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Reasonable Expectations in Nonmarital Cohabitation: A Proposal, For Recovery

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NOTE

REASONABLE EXPECTATIONS IN NONMARITAL COHABITATION: A PROPOSAL FOR RECOVERY

The property rights of unmarried cohabitants at the termination of their relationship has been a source of litigation for decades.[1] The dramatic increase in the number of persons living together without marriage in recent years[2] has underscored the necessity for courts to formulate clear standards to apply in determining the financial rights and responsibilities of nonmarital partners. In 1976, the Supreme Court of California was called upon to formulate such standards in the highly-publicized and controversial case of *Marvin v. Marvin*.[3]

The plaintiff, Michelle Triola Marvin, brought suit against the defendant, celebrity Lee Marvin, to enforce a contract under which she claimed to be entitled to support payments and to half the property accumulated by the parties during their seven years of cohabitation.[4] The first cause of action, a request for declaratory relief, sought a determination of her contract and property rights.[5] The second sought the imposition of a constructive trust on one half of the property.[6] The trial court rendered judgment for the defendant on the pleadings.[7] After the plaintiff's motion to amend the complaint was denied, she appealed to the California Supreme Court.[8] The court held that the complaint furnished a suitable basis upon which relief could be granted and that the trial court had erred in granting the defendant's motion for judgment on the pleadings.[9]

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[1] *See, e.g.*, Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951); Jones v. Jones, 313 Ky. 367, 231 S.W.2d 15 (1950); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Beuch v. Howe, 71 S.D. 288, 23 N.W.2d 744 (1946); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948).

[2] Census figures for 1977 indicate that nonmarital cohabitation increased eighty-three per cent in the years between 1970 and 1977. M. Plotkin, *United States Population: Changing Population Patterns*, 1979 WORLD ALMANAC AND BOOK OF FACTS 205, 205.

[3] 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). For legal commentary on the *Marvin* decision, see, *e.g.*, Kay and Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937 (1977); Branca, *A Practitioner's Guide to the Wages of Sin: Marvin v. Marvin*, 52 LOS ANGELES B. J. 502 (1977); Note, *Property Rights of De Facto Spouses*, 90 HARV. L. REV. 1708 (1977); Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359 (1978); Casenote, 17 SANTA CLARA L. REV. 947 (1977); Casenote, 46 U. CIN. L. REV. 924 (1977).

[4] 18 Cal. 3d at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

[5] *Id.* at 666, 557 P.2d at 110-11, 134 Cal. Rptr. at 819-20.

[6] *Id.*, 557 P.2d at 111, 134 Cal. Rptr. at 820.

[7] *Id.* at 667, 557 P.2d at 111, 134 Cal. Rptr. at 820. The defendant originally had demurred unsuccessfully to the plaintiff's allegations. Following extensive discovery and pretrial proceedings, the case went to trial, at which time the defendant filed a motion to dismiss. The court treated this motion as one for judgment on the pleadings because of a stipulation previously made by the parties. *Id.* at 666-67, 557 P.2d at 111, 134 Cal. Rptr. at 820.

[8] *Id.* at 667, 557 P.2d at 111, 134 Cal. Rptr. at 820.

[9] *Id.* at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825. Justice Tobriner wrote the majority opinion, in which Chief Justice Wright and Justices McComb, Mosk, Sulli-

In its 1932 decision of *Trutalli v. Meraviglia*,[10] the California court had held that a man and woman who live together without being legally married are nevertheless competent to make a valid agreement to share property acquired during the relationship, as long as the illegal cohabitation does not form the consideration for the property agreement.[11] Thus, following *Trutalli* and its progeny, the *Marvin* court determined that agreements like the one alleged by the plaintiff fail only to the extent that they rest explicitly upon a consideration of sexual relations.[12] The court further stated that, in the absence of an express agreement, courts might grant relief in implied contract or in equity.[13] Finding that the express agreement alleged by the plaintiff did not rest upon an unlawful consideration, the court reversed the trial court judgment and remanded the case.[14]

On remand, the trial court found that neither the words nor the conduct of the parties indicated an express[15] or implied[16] agreement to share property. In addition, the evidence adduced by the trial court failed to justify imposition of the equitable remedies of resulting or constructive trust suggested by the California Supreme Court.[17] The trial court nevertheless awarded the plaintiff $104,000 for rehabilitation,[18] stating that it was following the supreme court's instructions to employ additional equitable remedies if warranted by the circumstances of the case.[19]

The reasoning of the California Supreme Court in *Marvin* has been cited and adopted by several other state supreme courts in the years since the deci-

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van and Richardson concurred. Justice Clark filed a concurring and dissenting opinion. *Id.* at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832.

[10] 215 Cal. 698, 12 P.2d 430 (1932).

[11] *Id.* at 701-02, 12 P.2d at 431.

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

[13] *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[14] *Id.* at 684-85, 557 P.2d at 123, 134 Cal. Rptr. at 832.

[15] Marvin v. Marvin, [1979] 5 FAM. L. REP. (BNA) 3077, 3081 (Cal. Super. Ct. April 17, 1979).

[16] *Id.* at 3082.

[17] *Id.* at 3084. These theories had been suggested by the supreme court in *Marvin*. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. The supreme court had also indicated that courts might fairly apportion property accumulated through "mutual effort." *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830. The trial court indicated that it was unable to find in the instant action mutual effort that would warrant division of the defendant's property. 5 FAM. L. REP. at 3085. For a discussion of the plaintiff's mutual effort argument and the trial court's resolution of the issue, see text at notes 160-72 and notes 202-13 *infra*.

[18] 5 FAM. L. REP. at 3085. The sum was awarded so that Ms. Marvin could learn new employment skills or refurbish those previously utilized. *Id.* The superior court indicated that Ms. Marvin should be able to accomplish rehabilitation in less than two years. *Id.* n.18. It further noted that the amount of the award would be approximately equivalent to the amount of money the plaintiff would earn in two years at the highest scale of wages she had ever received, $1000 a week. *Id.* The court added that some of the funds might be used for living expenses, but that their primary purpose was for retraining. *Id.* n.19.

[19] *Id.* at 3085. These instructions are found in Marvin v. Marvin, 18 Cal. 3d at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

sion.[20] A 1979 decision by the Supreme Court of Illinois, however, illustrates the problems which plaintiffs may face in jurisdictions without California's history of favorable treatment of the claims of unmarried cohabitants.

The plaintiff in *Hewitt v. Hewitt*[21] had originally filed a complaint for divorce against the defendant, with whom she had lived for fifteen years.[22] The trial court dismissed the complaint when the plaintiff admitted that she and the defendant had never obtained a marriage license or participated in a marriage ceremony.[23] The court found, however, that certain property was held in joint tenancy, and directed the plaintiff to amend her complaint to make it more definite as to the nature of such property.[24] The amended complaint sought equal division of the property held in joint tenancy or in the defendant's name, on the basis of express oral contract, implied contract, constructive trust and equitable principles.[25] This complaint was also dismissed by the trial court, which found that Illinois law and public policy required such claims to be based on a valid marriage.[26] The appellate court reversed, holding that the plaintiff's complaint stated a cause of action on an express oral contract.[27] In reversing the appellate court judgment, the Illinois Supreme Court found that enforcement of a contract between unmarried cohabitants would contravene Illinois public policy.[28] The court determined that enforcement would violate the purpose of the Illinois Marriage and Dissolution of Marriage Act to "strengthen and preserve the integrity of marriage and safeguard family relationships."[29] In addition, the *Hewitt* court was unwilling to embrace "the naivete we believe involved in the assertion that there are involved in these [nonmarital] relationships contracts separate and independent from the sexual activity."[30]

The Illinois Supreme Court in *Hewitt* adopts traditional contentions which have been raised in the past to bar recovery for unmarried cohabitants.[31] In contrast, *Marvin* represents an alternative viewpoint, illustrating the arguments of those who have proposed that nonmarital partners should be able to assert their claims in court.[32] This Note will analyze the validity of recovery between unmarried cohabitants and the theories upon which such

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[20] *See, e.g.*, Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249 (1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978).

[21] 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

[22] *Id.* at 52, 394 N.E.2d at 1205.

[23] *Id.*

[24] 62 Ill. App. 3d 861, 862, 380 N.E.2d 454, 456 (1978).

[25] *Id.* at 867, 380 N.E.2d at 459.

[26] *Id.* at 863, 380 N.E.2d at 456.

[27] *Id.* at 867, 380 N.E.2d at 459.

[28] 77 Ill. 2d at 66, 394 N.E.2d at 1211. Mr. Justice Underwood delivered the opinion of the Illinois Supreme Court.

[29] *Id.* at 61-62, 394 N.E.2d at 1209, *quoting* ILL. REV. STAT. ch. 40, § 102(2) (1977).

[30] *Id.* at 60, 394 N.E.2d at 1209.

[31] See text at notes 221-23 and 231-33 *infra*.

[32] *See, e.g.*, Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker's Services*, 10 FAM. L.Q. 101 (1976) [hereinafter cited as Bruch].

recovery logically may be based. First, the opinions of the Illinois Supreme Court in *Hewitt* and the California Supreme Court in *Marvin* will be examined. Next, the Note will critically examine the opinion and order of the trial court on remand in *Marvin* to determine whether that court correctly interpreted the California Supreme Court opinion, and whether the dissent's criticisms of the majority opinion were borne out. It will be submitted that, because of its failure to apply correctly the instructions of the California Supreme Court, the trial court not only illustrated some of the dissent's concerns, but also added force to the *Hewitt* court's apprehension that recovery for unmarried cohabitants could amount to judicial reinstatement of common law marriage. Finally, the Note will propose general guidelines for courts determining the property rights and financial obligations of unmarried cohabitants. It will be suggested that courts follow the lead of the California Supreme Court's *Marvin* decision insofar as it proposes the application of recognized principles of contract law and equity in order to protect the parties reasonable expectations and to prevent unjust enrichment. It will be further submitted that, in the absence of evidence authorizing recovery under accepted legal and equitable theories, no recovery should be granted.

I. The Opinions in *Hewitt* and *Marvin*

A. Hewitt v. Hewitt: *A Traditional Approach to Nonmarital Cohabitation*

The appellate court decision which the Illinois Supreme Court reviewed in *Hewitt* quoted extensively from the California Supreme Court's *Marvin* opinion,[33] and concluded that the *Marvin* court's reasoning "is particularly persuasive upon the allegations here pleaded wherein plaintiff has alleged facts which demonstrate a stable family relationship extending over a long period of time."[34] Thus, the appellate court determined that, because the relationship of the parties so closely resembled a conventional marriage, the plaintiff's conduct had not "so affronted public policy that she should be denied any and all relief,"[35] and held that her complaint stated a cause of action in express oral contract.[36] The Illinois Supreme Court, however, refused to adopt similar reasoning. Indeed, the conventional aspects of the parties' relationship, which the appellate court found so convincing, were instrumental in the Illinois Supreme Court's decision that recovery under these circumstances would contravene Illinois public policy. The court noted: "In our judgment the fault in the appellate court holding in this case is that its practical effect is the reinstatement of common law marriage, . . . for there is no doubt that the alleged facts would, if proved, establish such a marriage under our pre-1905 law."[37]

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[33] 62 Ill. App. 3d at 865-68, 380 N.E.2d at 458-60.

[34] *Id.* at 868, 380 N.E.2d at 460.

[35] *Id.* at 869, 380 N.E.2d at 460.

[36] *Id.* at 867, 380 N.E.2d at 459.

[37] 77 Ill. 2d at 65, 394 N.E.2d at 1211 (citations omitted). Ill. Rev. Stat. ch. 40, § 214 (1977) provides that common law marriages contracted after June 30, 1905 are invalid.

The plaintiff alleged that, after she became pregnant in 1960, the defendant had assured her that they were married and that no ceremony was necessary.[38] She further alleged that he had promised to "share his life, his future, his earnings and his property" with her, and that she in turn had given him "every assistance a wife and mother could give."[39] At the time of the trial, the defendant was a successful professional, earning more than $80,000 a year, and the plaintiff claimed that his success was due to her financial, professional, social and personal contributions.[40] Against that factual background, the plaintiff claimed entitlement in equity to a one-half share of the defendant's property, because of his promise to share his property and earnings with her and because the property had been acquired through the parties' joint endeavors.[41] She also alleged that the conduct of the parties evidenced an implied contract which entitled her to half the property.[42] In addition, she claimed that the defendant's fraudulent assurances that she was his wife justified the impression of a trust on his property, and that he had been unjustly enriched by her detrimental reliance on his promises.[43]

In its discussion of the plaintiff's claims, the Illinois Supreme Court first criticized the appellate court's reliance on *Marvin*. The court noted that the *Marvin* decision had authorized recovery under "a pure contract theory, under which . . . the pseudoconventional family relationship which impressed the appellate court here is irrelevant."[44] The Illinois court indicated that it was in any event unwilling to adopt the California Supreme Court's reasoning. The court recognized that the issue of recovery for unmarried cohabitants might involve more than the application of common law principles of express contract.[45] Remarking that *Marvin* had also authorized recovery under common law principles of implied contract and equity, the *Hewitt* court intimated that the recognition of these theories of recovery would amount to granting property rights to nonmarital partners merely on the basis of cohabitation and subsequent separation.[46] The court futher stated that judicial recognition of

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[38] 77 Ill. 2d at 53, 394 N.E.2d at 1205.

[39] *Id.* at 54, 394 N.E.2d at 1205.

[40] *Id.* at 53-54, 394 N.E.2d at 1205. The plaintiff had obtained financial assistance from her parents in order to aid the defendant in his education and in the establishment of his practice of pedodontia. In addition, she had received payroll checks for her assistance in the defendant's practice, but had placed them in a common fund. *Id.*

[41] *Id.* at 53, 394 N.E.2d at 1205.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 56, 394 N.E.2d at 1207.

[45] *Id.*

[46] The court noted:

> Plaintiff argues that because her action is founded on an express contract, her recovery would in no way imply that unmarried cohabitants acquire property rights merely by cohabitation and subsequent separation. However, the *Marvin* court expressly recognized and the appellate court here seems to agree that if common law principles of express contract govern express agreements between unmarried cohabitants, common law principles of implied contract, equitable relief and constructive trust must govern the parties' relations in the absence of such an agreement. . . . In all prob-

the claims of unmarried cohabitants presents a "more fundamental problem" than the mere application of contract principles or considerations of equity or fairness between the parties.[47] The court determined that "[o]f substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage,"[48] and proceeded to examine the public policy issues it found to be relevant in adjudicating such claims.

First, the court rejected the plaintiff's argument that changes in societal attitudes toward nonmarital cohabitation justify modification of the Illinois policy that "[a]n agreement in consideration of future illicit cohabitation . . . is void."[49] The court acknowledged that courts in other jurisdictions had enforced contracts between nonmarital partners by severing the portion of the contract based on sexual services from the portion calling for legal exchange of property or services,[50] but it refused to adopt that rationale.[51] The Illinois court determined that the real issue was "whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State,"[52] and found that such a public policy decision should originate in the legislature, "in the exercise of its traditional authority to declare public policy in the domestic relations field."[53]

Second, the court reasoned that judicial recognition of the claims of unmarried cohabitants would contravene the policy of the Illinois Marriage and Dissolution of Marriage Act.[54] One of the purposes of that Act is to "strengthen and preserve the integrity of marriage and safeguard family relationships."[55] The court expressed its belief that allowing recovery would make cohabitation too attractive an alternative to marriage, thus violating that purpose.[56] In addition, the Illinois court determined that the legislature's decision to retain fault grounds in divorce proceedings[57] "prevents the mar-

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ability the latter case will be much the more common, since it is unlikely that most couples who live together will enter into express agreements regulating their property rights.

Id. at 56-57, 394 N.E.2d at 1207 (citations omitted).

[47] *Id.* at 57-58, 394 N.E.2d at 1207.

[48] *Id.* at 58, 394 N.E.2d at 1207.

[49] 77 Ill. 2d at 59-60, 394 N.E.2d at 1208, *quoting* Wallace v. Rappleye, 103 Ill. 229, 249 (1882).

[50] *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 43 (1932); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249 (1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).

[51] 77 Ill. 2d at 59-60, 394 N.E.2d at 1208-09.

[52] *Id.* at 61, 394 N.E.2d at 1209.

[53] *Id.*

[54] ILL. REV. STAT. ch. 40, § 101-802 (1977).

[55] *Id.* at § 102(2).

[56] 77 Ill. 2d at 61-62, 394 N.E.2d at 1209.

[57] ILL. REV. STAT. ch. 40, § 401 (1977) provides in pertinent part:

The court shall enter a judgment of dissolution of marriage (formerly known as divorce) if:

. . . .

(2) the court finds that, without cause or provocation by the petitioner: either party has committed adultery subsequent to the marriage,

riage relation from becoming in effect a private contract terminable at will," and indicates that "public policy disfavors private contractual alternatives to marriage."[58] Finally, the court found that the legislature's recent decision to grant the rights of a legal spouse to a putative spouse, but not to knowingly unmarried cohabitants,[59] represented further legislative disapproval of recovery for nonmarital partners.[60]

The *Hewitt* court concluded that "we do not intend to suggest that plaintiff's claims are totally devoid of merit," but that the questions involved in the dispute were within the province of the legislature, not the courts.[61] With those remarks, it reversed the appellate court decision and reinstated the trial court's dismissal of the plaintiff's complaint.[62]

While the Illinois Supreme Court based its decision in *Hewitt* primarily on deference to legislative judgment, the California Supreme Court in *Marvin* regarded the rights of unmarried cohabitants as a uniquely judicial issue.[63]

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or has wilfully deserted or absented himself or herself from the husband or wife for the space of one year, or has been guilty of habitual drunkenness for the space of 2 years, or has been guilty of gross and confirmed habits caused by the excessive use of addictive drugs for the space of 2 years, or has attempted the life of the other by poison or other means showing malice, or has been guilty of extreme and repeated physical or mental cruelty, or has been convicted of a felony or other infamous crime or has infected the other with a communicable venereal disease. . . .

Id.

[58] 77 Ill. 2d at 64, 394 N.E.2d at 1210.

[59] ILL. REV. STAT. ch. 40, § 305 (1977) provides:

Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited, under Section 212, or declared invalid, under Section 301. If there is a legal spouse or other putative spouse, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance and support rights among the claimants as appropriate in the circumstances and in the interests of justice. This Section shall not apply to common law marriages contracted in the State after June 30, 1905.

Id.

[60] 77 Ill. 2d at 64, 394 N.E.2d at 1210.

[61] *Id.* at 66, 394 N.E.2d at 1211.

[62] *Id.*

[63] The court noted: "The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision." 18 Cal. 3d at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819. It further stated: "The delineation of the rights of nonmarital partners before 1970 had been fixed entirely by judicial decision; we see no reason to believe that the Legislature, by enacting the Family Law Act, intended to change that state of affairs." *Id.* at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829. These remarks were made in conjunction with the court's discussion of *In re Marriage of Cary* and *Estate of Atherley*, two California court of appeal decisions discussed in the text accompanying notes 202-13 *infra*.

B. Marvin v. Marvin: *An Alternative Approach*

The facts confronted by the California Supreme Court in *Marvin v. Marvin* were similar to those in *Hewitt*. The plaintiff in *Marvin* alleged that she and the defendant had entered into an oral agreement in October, 1968, which provided that they would live together and share equally any and all property accumulated as a result of their individual or combined efforts.[64] The plaintiff at that time allegedly agreed to render her services as a homemaker and companion to the defendant.[65] She further claimed to have given up her "lucrative career as an entertainer and singer" in return for the defendant's promise to provide for her financial support for the rest of her life.[66]

In examining the plaintiff's allegations to determine whether they stated a cause of action,[67] the California Supreme Court, unlike the Illinois court, had at its disposal a substantial body of case law, beginning with its 1932 decision in *Trutalli v. Meraviglia*.[68] The plaintiff based her cause of action on the principle set forth in *Trutalli*, whereby unmarried cohabitants may lawfully contract concerning property acquired during their relationship.[69] The defendant contended that the alleged contract was so closely connected with the "immoral" character of the relationship that its enforcement would contravene public policy.[70] He asserted that former decisions had held that a contract "involved in"[71] or made in "contemplation" of[72] a sexual relationship would

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[64] *Id.* at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819. During the period of cohabitation, the defendant had acquired in his name "substantial personal and real property," including motion picture rights worth more than one million dollars. *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819. The supreme court accepted as true the allegations of the plaintiff's complaint, in order to determine whether they stated or could be amended to state a cause of action. *Id.*

[68] 215 Cal. 698, 12 P.2d 430. See text at notes 10 and 11 *supra*. Although *Trutalli's* general principle had been upheld on numerous subsequent occasions, see, *e.g.*, Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943); Croslin v. Scott, 154 Cal. App. 2d 767, 771, 316 P.2d 755, 758 (1957); Bridges v. Bridges, 125 Cal. App. 2d 359, 362, 270 P.2d 69, 71 (1954), the decisions did not provide a clear standard for determining the rights of unmarried cohabitants. See text at notes 71-74 and 79-85 *infra*. The *Marvin* court noted that "the past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting . . . ." 18 Cal. 3d at 670, 557 P.2d at 113, 134 Cal. Rptr. at 822. The *Marvin* decision presented the California Supreme Court with an opportunity to formulate a clear standard and to resolve conflicts in several recent California court of appeal decisions. Two of these decisions, In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), and Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975), held that the Family Law Act, CAL. CIV. CODE §§ 4000-5138 (West 1970 & 1980 Supp.), governs the rights of unmarried cohabitants at the termination of their relationship, while another, Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975), rejected that holding. 18 Cal. 3d at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

[69] 18 Cal. 3d at 667-68, 557 P.2d at 111, 134 Cal. Rptr. at 820.

[70] *Id.* at 668, 557 P.2d at 112, 134 Cal. Rptr. at 821.

[71] *See, e.g.*, Shaw v. Shaw, 227 Cal. App. 2d 159, 164, 38 Cal. Rptr. 520, 523 (1964) (dictum); Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951) (dictum).

[72] *See, e.g.*, Hill v. Estate of Westbrook, 39 Cal. 2d 458, 460, 247 P.2d 19, 20 (1952); Barlow v. Collins, 166 Cal. App. 2d 274, 277, 333 P.2d 64, 66 (1958) (dictum);

not be enforced.[73] In light of this contention, the supreme court surveyed California precedent and determined that agreements in fact had not been held invalid if they were involved in or contemplated sexual relations.[74] Instead, recovery had been denied only where the agreement rested upon a consideration of meretricious sexual services.[75] Relying on these decisions, the supreme court formulated the standard that adults who live together and engage in sexual relations are fully competent to negotiate an agreement respecting their property rights, to the extent that the contract is not made in consideration for sexual services.[76] The *Marvin* court concluded that, because the terms of the contract as alleged by the plaintiff did not rest upon such unlawful consideration, the trial court's judgment for the defendant must be reversed.[77]

Having thus determined the validity of express agreements between unmarried cohabitants, the majority considered other bases upon which courts could grant recovery in such situations.[78] The court focused on theories of implied contract and equitable relief, examining the treatment of the claims of unmarried cohabitants in former California Court of Appeal[79] and Supreme Court[80] decisions.[81] The court found that these cases "exhibited a schizophrenic inconsistency" in their treatment of claims of nonmarital partners.[82]

Bridges v. Bridges, 125 Cal. App. 2d 359, 362, 270 P.2d 69, 71 (1954) (dictum); Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 602, 213 P.2d 727, 729 (1950).

[73] 18 Cal. 3d at 668, 557 P.2d at 112, 134 Cal. Rptr. at 821.

[74] *Id.* at 670, 557 P.2d at 113, 134 Cal. Rptr. at 822.

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

[76] *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

[77] *Id.* at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825. The defendant had offered several other justifications for the trial court's judgment in his favor. These arguments involved the proper interpretation of California statutes. Each of these arguments was rejected by the supreme court. For a discussion of these claims, see 18 Cal. 3d at 668 n.4, 672-74, 557 P.2d at 112 n.4, 115-16, 134 Cal. Rptr. at 821 n.4, 824-25.

[78] *Id.* at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825. Although the court's decision concerning the issue of express agreements mandated reversal of the trial court's judgment, both parties had briefed the issue of recovery in the absence of such an agreement. Because the supreme court held that the plaintiff might amend her complaint to state a cause of action in implied contract or in equity, the court took this opportunity to resolve inconsistencies in former decisions concerning relief in these areas and to guide the parties on retrial. *Id.*

[79] *See, e.g.*, Weak v. Weak, 202 Cal. App. 2d 632, 638-39, 21 Cal. Rptr. 9, 13 (1962) (equity will protect interests of unmarried cohabitants who agree to pool earnings and share equally in joint accumulations); Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 719, 200 P.2d 49, 56 (1948) (in absence of express agreement, unmarried cohabitant is not entitled to recover value of services); Oakley v. Oakley, 82 Cal. App. 2d 188, 192, 185 P.2d 848, 850 (1947) (in absence of express agreement, unmarried cohabitant is not entitled to recover value of services).

[80] *See* Keene v. Keene, 57 Cal. 2d 657, 662-64, 371 P.2d 329, 331-33, 21 Cal. Rptr. 593, 595-97 (1962) (rendition of services does not form the basis for equitable division of property); Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943) (cohabitant is entitled to equitable division of property in proportion to the value of funds contributed toward its acquisition).

[81] 18 Cal. 3d at 675-79, 557 P.2d at 116-19, 134 Cal. Rptr. at 825-28.

[82] 18 Cal. 3d at 678, 557 P.2d at 118, 134 Cal. Rptr. at 827.

The *Marvin* court noted that, in prior decisions, the California courts had upheld express agreements between unmarried cohabitants, thus applying common law contract principles, but had denied relief in implied contract, thus ignoring the common law principle that implied contracts can arise from the conduct of the parties.[83] Additionally, the *Marvin* court found an inconsistency in the courts' disposition of property accumulated through joint effort. It observed that, while the courts had held that a party would be entitled to a share of property when he had contributed funds or property toward its acquisition,[84] they had refused to recognize an interest in property based on one party's contributions of services.[85] The California Supreme Court concluded that this refusal to permit unmarried cohabitants to assert rights based upon accepted principles of implied contract or equity had resulted in an unfair distribution of property.[86] Examining the reasons traditionally advanced to justify denial of relief, the court determined that none had merit.[87]

First, the supreme court indicated that the most common basis for denial of recovery had been the assertion that "[e]quitable considerations arising from the reasonable expectations of . . . benefits attending the status of marriage . . . are not present [in a nonmarital relationship]."[88] While the *Marvin* court agreed that parties to a nonmarital cohabitation cannot have based any expectations on the belief that they are married, it recognized that "other expectations and equitable considerations remain."[89] The court reasoned that the parties might expect that property would be divided according to their own tacit understanding, and that, in the absence of such understanding, the courts might fairly apportion property accumulated through mutual effort.[90]

The court implied that recovery in former cases had also been denied because of a presumption that the services of unmarried cohabitants are contributed as a gift, and therefore have no value as consideration for an implied agreement or as a basis for equitable distribution of property.[91] The *Marvin* court rejected this presumption, stating that "[t]here is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift."[92] The majority determined that a better approach

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[83] *Id.*

[84] *Id.* at 679, 557 P.2d at 119, 134 Cal. Rptr. at 828.

[85] *Id.*

[86] *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

[87] *Id.* The court first noted that denial of recovery had not been, and could not be, justified by any theory of punishing a "guilty" partner: "Indeed, to the extent that denial of relief 'punishes' one partner, it necessarily rewards the other by permitting him to retain a disproportionate amount of the property." *Id.*

[88] *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830, *quoting* Vallera v. Vallera, 21 Cal. 2d at 685, 134 P.2d at 763.

[89] 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

[90] *Id.*

[91] *Id.* at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830. *See, e.g.*, Keene v. Keene, 57 Cal. 2d 657, 668, 371 P.2d 329, 336, 21 Cal. Rptr. 593, 600 (in case of nonmarital cohabitation, strong implication that services are intended by one performing them as gifts).

[92] 18 Cal. 3d at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830.

would be to presume "that the parties intended to deal fairly with one another."[93]

The *Marvin* court also rejected a final argument which traditionally had been advanced to deny recovery—that granting remedies to unmarried cohabitants would discourage marriage. While recognizing the well-established public policy to foster and promote the institution of marriage, the court held that "perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy."[94] Furthermore, the court took judicial notice of the prevalence of nonmarital relationships in modern society,[95] and found that it would not be realistic to deny recovery on the basis of "alleged moral considerations that have apparently been so widely abandoned by so many."[96]

Having thus dispensed with the arguments formerly advanced to deny extracontractual recovery, the *Marvin* court concluded that, in the absence of an express agreement, courts should apply remedies designed to protect the reasonable and lawful expectations of the parties to a nonmarital cohabitation.[97] First, the majority proposed that a court might inquire into the conduct of the parties to determine whether an implied contract or implied agreement of partnership or joint venture was indicated.[98] Second, the court sanctioned recovery under principles of resulting or constructive trust when appropriate.[99] Finally, the court determined that a party to a nonmarital cohabitation might recover in *quantum meruit* for the reasonable value of services rendered, less the reasonable value of support received, if that party could show that services were rendered with the expectation of monetary award.[100] The court did not elaborate on these theories of recovery, but rather advanced them by way of illustration, adding in a footnote that courts might fashion "additional equitable remedies to protect the expectations of the parties" when warranted by the facts of the particular case.[101] Having made these suggestions to guide the trial court, the California Supreme Court remanded the *Marvin* case for further proceedings.

Justice Clark dissented in part from the majority opinion. While concurring with the decision of the majority to permit recovery in express or implied contract, Justice Clark criticized its provision for *quantum meruit* and equitable

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[93] *Id.*, *quoting* Keene v. Keene, 57 Cal. 2d at 674, 371 P.2d at 339, 21 Cal. Rptr. at 603 (dissenting opinion).

[94] *Id.*, 557 P.2d at 122, 134 Cal. Rptr. at 831. The supreme court indicated that denial of relief would not be an effective method of encouraging parties to marry because the party in whose name property is held might in fact prefer not to marry in order to thus retain all the benefits. *Id.* For further discussion of the argument that allowing recovery for unmarried cohabitants would discourage marriage, see text at notes 229-35 *infra*.

[95] *Id.*, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[96] *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*, 557 P.2d at 122-123, 134 Cal. Rptr. at 831-32.

[101] *Id.* at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

recovery.[102] He found the discussion of these theories of recovery to be unnecessary in the instant case, because the resolution of the contract issue alone required reversal of the trial court judgment.[103] He also criticized the majority's failure "to advise us of the circumstances permitting recovery, limitations on recovery, or whether their numerous remedies are cumulative or exclusive."[104] Moreover, he reasoned that the "general sweep" of the majority opinion raised but failed to answer questions in several areas.

First, Justice Clark questioned whether the allowance for recovery in the absence of agreement might violate legislative intent.[105] Specifically, he expressed doubt that what he termed the "equal division rule" of the majority opinion could be reconciled with the legislature's exclusion of "some parties to a meretricious relationship" from the statute providing for equal division of marital property at the termination of a marriage.[106] In addition, he indi-

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[102] *Id.* at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832. Justice Clark used the term "implied in fact agreement." It seems clear that this is the type of agreement to which the majority was referring when it used the term "implied contract." The majority clearly stated that such agreements would be implied from the conduct of the parties. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. In a footnote, the majority also stated that, "in a sense all contracts made in fact, as distinguished from quasi-contractual obligations, are express contracts, differing only in the manner in which the assent of the parties is expressed and proved." *Id.* at 678 n.16, 557 P.2d at 118 n.16, 134 Cal. Rptr. at 827 n.16.

[103] *Id.* at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832. Justice Clark reasoned that "[t]his court should not attempt to determine all anticipated rights, duties and remedies within every meretricious relationship—particularly in vague terms. Rather, these complex issues should be determined as each arises in a concrete case." *Id.*

[104] *Id.* Justice Clark envisioned the possibility that "under the majority opinion a party may recover half of the property acquired during the relationship on the basis of general equitable principles, recover a bonus based on specific equitable considerations, and recover a second bonus in quantum meruit." *Id.*

[105] *Id.* at 686, 557 P.2d at 124, 134 Cal. Rptr. at 833.

[106] *Id.* at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832. CAL. CIV. CODE § 4452 (West Supp. 1980) provides:

> Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed "quasi-marital property". If the court expressly reserves jurisdiction, it may make the property division at a time subsequent to the judgment.

Id. Thus, putative spouses are entitled to equal division of community property, as are lawful spouses. No mention, however, is made of unmarried cohabitants who, like the Marvins, are well aware that they are not legally married. Therefore, Justice Clark was correct in his assertion that such couples had been excluded from the legislature's equal division rule. Nevertheless, his contention that the majority had created judicially an "equal division rule" for unmarried cohabitants seems inaccurate. In fact, the majority had stated emphatically that its decision did not "extend to plaintiff the rights which the [civil code] grants valid or putative spouses; we hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person." 18 Cal. 3d at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

cated that the application of equitable principles and its attendant examination of the conduct of the parties might violate the spirit of the statute providing for "no-fault" divorce.[107]

Justice Clark also expressed concern that recovery in the absence of agreement might in fact contravene the intentions of the parties rather than further them.[108] He reasoned that parties to a nonmarital relationship might have chosen not to marry in order to avoid financial obligations.[109] Moreover, he questioned whether allowance of *quantum meruit* recovery might place unmarried cohabitants in a better position than lawful spouses.[110]

Finally, Justice Clark expressed his concern that the allowance of extracontractual recovery would generate "undue burdens" on trial courts.[111] He mentioned two potential problems. The first is the difficulty in ascertaining the value of services rendered and benefits received where *quantum meruit* relief is requested.[112] The second is what he termed the "unmanageable burden of arbitrating domestic disputes" where equitable principles are employed.[113]

C. *Conflicts Between* Hewitt *and* Marvin

An examination of the reasoning in the preceding opinions reveals that the *Hewitt* decision is in several respects directly at odds with the majority opinion in *Marvin*. The Illinois Supreme Court was unwilling to accept the *Marvin* majority's holding that an express contract between unmarried cohabitants is enforceable to the extent that it does not rest upon a consideration of sexual services.[114] Of course, the *Hewitt* court was under no obligation to accept the reasoning of the supreme court of another state, particularly in light of the fact that the *Marvin* decision was "facilitated by California precedent."[115] The Illinois court was aware of the argument advanced in *Marvin* that refusal to grant recovery might lead to unfair results as between the parties,[116] but indicated that such a consideration is secondary to public policy

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[107] 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832.

CAL. CIV. CODE § 4509 (West Supp. 1980) provides:

> In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, *evidence of specific acts of misconduct shall be improper and inadmissible*, except where child custody is in issue and such evidence is relevant to that issue.

Id. (emphasis added).

[108] 18 Cal. 3d at 686, 557 P.2d at 124, 134 Cal. Rptr. at 833.

[109] *Id.* at 685-86, 557 P.2d at 123, 134 Cal. Rptr. at 832.

[110] *Id.* at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832. Lawful spouses in California cannot receive recovery in *quantum meruit*. Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 100, 69 P.2d 845, 847 (1937). Presumably, this rule is what Justice Clark was referring to when he expressed his concern that unmarried cohabitants would be in a better position than lawful spouses. For discussion of this statement, see text at notes 258-61 *infra*.

[111] 18 Cal. 3d at 686, 557 P.2d at 124, 134 Cal. Rptr. at 833.

[112] *Id.*, 557 P.2d at 123, 134 Cal. Rptr. at 832.

[113] *Id.*

[114] 77 Ill. 2d at 5460, 394 N.E.2d at 1208-09.

[115] *Id.* at 61, 394 N.E.2d at 1209.

[116] *Id.* at 57-58, 394 N.E.2d at 1207.

issues.[117] The *Hewitt* court's primary concern was that allowance of recovery would in effect amount to reinstatement of common law marriage and would weaken the marital relationship.[118] The *Marvin* majority, by contrast, refused to equate recovery with common law marriage or to find that the importance of marriage would be diminished.[119] Rather, that court merely held that unmarried cohabitants should have the same rights before the law as any other unmarried persons.[120] The essential difference between the *Hewitt* and *Marvin* decisions seems to be that the California court found it necessary merely to grant legal status to the claims of nonmarital partners, while the Illinois court framed the issue of recovery as one requiring the grant of legal status to the extralegal relationship itself.

Some of Justice Clark's criticisms of the *Marvin* majority opinion echo the concerns of the *Hewitt* court. As was the *Hewitt* court, he was concerned that recovery for unmarried cohabitants might violate legislative intent. Both he and the Illinois court were troubled by their respective legislatures' exclusion of nonmarital partners from the statutes governing property distribution at the termination of marriage. Moreover, Justice Clark's determination that the majority had created an "equal division rule" and that recovery for nonmarital partners might contravene the parties' intentions by imposing marriage-like financial obligations indicates that he may have viewed recovery at least in part as a grant of legal status to the nonmarital relationship itself.[121] The opinion of the superior court which considered the *Marvin* action on remand provides an opportunity to test the validity of Justice Clark's criticisms, and to examine the practical application of the theories underlying the *Marvin* majority opinion.

II. *Marvin v. Marvin* on Remand: The Superior Court's Reasoning and its Shortcomings

When the *Marvin* case was considered on remand by the superior court of Los Angeles County in April of 1979,[122] the principles enunciated in the supreme court's majority opinion were put to a practical test. Following the decision, the plaintiff amended her complaint to reflect the remedies suggested by the supreme court.[123] Her three causes of action alleged express and implied contract and equitable bases for relief.[124]

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[117] *Id.* at 58, 394 N.E.2d at 1207.

[118] See text at notes 37 and 48-60 *supra*.

[119] 18 Cal. 3d at 683-84, 684 n.24, 557 P.2d at 122, 122 n.24, 134 Cal. Rptr. at 831, 831 n.24.

[120] *Id.* at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

[121] Of course, unlike the *Hewitt* court, Justice Clark did sanction recovery in express or implied contract. See text at note 102 *supra*.

[122] Marvin v. Marvin, [1979] 5 Fam. L. Rep. 3077 (Cal. Super. Ct. April 17, 1979).

[123] *Id.*

[124] *Id.* The fourth and fifth causes of action, based on *quantum meruit*, had not been pursued by the plaintiff at trial. *Id.*

The superior court, however, was unable to find an express contract under which the plaintiff would be entitled to relief.[125] The court also determined that the conduct of the parties did not give rise to an implied contract to share property and earnings.[126] The superior court found the specific equitable remedies of resulting and constructive trust suggested by the California Supreme Court[127] to be unsupported by the evidence.[128] Moreover, the court was unable to find mutual effort in the accumulation of property which would warrant its division.[129] Despite these findings, the superior court held that the plaintiff was entitled to equitable relief in the form of a rehabilitative award of $104,000.[130] The court based its determination on instructions found in a footnote in the supreme court's majority opinion which authorized courts to fashion "additional equitable remedies to protect the expectations of the parties . . . in cases in which existing remedies prove inadequate."[131]

A. *Rejection of Suggested Contractual Remedies*

The superior court made no specific findings of fact; rather, it summarized the testimony of the plaintiff and the defendant.[132] The facts which the court found persuasive were included in its discussion of the theories of recovery advanced by the plaintiff.

First, the superior court found that the parties had not negotiated an express contract concerning division of property or support payments. The plaintiff based her contract claim on two promises allegedly made by the defendant. The first promise was that whatever property the defendant possessed would belong to the plaintiff as well.[133] The second was that the defendant would always "take care of" the plaintiff.[134] After examining these statements in light of the circumstances surrounding them, the court was unable to conclude that they evidenced mutual consent to a property-sharing or support agreement. The court determined that both statements failed to express clear intent on the part of the defendant to share his property with the plantiff,[135] and that she would have been unreasonable in so interpreting them.[136]

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[125] *Id.* at 3081-82.

[126] *Id.* at 3082-83.

[127] 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[128] 5 FAM. L. REP. at 3084.

[129] *Id.* at 3084-85.

[130] *Id.* at 3085. See note 18 *supra* for an explanation of how this figure was reached.

[131] *Id.* Marvin v. Marvin, 18 Cal. 3d at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

[132] 5 FAM. L. REP. at 3077-81.

[133] *Id.* at 3081.

[134] *Id.* at 3082.

[135] *Id.* at 3081, 3082.

[136] *Id.* The court considered evidence that the defendant often had expressed his antagonism toward marriage in general and the property rights automatically acquired by a wife in particular. *Id.* In light of this antagonism, the court reasoned, the defendant could not have intended to promise the plaintiff a share of his property

Moreover, the court determined that the plaintiff had not made an enforceable promise in return for the defendant's second "promise."[137]

Having found no express contract upon which to grant relief, the superior court next proceeded to examine the conduct of the parties to determine whether an implied contract was demonstrated. The superior court emphasized that an implied agreement, like an express agreement, must be founded upon mutual consent.[138] Reviewing the evidence of the personal, social and financial conduct of the parties, the court was unable to infer the requisite consent.[139]

First, the financial arrangements of the parties did not indicate the existence of an implied contract to share property or earnings. Title to all real property acquired by the defendant during the relationship was placed solely in his name.[140] He kept his funds separate from those of the plaintiff, except on several isolated occasions.[141] The parties filed separate tax returns,[142] and the plaintiff placed all the income she acquired during the relationship in a separate bank account.[143] Second, the court observed that the personal and social conduct of the parties did not indicate mutual consent to contract. Neither the fact that the plaintiff was occasionally introduced as Michelle Marvin, nor the fact that the parties had registered at hotels as Mr. and Mrs. Marvin, was found to manifest a tacit property-sharing agreement.[144] Moreover, the trial court determined that some of the plaintiff's statement and actions specifically contraindicated the existence of an implied contract. For example, the court noted that the plaintiff had made a statement to the effect that she was always very proud of the fact that "nothing really held" her and the defendant in their relationship.[145] In addition, the court determined that the plaintiff's original motivation in bringing suit was to enforce an express agreement that the defendant would make monthly payments to the plaintiff for a five-year period.[146] The court implied that the plaintiff's

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similar to that to which a wife would be entitled. *Id.* It concluded that, because the plaintiff was aware of the defendant's attitude, she could not reasonably have expected such an entitlement. *Id.*

[137] *Id.* at 3082. In determining that the plaintiff had not made an enforceable promise, the court noted: "Even if, *arguendo*, she had promised to forego her career, defendant could not have legally enforced such promise." *Id.*

[138] *Id.* at 3083.

[139] *Id.*

[140] *Id.* at 3082.

[141] *Id.* at 3082, 3083. The parties maintained joint bank accounts while living together outside of Los Angeles when the defendant was filming motion pictures "on location." *Id.* at 3079, 3080. The court found that these isolated instances did not indicate that the parties intended to share the funds, which were always transferred to the defendant's separate account in Los Angeles when the parties returned. *Id.* at 3083.

[142] *Id.* at 3082.

[143] *Id.*

[144] *Id.* at 3083.

[145] *Id.* at 3082. The statement was made in an interview recorded in an article introduced into evidence at the trial. *Id.*

[146] *Id.* Although the defendant had at one point made monthly payments to the plaintiff, such payments had been discontinued. *Id.* at 3080.

original pursuit of that channel of recovery indicated that she did not expect a share of the defendant's property.[147]

The court further determined that, while the plaintiff had proved that she performed household services for the defendant, she had not proved that these services were performed in consideration for a property agreement.[148] Although the court recognized that household services may be valuable consideration, it stated that such services are often performed gratuitously.[149] Because the plaintiff had failed to prove the existence of an implied agreement, the court held that she was unable to claim that the services she had performed were in consideration for such an agreement.[150]

In conclusion, the court stated that the relationship of the parties was based on mutual affection, and not on mutual consent to contract.[151] Having thus found no basis for recovery in implied contract, the court went on to consider the plaintiff's claims for equitable relief.

B. *Rejection of the Plaintiff's Equitable Arguments*

The court first considered the plaintiff's claim that she was entitled to a share of the defendant's property on the basis of a resulting trust. The court pointed out that, in order for a resulting trust to be estabished, it must be proved by clear and convincing evidence that the parties intended the property to be held by one party in trust for the other, and that consideration to purchase the property was provided by the party not holding title.[152] The court found that the plaintiff had failed to prove that she had provided such consideration.[153] The court recognized that the plaintiff might contend that her furnishing household services for the defendant relieved him of the expense of obtaining them from a third party, and thereby enhanced his financial status and his ability to purchase property.[154] Nevertheless, the court

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[147] *Id.* at 3082. The superior court also found that the plaintiff's pursuit of a claim for compensation from the producer of a film in which Lee Marvin had appeared was evidence that no agreement was contemplated by the parties. The court noted:

> The very fact that plaintiff pursued a claim [against the producer] makes it plain that she expected no part of any earnings of defendant from the picture. Otherwise, why would she commence a lawsuit to recover a finder's fee or half of a producer's fee when she would have rights to half of the million dollars paid to defendant for the picture?

Id. The superior court's reasoning on this point is unclear. In the suit against the producer, the plaintiff apparently was attempting to obtain compensation for her own efforts. Such a claim does not seem inconsistent with an expectation that she would receive a portion of the defendant's earnings as well. Rather, if the parties had intended to share equally in acquisitions, the defendant would be entitled to half of her earnings just as she would be to his.

[148] *Id.* at 3083.

[149] *Id.*

[150] *Id.* In addition, the court determined that the evidence did not support the plaintiff's contention that she had given up her career as consideration for an implied agreement. *Id.* at 3082.

[151] *Id.* at 3083.

[152] *Id.* at 3084.

[153] *Id.*

[154] *Id.*, *citing* Bruch, *supra* note 32, at 123.

determined that any such enhancement was offset by the flow of economic benefits from the defendant to the plaintiff.[155]

The court next considered the plaintiff's claim that she was entitled to a share of the property by virtue of a constructive trust. The court noted that this remedy is imposed to force restitution of something that in fairness and good conscience does not belong to the party in possession.[156] The court concluded that all property accumulated by the defendant during his relationship with the plaintiff was obtained through his own efforts, reputation and skill and that it could not be said that such property did not in good conscience belong to him.[157] The superior court also noted that a constructive trust may be imposed where property is obtained through fraudulent misrepresentation or by some other wrongful act.[158] The court, however, found no evidence of such wrongdoing by the defendant.[159]

The plaintiff's final claim derived from the California Supreme Court's suggestion in *Marvin* that a court might "fairly apportion property accumulated through mutual effort."[160] She contended that her work as homemaker, cook and companion constituted "mutual effort."[161] In light of this contention, the superior court examined the conduct of the parties in two cases it understood the supreme court to have cited as "examples of mutual effort,"[162] *In re Marriage of Cary*[163] and *Estate of Atherley*.[164] In *Cary*, the parties had purchased a home and other property, obtained credit, borrowed money and filed joint income tax returns.[165] The parties in *Atherley* had pooled their earnings and used the pooled funds to purchase land and materials for improvements on the land.[166] Both parties had worked on the improvements and they held a promissory note received on the sale of a parcel in joint tenancy.[167]

Contrasting the facts of *Cary* and *Atherley* with those in the instant action, the superior court concluded that the women in the former cases had shown "considerably more involvement . . . in the accumulation of property" than had the plaintiff.[168] The court noted that, in *Marvin*, all assets were purchased solely with the defendant's earnings, and funds were kept in separate accounts.[169] Finding that it could not "deem the singing career of [the] plain-

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[155] FAM. L. REP. at 3084. Such benefits included fur coats, a Mercedes Benz, world travel and the defendant's attempts to aid the plaintiff in her singing career. *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

[161] 5 FAM. L. REP. at 3084.

[162] *Id.*

[163] 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

[164] 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

[165] 34 Cal. App. 3d at 348, 109 Cal. Rptr. at 863.

[166] 44 Cal. App. 3d at 761-63, 119 Cal. Rptr. at 42-43.

[167] *Id.* at 762, 119 Cal. Rptr. at 43.

[168] 5 FAM. L. REP. at 3084.

[169] *Id.* at 3085.

tiff to be the 'mutual effort' required by the supreme court,"[170] the trial court reasoned that the plaintiff's only contribution to the requisite mutual effort was her furnishing household services and companionship.[171] Citing the social and financial benefits flowing from the defendant to the plaintiff, the court determined that any such contributions "would appear to have been compensated."[172]

The superior court's denial of the mutual effort argument left most of the remedies suggested by the supreme court unavailable to the plaintiff. Nevertheless, despite the failure of the trial court to find facts sufficient to establish an express or implied contract or to impose a trust on the defendant's property, the court fashioned a remedy for the plaintiff. Quoting from the footnote to the majority opinion of the supreme court which authorized lower courts to fashion "additional equitable remedies to protect the expectations of the parties . . . [where] existing remedies prove inadequate,"[173] the trial court awarded the plaintiff $104,000 "for rehabilitation purposes."[174] This equtable award, granted with scant discussion, indicates that the superior court misinterpreted the supreme court's majority opinion. In addition, the award serves to illustrate the validity of some of Justice Clark's criticisms.

C. *The Shortcomings of the Court's Equitable Award*

The superior court offered few justifications for its rehabilitative award to the plaintiff, simply stating that it was exercising its inherent equitable powers.[175] The court took notice of the plaintiff's "recent resort . . . to unemployment insurance benefits to support herself and . . . the fact that a return of [the] plaintiff to a career as a singer is doubtful."[176] Further, the court indicated its awareness that "the market value of [the] defendant's property at [the] time of separation exceeded $1,000,000."[177] In conclusion, the superior court expressed its intention that the monetary award should be used to re-educate the plaintiff, so that she might learn employable skills and "return from her status as companion of a motion picture star to a separate, independent but perhaps more prosaic existence."[178]

It is difficult to reconcile the superior court's equitable award with the instructions of the California Supreme Court upon which it was based. The supreme court had indeed authorized lower courts to fashion additional equitable remedies where indicated by the circumstances.[179] The majority,

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[170] *Id.* The court noted that the plaintiff's net earnings from her singing career had gone into her separate account, and that the defendant had in fact expended funds to further her career. *Id.*

[171] *Id.*

[172] *Id.*

[173] *See* Marvin v. Marvin, 18 Cal. 3d at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

[174] 5 FAM. L. REP. at 3085.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] 18 Cal. 3d at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

however, had attached the condition that such equitable remedies should "protect the expectations of the parties."[180] The superior court cited the footnote containing these instructions before granting the plaintiff her rehabilitative award.[181] Yet, in contradiction, the superior court earlier stated at length, in its discussion of the plaintiff's claims under express and implied contract, that neither the words nor the conduct of the defendant reasonably would have promoted expectations of proprietary benefits on the part of the plaintiff.[182] In fact, the court determined that the plaintiff had received financial benefits from the defendant which offset any benefits she had provided him through her furnishing of companionship and household services.[183] Further, the court reasoned that the defendant's words and conduct indicated that he was unwilling to undertake the responsibility of caring financially for the plaintiff when the relationship had ended.[184] In light of these findings, the superior court's equitable award to the plaintiff can hardly be said to have been based on the parties' expectations.[185]

The superior court opinion suggests that the basis for the equitable relief awarded was the financial need of the plaintiff and the defendant's ability to meet her needs because of his financial position.[186] The supreme court opinion, however, nowhere states that one party's financial needs and the other's financial capabilities will in themselves justify the award of an equitable remedy. Rather, the supreme court continually emphasized that recovery should be premised upon what trial courts determine to be the parties' reasonable and lawful expectations.[187] Having found that the relationship in the *Marvin* case gave rise to no reasonable expectations on the part of the plaintiff that the defendant would provide for her financial needs, the superior court should not have strained to supply a remedy.

The remedy fashioned by the superior court not only contravenes the instructions provided in the supreme court majority opinion, but also illustrates several of the concerns expressed by Justice Clark in his dissent. First, Justice Clark had expressed concern that recovery in the absence of agreement might "contravene the intention of the parties."[188] As noted above,[189] the superior court was unable to find that the defendant intended to support the plaintiff after their relationship had terminated. Thus, the superior court remedy contravened the intention of at least one of the parties to the *Marvin* action.

Justice Clark also had questioned whether it is "equitable to impose the economic obligations of lawful spouses on [unmarried cohabitants] when the

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[180] *Id.*

[181] 5 FAM. L. REP. at 3085.

[182] *Id.* at 3081-83.

[183] *Id.* at 3083-85.

[184] *Id.* at 3081-82.

[185] Lee Marvin is appealing the superior court judgment, claiming that the equitable award cannot be reconciled with the court's determination that there was no contractual relationship between the parties. 5 FAM. L. REP. 2962 (Oct. 16, 1979).

[186] 5 FAM. L. REP. at 3085.

[187] 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

[188] *Id.* at 686, 557 P.2d at 124, 134 Cal. Rptr. at 833.

[189] See text accompanying note 184 *supra*.

latter may have rejected matrimony to avoid such obligations."[190] The similarity between the superior court award and the recovery often awarded to lawful spouses cannot be overlooked. Upon granting a divorce decree, a court may award "rehabilitative alimony" in order to enable the spouse who has remained at home performing household services to receive an education and obtain employment.[191] The superior court expressly stated its intention that the plaintiff's award should be used for purposes of education and employment.[192] In addition, alimony is often calculated according to the financial needs of one party and the financial capabilities of the other.[193] Such financial circumstances were considered by the superior court in its decision.[194] Thus, the court seems to have imposed at least some of the economic obligations of a lawful spouse on the defendant,[195] although it had documented his desire to avoid marriage and its financial consequences.[196]

The superior court might have avoided the realization of Justice Clark's reservations, had it followed the majority's instructions to grant recovery based on the parties' reasonable expectations. Nevertheless, in addition to granting recovery that contravened the parties' expectations, the superior court also seems to have misinterpreted the majority's discussion of the value of household services.

D. *The Court's Reluctance to Value Household Services*

The majority opinion had been explicit in recognizing that household services have value.[197] The California Supreme Court had criticized former decisions which refused to recognize an interest in property based upon the contribution of services,[198] and in particular had criticized the presumption that services are contributed as a gift.[199] Yet the superior court seemed reluctant to depart from the presumption that services are contributed gratuitously, or to recognize that services may form a basis for an interest in property.

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[190] 18 Cal. 3d at 685-86, 557 P.2d at 123, 134 Cal. Rptr. at 832.

[191] *See, e.g.*, Brown v. Brown, 300 So. 2d 719, 724 (Fla. 1974); Dakin v. Dakin, 62 Wash. 2d 687, 692, 384 P.2d 639, 642-43 (1963) (wife awarded temporary alimony for support until she became employed and self-sufficient).

[192] 5 FAM. L. REP. at 3085.

[193] *See, e.g.*, Brown v. Brown, 300 So. 2d 719, 725 (Fla. 1974) (summarizing present alimony law as providing that alimony will be based on needs of recipient and financial capabilities of contributing spouse); Steinhauer v. Steinhauer, 252 So. 2d 825, 830 (Fla. 1971) (court listed wife's financial needs, her employment ability, the capacity of the husband to meet the needs of the wife and children, as factors to consider in determining whether to award alimony); In re Marriage of Williams, 199 N.W.2d 339, 346-48 (Iowa 1972) (needs and financial capacity of both spouses considered).

[194] 5 FAM. L. REP. at 3085.

[195] The defendant was not, however, required to divide his property equally with the plaintiff, as would a lawful spouse under CAL. CIV. CODE § 4800(a) (West Supp. 1980).

[196] 5 FAM. L. REP. at 3082.

[197] *See* 18 Cal. 3d at 670 n.5, 557 P.2d at 113 n.5, 134 Cal. Rptr. at 822 n.5.

[198] *Id.* at 679, 557 P.2d at 119, 134 Cal. Rptr. at 832.

[199] *Id.* at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830.

First, in its discussion of the plaintiff's claim of implied contract, the superior court stated that household services "may be rendered out of love or affection and are indeed so rendered in a myriad of relationships between man and woman which are not contractual in nature."[200] Remarking that the plaintiff had failed to prove the other elements of a contract, the court refused to accept the proof of her furnishing household services as consideration for an implied contract.[201] While the result reached by the superior court seems to be warranted by the evidence, the court's reasoning implies that, absent other proof of contract, services are presumed to be gratuitous. A better approach for the superior court might have been to hold that the furnishing of household services by the plaintiff was evidence supporting the existence of an implied agreement. The court then could have examined the other conduct of the parties to determine whether the evidence of implied agreement had been rebutted. Thus, the superior court could have reached the same result without contradicting the supreme court's finding that services should not be presumed to be a gift.

In its discussion of the plaintiff's "mutual effort" argument, the superior court also appears to have misinterpreted the majority opinion. The superior court's interpretation of "mutual effort" was based on an examination of the fact patterns of two court of appeal decisions which it said had been cited by the supreme court as examples of mutual effort, *In re Marriage of Cary*[202] and *Estate of Atherley*.[203] The *Cary* and *Atherley* decisions, however, had not been cited specifically in the supreme court opinion as examples of mutual effort. Each of these decisions held that unmarried cohabitants are entitled to division of community property acquired during an "actual family relationship."[204] While the *Marvin* court rejected this reasoning, it expressed agreement with "the perception of [those] courts that the application of former precedent in the factual setting of those cases would work an unfair distribution of the property accumulated."[205] The California Supreme Court then examined the reasoning of the pre-*Cary* decisions.[206] It was during this examination that the majority suggested that courts might fairly apportion property accumulated through mutual effort.[207]

Considering the facts of *Cary* and *Atherley* as illustrative of mutual effort, the superior court determined that the supreme court "doubtless intended by the phrase 'mutual effort' to mean the relationship of a man and woman who have joined together to make a home, who act together to earn and deposit such earnings in joint accounts, who pay taxes together."[208] The court further stated that mutual effort could not be inferred from one party's con-

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[200] 5 FAM. L. REP. at 3083.

[201] *Id.*

[202] 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

[203] 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

[204] In re Marriage of Cary, 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 867; Estate of Atherley, 44 Cal. App. 3d at 769, 119 Cal. Rptr. at 48.

[205] 18 Cal. 3d at 681, 557 P.2d at 120-21, 134 Cal. Rptr. at 829-30.

[206] *Id.* at 682-83, 557 P.2d at 121-22, 134 Cal. Rptr. at 830-31.

[207] *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

[208] 5 FAM. L. REP. at 3085.

tribution of "services as homemaker, cook and companion and nothing else,"[209] but in addition would require "participation in money-earning activities."[210] This reasoning is in direct contradiction with that of the California Supreme Court, which had criticized former decisions precisely because they had refused to recognize an interest in property based on contribution of services.[211] In fact, the majority had quoted with approval from the dissenting opinion of Justice Curtis in *Vallera v. Vallera*,[212] in which he pointed out:

> Unless it can be argued that a woman's services as cook, housekeeper, and homemaker are valueless, it would seem logical that if, when she contributes money to the purchase of property, her interest will be protected, then when she contributes her services in the home, her interest in property accumulated should be protected.[213]

Thus, the supreme court opinion had not in fact required the participation in money-earning activities which the superior court found it to have "doubtless intended."

The superior court's decision concerning the value of services, as consideration for an implied agreement or as a contribution toward mutual effort, may not have been prejudicial to the plaintiff in *Marvin*, because the value of her services was far offset by financial benefits flowing to her from the defendant.[214] Nevertheless, it may prove detrimental to plaintiffs in future actions if courts ruling on the value of services rely on the reasoning of the superior court rather than on a careful reading of the California Supreme Court opinion.

In summary, the superior court's interpretation of the supreme court opinion was flawed in several respects. First, the equitable award did not reflect the expectations of the parties. Thus, the supreme court's specific instructions were disregarded. In addition, because of this failure to follow the supreme court's instructions, the superior court decision illustrated some of the concerns expressed by Justice Clark. Finally, the superior court's interpretation of the majority opinion with regard to the value of household services violated the spirit of the supreme court's reasoning in *Marvin*.

Aside from the superior court's misinterpretation of the *Marvin* majority opinion and its consequent realization of Justice Clark's criticisms, the court's equitable award to the plaintiff seemingly adds force to some of the arguments advanced by the Illinois Supreme Court in *Hewitt*. First, the Illinois court had expressed concern that recovery in the absence of agreement might lead to awards based on the fact of cohabitation and subsequent separation alone.[215] The *Marvin* superior court's award was not based on any legally-cognizable contractual relationship between the parties, nor did it represent

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[209] *Id.*

[210] *Id.*

[211] 18 Cal. 3d at 679, 557 P.2d at 119, 134 Cal. Rptr. at 828.

[212] 21 Cal. 2d 681, 134 P.2d 761.

[213] 18 Cal. 3d at 679, 557 P.2d at 119, 134 Cal. Rptr. at 828, *quoting* Vallera v. Vallera, 21 Cal. 2d at 686-87, 134 P.2d at 764 (dissenting opinion).

[214] See text at notes 155 and 172 *supra*.

[215] 77 Ill. 2d at 56-57, 394 N.E.2d at 1207.

the imposition of any recognized equitable remedy available to unmarried persons. Thus, the relief does seem to have been awarded merely on the basis of cohabitation and subsequent separation. In addition, the marital nature of the award could be viewed by proponents of the *Hewitt* decision as representing at least a partial judicial reinstatement of common law marriage. It is unfortunate that the California Supreme Court's philosophy of recognizing judically the claims of unmarried cohabitants was transformed by the superior court into a judicial recognitition of the relationship itself. The superior court's mutation of the supreme court opinion thus lends credibility to the arguments of those who oppose recovery for unmarried cohabitants.

The arguments in opposition to recovery for unmarried cohabitants can, however, be answered. This Note proposes that the answers lie in public policy considerations which point to allowance of recovery within the limits of existing legal and equitable theories.

III. A Proposal for Judicial Treatment of Claims of Unmarried Cohabitants

In recent years, the incidence of nonmarital cohabitation in the United States had increased dramatically. Census figures for 1977 indicate that the number of couples living together without being legally married increased eighty-three percent from 1970 to 1977.[216] In all, one million unrelated couples of opposite sexes were living together.[217] In light of these statistics, and in view of the wide publicity given the *Marvin* decisions,[218] it appears inevitable that courts will be faced with an ever-increasing number of cases in which the property rights and financial obligations of unmarried couples will be at issue. When such issues arise, courts must be prepared to make well-reasoned decisions which not only resolve the problems of the immediate litigants but also provide clear guidelines for future rulings on the same issues.

A workable approach to the problem would be the application of accepted principles of contract law and equity, as proposed by the California Supreme Court in *Marvin*. The application of recognized legal theories will result in consistent treatment of the claims of unmarried cohabitants and will provide guidelines for the litigants and for courts and attorneys as well. First, courts should enforce express agreements concerning the property or funds of unmarried cohabitants. Second, in the absence of proof of an express contract, courts should examine the conduct of the parties to determine whether

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[216] M. Plotkin, *United States Population: Changing Population Patterns*, 1979 World Almanac and Book of Facts 205, 205.

[217] *Id.*

[218] N.Y. Times, Dec. 28, 1976, at 12, col. 6; *id.*, Jan. 2, 1977, § IV, at 7, col. 1; *id.*, Feb. 12, 1977, at 19, col. 2; *id.*, Jan. 9, 1979, at 14, col. 2; *id.*, Jan. 13, 1979, at 8, col. 6; *id.*, Jan. 31, 1979, at 8, col. 5; *id.*, Feb. 21, 1979, at 12, col. 6; *id.*, Feb. 22, 1979, § III, at 1, col. 5; *id.*, Feb. 25, 1979, § IV, at 16, col. 1; *id.*, Mar. 16, 1979, at 14, col. 6; *id.*, § II, at 30, col. 1; *id.*, April 19, 1979, at 1, col. 5; *id.*, § II, at 13, col. 1; *id.*, April 20, 1979, at 18, col. 1; *id.*, April 22, 1979, at 35, col. 1; *id.*, July 20, 1979, § II, at 6, col. 3.

an implied agreement is indicated. Third, courts should apply the principle of *quantum meruit* in order to compensate unmarried cohabitants for services rendered. Finally, courts should apply traditional theories of equitable recovery to unmarried cohabitants.

The application of the preceding theories of recovery will protect the reasonable expectations of the parties and prevent unjust enrichment.[219] If, however, the facts of a particular case do not authorize recovery under recognized legal or equitable theories, courts should not strain to provide relief. It has been demonstrated that the *Marvin* court's authorization of "additional equitable remedies"[220] resulted in a superior court award which contravened the parties' expectations and resembled in certain respects the relief granted at termination of a legal marriage. In order to avoid such a result, courts should take care to grant only that relief which is within the confines of traditional legal and equitable theories available to unmarried persons. Recovery should not flow from the fact of cohabitation alone.

As the *Hewitt* opinion demonstrates, a court may be required to resolve public policy arguments before it can implement the proposed guidelines set forth above. It is strongly urged that courts resolve these policy arguments in favor of allowing recovery for unmarried cohabitants.

Courts in some cases have declared that unmarried cohabitants should be left in the position in which they are found, as if they were *in pari delicto*.[221] This argument was summarily rejected by the California Supreme Court in its *Marvin* decision. As the court reasoned, "to the extent that denial of relief 'punishes' one partner, it necessarily rewards the other by permitting him to retain a disproportionate amount of the property."[222] Justice Finley of the Washington Supreme Court expressed a similar view in 1957:

> Under such circumstances [claims brought at termination of a nonmarital cohabitation], this court and the courts of other jurisdictions have, in effect, sometimes said, "We will wash our hands of such

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[219] This list is not intended to be exhaustive; courts might apply other accepted legal principles warranted by the circumstances of a particular case. For example, unmarried cohabitants holding a deed to property which indicates concurrent ownership might bring an action to partition the property. *See, e.g.*, Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249, 255 (1977) (plaintiff brought action to partition real and personal property acquired during the relationship; deed to parties' home listed them as husband and wife; court found partition statute to be an "appropriate vehicle" for enforcing what evidence indicated to be the parties' reasonable expectations). *But cf.* Beal v. Beal, 282 Or. 115, 121-22, 577 P.2d 507, 510 (1978) (suit to declare interests of the parties in real property; land sale contract listed parties as husband and wife; court found that other evidence must also be considered: "a mechanistic application of [rules of cotenancy] will not often accurately reflect the expectations of the parties").

[220] 18 Cal. 3d at 685 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

[221] *See* Oakley v. Oakley, 82 Cal. App. 2d 188, 192, 185 P.2d 848, 850 (1947); Rehak v. Mathis, 239 Ga. 541, 543, 238 S.E.2d 81, 82 (1977); Creasman v. Boyle, 31 Wash. 2d 345, 353, 196 P.2d 835, 839 (1948); *see generally* First Fed. Sav. & Loan Ass'n v. Ansell, 68 Ohio App. 369, 376, 41 N.E.2d 420, 423 (1941) ("Where parties are *in pari delicto* neither can secure affirmative relief at law or in equity.").

[222] 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

> disputes. The parties should and must be left to their own devices, just where they find themselves." To me, such pronouncements seem overly fastidious and a bit fatuous. They are unrealistic and, among other things, ignore the fact that an unannounced (but nevertheless effective and binding) rule of law is inherent in any such terminal statements by a court of law. The unannounced but inherent rule is simply that the party who has title, or in some instances who is in possession, will enjoy the rights of ownership of the property concerned. The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship.[223]

Thus, when facing arguments that the parties in this type of litigation should be left where they are found, courts must be aware that such judicial inaction, rather than representing regard for high moral considerations, might be viewed as tacit approval of an arrangement that in effect rewards the party who had the foresight to place the funds or property in his or her control. This seems to be the result of the *Hewitt* litigation. Although Victoria Hewitt's personal and financial contributions had aided her partner in the successful pursuit of his career,[224] she was precluded from asserting a claim to any of the property he had accumulated as a result of that success. Thus, Robert Hewitt in effect was rewarded for his foresight in avoiding a legal marriage.

Moreover, as Justice Finley pointed out, decisions based on outdated moral considerations are "unrealistic."[225] For a variety of reasons, many people have chosen to live together without undertaking the formalities of a legal marriage.[226] As noted above,[227] statistics indicate that nonmarital cohabitation is a "fact of life" of modern society. Such statistics in fact probably underestimate the number of persons living together outside of marriage.[228] A nationwide survey commissioned by *Time* magazine in 1977 indicated that fifty-two per cent of those interviewed did not view cohabitation as "morally wrong."[229] Although surveys are inconclusive, the results of the *Time* inquiry, along with the statistics cited above, at least point to an increasing tolerance of nonmarital cohabitation in American society. In light of this

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[223] West v. Knowles, 50 Wash. 2d 311, 316, 311 P.2d 689, 692-93 (1957) (concurring opinion).

[224] See note and text at note 40 *supra*.

[225] 50 Wash. 2d at 316, 311 P.2d at 692.

[226] The California Supreme Court in *Marvin* enumerated several possible reasons motivating couples to live together without marrying. It noted that "many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage." 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. The court also reasoned that "[i]n lower socio-economic groups the difficulty and expense of dissolving a former marriage often leads couples to choose a nonmarital relationship." *Id.* at 675 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.

[227] See text at notes 216 and 217 *supra*.

[228] *See* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 n.98.

[229] *The New Morality*, TIME, Nov. 21, 1977, at 112, 114.

tolerance, it would be anachronistic for courts to deny unmarried cohabitants relief on the basis of "alleged moral considerations that have apparently been so widely abandoned by so many."[230]

In other jurisdictions, courts have entertained arguments that the strong public policy to encourage marriage and family life in American society would be weakened if unmarried persons were allowed to assert financial and other property rights against their partners.[231] Indeed, the *Hewitt* court reasoned that allowance of recovery would make cohabitation too attractive an alternative to marriage.[232] Nevertheless, as the California Supreme Court indicated in *Marvin*, "[t]he argument that granting remedies to the nonmarital partners would discourage marriage must fail."[233]

First, it cannot be said that likelihood of financial recovery is the only factor in a couple's decision to live together instead of marrying. Other personal and social factors may influence the decision.[234] Many couples may not even be aware of the financial consequences of their choice.[235] For these couples, denial of recovery for unmarried cohabitants would not be likely to encourage or to discourage marriage. They may enter into marriage, and find at its termination that they have certain financial rights and responsibilites.[236] By contrast, they may forego marriage, but nevertheless expect that their respective contributions to the property they accumulate will be fairly apportioned at termination of the relationship—if not by themselves, then by the courts.[237] Their personal and financial conduct may reflect these expectations. Yet, if courts adopt the rule that unmarried cohabitants will be denied recovery in all cases, and if one party fails to honor voluntarily his portion of the agreement, the other may be left with no property or with an amount of property that does not reflect his expectations or contributions. In such cases, denial of recovery not only will have failed in its purpose to encourage marriage, but also will have resulted in unfair distribution of property. Such was the result of the *Hewitt* decision.

In other cases only one of the parties in the relationship may be aware that unmarried cohabitants will be denied recovery. It does not necessarily follow that he or she would choose to marry. In fact, that party might have strong motivation to refrain from marriage. He could enter into a nonmarital

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[230] Marvin v. Marvin, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[231] *See, e.g.*, Hewitt v. Hewitt, 77 Ill. 2d at 61-62, 394 N.E.2d at 1209; In re Marriage of Cary, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 866 (1973) (argument rejected).

[232] Hewitt v. Hewitt, 77 Ill. 2d at 61-62, 394 N.E.2d at 1209.

[233] 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[234] See note 226 *supra*. In addition, some couples may wish to marry, but are unable to enter into a valid marriage. *See, e.g.*, Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (upholding official's refusal to issue marriage license to homosexual couple), *appeal dismissed*, 409 U.S. 810 (1972).

[235] *See* Bruch, *supra* note 32, at 103.

[236] These rights and responsibilities may include division of community property, *see, e.g.*, CAL. CIV. CODE § 4800(a) (West Supp. 1980), or alimony or support payments, *see generally* cases cited at notes 191 and 193 *supra*.

[237] *See* Marvin v. Marvin, 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830; Bruch, *supra* note 32, at 135.

relationship, confident that, despite the contribution of funds or services by the other party, he would not be required to make restitution for the benefits he acquired at the expense of the other. Thus, in such cases it may be said that denial of recovery would in effect discourage marriage by allowing the party who had the foresight to obtain title to the property or possession of the funds to retain all the benefits.[238]

Once a court has determined that recovery for unmarried cohabitants will not in fact discourage marriage, and that leaving the parties where they are found may result in unfair distribution of property, application of recognized legal and equitable principles to the claims of unmarried cohabitants should follow. A logical first step would be for the court to determine whether the parties have negotiated an express contract regarding distribution of property or funds. If so, the intentions of the parties as expressed in the agreement should be honored.

In certain cases, however, unmarried cohabitants may have a final hurdle to overcome before an express agreement between them will be enforced. Statutes in some states prescribe criminal penalties for nonmarital cohabitation.[239] Courts in those states may feel compelled to apply the rule that "[a] contract to do an illegal act . . . is . . . void and unenforceable."[240] Refusal to enforce the entire contract, however, may not be the only course available to these courts. Instead, the concept of "divisibility" could be applied. This concept is sometimes used to determine whether a contract "tainted with illegality can be severed into a legal and enforceable portion and an illegal and unenforceable portion."[241] Applying this concept to nonmarital cohabitation, the agreement to cohabit, which is in violation of the statue, could be severed from the agreement concerning the distribution of property and funds which the parties have accumulated.[242] When a contract is divisible, however, a

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[238] *See* In re Marriage of Cary, 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 866; Hewitt v. Hewitt, 62 Ill. App. 3d at 868-69, 380 N.E.2d at 460.

[239] *See, e.g.*, ILL. REV. STAT. ch. 38, § 11-8(a) (1977); MASS. GEN. LAWS ANN. ch. 272, § 16 (West 1970); VA. CODE § 18.2-345 (1975).

[240] Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 388, 108 N.Y.S. 830, 833 (1908). *See also* Sinnar v. LeRoy, 44 Wash. 2d 728, 731, 270 P.2d 800, 802 (1954) ("A court will not knowingly aid in the furtherance of an illegal transaction, but will leave the parties where it finds them.").

[241] *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS at 431, § 11-28 (2d ed. 1977).

[242] *Cf.* Lund v. Bruflat, 159 Wash. 89, 292 P. 112 (1930) (portion of plumbing contract calling for payment of services not enforced because plumber was not licensed, and thus was in violation of statute, while portion providing for payment for materials was enforced).

The California courts have been applying the divisibility concept to contracts between unmarried cohabitants since the *Trutalli* decision. *See, e.g.*, Croslin v. Scott, 154 Cal. App. 2d 767, 316 P.2d 755 (1957); Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 59 (1954). The *Marvin* supreme court decision indicated that the cases did not distinguish between "illegal relationships and lawful nonmarital relationships." 18 Cal. 3d at 668 n.4, 557 P.2d at 112 n.4, 134 Cal. Rptr. at 821 n.4. *See generally* A. CORBIN, 6A CORBIN ON CONTRACTS § 1476, at 622 (1962) ("Agreements made by the parties with respect to money or property are enforceable if they are quite independent of the illicit relationship.").

condition to enforcement of the legal portion attaches: the other portion of the agreement must not be "criminal or immoral in a high degree."[243] It would be unrealistic for courts to apply this condition to block enforcement of an express contract between unmarried cohabitants, because, as was noted above,[244] cohabitation is a common and widely-accepted phenomenon in American society. Moreover, application of the divisibility concept seems particularly appropriate for agreements between unmarried cohabitants in light of the unfair property distribution that may result from leaving the parties where they are found.

In jurisdictions in which courts decide to apply the divisibility concept, as well as in jurisdictions where statutes do not prohibit cohabitation, express contracts between unmarried cohabitants should be enforced. In the absence of an express agreement, a court should determine whether the conduct of the parties indicated an agreement implied in fact. As Professor Corbin has explained, such contracts differ from express agreements only in the manner in which assent is expressed.[245] As he further states, however: "The matter that is of importance is the degree of effectiveness of the expression used. . . . [W]hen conduct other than words is such as persons frequently perform with different meanings, it is difficult, and sometimes impossible, to decide that an implied contract exists."[246]

This distinction between express and implied contracts will be important when courts are asked to infer contractual intent from the conduct of unmarried cohabitants. In some cases the parties' conduct may indicate clear intent to share equally in their acquisitions. Such acts might include the maintenance of joint bank accounts, the holding of property in joint tenancy or as tenants in common, or the filing of joint tax returns.[247] In other cases, however, circumstances may not indicate such clear intent. This may be the case where the acts of one of the parties are such as may be performed in the absence of contract. The living arrangement of unmarried cohabitants often resembles the lifestyle of a traditional married couple, where one party remains in the home performing household services while the other obtains lucrative employment.[248] A court may be reluctant to infer contractual intent from such a relationship, finding as did the superior court in *Marvin* that household services "may be rendered out of love or affection . . . in a myriad of relationships between man and woman which are not contractual in nature."[249]

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[243] J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS at 794, § 22-11.

[244] See text at notes 216-17 and 227-30 *supra*.

[245] A. CORBIN, CORBIN ON CONTRACTS § 18 (One Vol. Ed., 1952).

[246] *Id.* at 26.

[247] *See* Beal v. Beal, 282 Or. 115, 122, 577 P.2d 507, 510 (1978) ("[J]oint acts of a financial nature can give rise to an inference that the parties intended to share equally."); Marvin v. Marvin, 5 FAM. L. REP. at 3083 ("The evidence of a contract as to property may be imputed from a change in the manner of holding, such as joint tenancy bank accounts . . .").

[248] *See, e.g.*, Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); Carlson v. Olson, ___ Minn. ___, 256 N.W.2d 249 (1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).

[249] 5 FAM. L. REP. at 3083.

Nevertheless, although household services may be performed without contractual intent in some cases, it would be unwise for a court to adopt a presumption that they are so performed in the case of unmarried cohabitants. Such a presumption ignores economic realities. A party who performed the same services in the market place—as a cook, housekeeper, or maid—would receive compensation. When the services are performed in the nonmarital home, the other party is spared the expense of procuring them elsewhere or the time it would take to perform them himself. In light of the value the homemaker could have received for the same services performed outside the home, and in view of the economic benefits conferred on the other party when such services are rendered in the home, a more logical presumption would be that the services were rendered with reasonable expectation on the part of both parties that the party who provided the services would receive valuable benefits in return.[250] Such benefits might include a share in the property or funds accumulated during the relationship. The nature and extent of the benefits to be provided pursuant to this implied agreement would be determined by the trier of fact as indicated by the circumstances of the case.[251]

If the circumstances do not indicate an implied agreement concerning property or funds, performance of household services might justify application of the quasi-contractual remedy of *quantum meruit*. In order to prevent unjust enrichment, the law ordinarily will imply a promise to pay reasonable value when one party has accepted valuable services from another, unless the circumstances indicate that the services were rendered gratuitously.[252] In a domestic setting, courts usually presume that services were rendered gratuitously.[253] Thus, an unmarried cohabitant requesting relief in *quantum meruit* should be prepared to show that services were performed with expectation of monetary reward.[254] Under the principles of *quantum meruit*, the value of services rendered by the plaintiff will be offset by the value of the benefits received from the other party.[255]

It may be recalled that Justice Clark disapproved *quantum meruit* recovery in cases involving unmarried cohabitants. He foresaw difficulty in determining the value of services rendered and benefits received.[256] It would be unreasonable, however, for a court to hold that difficulty in evaluation should preclude recovery under an accepted legal principle. In many cases, especially

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[250] Furthermore, the party who remains in the home may have foregone opportunities to train for and obtain more lucrative employment elsewhere.

[251] For a sophisticated and insightful discussion of the economic value of household services, see Bruch, *supra* note 32, at 110-14.

[252] *See, e.g.*, Jacks v. Sullinger, 284 Ala. 223, 224, 224 So. 2d 583, 584 (1969); Bush v. Kramer, 185 Neb. 1, 3, 173 N.W.2d 367, 369 (1969).

[253] *See, e.g.*, In re Estate of Martin, 261 Iowa 630, 639, 155 N.W.2d 401, 406 (1968); Hertzog v. Hertzog, 29 Pa. 465, 469 (1857).

[254] *See* Marvin v. Marvin, 18 Cal. 3d at 684, 557 P.2d at 123, 134 Cal. Rptr. at 832; Hill v. Westbrook's Estate, 39 Cal. 2d 458, 462, 247 P.2d 19, 21 (1952).

[255] *See* Marvin v. Marvin, 18 Cal. 3d at 684, 557 P.2d at 123, 134 Cal. Rptr. at 832; Lazzarevich v. Lazzarevich, 88 Cal. App. 2d at 714, 200 P.2d at 53.

[256] Marvin v. Marvin, 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832.

those involving severe personal injury, damages are not easily ascertainable.[257] Yet plaintiffs in these actions are not barred access to the courts.

Justice Clark also was concerned that recovery in *quantum meruit* would place unmarried cohabitants in "a better position than lawful spouses."[258] Presumably, he was referring to the California principle that a lawful spouse cannot recover in *quantum meruit*.[259] A lawful spouse in California, however, is entitled to half of the property acquired during the marriage.[260] Thus, a nonmarital partner recovering in *quantum meruit* would be in a better position than a lawful spouse only if the reasonable value of services rendered less benefits received exceeded the value of half the property acquired during the relationship. Similarly, a plaintiff in a jurisdiction in which marital property is divided in another manner would be in a better position than a lawful spouse only if the *quantum meruit* recovery were greater than that which would be received in a divorce settlement if the parties were married. Yet, the term *quantum meruit* means "as much as he deserves."[261] Therefore, if the services of the plaintiff, minus benefits received, entitle him to recovery greater than he would receive in a divorce settlement, that is his right.

Application of the foregoing principles of contract law and *quantum meruit* will ensure that the reasonable expectations of nonmarital partners will be protected, and that one party will not be allowed to be unjustly enriched at the expense of the other. In short, unmarried cohabitants will have the same rights before the law as do any other unmarried persons. Consequently, recognized theories of equitable recovery should be available to unmarried cohabitants as well. The theories of resulting and constructive trust suggested by the California Supreme Court in *Marvin* are examples of recognized principles which have been applied in the past to the claims of unmarried cohabitants.[262] A court applying these and other accepted equitable remedies should look to the statutes and decisions of its own jurisdiction in order to determine the requisite standard of proof and the other elements of the theory advanced by the litigants. It is suggested that, as a general principle, courts should recognize and consider the value of homemaking services when determining the respective contributions of the parties in acquiring real or personal property. As the superior court noted in *Marvin*, when one party performs domestic services, the other need not procure them at a price elsewhere.[263] Thus, the purchasing power of the couple is enhanced through the efforts of the homemaker.[264]

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[257] *See, e.g.*, Anderson v. Sears, Roebuck & Co., 377 F. Supp. 136 (E.D. La. 1974) (reviewing trial court judgment determining damages for past physical and mental pain, future physical and mental pain, future medical expenses, loss of earning capacity, permanent disability and disfigurement).

[258] 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832.

[259] *See* Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 100, 69 P.2d 845, 847 (1937).

[260] CAL. CIV. CODE § 4800(a) (West Supp. 1980).

[261] BLACK'S LAW DICTIONARY 1119 (5th ed. 1979).

[262] *See, e.g.*, Padilla v. Padilla, 38 Cal. App. 2d 319, 321, 100 P.2d 1093, 1094 (1940) (resulting trust); Omer v. Omer, 11 Wash. App. 386, 393, 523 P.2d 957, 961 (1974) (constructive trust).

[263] 5 FAM. L. REP. at 3084. *See* Bruch, *supra* note 32, at 123.

[264] 5 FAM. L. REP. at 3084.

The application of recognized legal and equitable theories of recovery will provide clear guidelines for judicial treatment of the claims of unmarried cohabitants. When such parties encounter a dispute concerning the division of property acquired during the relationship, they can look for guidance to the decisional law of their jurisdiction. The aggrieved party thus may bring action under accepted theories of recovery in the case law, choosing the theory that is best suited to the fact pattern of the relationship. Courts in turn will have at their disposal an existing body of standards upon which to base their decisions.

Of course, a court may have to resolve threshold public policy issues before determining that unmarried cohabitants will be allowed to seek relief in the courts.[265] Once these policy issues have been resolved, however, the claims of nonmarital partners should be treated in the same manner as the claims of any other unmarried persons. It follows that, just as the fact of cohabitation in itself should not be the basis for denial of recovery, recovery should not be allowed on the basis of cohabitation alone. In the absence of evidence that the parties entertained expectations of mutual financial benefit, and in the absence of evidence of unjust enrichment or other unfair dealings, no relief should be granted. Such relief not only would contravene the intentions of the parties, but also would result in inconsistent treatment of the claims of unmarried cohabitants. Thus, courts should not make sweeping statements authorizing the evolution of additional equitable remedies in the case of unmarried cohabitants. A statement to that effect would only serve to introduce further uncertainty into an area in which clear guidelines are required. The *Marvin* decisions illustrate the uncertainty that may result from such an authorization. Although the California Supreme Court had emphasized that recovery should reflect the parties' expectations,[266] its statement that courts might fashion additional equitable remedies led to the superior court award which in fact specifically contravened those expectations.[267] Strict adherence to traditional, recognized theories of recovery will enable courts in other jurisdictions to avoid the problems in interpretation which resulted in the anomalous decision of the superior court in California.

CONCLUSION

The decision of the California Supreme Court in *Marvin v. Marvin* upheld the rights of unmarried cohabitants to order their financial affairs as they choose. That court attempted to provide a clear standard for courts to apply in determining the financial rights and obligations of nonmarital partners. The court held that such parties should be treated as are any other unmarried persons, and that recovery should reflect the parties' reasonable expectations. When this standard was tested in the remanded *Marvin* action, however, it did not prevent the trial court from awarding a marriage-like remedy which did not reflect what it found to be the parties' expectations.

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[265] See text at notes 221-38 *supra*.
[266] 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.
[267] See text at notes 179-85 *supra*.

The Illinois Supreme Court, by contrast, proclaimed in *Hewitt* that no recovery for unmarried cohabitants would be forthcoming, absent a favorable indication by the legislature. That court equated recovery with legal recognition of a relationship which it found to be clearly violative of Illinois law and public policy. While the *Hewitt* decision was framed in terms of the law of that jurisdiction, the policy issues raised in *Hewitt*—moral considerations and high regard for the sanctity of marriage—echo some of the concerns traditionally advanced to deny recovery for nonmarital partners in other jurisdictions.

The increasing incidence of nonmarital cohabitation in the United States suggests that courts often will be requested to determine the property rights of such couples. It remains to be seen whether a majority of these courts will adopt the *Marvin* rationale and allow recovery that reflects the parties' reasonable expectations, or will follow the lead of the *Hewitt* court in holding that public policy would bar any and all recovery. This Note has proposed that these courts apply recognized legal and equitable theories to the claims of nonmarital partners. Such theories will provide guidance for the litigants and the courts, and will ensure consistency in the treatment of unmarried cohabitants. When the evidence in a particular case does not support the application of a recognized theory of recovery, courts should not strain to provide relief. These courts should take cognizance of the decisions of the California Supreme Court and the superior court in *Marvin*, and should be wary of authorizing recovery beyond the scope of existing theories.

MARY DENEVI