policy concerns, make clear the need for alternative methods of recognizing the premarital period upon the divorce of the parties.

A. *Interpretation of Existing Language in Property Division Statutes*

One possible method of recognizing the premarital period in the context of divorce proceedings is through broader judicial interpretation of the existing provisions of property division statutes. Judicial intrepretation may be utilized both as a means of characterizing property acquired during premarital cohabitation as divisible property, and as a means of considering the period of premarital cohabitation in making the actual division of property.[81]

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[80] *See also* Parkinson v. J. & S. Tool Co., 64 N.J. 159, 313 A.2d 609 (1974), a case in which a woman was awarded workman's compensation benefits as a de facto wife. She had been previously married to the decedent and had been cohabiting with him at the time of his death. The Supreme Court of New Jersey said that "petitioner's and decedent's cohabitation from 1950 to the date of decedent's death in 1968 had its 'genesis' in the ceremonial marriage of 1927." *Id.* at 166, 313 A.2d at 613. A private renewal of marriage vows on the advice of a priest was held to "revive" the marriage sufficiently to entitle the claimant to benefits as a de facto wife. *Id.*, 313 A.2d at 613.

[81] This latter approach is appropriate for all three types of property division statutes although in "title" states judicial expansion options are considerably more limited. Because courts in such states are limited to ascertaining and reaffirming title, as opposed to "equitably" distributing property regardless of title, there is less room to consider factors such as premarital cohabitation, which may be relevant to an "equitable" solution. To the extent, however, that title states modify the harshness of their scheme through concepts of special equity, *see supra* note 25, the suggestions that follow also may be utilized in "title" states as judicial modifications of the method for ascertaining title.

In Illinois, for example, the property division statute directs the divorce court to consider "all relevant factors, including . . . the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital *and non-marital* property," when making a property division award.[82] Although this provision is used most frequently by a spouse who has contributed to the other spouse's nonmarital property *during* marriage, nothing in the language of the statute should preclude a spouse from seeking recognition of contributions made to the property of the other spouse *prior* to the marriage. Thus, when a party has contributed to the acquisition of property during premarital cohabitation, but title to that property is taken solely in the name of the other party, the Illinois provision arguably requires the divorce court to consider the premarital contribution in dividing the marital property. By considering this contribution, the premarital contributor would be awarded a greater proportion of the marital property than would otherwise be the case.

Property division statutes in several states direct the divorce court to consider "all relevant factors" in making a property division award.[83] A spouse in these states could argue that the fact that the parties lived together before marriage and acquired property during that period through their joint efforts should be taken into account in fashioning an appropriate property division award.

Neither the Illinois statute nor the "all relevant factors" provision permits characterization of property acquired during the premarital period as divisible. Both merely allow the premarital period to be considered when the court divides the marital property. Therefore, the impact of such a provision under a "separate/marital" property division statute may be minimal if there is little or no marital property.[84]

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[82] Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 503(d)(1) (Smith-Hurd Supp. 1981) (emphasis added).

[83] For an example of such a provision in "separate/marital" property states, see DEL. CODE ANN. tit. 13, § 1513(a) (1981). S.D. CODIFIED LAWS ANN. § 25-4-44 (1976) provides an example of a similar "catch-all" provision in an "all property" state ("Court shall have regard for equity and the circumstances of the parties" in making property division.).

[84] At least one court has recognized the limitations of remedies that do not themselves recharacterize property as marital, but rather merely allow certain factors to be considered in dividing marital property. Drennan v. Drennan, 93 Ill. App. 3d 903, 418 N.E.2d 30 (App. Ct. 1981). In *Drennan,* there was no substantial marital property with which to compensate the wife for contributions she made during the marriage to reduce the mortgage on a home acquired by her husband prior to marriage. Although the Illinois property division statutue directed divorce courts to consider contributions by a party to both marital and nonmarital property as relevant factors in dividing property, the statute permitted division of only marital property. Recognizing the limitations on the use of this factor when there was little or no marital property, the Appellate Court of Illinois endorsed several other methods of compen-

One method of giving courts in "separate/marital" property states the power to divide property acquired during premarital cohabitation might be through judicial expansion of the definition of divisible property to include property acquired by the parties during the period of premarital cohabitation. Several courts have refused to so expand the definition.[85] However, courts in both Illinois and Colorado have expanded the definition of marital property to include certain pieces of property acquired by one of the spouses prior to marriage if the property is acquired in contemplation of marriage. These decisions may serve as a basis for providing a remedy to divorcing spouses seeking recognition of the premarital period for purposes of property division.

In *In re Marriage of Altman*,[86] for example, the husband purchased a home several days prior to and in contemplation of marriage. The parties jointly selected the home, financed it through the husband's GI Bill privileges, and resided there during the marriage. Most of the equity acquired in it during the marriage resulted from joint contributions of the parties. Even though the home was acquired prior to marriage, the Colorado Court of Appeals upheld the trial court's classification of it as marital property. The court expanded the literal meaning of the Colorado property division statute stating that "[i]n order to obtain the status of separate property under . . . [the statute], it must appear that the property was acquired prior to marriage with the intent that it become the separate property of Husband. A contrary intent appears from the record before us."[87]

Citing the *Altman* decision, the Appellate Court of Illinois, in *Stallings v. Stallings*,[88] also expanded the statutory definition of marital property to include certain property acquired prior to marriage. In *Stallings*, the couple purchased their home as tenants in common less than two months before

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sating the wife for her contribution. The court suggested a lump sum award related to the wife's contribution to the nonmarital assets, or a charge or lien against the nonmarital property in the amount of her contribution.

Although these options do not technically reclassify nonmarital property as marital property, they do result in the distribution of nonmarital property to the spouse not holding title. However, courts may not be willing to extend *Drennan* beyond its facts. In *Drennan*, the wife's contribution was made *during* the marriage and it was monetary. Spouses whose contribution to nonmarital property took place during premarital cohabitation or whose contribution was nonmonetary could be without remedy.

The *extent* of compensation for contributions to nonmarital property is also unclear both under the Illinois statutory provision discussed in the text and under *Drennan*. Courts may limit compensation to the actual dollar amount of the contribution. On the other hand, courts may include property appreciation in proportion to the extent of the spouse's contribution.

[85] *In re* Marriage of Crouch, 88 Ill. App. 3d 426, 430, 410 N.E.2d 580, 582 (App. Ct. 1980); Grishman v. Grishman, 407 A.2d 9, 11-12 (Me. 1979).

[86] 35 Colo. App. 183, 530 P.2d 1012 (Ct. App. 1974).

[87] *Id.* at 184, 530 P.2d at 1013.

[88] 75 Ill. App. 3d 96, 393 N.E.2d 1065 (App. Ct. 1979).

their marriage. The wife furnished the down payment and made mortgage payments during the marriage from her salary. Rather than holding that each spouse's interest in the property as tenant in common was that spouse's separate property since acquired before marriage, the trial court characterized the property as marital and awarded the entire home to the wife.[89] The appellate court upheld classification of the home as marital property, stating:

> Our new Marriage and Dissolution of Marriage Act does not arbitrarily categorize all property acquired prior to marriage as nonmarital property. Rather, Section 503, we believe, is intended to protect such property as may have been purchased by one spouse prior to marriage entirely with his or her own funds.[90]

In *In re Marriage of Schriner*,[91] the Appellate Court of Illinois held that the *Stallings* holding was applicable even when the husband paid the entire price of the property before marriage, if it were shown that the property was not purchased for the husband's sole use. By emphasizing *intent* to keep property separate, the Appellate Court of Illinois, as did the Colorado Court of Appeals, went beyond the literal definitions of marital and separate property set forth in their property division statutes.[92]

Although the theories espoused in *Altman* and *Stallings* arguably may serve as a vehicle enabling litigants to characterize property acquired during

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[89] By characterizing the property as marital, the court could then include it in the property to be divided between the parties upon the dissolution of the marriage. If the property had been characterized as separate, the court would have been constrained to assign it to the husband, despite the fact that it was used jointly by the parties during their marriage and that marital funds were used in the accrual of equity in the property.

[90] 75 Ill. App. 3d at 99, 393 N.E.2d at 1067.

[91] 88 Ill. App. 3d 380, 383-84, 410 N.E.2d 572, 574-75 (App. Ct. 1980).

[92] The Illinois statute, for example, provides as follows:

§ 503. Disposition of property

(a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, bequest, devise or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;

(6) the increase in value of property acquired before the marriage; and

(7) property acquired before the marriage.

Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 503(a) (Smith-Hurd Supp. 1981).

the period of premarital cohabitation as marital property,[93] courts may be unwilling to extend the holdings in those cases to include this situation. Several factors may be sufficient to distinguish property acquired during a period of premarital cohabitation from property acquired in contemplation of marriage, even if the cohabiting parties did plan on eventually marrying.[94] Unlike property acquired in contemplation of marriage, parties use property acquired during premarital cohabitation prior to the marriage. In addition, the purchase may have occurred months or even years prior to the actual marriage.

If courts are willing to ignore these distinctions, however, parties could argue that the *Altman-Stallings* holdings apply even if the parties did not contemplate marriage when they began cohabiting. The "contemplation of marriage" criterion discussed in *Altman* and *Stallings* can be viewed as merely one method for ascertaining whether the parties intended to share the property during marriage. When parties cohabit before marriage, a court

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[93] These cases clearly represent an expansion of the statutory definitions of marital and separate property and not merely a clarification of ambiguous terms. Especially in the *Schriner* case, in which the property in question was entirely paid for by the husband prior to the marriage, the court's finding that the property was marital property represents a clear extension of the concept of marital property and a concomitant contraction of the concept of separate property. If the court intended only to characterize the property as marital because it was used jointly by the parties, the court could have used the doctrine of transmutation. *See infra* notes 95-100 and accompanying text. Under that doctrine the property originally would have been characterized as separate property but at some later point would have been transmuted into marital property. The language in the Colorado and Illinois decisions, however, indicates that the property in question was marital property from the moment it was acquired. The courts emphasized the intent of the purchaser prior to rather than during the marriage to share the property.

[94] *See supra* note 85 and accompanying text. In a recent decision involving a premarital cohabitation claim, the Illinois Court of Appeals did not apply *Stallings*. *In re* Marriage of Reeser, 97 Ill. App. 3d 838, 424 N.E.2d 45 (App. Ct. 1981). The court did not specifically base its holding on the cohabitation, but rather on the failure of the claimant to prove that the property, a home, was purchased in contemplation of marriage. It indicated that evidence regarding the premarital cohabitation period might have been relevant in determining whether the property should be classified as marital, but it left unclear exactly what impact that evidence would have on its decision:

> In the instant case the facts do not support the finding that the home was purchased in contemplation of marriage. Title to the property, when purchased, was placed in the husband's name only, and although the wife testified that she stayed in the home prior to marriage, there is no basis for a finding that the parties contemplated marriage at the time of the purchase. There was no testimony with regard to when the parties became engaged, nor where the husband lived prior to purchasing the home. Neither does the record reveal how long the parties knew each other prior to their marriage or cohabitation.

Id. at 840, 424 N.E.2d at 47.

could examine the circumstances surrounding the acquisition of the property as well as how the parties used the property during the period of cohabitation for evidence of *intent* that the property be shared.

B. *Transmutation*

Another doctrine used in "separate/marital" property states to give recognition to the period of premarital cohabitation in a divorce action is transmutation. This judicially-created doctrine is another example of courts' willingness to go beyond the basic strictures of the statutory classifications of separate and marital property when those strictures would lead to inequitable results. According to the doctrine of transmutation, property that originally was classified as separate property can be transmuted into marital property when the spouse with title represents to the other spouse that the property will be shared.[95]

Transmutation may occur by agreement, either express or implied. Courts have applied the doctrine of transmutation by agreement not only when representations regarding intent to share the property were made during the marriage, but also when representations were made shortly before the marriage.[96] Transmutation also has been found when representations were made in the same vague language[97] as allegations of oral contracts between nonmarital cohabitants.[98] Thus, when a party represents that property acquired during the premarital period will be shared, those representations might serve as the basis for an argument that the nonmarital property was transmuted into marital property, rather than as the basis for only an independent

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[95] *See, e.g.*, Faust v. Faust, 91 Cal. App. 2d 304, 308, 204 P.2d 906, 908 (Dist. Ct. App. 1949); Stice v. Stice, 81 Cal. App. 2d. 792, 797-98, 185 P.2d 402, 406 (Dist. Ct. App. 1947); Daniels v. Daniels, 557 S.W.2d 702, 704 (Mo. Ct. App. 1977).

Transmutation also may occur in some jurisdictions through the commingling of separate property with marital property. *See, e.g., In re* Marriage of Smith, 86 Ill. 2d 518, 529, 427 N.E.2d 1239, 1244 (1981) (if spouse holding nonmarital property commingles it with either marital property or nonmarital property of the other spouse, the commingled property is presumed to be marital property). Divorcing spouses who have lived together before marriage and who have commingled property or funds acquired during premarital cohabitation with property or funds acquired subsequent to the marriage could take advantage of this theory.

[96] *See, e.g.*, Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398 (1934) (oral agreement before marriage that property each owned was to become community property suffices to transmute the separate property into community property). Although this case involved the characterization of property as either separate or *community* property, the concepts are similar to those used in common law jurisdictions to characterize separate and marital property.

[97] *See, e.g., In re* Sill's Estate, 121 Cal. App. 202, 204, 9 P.2d 243, 244 (Dist. Ct. App. 1932), in which the transmutation was based upon the husband's statement to his wife that "it is just as much yours as it will be mine; this is our home."

[98] *See supra* notes 37-38 and accompanying text.

contractual claim.[99] Transmutation by agreement also may be implied through the actions of the parties with respect to the property.[100] When parties have lived together before marriage, their joint use and control over property both during cohabitation and then during marriage might support a claim of transmutation through implied agreement.

C. *Limitations of the Judicial Alternatives*

Each of the above-described methods for judicial recognition of the premarital period in the context of divorce proceedings has certain limitations. Interpretation of existing statutory language to take into account the premarital cohabitation period in determining *how* the property is to be divided may be useful in "all property" states. In contrast, this remedy is less effective in "separate/marital" property states if there is little or no marital property for the courts to divide. Cases expanding the definition of divisible "marital" property to include property acquired shortly before marriage have thus far been limited to situations involving contemplation of marriage at the time the property was purchased and have not included the additional factor of premarital cohabitation. Without guidance from the legislature, courts may be unwilling to so broadly extend existing statutory language.

The judicial alternatives avoid the procedural problems involved in bringing a separate action. However, to the extent that classification of property as marital depends upon intent, problems of proof arise similar to those discussed in relation to intent-based remedies.[101] Moreover, remedies based on transmutation and judicial interpretation focus primarily on particular pieces of property rather than on the more general economic relationship between premarital cohabitants. The limitations of these remedies derive from the fact that none of them were created to deal specifically with recognizing the period of premarital cohabitation at divorce. Thus, they are not the product of a considered attempt to provide an adequate remedy.

V. Legislative Recognition of the Premarital Period

A. *The Proposal*

In contrast to judicial recognition of the premarital period, legislation can directly respond to the problems associated with the current approach of the courts and with the judicial alternatives. In "separate/marital" property

[99] By utilizing the doctrine of transmutation as a means of arguing that property acquired during the premarital period should be divisible, divorcing spouses can eliminate many of the procedural problems involved in bringing an independent action. Proving an express or implied agreement to share, however, involves some of the same proof problems discussed in conjunction with intent-based theories. *See supra* note 53-55 and accompanying text.

[100] *See* Daniels v. Daniels, 624 Mo. 872, 557 S.W.2d 702 (1977).

[101] *See supra* notes 53-60 and accompanying text.

states, for example, legislation could expand the definition of divisible property.

This Article proposes that divorce statutes in "separate/marital" property states be amended to draw their basic distinctions between divisible and separate (or nondivisible) property rather than between marital and nonmarital property.[102] Divisible property should include both marital property as it is presently defined in statutes *and* premarital property. Premarital property should be comprised of two specific types of property: (1) property acquired by either party "in contemplation of marriage" with the intent that the parties use the property jointly during marriage;[103] and (2) property acquired by either party during a period of premarital cohabitation.

Courts in all states should distribute the divisible property in accordance with the same factors that the state presently prescribes for marital property with one important difference. This Article also proposes that legislation modify factors that look to actions of the parties during marriage by extending the relevant time period to include the period of premarital cohabitation.[104] For example, when a statute directs the court to consider the duration of the marriage in dividing the property,[105] the amended statute should direct the court to consider the duration of the period of cohabitation and marriage combined. Likewise, when the contributions of a spouse as homemaker are to be considered,[106] legislation should make clear that homemaker services during the period of premarital cohabitation be considered as well.

The amended statutes in all states should provide that, unless the parties made an express contract prior to marriage regarding the disposition of premarital property, the statutory remedies are exclusive and in lieu of any other remedies that the jurisdiction extends to nonmarital cohabitants. The exception for express contracts permits some variance from the statutory scheme; however, express contracts should be enforced only if two condi-

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[102] The term "nondivisible" should be avoided if the jurisdiction allows separate property to be invaded.

[103] This subsection of the statutory proposal codifies the concept already recognized judicially in Colorado and Illinois. *See supra* notes 86-94 and accompanying text.

[104] In "title states," attempts to mitigate the harshness of the "title" rule are most often accomplished judicially because of a reluctance on the part of the legislature to abandon the statutory scheme. Therefore, until the legislatures decide to effect a more sweeping revision of their property division statutes, legislative action in these states is unlikely.

[105] *See, e.g.*, CONN. GEN. STAT. ANN. § 46-51 (West 1978); Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 503(d)(3) (Smith-Hurd Supp. 1981); KY. REV. STAT. § 403.190 (1)(c) (Supp. 1982).

[106] *See, e.g.*, Ill. Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, § 503(d)(1) (Smith-Hurd Supp. 1981); KY. REV. STAT. § 403.190(1)(a) (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 722-A(1)(A) (1981).

tions are met: (1) the agreement complies with all the formalities[107] and substantive requirements[108] that the jurisdiction imposes upon antenuptial agreements; and (2) the agreement addresses specifically the disposition of property upon dissolution of marriage.

The exception to the exclusive statutory remedies is consonant with the trend toward allowing parties to vary by contract certain statutorily-imposed incidents of marriage.[109] Such agreements must meet strict standards[110] to ensure fairness. In addition to the content and formality of execution requirements imposed on antenuptial agreements in general, the requirement that the agreement specifically address the disposition of premarital property upon the dissolution of marriage ensures that the parties intended the agreement to regulate their property ownership and division even if they married.

B. *In Support of the Proposed Solution*

Despite the changing attitude of American society toward nonmarital cohabitation, it is not yet fully accepted as a social institution.[111] Therefore,

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[107] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-201(B) (1976) (antenuptial contract must be acknowledged by an officer authorized to acknowledge deeds); DEL. CODE ANN. tit. 13, § 301 (1981) (two witnesses and execution ten days before marriage required for valid antenuptial contract). The Statute of Frauds in most states requires promises in consideration of marriage to be in writing. *See generally* H. CLARK, *supra* note 77, at § 1.9 (discussing antenuptial agreements).

[108] Because of the relationship of trust between the parties to an antenuptial agreement, courts and legislatures have imposed stringent requirements to ensure that antenuptial agreements are made with full knowledge of the circumstances. *See, e.g.*, Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969) (prenuptial agreement held invalid where wealthy and educated husband did not explain to wife, who had high school education and little means, the extent to which she was surrendering her rights in signing the agreement); TENN. CODE ANN. § 36-606 (Supp. 1982) (antenuptial agreements enforceable only if court determines that parties entered into agreement knowingly and freely and without undue influence or duress).

[109] *See* Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (Ct. App. 1975) (statute rendering certain after-acquired property community property does not preclude a valid antenuptial agreement); Ferry v. Ferry, 586 S.W.2d 782 (Mo. Ct. App. 1979) (if not unconscionable, an antenuptial agreement is neither contrary to public policy nor precluded by the Missouri Dissolution of Marriage Act).

[110] *See supra* notes 107-08.

[111] Trost, in his book *Unmarried Cohabitation*, describes three stages in the development of a country's views on nonmarital cohabitation. Nonmarital cohabitation is first regarded as a deviant phenomenon; the country then goes through a period of change and acceptance; and lastly, the lifestyle becomes an accepted social institution. J. TROST, *supra* note 7, at 186. Trost concludes that as of 1979, the date of publication, much of the United States still seemed to regard nonmarital cohabitation as deviant although some parts of North American culture had progressed to the period of change and acceptance. *Id.* at 187.

a proposal to institutionalize this lifestyle through legislative recognition in divorce proceedings is certain to be controversial.

Proposals to recognize rights arising from periods of nonmarital cohabitation often are criticized as discouraging marriage by blurring the distinction between cohabitation and marriage.[112] To the extent that the deterrence of marriage argument has any validity,[113] it has little application to the legisla-

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[112] 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. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?

Hewitt v. Hewitt, 77 Ill. 2d 49, 58, 394 N.E.2d 1204, 1207 (1979).

Even the California Supreme Court in *Marvin*, while extending a variety of remedies to nonmarital cohabitants, reaffirmed the centrality of marriage to the welfare of American society:

> The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.

Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).

[113] The "deterrence of marriage" argument is based upon certain questionable assumptions about the role that government can and should play in shaping people's moral behavior. The current trend in the area of state regulation of family relationships is toward less regulation of the formalities of entering or exiting a relationship and toward more regulation of its consequences, i.e., economic and child-related matters. *See* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 665-66 (1976). This deregulation of formalities may reflect recognition of the fact that some areas of behavior are law-resistant and not responsive to coercive pressure applied through the law. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 127 (1981).

Arguably, proponents of the deterrence of marriage argument are erroneously framing the issue in terms of couples affirmatively selecting between marriage and cohabitation. Empirical data from a Swedish study indicates that "it is very seldom that a couple moves in together 'without marrying.' What they do is simply move in together. There is rarely an evident decision not to marry . . . (nor) very often even a decision to move together. It just happens to turn out that way." J. TROST, *supra* note 7, at 79.

In fact, this study suggests that the comparative legal and economic incidents of marriage and nonmarital cohabitation are not substantial factors in a couple's decision to cohabit rather than to marry. In a question specifically designed to require

tive proposal presented in this Article. The rights deriving from this proposal are extended only to those cohabitants who *have married.* Rather than discouraging marriage, then, the legislative proposal arguably encourages marriage by increasing the rights flowing from the nonmarital period. Nor does this proposal extend to nonmarital cohabitants all of the statutory rights usually associated with marriage such as alimony or inheritance rights.[114] Rather, this legislative proposal would merely modify divorce statutes to respond directly to the special problems encountered by premarital cohabitants at divorce.

Proposals to extend property rights to nonmarital cohabitants also have been criticized as an imposition upon the freedom of parties to engage in alternative lifestyles that are attractive because they have no legal implications.[115] The legislative proposal, however, does allow such parties to contract out of the legislative scheme. In addition, studies suggest that the legislative proposal probably is consonant with and responsive to the expectations of cohabitants. The authors of one study, for example, directed university students to write a contract either for a relationship in which they were involved or for and with another couple.[116] The contracts indicated an

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couples to think about the impact of legal and economic incidents upon a decision to marry, Trost asked 101 newly-married couples who had cohabited prior to marriage whether they would have married if the law were changed so that cohabitation without marriage were in all respects equated with marriage. Only 12% of the men and 13% of the women answered no. J. TROST, *supra* note 7, at 81-82. Most respondents answered that they would have married anyway because of tradition, ethics ("marriage is the only right thing"), or other factors unassociated with the economic or legal relationship between the parties. *Id.* Trost asked the same question to 111 couples presently living together. Fifty-nine percent of the men and 57% of the women responded that they would not marry if marriage and cohabitation were equal at law. *Id.* Thus, the difference in legal treatment does not seem to be what is attracting cohabitants to choose that lifestyle.

Although the Trost study is extensively cited, *e.g.*, Blumberg, *Cohabitation Without Marriage: A Different Perspective,* 28 U.C.L.A. L. REV. 1125, 1130 (1981), the conclusions that can be drawn from it are limited by the fact that it is a Swedish study. Swedish society arguably differs from American society in the way cohabiting couples perceive their relationship. The Trost study, however, remains the most complete study of cohabitation available. In the United States, most empirical research regarding cohabitation, such as the Weitzman study, discussed *infra* notes 116-17, focuses upon college students.

[114] The legislative proposal merely increases the effect of a marriage in much the same way as the subsequent marriage of a child's parents makes the child legitimate. *See* H. CLARK, *supra* note 77, at 158 n.4.

[115] Clark, *supra* note 1, at 451-52; *cf.* Weyrauch, *Metamorphosis of Marriage,* 13 FAM. L.Q. 415, 425-26 (1980) (referring to the fact that property and contract law are being applied to persons who specifically did not enter into marriage contracts as "paradoxical and practical").

[116] Weitzman, Dixon, Bird, McGinn & Robertson, *Contracts for Intimate Rela-*

overwhelming preference for sharing property acquired during the relationship.[117] A Swedish study of 101 newly-married couples who had previously cohabited and 111 couples cohabiting at the time of the study also supports this hypothesis in that more than eighty percent of the participants felt there was no difference between cohabitation and marriage.[118]

The proposed legislative changes should eliminate many of the problems involved in relegating divorcing spouses to the time and expense of pursuing separate actions. Nonmarital cohabitation remedies are ill-designed to cope with the problems of premarital cohabitants.[119] The legislative proposal not only eliminates the proof problems of the intent-based theories and of the judicial alternatives discussed in this Article, but it also eliminates the

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tionships: A Study of Contracts Before, Within and in Lieu of Legal Marriage, 1 ALTERNATIVE LIFESTYLES 303 (1978).

The students involved in this study were enrolled in an upper level sociology course on sex roles in the law. Fifty-nine contracts were submitted, 22% of which were contracts within marriage, 24% between couples who planned to marry but wanted to live together first, and 47% between couples choosing cohabitation as an alternative to marriage. *Id.* at 332-33.

[117] Seventy-six percent of those choosing cohabitation as an alternative to marriage designated all post-contract assets as community property, and 100% of those who planned to marry but wanted to live together first chose the community property option. *Id.*

As with the Trost study, *see supra* note 113, the conclusions that can be drawn from this study are limited by the sample of the population upon which the study is based. The middle-class college student comprising the Weitzman study may not be representative of the majority of couples cohabiting in this country.

[118] More than 80% of the participants defined the term "cohabitation without marriage" as either "like being married," "married indirectly," or "about the same as being married." J. TROST, *supra* note 7, at 20. In fact, more than 90% of those cohabiting at the time of the study responded that they looked upon their relationship as fully comparable to marriage. *Id.* at 21. Despite the feelings of the participants that there was no difference between cohabitation and marriage, the law in Sweden does draw distinctions in the treatment of those two groups. *Id.* at 139-53. Consequently, Trost concludes that the feeling of comparability "has more of a normative character and thus says more about how the respondents feel that it should be than how it *de facto* is." *Id.* at 160.

[119] Some commentators have noted the theoretical possibility that recovery for nonmarital cohabitants under remedies such as quantum meruit or implied-in-fact partnerships may be greater than that afforded to spouses upon divorce. Blumberg, *supra* note 113, at 1165; Bruch, *supra* note 64, at 130-31. This potential result may lead to objections to the exclusivity of the proposed statutory remedy. The theoretical discrepancy in potential recovery should be discounted, however, by the difficulties of proving the causes of action necessary to obtain recovery under existing theories. *See supra* notes 53-80 and accompanying text. The statutory remedy would automatically bring property acquired during the period of premarital cohabitation into the pot of divisible property. Thus the likelihood of some recovery would be far greater under the statutory scheme than under presently available remedies.

waiver, superseding contract, and modification of contract concerns posed by nonmarital cohabitation remedies. In addition, explicit recognition in the legislative proposal of the premarital period as related to and yet distinct from the period of the marriage lessens the likelihood that a court will determine that the advantages acquired by a spouse during the marriage negate any claims relating to the premarital period.[120]

By broadening the definition of divisible property to include property acquired during premarital cohabitation, legislatures will be giving the courts more resources from which to fashion an equitable separation of the parties' economic partnership. Moreover, by utilizing the broad discretion they have in fashioning the actual division of property, courts will retain their ability to survey the equities and to examine the contribution that each party made to the acquisition of the property[121] in fashioning the actual award.

VI. CONCLUSION

Increasingly, divorce courts are being faced with the task of fashioning property division awards for divorcing spouses whose economic relationship began during a period of premarital cohabitation. Courts have responded by basing relief on the remedies available to nonmarital cohabitants without first evaluating the problems that arise when those remedies are utilized in the context of a divorce proceeding.

Although broad judicial interpretation of existing divorce statutes may provide partial relief to divorcing spouses as an alternative to pursuing remedies designed for nonmarital cohabitants, a more direct response through amendment of divorce statutes would provide a more comprehensive scheme. The legislative scheme proposed in this Article calls for expansion of the categories of divisible property to include property acquired during premarital cohabitation and for similar expansion of the relevant time period that courts are directed to consider in determining how the property should be divided. In addition to eliminating the substantive and procedural problems caused by relegating a divorcing spouse to remedies designed for nonmarital cohabitants, this proposal furthers the policy of judicial economy. Moreover, it enables the court to fulfill its responsibility to provide an equitable separation of the divorcing parties' lives in a manner that enables them to function as independent members of society.

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[120] *See supra* notes 61-63 and accompanying text.

[121] Most disposition of property statutes specifically direct the court to "equitably" divide the property and and to consider "all relevant factors" in doing so. *See, e.g., supra* notes 82-83 and accompanying text.

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