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Implications of the Repeal of Louisiana Civil Code Article 1481

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IMPLICATIONS OF THE REPEAL OF LOUISIANA CIVIL CODE ARTICLE 1481

In its 1987 summer session, the Louisiana Legislature repealed Civil Code article 1481.[1] This article had prohibited donations of immovables between those who lived together in open concubinage. Donations of movables between such persons could not exceed prescribed limits. Those who afterwards married were excepted from this rule.[2]

Jurisprudential interpretation[3] and application of article 1481 was consistent with the stigmatization of concubinage.[4] The courts established that most contracts between unmarried cohabitants,[5] whether onerous or gratuitous, are against public policy.[6] This position has often led to

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1. 1987 La. Acts No. 468.

2. La. Civ. Code art. 1481 (1870):

> Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.
>
> Those who afterwards marry are excepted from this rule.

3. Concubinage has been defined by Louisiana jurisprudence as "a relationship of sexual content in which a man and woman live together as husband and wife in a state approximating marriage." Succession of Bacot, 502 So. 2d 1118, 1129 (La. App. 4th Cir.), writ denied, 503 So. 2d 466 (1987), citing Succession of Filhiol, 119 La. 998, 44 So. 843 (1907).

4. Different courts in Louisiana have characterized concubinage in different ways, but the import of their characterizations has been quite similar. The purpose of article 1481 was found to be "to protect the moral fabric of society against those who would brazenly flout its standards." Succession of Battiste, 145 So. 2d 668, 669 (La. App. 4th Cir. 1962). Another court stated this a bit more diplomatically: "The disabilities under which the law places persons who have lived in this condition, are created for the maintenance of good morals, of public order, and for the preservation of the best interests of society." Cole v. Lucas, 2 La. Ann. 946, 952 (1847). In addition, concubinage is usually described as either illicit, immoral, or meretricious. See Schwegmann v. Schwegmann, 441 So. 2d 316 (La. App. 5th Cir.), writ denied, 443 So. 2d 1122 (La. 1983), cert. denied, 467 U.S. 1206, 104 S. Ct. 2389 (1984); Guerin v. Bonaventure, 212 So. 2d 459 (La. App. 1st Cir. 1968).

5. The terms "cohabitants" and "unmarried cohabitants," whenever used in this comment, should be understood as a reference to the same relationship defined as concubinage. See supra note 3.

6. Although the Louisiana courts never absolutely refused to recognize claims based on an alleged contract between cohabitants, they developed a test which precluded recovery in the majority of these cases. The courts focused on the question of whether the alleged contract was incidental to the parties' sexual relationship. For that purpose, the courts examined the point in time of the parties' business relationship, from which the claim

unjust results concerning cohabitants' monetary and property rights at the end of such relationships.[7]

Although article 1481 no longer exists as a specific restriction on gratuitous contracts, Civil Code article 1968[8] may still serve as a valid means to reach the same result. The validity of using article 1968 for this purpose is, however, subject to scrutiny under an analysis of legislative intent.

During the same session in which article 1481 was repealed, a bill containing an article on contracts between cohabitants was introduced and rejected. The article read as follows:

> Art. 101 Contract between cohabitants
>
> An otherwise valid contract is not rendered unenforceable solely because the parties, neither of whom was married, were cohabitants at the time of contracting, but such a contract must be in writing.[9]

This comment analyzes the legislature's intent in repealing article 1481 while rejecting proposed article 101. It includes a discussion of any change in public policy, and thus in the application of article 1968, that may be inferred from this legislative action. Aside from purely gratuitous donations, and the written onerous contracts rejected by the legislature,[10]

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arose, in relation to the commencement of their sexual relationship. See *Schwegmann*, 441 So. 2d at 321-22. Where the courts found that the business relationship on which the claim was based had begun after the parties' cohabitation, they denied recovery on the basis that the sexual relationship must have been the primary basis for the business relationship. See, e.g., Sparrow v. Sparrow, 231 La. 966, 93 So. 2d 232 (1957); Simpson v. Normand, 51 La. Ann. 1355, 26 So. 266 (1899); Guerin v. Bonaventure, 212 So. 2d 459 (La. App. 1st Cir. 1968); Foshee v. Simkin, 174 So. 2d 915 (La. App. 1st Cir. 1965). In a few cases, the courts found that the parties' business relationship had begun before their cohabitation, and recovery was allowed. See, e.g., Succession of Pareuilhet, 23 La. Ann. 294 (1871); Delamour v. Roger, 7 La. Ann. 152 (1852); Viens v. Brickle, 8 Mart. (o.s.) 11 (1820). See also, H.B. 1139, § 1, art. 101, comment (5), 1987 La. Reg. Sess. for a brief description of the claim in each of these cases.

7. See, e.g., *Sparrow*, 231 La. at 966, 93 So. 2d 232.

8. La. Civ. Code art. 1968 states:

> The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

9. H.B. 1139, § 1, art. 101, 1987 La. Reg. Sess.

10. Although the legislature rejected proposed article 101, it is far from certain that the reason for that rejection was a fear of all written contracts between cohabitants. A contract of sale of an immovable, for example, could exist between cohabitants, and would be legally valid, provided all the requirements of form and substance associated with such a sale were met. The legislature's fear might have lain in the possibility that, under article 101, cohabitants would enter into contracts creating effects very similar to those of the civil contract of marriage without being legally married. For a discussion of this proposition, see infra text accompanying notes 14-21.

there remain several alternatives whereby cohabitants may be able to contract with one another without overstepping the bounds of public policy.

If the law of obligations can be applied to unmarried cohabitants just as it is applied to other contracting parties, several possible remedies exist for a cohabitant who finds himself inequitably treated when the relationship ends. The pivotal question to be answered is whether onerous contracts between unmarried cohabitants, when not independent of the sexual relationship, will remain contrary to public policy and thus null under article 1968. A proposal for an equitable solution, whereby the law reflects the reasonable expectations of the parties, will be presented. The proposal will focus on agreements in which money, property, or labor are combined for the mutual benefit of the parties to the relationship. The problems presented by the parties' monetary and property claims at the termination of the relationship then will be addressed.

The Repeal of Article 1481

The most recent legislative expression of the public policy concerning contracts between unmarried cohabitants is the repeal of article 1481. One might conclude from this repeal that all donations between cohabitants are no longer subject to attack on the basis of sexual relationship. In order to draw that conclusion, however, it is necessary to determine whether such donations are still against public policy. If they are, article 1968 creates an alternative mode of invalidation. Article 1968 is more encompassing than article 1481, which restricted only gratuitous donations between unmarried cohabitants. Article 1968 may be used to invalidate onerous and gratuitous contracts between any parties.

From the repeal of article 1481, it may be inferred that some contracts, specifically donations between cohabitants, are no longer against public policy, and thus not subject to invalidation under article 1968. The specificity of article 1481 supports this inference. First, it applied only to those living in open concubinage, those who did nothing to hide the illicit nature of their relationship. Second, it applied only to donations. Finally, it only allowed donations of movables worth not more than 10% of one's estate. From the repeal of such a specific article, one can infer a specific legislative intent. The intent to allow unrestricted gratuitous contracts between those living in open concubinage (as well as "closed" concubinage) is the most logical inference. By permitting such contracts, the legislature has also implied that such donations are no longer against public policy and, consequently, are no longer subject to invalidation under article 1968.

Once this has been established, further inquiry is still necessary. Did the legislature intend, in repealing article 1481, to make a broader

statement about the public policy concerning concubinage in general? In other words, does the repeal of article 1481 suggest that concubinage in general is no longer against public policy, and, therefore, all contracts between unmarried cohabitants should be unassailable for illicit cause? When viewed in connection with the rejection of proposed article 101, the repeal of article 1481 suggests a less expansive legislative intent.

The Rejection of Proposed Article 101

The Persons Committee of the Louisiana Law Institute[11] proposed article 101 as a possible solution to the problems encountered by unmarried cohabitants concerning money and property agreements. The Committee also considered a number of other options. One possibility was more extreme than the law at the time: the adoption of a positive statement that contracts between cohabitants are unenforceable. Codifying the jurisprudence surrounding article 1481 or allowing it to continue in effect by adopting no provision on cohabitation was the second alternative. A third possibility was the recognition of common-law marriages confected in Louisiana. Finally, the most radical proposal was to give legal effect to cohabitation.[12] All of these possibilities were discarded in favor of article 101 which, in the committee's judgment, would have preserved the uniqueness of marriage while satisfying the "reasonable expectations of cohabitants who intend and agree that their relationship shall have certain legal consequences."[13]

The legislature, however, did not adopt article 101. The implications of this decision must be examined in order to articulate with more certainty the present status of concubinage under Louisiana law. It may appear that the legislature intended to allow the jurisprudence surrounding article 1481 to continue in effect by adopting no provision on cohabitation (the second committee option above). The subsequent repeal of article 1481, however, suggests otherwise, since it arguably will disrupt a long-standing policy that prohibited any sort of unrestricted contractual relationship between cohabitants.

The rejection of article 101 suggests that the law still favors marriage over cohabitation.[14] More precisely, it suggests that the legislature did not wish to extend to cohabitants the option of a non-marital relationship

11. For a discussion of the Persons Committee's recent work, see Spaht, Revision of the Law of Marriage: One Baby Step Forward, 48 La. L. Rev. (1988). Professor Spaht served as Reporter for the Persons Committee.

12. Spaht, From the Reporter I: Policy Considerations, at 3 (reporting on proposed art. 101), on file at the office of the Louisiana Law Review.

13. Id.

14. H.B. 1139, § 1, art. 101, comment (d), 1987 La. Reg. Sess.

almost identical to marriage, but with only those legal consequences the couple chose to provide in the contract. If this article had been adopted, couples not legally married (or incapable of marrying)[15] could duplicate a matrimonial regime by contract, yet "contract around" the incidents of marriage that they wished to avoid.

Marital contracts provide a method by which couples who are married or wish to marry may achieve a result similar to that which could have been achieved by cohabitants under article 101. The difference, however, is that married couples enter into a relationship governed by particular state laws. Allowing cohabitants to avoid marriage while attaching selected legal consequences to their relationship could eventually remove or substantially reduce state control over the family unit.[16] As stated in *Schwegmann v. Schwegmann*,[17] "Without the family, the state cannot exist and without marriage the family cannot exist."[18]

State control over the monetary and property dispositions of married, separated, or divorced persons has been reduced through the availability of marital contracts.[19] Thus, such control can be deemed unnecessary where the parties to a marriage, in accord with relevant public policy, can devise a scheme that suits their needs and desires better than the one devised by the state. It might be argued that the state likewise indirectly exercises unnecessary control over cohabitants by denying their monetary and property claims. However, article 1968, in conjunction with the traditional notion that concubinage is against public policy, provides ample support for a rebuttal of that argument. Unless a change in public policy can be inferred from the acts of the legislature, cohabitants' contracts will remain subject to "traditional notions of public policy" which evolved from religious beliefs and opposition to interracial relationships.[20]

Since contracts between cohabitants are no longer as severely restricted (because of the repeal of article 1481), the idea that the majority

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15. La. Civ. Code art. 88 (1870) has been interpreted as prohibiting marriage between two people of the same sex. The law has not changed. See La. Civ. Code arts. 89, 96.

16. The Civil Code provides certain impediments which will preclude two persons from marrying each other. See La. Civ. Code arts. 88-90. Article 98 also provides for mutual obligations of support, fidelity and assistance between husband and wife. Similar obligations do not attach to a concubinage relationship.

17. 441 So. 2d 316 (La. App. 5th Cir.), writ denied, 443 So. 2d 1122 (La. 1983), cert. denied, 467 U.S. 1206, 104 S. Ct. 2389 (1984).

18. Id. at 326.

19. See La. Civ. Code art. 2329.

20. See J. Schafer, Open and Notorious Concubinage: The Emancipation of Slave Mistresses by Will and the Supreme Court in Antebellum Louisiana, 28 Louisiana History 165 (1987); Lorio, Concubinage and Its Alternatives: A Proposal for a More Perfect Union, 26 Loy. L. Rev. 1, 18 (1980). See infra note 78.

of these contracts are against public policy may be giving way to more practical concerns. Aside from any policy implications, the rejection of article 101 may suggest that the legislature did not wish to extend to cohabitants the option of entering into a relationship similar to marriage but governed by contract law rather than family law. Family law affords the state far more discretion and opportunity to structure society and intra-family relations in a manner consistent with traditional notions concerning family life. The need to afford the state such discretion in the area of cohabitants' rights, however, is questionable.[21]

The availability to cohabitants of other legal remedies is not necessarily precluded by the unavailability of written contracts which would allow the approximation of a matrimonial regime. Despite the rejection of article 101, the repeal of article 1481 suggests a more liberal policy than the one previously applied to contracts between cohabitants.

The Trend of Public Policy in Louisiana

Louisiana's policy of discouraging concubinage "for the 'sake of public order or good morals'"[22] is consistent with its public policy of promoting marriage. "The fact that a subsequent marriage of the two concubines exempts them from the limitation [in article 1481] on donations is an obvious attempt to encourage the marital state."[23] One scholar points out, however, that "[p]enalizing those who have chosen concubinage over marriage has not significantly promoted the latter institution at the expense of the former."[24] Perhaps it is for that reason that the Louisiana courts have gradually become more willing to allow concubines to recover in certain instances in which they previously could not recover, or were limited in their recovery.[25]

Louisiana law has undergone a gradual change in its treatment of cohabitants. The trend has moved away from a "qualified disapproval"[26] of concubinage toward a recognition that unmarried cohabitants should be afforded certain rights and benefits under the law.

Concubinage and Life Insurance Policies

The ignominy attached to concubinal relationships has waned over the years. In *New York Life Insurance Co. v. Neal*,[27] a 1905 decision,

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21. See infra text accompanying notes 22-84.

22. New York Life Ins. Co. v. Neal, 114 La. 652, 657, 38 So. 485, 486 (1905), citing La. Civ. Code art. 11 (1870) as the reason for the limitation placed on donations covered by article 1481.

23. Lorio, supra note 20, at 18.

24. Id. at 23.

25. See infra text accompanying notes 27-43.

26. H.B. 1139, § 1, art. 101, comment (b), 1987 La. Reg. Sess.

27. 114 La. 652, 38 So. 485 (1905).

the Louisiana Supreme Court allowed a concubine, as named beneficiary of a life insurance policy, to recover only one-tenth of the proceeds. The court classified the proceeds of the policy as the donation of a movable subject to reduction under article 1481 because the relationship was undoubtedly open.[28] Since the proceeds of the policy constituted the donor's entire estate, the concubine was entitled to receive only one-tenth of the proceeds. In 1920, however, the supreme court allowed a concubine, whose relationship was not open, to recover the entire proceeds of a life insurance policy in which she was the named beneficiary.[29] In a 1930 decision, *Sizeler v. Sizeler*,[30] the Louisiana Supreme Court overruled *Neal*, and declared article 1481 inapplicable to the proceeds of a life insurance policy.[31] Thus, the concubine was allowed to recover the entire proceeds from the policy.

This was arguably the first step towards a more liberal attitude regarding the rights of concubines under Louisiana law. In *Neal*, the 1905 case, the supreme court characterized donations between concubines, and impliedly concubinage itself, as against public order and good morals, citing Civil Code article 11.[32] Yet in *Sizeler*, only twenty-five years later, neither article 11 nor article 1895 of the 1870 code (the source provisions of current articles 7 and 1968) was invoked, and the openness of the alleged concubinage was irrelevant to the outcome. Although the *Sizeler* court found that a life insurance policy is not governed by the rules applicable to donations,[33] it also established that

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28. Id. at 654, 38 So. at 485.

29. Toussant v. National Life & Accident Ins. Co., 147 La. 977, 86 So. 415 (1920).

30. 170 La. 128, 127 So. 388 (1930).

31. Id. at 132, 127 So. at 389.

32. La. Civ. Code art. 11 (1870) has been incorporated into new La. Civ. Code art. 7. Article 7 does not change the law. Comment (a). Article 11 provided:

> Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals.
>
> But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good.

Article 7 now provides:

> Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.

33. The court classified a life insurance policy as *sui generis*, but as Justice Thompson noted in his dissent, to allow a concubine to recover the proceeds of a life insurance policy is virtually indistinguishable from allowing her to receive a donation. Although the two methods are distinguishable, the results are not—both gratuitously benefit the concubine. Of insurance and donations he stated: "[I]t is manifest that the former may be made as effective as the latter to accomplish a purpose the law reprobates." 170 La. at 140, 127 So. at 392, quoting New York Life Ins. Co. v. Neal, 114 La. 652, 658, 38 So. 485, 487 (1905).

one living in a state of concubinage, whether open or secret, could enter into a contract (albeit a particular type of contract) for the benefit of his concubine.

In *Prudential Insurance Co. v. Taylor*,[34] a federal court found that under Louisiana law the insured had a right to make his concubine, with whom he was living in adultery, the beneficiary of a life insurance policy to the prejudice of his daughter and wife.[35] The concubine was decreed owner of the entire proceeds of the policy. The same result was reached in *Woodmen of the World Life Insurance Society v. LeBlanc*,[36] a case with similar facts. Regarding the decedent's change in beneficiaries from his wife and their two minor children to his concubine, the *LeBlanc* court stated, "It was not for the trial judge then, nor is it for us now, to pass judgment on the decedent for his decision to change beneficiaries . . . ."[37] With respect to Louisiana's law on concubinage, this statement succinctly acknowledges the trend away from imposing upon individuals, through assertions of public policy, a sense of morality that is not shared by all.

Concubinage and Workers' Compensation Benefits

The trend toward a more liberal attitude regarding the benefits legally available to concubines continued to evolve in *Henderson v. Travelers Insurance Co.*,[38] a 1978 case. After years of denying Workers' Compensation Act benefits to concubines who were dependent on their paramours for support,[39] the Louisiana Supreme Court in *Henderson* permitted recovery of such benefits by a concubine.[40] Previous cases on

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34. 46 F. Supp. 115 (W.D. La. 1942).

35. The *Taylor* court cited two previous Louisiana decisions that had followed *Sizeler*, In re Sun Life Assurance Co., 155 So. 399 (La. App. Orl. 1934), and Grayson v. Life Ins. Co., 144 So. 643 (La. App. Orl. 1932).

36. 417 So. 2d 886 (La. App. 3d Cir. 1982).

37. Id. at 888.

38. 354 So. 2d 1031 (La. 1978).

39. See Humphreys v. Marquette Casualty Co., 235 La. 355, 103 So. 2d 895 (1958); Liberty Mut. Ins. Co. v. Ceasar, 345 So. 2d 64 (La. App. 3d Cir.), writ denied, 347 So. 2d 1118 (La. 1977); Dickerson v. Employers Mut. Liab. Ins. Co., 248 So. 2d 852 (La. App. 2d Cir.), writ denied, 259 La. 763, 252 So. 2d 457 (1971); Patin v. T. L. James & Co., 39 So. 2d 177 (La. App. 1st Cir. 1949); Moore v. Capitol Glass & Supply Co., 25 So. 2d 248 (La. App. 1st Cir. 1946). See also Lorio, supra note 20, at 17.

40. It should be noted, however, that there were no preferred claimants to prime her claim and that the concubine was not granted the same rights as a legal widow. See Lorio, supra note 20, at 17.

In a footnote, the *Henderson* court acknowledged the favoritism with which the law looked upon marriage, as opposed to concubinage:

> The legislative policy expressed by Civil Code Article 1481 of disfavoring concubines in favor of the legitimate family of the decedent, if applicable to

the issue had found uniformly that a concubine was not a family member within the meaning of the statute,[41] and thus could not recover benefits despite proof of dependency. *Henderson* overruled the prior jurisprudence, and the court stated that it was "unable to find in the terms of the compensation act itself any legislative intent to deny compensation benefits to any dependent member of the decedent's family household because of moral unworthiness."[42]

The court cited *Sizeler v. Sizeler*[43] as authority for the proposition that it is not within the court's discretion to consider "moral unworthiness as a criterion for eligibility" for recovery with respect to concubines when the same criterion is not imposed upon other claimants.[44] This analogy to *Sizeler*, the seminal case which allowed a concubine who was the named beneficiary of a life insurance policy to recover the entire proceeds, is particularly apt. It shows a recognition by the court of the trend away from using moral turpitude as a basis for denying relief to cohabitants. Rather than being penalized because of their relationship, the cohabitants in both the workers' compensation and the insurance cases actually benefitted as a result of their relationship. This could be viewed as an acknowledgment that cohabitants' relationships are nothing more than an alternative lifestyle, and that participants therein should be afforded all the rights and remedies available to unmarried citizens who do not have a cohabitant.

Recent Failure to Apply Article 1968

Succession of Bacot,[45] a 1987 case in which a testator left his entire estate to his homosexual lover,[46] presented the first challenge under

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the compensation statute's scheme, is adequately served by the concubine's less favored position with regard to the preferred compensation claimants, the spouse, children, parents, and siblings of the decedent.

354 So. 2d at 1034 n.6. The implication is that promoting marriage and therefore legitimate families, rather than discouraging concubinage, is the real concern of lawmakers and judges. From a policy standpoint, it emphasizes a shift from condemnation of concubinage to promotion of the institution of marriage. See infra text accompanying notes 78-83.

41. La. R.S. 23:1253 (1985) reads in pertinent part: "No person shall be considered a dependent, unless he is a member of the family of the deceased employee, or bearing to him the relation of husband or widow, or lineal descendant or ascendant, or brother or sister, or child."

42. 354 So. 2d at 1034.

43. 170 La. 128, 127 So. 388 (1930).

44. 354 So. 2d at 1034.

45. 502 So. 2d 1118 (La. App. 4th Cir.), writ denied, 503 So. 2d 466 (La. 1987).

46. Bacot, the deceased, had adopted Elmo Orgeron, Jr., an adult male, who was named executor and sole legatee in Bacot's original will, which was in statutory form. Two years after the writing of that will, Bacot wrote an olographic will, naming "Danny" as his sole legatee. Since the validity of the adoption was not pleaded as an issue at trial, the court of appeal remanded the issue to the trial court. Id. at. 1126-27.

article 1481 to a disposition mortis causa in favor of a cohabitant of the same sex. Article 1481 was found inapplicable to homosexual relationships, and, significantly, the article was repealed the following year. The opinion in *Bacot* established that under article 1481, homosexuals and heterosexuals were treated differently. While cohabiting homosexuals involved in an open sexual relationship could donate to each other free from the restrictions of article 1481, heterosexuals living together under the same circumstances could not. The court in *Bacot* stated that "[h]omosexuals living together, no matter what the duration, can never marry, and therefore such individuals can never be concubines to one another."[47]

The fact that article 1968 was not used to invalidate the donation despite the sexual nature of the relationship is particularly important.[48] Homosexual activity is prohibited by the Louisiana Criminal Code as a crime against nature.[49] Violation of the statute is punishable by a fine of not more than two thousand dollars, imprisonment with or without hard labor for not more than 5 years, or both. The fact that such sexual activity is prohibited by law necessarily indicates that homosexual relationships in which it occurs are illicit and thus against public policy.

Despite testimony at trial in which three men admitted to having had a sexual relationship with Bacot (an admitted homosexual),[50] the court did not classify their relationships as illicit. It did, however, state that "concubinage has traditionally been described . . . [as] an open, illicit sexual relationship approximating marriage."[51] At issue in *Bacot* was the determination of the intended legatee's identity from one statement in the deceased's olographic will: "I leave all to Danny."[52] Three men named Danny intervened in the probate proceedings, each claiming to be the person named in the will. The trial court found Danny Washington to be the intended legatee because of his "longtime ho-

47. Id. at 1130, citing La. Civ. Code art. 88 (1870). See La. Civ. Code arts. 89, 96.

48. Arguably, article 1968, by its terms, does not apply to donations mortis causa. La. Civ. Code art. 1917, however, provides authority for applying article 1968 to wills. Article 1917 provides:

> The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations.

Furthermore, comment (b) of article 1917 states that "[u]nder this Article, the general rules of contracts are applicable to declarations of will contained in unilateral acts." Although article 1917 was not in effect at the time of the testator's death, comment (a) of that article states that it does not change the law.

49. La. R.S. 14:89 (1986).

50. 502 So. 2d at 1120.

51. Id. at 1129.

52. Id. at 1120.

mosexual love affair and cohabitation [with Bacot] wherein they assumed duties and obligations usually manifested by married people."[53] Bacot's relationships with the other two men were found to be "transitory . . . [and] purely sexual in nature."[54] The appellate court placed great emphasis on the "relationship . . . of love and caring"[55] that existed between Bacot and Washington. The two lived together for nine years, and Washington attended Bacot during his illness. They also "shared the household chores and duties, maintained joint bank accounts, jointly entered into a signed rental agreement and were reciprocal beneficiaries on each other's life insurance policies."[56]

The similarity to concubinage is more than slight. Yet the court did not invoke any public policy argument to invalidate the donation.[57] The state's primary reason for invalidating contracts between unmarried cohabitants who share a sexual relationship is to promote marriage and legitimate families. Invalidating contracts between homosexual cohabitants would not accomplish that purpose since homosexuals cannot marry. This is indicative of a shift in the emphasis of public policy away from condemnation of concubinage and toward promotion of the institution of marriage.

This presented an interesting inconsistency in the law. Although homosexual acts are prohibited by law according to Louisiana Revised Statutes (La. R.S.) 14:89, *Bacot* established that donations (and, inferentially, onerous contracts) between homosexual cohabitants are not against public policy. Yet contracts between heterosexual cohabitants, whose sexual relationships do not involve illegal acts, remained subject to invalidation through application of article 1481. Contracts between heterosexual cohabitants are still subject to invalidation under article 1968 due to the historical interpretation of article 1481, which established that the sexual relationship was a valid basis on which to find such contracts violative of public policy. Similar contracts between homosexuals do not appear to violate public policy under *Bacot*.

This anomaly could be justified by arguing that since homosexuals are not afforded the option to marry, it is only fair to allow them to contract onerously with each other in order to provide for the disposition of shared property upon the termination of their relationship. But by the same token, heterosexual cohabitants who have the option of marriage should not be coerced into it. It should remain an option. Het-

53. Id. at 1121. See La. Civ. Code art. 1714.
54. Id. at 1123.
55. Id. at 1123.
56. Id. at 1123-24.
57. See supra note 48.

erosexual cohabitants do not detract from the civilized structure of society and the perpetuation of the family unit any more than do homosexual cohabitants. Heterosexuals, at least, may procreate and live as a family unit, even without the state's recognition. The court in *Bacot* cites Planiol to explain the state's interest in promoting marriage: "[S]ociety has a supreme interest in the duration of unions which create families. Concubinage was frowned upon as a means of avoiding the responsibilities of family associated with marriage, especially the obligations associated with the birth of children."[58] Although the children of cohabitants would be illegitimate, if their filiation be proved, they would be treated no differently from legitimate children, since the constitution provides for equal protection of illegitimate children.[59]

The failure of the court in *Bacot* to use a public policy rationale to invalidate the will while article 1481 was still in effect was in accord with the trend away from penalizing unmarried cohabitants on the basis of moral unworthiness. If the legislature had felt a strong aversion to gratuitous donations between cohabitants due to the "illicit nature" of these contracts, it could have changed article 1481 to a "gender neutral" article. Instead, the article was repealed, thereby putting heterosexual and homosexual cohabitants on an equal footing with respect to capacity to donate. Whether these two groups of people who have chosen "alternative lifestyles" will remain on equal footing as to capacity to contract otherwise with their partners is left for the courts to decide.

Arguably, application of article 1968 would be outdated and ineffective. If prior law on concubinage continues in effect with regard to financial arrangements between cohabitants, "[t]he only person whose expectations [will] be satisfied . . . [will] be a cohabitant who [has] disingenuously entered into such an agreement in reliance upon his greater knowledge of the law."[60] When one cohabitant is more sophisticated than the other, use of article 1968 to deny legitimate claims may benefit the sophisticated cohabitant at the expense of the less sophisticated partner. If recovery would otherwise be appropriate, application of article 1968 would not promote the institution of marriage. The sophisticated cohabitant probably benefits from such a use of article 1968. Although marriage and a marital contract might limit the less sophisticated party's

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58. *Bacot*, 502 So. 2d at 1128, citing 1 M. Planiol, Traité Elementaire de Droit Civil No. 697 (La. Law Inst. trans. 1959). See also Lorio, supra note 20, at 18.

59. See generally, Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977); Jimenez v. Weinberger, 417 U.S. 628, 94 S. Ct. 2496 (1974); Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S. Ct. 1400 (1972); Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968).

60. *Spaht*, From the Reporter II: Committee Deliberations, at 4 (reporting on proposed art. 101), on file at the office of the Louisiana Law Review.

recovery, at least that party would have a basis for asserting a claim against the other party. Thus it is arguable that article 1968 places the sophisticated party in a better position than marriage.

Repeal of La. R.S. 14:79.1

From 1960 to 1975, under La. R.S. 14:79.1,[61] entering into a common law marriage was a crime, punishable by a fine of up to one thousand dollars, imprisonment, with or without hard labor, for up to one year, or both. In addition to defining a common law marriage,[62] the statute provided: "The living together openly by a man and woman as man and wife shall be considered as prima facie evidence that a common law marriage has been entered into by them."[63]

Thus unmarried cohabitants were once subject to criminal prosecution in Louisiana. The title of the repealing act read as follows:

> An act to provide that it is the public policy of the state of Louisiana to accord equal protection under the law of the state to all citizens without regard to race, creed, color or national origin; to repeal laws inconsistent with this policy and to permit the gathering of statistics on such bases provided they are not used in contravention of this policy.[64]

The repeal of section 79.1 in 1975 reflected the trend, which began in 1930 with the life insurance cases, toward a more liberal public policy on concubinage and its attendant penalties under the law. As the title of the repealing act suggests, the religious overtones inherent in previous public policy were giving way to more important concerns.

The Putative Spouse Doctrine in Louisiana

A more recent change in the law relating to putative marriages suggests an attenuation of the public policy of promoting marriage. Civil Code article 96, effective January 1, 1988, provides that the civil effects of marriage continue in favor of a putative spouse "regardless of whether

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61. La. R.S. 14:79.1, enacted by 1960 La. Acts No. 73, § 1, and repealed by 1975 La. Acts No. 638, § 3.

62. Id. Section 79.1 provided in pertinent part:

> Entering into a common law marriage as herein defined is hereby declared to be a crime. For the purposes of this section a common law marriage is an agreement, either written, oral, or tacitly entered into, between a man and woman to then and there become husband and wife, without a ceremonial marriage solemnized pursuant to a license obtained in accordance with the laws of this state, followed by cohabitation.

63. Id.

64. 1975 La. Acts No. 638, § 3.

[he] remains in good faith"[65] when the cause of the nullity of the marriage is the other party's prior undissolved marriage.[66] Formerly, under repealed Civil Code articles 117[67] and 118,[68] "the civil effects of the putative marriage terminated as of the moment at which the good faith spouse learned or should have learned of the existence of the impediment."[69]

The purpose of new article 96 is the prevention of injustice that might result from the failure of the spouse, whose prior marriage is the source of the nullity, to seek a divorce and remarry the good faith putative spouse upon the latter's discovery of the impediment.[70] Formerly, the good faith spouse could only sue for a declaration of nullity of the marriage or continue in the marriage without civil effects, but article 96 now provides an alternate remedy.

Although article 96 does espouse more equitable treatment for a putative spouse who contracted the marriage in good faith, it also diminishes the distinction between a cohabitant and a putative spouse. The latter enjoys protection under the law for monetary and property claims on the basis of a good faith belief that he was legally married. The continuation of this good faith belief is no longer a prerequisite to relief in cases where a prior undissolved marriage, known only to the bigamous spouse, is the source of nullity.

Such a putative marriage now differs from concubinage only in the way in which the relationship began. A cohabitant with a conscious disregard for the institution of marriage does not enter the relationship with a belief that he is married. Once the good faith putative spouse ceases to be in good faith, the relationship becomes identical to concubinage. Both "spouses" know they are not legally married, but they

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65. La. Civ. Code art. 96 provides in pertinent part:

> An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.
>
> When the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage.

66. Regarding La. Civ. Code art. 96, the new putative spouse article, see Spaht, supra note 11, at 1149.

67. La. Civ. Code art. 117 (1870), repealed by 1987 La. Acts No. 886, § 1. For a discussion of the recent revisions to the Civil Code under 1987 La. Acts No. 886, see Spaht, supra note 11.

68. La. Civ. Code art. 118 (1870), repealed by 1987 La. Acts No. 886, § 1. See also Spaht, supra note 11.

69. La. Civ. Code art. 96 comment (b) and cases cited therein.

70. La. Civ. Code art. 96 comment (b).

continue to live together as husband and wife. The incentive to marry is diminished by the fact that the civil effects of marriage still flow in favor of the spouse who was in good faith. Arguably, the strongest incentive now for the putative spouses to marry would be that it cuts off significant property claims of the bigamous spouse's prior spouse at his death, since that individual would still be entitled to a portion of the assets acquired during the putative marriage.[71] Nonetheless, the legislature's willingness to afford relief to a putative spouse in bad faith, whose status differs only slightly from concubinage, further substantiates the shift of public policy. Although article 96 still reflects a preference for marriage, it is indicative of the trend away from penalizing persons simply because they are cohabitants.

History of 1481

The history of article 1481 is itself an indication of the gradual change to a more liberal public policy on concubinage. Although article 1481 reflected the disapproval with which concubinage has been viewed under the law, it restricted only those living in open concubinage, and it allowed donations of movables which did not exceed the value of one-tenth of the estate.

Under early French law (the Code Michaud), concubines and paramours were completely incapable of donating to each other.[72] The prior versions of article 1481 that appeared in the Projet du Gouvernement of 1800[73] and the Civil Code of 1808[74] similarly forbade all donations between those living in open concubinage.[75] In the Civil Code of 1825, the article was amended to read exactly as it did until its repeal in 1987, except for the placement of a comma. The 1800 and 1808 versions were substantially the same as the 1825 and 1870 versions of article 1481, except that the earlier versions made no allowance for donations of movables, nor did they except from the restriction those who afterwards married. Thus the earlier versions of article 1481 were more sensitive

71. See Price v. Hopson, 230 La. 575, 89 So. 2d 128 (1956); Succession of Gordon, 461 So. 2d 357 (La. App. 2d Cir. 1984); Price v. Price, 326 So. 2d 545 (La. App. 3d Cir. 1976); Succession of Choyce, 183 So. 2d 457 (La. App. 2d Cir. 1966).

72. Lorio, supra note 20, at 12 n.61, quoting, in French, Code Michaud de janvier 1629 art. 132.

73. Projet du Gouvernement (1800), Book III, Title IX, art. 11, reprinted in 1 Compiled Edition of the Civil Codes of Louisiana 844 (J. Dainow ed. 1972).

74. La. Civ. Code art. 10 (1808), reprinted in 1 Compiled Edition of the Civil Codes of Louisiana 844 (J. Dainow ed. 1972).

75. The Code Napoleon (1804) contained no corresponding article, presumably as a result of the "scandals [which] arose in France as relatives of donors brought claims alleging that a concubinage existed between donor and donee in order to invalidate donations." Lorio, supra note 20, at 12.

to the policy of discouraging concubinage than to that of promoting marriage.[76]

The historical progression of the jurisprudence interpreting article 1481,[77] along with the various reasons for which it was applied,[78] reveal the developments in Louisiana's public policy on concubinage.[79] In 1800, the article forbade all donations between concubines. In 1825, it was modified to allow a donation of ten percent of one's estate, and it excepted those who afterwards married. This version remained in effect until long after the Civil War, but the reasons for which it was applied began to change. Originally, it was used to discourage illicit liaisons, especially between white men and their slaves.[80] Since concubinage between the white men and their slaves was common, the emphasis was on greater protection of heirs and preventing an increase in the number of free blacks.[81] With the passage of time, article 1481 was used to emphasize the immoral nature of concubinage, and the unacceptability of such relationships in society.[82] As concubinage became more prevalent in modern society, the emphasis shifted to promoting the institution of

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76. For a discussion of the history of concubinage in antebellum Louisiana, see Schafer, supra note 20, at 165.

77. See supra text accompanying notes 27-44 for a discussion of the changing interpretation of the public policy espoused by article 1481.

78. Under Louisiana law, slaves were considered personal property, thus "freeing a slave was considered a monetary donation to that bondservant," and reduction under the forced heirship doctrine became applicable. Schafer, supra note 20, at 168. Even if the master had no forced heir, "if the value of the slave mistress exceeded ten percent of the estate, she could not be freed." Id. at 169. Apparently the restriction on donations to concubines contained in article 1481 was originally applied to insure that legitimate forced heirs were not deprived of their "rightful inheritance" in favor of a slave. More significant, however was the legislature's concern over increasing the free black population. Schafer notes that "[t]he Louisiana Supreme Court was more likely to allow donations exceeding ten percent to white concubines." Id. at 169, n.13. This overriding concern is shown by the fact that in 1857 the legislature outlawed all emancipations in the state. Id. at 168. Since there was little likelihood that a white man would marry his slave mistress, or that the legislature wished to promote interracial marriages, the policy of promoting marriage did not evolve until later.

79. It has been suggested that the Civil Codes of 1808 and 1825 provide evidence of the fact that such relationships were widely accepted. The wife who wished to obtain a separation from her husband on the basis of his adultery with a concubine could do so only if he had kept his concubine in their common dwelling. R. Pascal & K. Spaht, Louisiana Family Law Course 579 (4th ed. 1986). See also La. Civ. Code art. 3 (1808), reprinted in 1 Compiled Edition of the Civil Codes of Louisiana 82 (J. Dainow ed. 1972); La. Civ. Code art. 137 (1825), reprinted in 1 Compiled Edition of the Civil Codes of Louisiana 81 (J. Dainow ed. 1972).

80. See supra note 78.

81. Id.

82. See, e.g., Cole v. Lucas, 2 La. Ann. 946 (1847); Succession of Battiste, 145 So. 2d 668 (La. App. 4th Cir. 1962).

marriage.[83] Finally, being an ineffective means to that end, article 1481 was repealed. The article's survival until 1987 was perhaps an anachronism. Nonetheless, it is evident that the historical changes in society necessitated changes not only in article 1481, but in the public policy behind the article as well.

Onerous Contracts Between Cohabitants: A Proposal for an Equitable Solution in Conformity with the Public Policy of Promoting Marriage

Consider a hypothetical scale where purely business contracts between cohabitants represent the origin, and marital-type sharing agreements between cohabitants represent the end. The farther away from the origin a contract appears, the closer it comes to approximating a marital property regime. Enforcement of these contracts is more likely to contravene the public policy of promoting marriage. The types of contracts that appear closer to the origin are less likely to be against this policy, and should be enforced.

The legislature has already indicated through the rejection of proposed article 101 that written onerous contracts, although purely business related, may not be an available means for cohabitants to structure financial agreements whereby money, property, and labor may be pooled for their common benefit and equitably distributed at the demise of the relationship.

The problem now is to determine what other types of contracts, if any, may be used for this purpose. In this discussion, three basic situations will provide the framework for analysis: first, cohabitants who are in business together, or who wish to start a business together; second, cohabitants who share a business relationship similar to that of employer-employee; and third, cohabitants who share a stereotypical relationship in which one partner provides most or all of the income and the other partner provides domestic services usually attributable to a housewife. Contracts between cohabitants in the first two situations are closer to the origin on the hypothetical scale, while contracts in the third situation approach the end of the scale. In all three situations it is presumed that a sexual relationship exists.

At the outset, it is necessary to summarily acknowledge, and simultaneously dispense with, the traditional jurisprudential method of determining the validity of the claim by ascertaining whether the business relationship came before or after the sexual relationship. In cases where the business relationship upon which the plaintiff based his claim was formed after the existence of the sexual relationship, the courts generally

83. See supra text accompanying text 22-64 and 72-76.

have denied recovery, reasoning that the sexual relationship must have been the primary motive of an incidental business relationship.[84] "[Some] cases indicate that the motive for the coming together was meant to be a factor in denying the concubine's recovery *only* in cases where the concubine claimed remuneration for services incidental to the concubinage relationship (e.g., house servant, nurse)."[85] An alternative method for denying remuneration for domestic services in such cases will be provided. Accordingly, the chronological order of the relationships should be viewed as a matter of coincidence. The situation of a man and woman who begin living together and subsequently working together should not be distinguished from the situation of a couple who work together before living together on the assumption that the latter were drawn together by their work rather than by their mutual attraction. The couple who live together before working together may have an equally legitimate business relationship upon which to base a contractual claim. The sequence of events presents a dubious basis upon which to decide the fate of a contract claim. Therefore, that approach should be abrogated, and the remainder of this discussion will treat it as such.

The primary obstacle to be overcome is the public policy of discouraging concubinage in order to promote the institution of marriage. While "the State is justified in encouraging . . . marriage over . . . concubinage"[86] to protect the stability of society, statistics suggest that the practice of penalizing cohabitants by dismissing their contract claims has not resulted in a decrease in concubinage or an increase in the number of marriages.[87] The following suggestions provide a plausible method whereby the reasonable expectations of cohabitants may be satisfied while the policy of promoting marriage remains intact. Since the trend in Louisiana demonstrates that the policy of discouraging concubinage has lost momentum, the following suggestions presuppose that the policy of promoting marriage is the real concern at issue.

An analysis of *Schwegmann v. Schwegmann*[88] provides an appropriate starting point. The contract alleged by the plaintiff in *Schwegmann* was one in which the cohabitants agreed to "combine their skills, efforts, labor and earnings and to share equally any and all assets and property

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84. See authorities cited supra note 6.

85. Note, Domestic Relations—Partnership—Right of Concubine to Share in Paramour's Estate, 32 Tul. L. Rev. 127, 129 (1957), citing Heatwole v. Stansbury, 212 La. 685, 33 So. 2d 196 (1947); see also Pricto v. Pricto, 165 La. 710, 115 So. 911 (1928); Purvis v. Purvis, 162 So. 239 (La. App. 2d Cir. 1935).

86. Schwegmann v. Schwegmann, 441 So. 2d 316, 326 (La. App. 5th Cir.), writ denied, 443 So. 2d 1122 (La. 1983), cert. denied, 467 U.S. 1206, 104 S. Ct. 2389 (1984).

87. See Lorio, supra note 20, at 27.

88. 441 So. 2d 316 (La. App. 5th Cir.), writ denied, 443 So. 2d 1122 (La. 1983), cert. denied, 467 U.S. 1206, 104 S. Ct. 2389 (1984).

acquired and accumulated as a result of their joint skills, efforts, labor and earnings."[89] Both the trial and appellate courts found that this type of agreement "fits exactly the codal definition of universal partnership."[90] Yet this alleged oral contract was held invalid for two reasons: first, a universal partnership had to be in writing at the time of this suit;[91] second, because it was a meretricious agreement, "even if [it] was not required to be in writing, it would be unenforceable."[92] The *Schwegmann* court cited several cases, all decided prior to 1966,[93] as support for the latter contention, stating that "where parties to a contract cohabit in a sexual relationship and their agreement to cohabit is part of the basis for the agreement between them, the agreement is unenforceable because it is an unlawful contract for meretricious services."[94] The basic notion is that where sex forms part of the consideration in a contract, the cause is unlawful and the contract is unenforceable.[95] The plaintiff in *Schwegmann* testified that "she and Mr. Schwegmann had sexual relations . . . *and that this was one of the reasons Mr. Schwegmann paid her money.*"[96] With such blatant testimony, the court had little choice but to consider the alleged contract unlawful. The court acknowledged, however, that under different circumstances it is possible to view an alleged agreement separately from the sexual relationship.

As it becomes more difficult to separate the sexual relationship from the alleged contract, the contract gets closer to the end of the hypothetical scale. Contractual claims that are based on an alleged contract that appears close to the end of the scale should therefore not be honored. Instead, it is possible in these situations to grant relief on a basis other than contract. When the contract is "separable" from the sexual relationship, it should be enforced. By analogy to a numbered scale, this method is capable of providing results in accord with the trend in public

89. Id. at 320.

90. Id. at 321.

91. Under La. Civ. Code art. 2834 (1870), which was in effect at the time the alleged contract was made, a universal partnership could not be created without a "writing signed by the parties." But see La. Civ. Code art. 2806. La. Civ. Code art. 2829 (1870) defined a universal partnership as a "contract by which the parties agree to make a common stock of all the property they respectively possess." La. Civ. Code arts. 2829-2834 (1870), concerning universal partnership, were repealed by 1980 La. Acts No. 150. That act revised Title XI of Book III of the La. Civ. Code of 1870, which contained the articles on partnerships.

92. 441 So. 2d at 322.

93. Sparrow v. Sparrow, 231 La. 966, 93 So. 2d 232 (1957); Delamour v. Roger, 7 La. Ann. 152 (1852); Foshee v. Simkin, 174 So. 2d 915 (La. App. 1st Cir. 1965).

94. 441 So. 2d at 324.

95. For a recent analysis of unlawful cause in contracts, see Litvinoff, Still Another Look at Cause, 48 La. L. Rev. 3, 8-10 (1987).

96. 441 So. 2d at 324.

policy and the legislative intent previously discussed without transgressing the public policy of promoting marriage.

In each of the three examples that follow, a hypothetical situation will be used to examine three different bases of contractual relief for cohabitants. The facts in each case will be similar, yet the distinctions will prompt different results consistent with the public policy of promoting marriage. Contracts that appear closest to the origin will be considered first, since it is suggested that they be enforced.

For the first example, consider a set of facts wherein John, who is the manager of a local restaurant, practices gourmet cooking in his spare time at home and hopes to open his own restaurant some day. Jane, who has been living with John for one year, is a certified public accountant who works for a small accounting firm in town. Each keeps a separate checking account, and they each pay for one half of all household expenses and bills. After discussing the idea, Jane and John decide to start a catering business on the weekends for small parties of forty people or less. John agrees to do all the cooking and food preparation, while Jane is to be in charge of all secretarial and accounting work. Both will deliver the food and work as bartenders or servers if requested. They place a notice in the newspaper advertising their new business, and the idea is immediately successful. Profits are split evenly, and after two months of weekend work both quit their week-day jobs to pursue the catering business on a full time basis. They open a business checking account into which all profits are deposited and from which all business expenses are withdrawn. Both are authorized to draw checks on the account. After one year of success, Jane and John begin leasing a small building at which they cater slightly larger receptions and parties. They also hire five employees to help John with the process of preparing and serving the food. Jane manages the office and accounting work. The business is increasingly successful, and after three years of working and saving, Jane decides that it is time to enjoy a standard of living commensurate with their earnings.

Until now, Jane and John had agreed that each would receive a monthly allotment of fifteen percent of the profits, to be deposited in their separate personal checking accounts. John, a conservative businessman, refuses to agree to allow a greater percentage of the profits to go into their separate checking accounts, preferring to save the money to invest in opening a restaurant. After several heated arguments over what to do with the remaining profits, Jane moves out of their apartment and sues John for fifty percent of the profits acquired from their business. Her claim is based on the allegation that a contract of partnership was formed when they first began operating the catering business from their home, and as one of two partners she is entitled to a fifty percent interest in all partnership assets.

Since the Civil Code does not require a written document to establish a contract of partnership,[97] it would appear that the facts of this hypothetical fit squarely the definition of a partnership or an "inadvertent partnership." In an inadvertent partnership situation, one is generally not aware that he is becoming a partner in a juridical entity.[98] A partnership may nonetheless have been established if the facts are sufficient to support the requirements for the formation of a partnership. One three-part test for the establishment of such an inadvertent partnership was set forth recently in *John P. Harris, M.D., Inc. v. Parmley*.[99] The three requirements to be met under that test are "(1) mutual consent, (2) participation in profits and/or losses and (3) proprietary interest in a community of property."[100] These three elements could obviously be inferred from the business relationship shared by Jane and John. The real question is whether the courts will find it appropriate to hold that a contract of partnership exists between unmarried cohabitants.

In *Glover v. Sowada*,[101] an inadvertent partnership case involving unmarried cohabitants, the court refused to infer an intent to share in the profits and losses[102] of a business operated by plaintiff and defendant, who were living together with the plaintiff's parents. The court placed great emphasis on the sloppy accounting practices of the business.[103] By

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97. La. Civ. Code art. 2806.

98. See Morris, Developments In The Law 1984-1985—Business Associations, 46 La. L. Rev. 413, 413-20 (1986).

99. 480 So. 2d 500 (La. App. 5th Cir. 1985).

100. Id. at 502. See also Morris, supra note 98, at 245. The test articulated in *Parmley* is not the only method by which an inadvertent partnership may be established. There are, in fact, five distinct tests, including the one in *Parmley*. For a list of these tests and an explanation of each, see Morris, supra note 98, at nn.2-3. Although the law in this area is unclear as to which test, if any, is the best or most proper, none of the tests appear to contemplate concubinage as a factor upon which establishment of an inadvertent partnership should turn.

101. 457 So. 2d 101 (La. App. 5th Cir.), writ denied, 461 So. 2d 316 (La. 1984). In this case, the court applied a test which was slightly different from the one used in *Parmley*. See Morris, supra note 98. The test in *Glover* provided that the plaintiff must show the following to establish the presence of an inadvertent partnership:

> (1) she and the defendant mutually agreed to form a partnership to participate in the profits which would accrue from the property, skill and industry furnished to the business in determined proportions by them, (2) both agreed to share in the losses as well as the profits of the venture, and (3) the property or stock of the enterprise formed a community of goods in which each party has a proprietary interest.

Glover, 457 So. 2d at 104.

102. The new test set out in *Parmley* does not require an agreement to share in losses.

103. "[T]here was no per se determination of what constituted the business' net profits or losses other than the tax returns or a per se division of either, nor was the plaintiff able to explain how the division of the gross receipts and expenses effected a division of

plaintiff's own testimony, "[T]he record keeping was done in a very lackadaisical . . . very relaxed fashion and, you know, a bookkeeper I am not."[104] Because the court found that the accounts apparently "were not entirely business accounts [and] . . . were no different than those of married couples who co-mingle funds from whatever source, separate or community, wages or business, and make disbursements . . . without regard to their source,"[105] it found that "[t]he litigants *did not mutually consent to form a partnership to participate in the profits* in a predetermined proportion."[106] The court also stated that "[t]he intent to share in the profits and losses must be expressed and should not be implied from the parties' conduct."[107]

The result in *Glover* was not in accord with *Darden v. Cox*,[108] "the leading supreme court decision on partnership criteria."[109] In *Darden*, the court "was willing to infer an agreement on the 'community of assets' element, and did not insist that an express form of actual agreement be proven."[110] Professor Morris explains that apparent inconsistency by analysis of the facts of each case, which reveals underlying issues not addressed by the courts. While proof of an express agreement to the partnership elements may be required in one case, the same type of agreement will be inferred from the circumstances in another case. "The real question in *Glover*, therefore, was . . . whether the court would allow an end run around the rules on the establishment of marital communities by permitting partnership doctrines to establish analogous rights in 'business' communities."[111] Professor Morris' contention is supported by the fact that the court in *Glover* cited two concubinage cases in which partnership claims were denied.[112]

In cases factually similar to the Jane and John hypothetical, the courts should easily find a contract of partnership or an inadvertent

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profits and losses." 457 So. 2d at 106. Good bookkeeping alone may not justify treating a business enterprise as a partnership entity, and sloppy bookkeeping alone should not preclude partnership status where the facts indicate otherwise. It is worth noting, however, that good bookkeeping has tremendous practical significance as an aid in proving partnership status. In the absence of other facts which strongly support a contrary result, courts may base denial of recovery upon such a blunder.

104. Id.

105. Id. at 107.

106. Id.

107. Id.

108. 240 La. 310, 123 So. 2d 68 (1960).

109. Morris, supra note 99, at 416.

110. Id. at 417.

111. Id.

112. See Glover, 457 So. 2d at 103, citing Foshee v. Simkin, 174 So. 2d 915 (La. App. 1st Cir. 1965), and Schwegmann v. Schwegmann, 441 So. 2d 316 (La. App. 5th Cir.), writ denied, 443 So. 2d 1122 (La. 1983), cert. denied, 467 U.S. 1206, 104 S. Ct. 2389 (1984).

partnership. Jane has a legitimate claim based on a business enterprise to which she contributed substantially. Since Jane is a certified public accountant, sloppy bookkeeping is an unlikely basis for denying the existence of a partnership. A review of the business' books and ledgers would provide adequate evidence of the couple's agreement to share equally in the profits (fifteen percent each) and to place the remainder of the profits in a separate account out of which the business was to be operated. Since both contributed equally to the initial expenses, it should be easy to find a fifty-fifty profit sharing agreement, as well as a fifty-fifty proprietary interest in coowned property (the business bank account and the lease) and the mutual consent necessary to meet the requirements recited in *Parmley*.

Contract claims of this sort, when they clearly arise from a business enterprise and their alleged terms are sufficiently supported by the evidence, should be treated in the same manner as claims by partners who are not cohabitants. A claim supported by a genuine business enterprise poses no threat to the institution of marriage. Neither party is attempting to gain the benefits that flow from a legal marriage; rather, they seek the benefits that flow from contribution of marketable skills and capital to a legitimate entrepreneurial business enterprise. Emphasis should be placed on the use of both parties' marketable, "business-type" skills which are both susceptible of economic valuation and sufficient to provide employment opportunities and which do not encompass domestic chores or services. A claim for compensation for the latter type of work encroaches upon the institution of marriage and should be treated differently. Before addressing claims of that sort, it is necessary to alter the facts of the hypothetical and discuss a situation in which a partnership has not been created.

Suppose now that John begins the catering business on his own and had been successfully operating the reception hall in the leased building for three years when he meets Jane. Jane has just become a certified public accountant and is presently unemployed. After dating for three months, he and Jane begin living together in his apartment. At this point, John's income is considerably larger than Jane's potential income. When John becomes dissatisfied with his present accountant, Jane volunteers to take care of all of John's accounting needs. Nothing is said about a salary, but John continues to pay all household expenses and opens a joint checking account from which Jane may withdraw freely. John asks only that she inform him before writing a check for more than five hundred dollars. Not wishing to take advantage of John's generosity, Jane spends very little money from the joint account. In accord with his generous nature, John begins sharing himself (and his money) with another woman. He maintains his relationship with Jane because she is a good accountant, and a cheap one. Besides, he loves

them both and has no desire to give up either. When Jane learns of his other liaison, she becomes outraged, moves out, and sues John for the value of her accounting services.

In cases of this sort, relief should be granted on the basis of either implied contract or unjust enrichment, using quantum meruit as the measure of recovery in the latter.[113] There was clearly no partnership agreement, since John began the business on his own and contributed all of the funds necessary to its operation. The business account was in John's name, and Jane had no access to the funds in this account. Jane did, however, provide a marketable skill which should not go uncompensated because of her relationship with John. "The theory of quantum meruit authorizes the party performing the services to receive compensation for his work, although no contractual agreement was reached with respect to price to be charged."[114] John should be able to set-off the value of anything he gave to Jane against the value of her services. In order to determine the amount owed by the party receiving the benefit, the court must make a "reasonable evaluation of the services performed as adjusted to the circumstances of the individual situation."[115] The court in *Schwegmann* did not preclude relief by a concubine on a quantum meruit basis, but found that business services, as opposed to domestic services, could be compensated as long as the enterprise "arose independently of the illicit relationship."[116]

Rather than looking to whether the enterprise arose independently of the relationship,[117] a "marketable skill" criterion should be used. As long as the services for which compensation is claimed are not domestic in nature, and are services for which a reasonable person would pay at least minimum wage, or for which one might find at least temporary employment, relief should be granted on a quantum meruit basis. In other words, if the cohabitant seeking recovery provided a marketable

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113. In Terral v. Bearden, 338 So. 2d 141, 144 (La. App. 2d Cir. 1976), the court stated that quantum meruit need not be pleaded as a basis for recovery but may be applied by the court where circumstances are appropriate. Id. Other cases, however, have held to the contrary, stating that a plaintiff who fails to prove the existence of the contract upon which he sues may not recover on quantum meruit unless he has pleaded for such relief in the alternative. It was also noted that the plaintiff's right to sue on quantum meruit should be reserved. B.F. Edington Drilling Co. v. Yearwood, 239 La. 303, 118 So. 2d 419 (1960). The reason behind this rule is further explained in O'Brien v. Grand, 118 So. 2d 517 (1960). See Litvinoff, The Law of Obligations in the Louisiana Jurisprudence 497-98 (1985). It should be noted that *Bearden* was decided several years later than *Yearwood* and *Grand*, but that the two latter cases are supreme court decisions.

114. Swan v. Beaubouef, 206 So. 2d 315, 317 (La. App. 4th Cir. 1968).

115. Id.

116. *Schwegmann*, 441 So. 2d at 325, quoting Guerin v. Bonaventure, 212 So. 2d 459, 461 (La. App. 1st Cir. 1968).

117. See supra text accompanying note 86.

skill, he should be compensated at the prevailing rate for the time the skill was provided, regardless of any connection between the business relationship and the sexual relationship. This method would eliminate questions regarding the degree of interdependence between the two relationships. The services provided by Jane were undoubtedly marketable, and are compensable by means of relief which in no way resembles an award of an interest in community property. Allowing recovery on a quantum meruit basis, regardless of the connection between the business and sexual relationships, would not contravene the public policy of promoting marriage. In most instances, marriage would entail the advantage of entitlement to one half of the community property, which would likely be worth more than the value of services rendered.

The third and final situation to be addressed appears very close to the end of the hypothetical scale. Although it is likely that enforcement of these contracts will be found to violate public policy, a plausible solution applicable in a few instances will be discussed. The facts of the Jane and John hypothetical must again be altered so that Jane, rather than being a certified public accountant, is a secretary making slightly more than the minimum wage when she meets John. John, on the other hand, will remain a successful businessman in the catering industry, but is divorced and has custody of his two children when he meets Jane. The children are five and seven years old. John was awarded the rather large family home as part of the divorce settlement. When John and Jane decide to live together, Jane agrees to quit her job and provide all of the usual domestic services, including care of the children, in exchange for which John promises to "take care of her" as long as they are together. John provides all of the income and gives Jane a sizeable monthly allowance to spend on "whatever her heart desires." After two years under this living arrangement, Jane becomes bored with the tedium of household chores; simultaneously, her passion for John dwindles. When John refuses Jane's request to send the children to boarding school, Jane moves out and sues John for compensation for the domestic services she provided.

In situations of this kind, compensation is generally denied. Quantum meruit provides the only plausible theory for recovery, yet in Jane's case, recovery could be denied solely because the value of her services did not exceed the value of what she received in return from John.[118]

118. It should be noted that if the party claiming compensation alleges an implied contract, recovery may not be proper when the other party can prove that he fulfilled his obligations under that implied contract. It might be wiser in such cases for the party claiming compensation to allege unjust enrichment. In the third Jane and John hypothetical, John might successfully argue that Jane performed domestic services in exchange for his

"If the recipient has contributed to the renderer's household expenses, these disbursements must be set off against the services rendered."[119] Thus in cases where a wealthy man supports his concubine who performs domestic services for him, the concubine generally cannot claim the rendition of services more valuable than what she has received in return. Recovery in such cases is properly denied.

On the other hand, the value of domestic services performed by the concubine of a less affluent man may exceed the value of the support provided by him when compared with the prevailing rates charged by household servants. To afford relief to the concubine in this case, however, might result in an award in excess of what she would receive in a divorce settlement. Such a result would be contrary to the public policy of promoting marriage.

In the few instances where the cost of a household servant, and possibly the additional cost of child care, exceeds the value of the support provided by the cohabitant who works outside the home, and where recovery would not be greater than it would in a divorce proceeding, recovery in quantum meruit could be allowed without transgressing the public policy of promoting marriage.[120] Although *Schwegmann* arguably precludes this type of recovery, an innovation by the courts would be acceptable. In awarding to the cohabitant only the difference between the value of her services and the value of the support she received, the court could emphasize the notion that because she rejected the idea of marriage, an award of anything more would be improper, because it would be equivalent to an award of an interest in community property. Thus the result could be reconciled with the public policy of promoting marriage.

To analogize the domestic services provided by a cohabitant to the function provided by a maid is demeaning. Yet it emphasizes the fact that domestic services provided by a housewife derive additional economic value not from the cost for a household servant, but instead from the amount of income provided by the husband in a marital relationship. The housewife becomes entitled to one half of the com-

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express promise to "take care of her for as long as they were together," which he did. Thus even if the value of her work exceeded the value of what she received in return, the court should award her nothing. She got what she "contracted" for, and absent error or fraud, the contract should stand. This argument will be more difficult to support in cases where there was no express statement upon which one could rely. Such a result seems equitable since parties should be encouraged to discuss and possibly clarify the terms of any agreement upon which one might later wish to litigate.

119. Comment, Personal Services About the Home, 23 La. L. Rev. 416, 420-21 (1963).

120. Recovery would be proper only where no contractual agreement, whether express or implied, can be shown. Unjust enrichment then would provide the only logical basis for recovery. See supra note 118.

munity property upon dissolution. Thus, it may be said that her services during marriage, by virtue of the marriage, become worth one half of the community. The marriage, rather than the services themselves, provides the source and measure of their value. Awards to concubines who have performed domestic services based upon the value of a "community" have been held impermissible in the past and should remain as such if the institution of marriage is to be promoted.

Conclusion

From the repeal of article 1481, it may be inferred with reasonable certainty that the intent of the legislature was to allow all donations between those living in open concubinage. This indicates that donations between cohabitants are no longer against public policy. The rejection of proposed article 101 makes it clear that not all contracts between cohabitants will be allowed, but it does not preclude otherwise enforceable contracts if they are not against public policy. In addition to the repeal of article 1481, there have been innovations by the courts and other legislative changes in the law, all indicative of a more liberal public policy on concubinage, and the effects or penalties that flow from this relationship.

The repeal of article 1481 and the current trend in public policy allow one to infer a new standard by which to judge the contractual claims of cohabitants. That standard requires a finding that the sexual relationship between cohabitants, in and of itself, no longer invalidates contracts between them. Contracts between cohabitants must no longer be subject to invalidation on the sole basis that the sexual relationship renders the contract contrary to public policy. Recovery would depend not on the nature of the relationship, but on whether enforcement of the contract would contravene the public policy of promoting marriage. Public policy has gradually moved away from discouraging concubinage and toward promoting the institution of marriage, and it is possible in many instances to honor claims on contracts between cohabitants without transgressing the latter policy.

On the hypothetical scale that ranges from contracts for the performance of purely business services to contracts for the performance of domestic services, claims based on the latter type of cohabitants' contracts are usually made in an attempt to receive some of the benefits that flow from a lawful marriage. Thus, enforcement of contracts in those latter instances would not be in accord with the policy of promoting marriage. However, in the absence of proof of the existence of a contract, unjust enrichment would provide an adequate basis for recovery if the value of the services was greater than the value of any benefit received in return, but less than the value of what would theoretically be acquired in a divorce proceeding.

Similarly, recovery upon contract claims arising out of a business relationship would merely amount to allowing compensation for the contribution of money, labor, or a marketable skill, any of which would undoubtedly be compensated if the parties to the alleged contract were not cohabitants. In these cases, partnership, inadvertent partnership, and quantum meruit provide the most logical bases for recovery. Penalizing cohabitants who assert business related claims does nothing to promote the institution of marriage; rather, it may discourage what would otherwise be a successful combination of entrepreneurial skills and a meaningful contribution to the economy. Therefore, contractual claims arising out of any type of business relationship between cohabitants, exclusive of contracts for domestic services, should be honored whether or not the business relationship is separable from the sexual relationship, provided that compensation would be granted in the same situation if the parties to the contract were not cohabitants.

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