Family Law: Property Rights of Unmarried Cohabitants

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Oral Olson and Laura Carlson lived together for 21 years, raising a son to majority and holding themselves out to friends, relatives, and the public as husband and wife, yet they were never legally married. Since Ms. Carlson did not have any income during the period of cohabitation, substantially all the real and personal property acquired by the parties was purchased with Mr. Olson's earnings. Nevertheless, much of this property, including their home, was held in joint tenancy. When the relationship terminated, Ms. Carlson brought an action to partition the parties' accumulated real and personal property. The trial court divided the property equally, finding an "irrevocable gift from Mr. Olson to [Ms. Carlson] of those assets purchased solely with his earnings." On appeal, Mr. Olson contended that the standard law of joint tenancy should apply without regard to the familial relationship of the parties and that the property should therefore be divided in accordance with the contribution of capital that each had made toward its acquisition. The Minnesota

1. The deed to their house, for instance, listed the parties as husband and wife. Carlson v. Olson, 256 N.W.2d 249, 250 (Minn. 1977).
2. The only exception was $1000 supplied by Ms. Carlson's mother for a remodeling project. Id.
3. Mr. Olson supplied the $900 down payment for the purchase of the home, and a $16,000 mortgage was executed by both parties. Id.
4. MINN. STAT. §§ 558.01-.32 (1976) provide the statutory framework for partition actions. See note 44 infra.
5. 256 N.W.2d at 255. The contribution of Ms. Carlson to the remodeling of the home was treated similarly. Id.
6. See id. at 251. Although holding property in joint tenancy, tenancy by the entirety, or tenancy in common raises a presumption that the parties intended to take equal shares in the event of a partition, that presumption is ordinarily rebutted by a showing that one party contributed more to the purchase or improvement of the property than the other. See, e.g., Duston v. Duston, 31 Colo. App. 147, 498 P.2d 1174 (1972) (where contributions to property held in joint tenancy by father, son, and son's wife were made equally by father and son, father was entitled to undivided one-half interest); Rickards v. Rickards, 53 Del. 134, 166 A.2d 425 (1960) (in action for annulment because of impotency, house held in tenancy by the entirety awarded to wife because her contribution was larger; husband allowed to recover his contribution); Williams v. Monzingo, 235 Iowa 434, 442, 16 N.W.2d 619, 623 (1944) ("In a showing of unequal contribution [by tenants in common, a] presumption arises . . . that the parties intended to share in proportion to the amount contributed by each to the purchase price.").

When the parties are legally married, however, some courts have held that the presumption of equal sharing is not overcome by showing unequal contribution and that the parties take equal shares unless there has been an express agreement to the contrary. See, e.g., Leach v. Leach, 167 Minn. 489, 209 N.W. 636 (1926) (in partition
Supreme Court rejected this contention, holding that an equal partition of both real and personal property was proper in a statutory partition proceeding and that "the trial court was justified in finding that . . . the parties intended . . . their modest accumulations . . . to be divided on an equal basis on the theory of an irrevocable gift." *Carlson v. Olson*, 256 N.W.2d 249, 255 (Minn. 1977).

By awarding property to an unmarried cohabitant who had made no monetary contribution toward the acquisition of that property, the *Carlson* court significantly departed from traditional common law treatment of such parties. Until recently, nonmarital cohabitation has given rise to judicially recognized rights only upon proof of either a common law or putative marriage. In those jurisdictions that still recognize common law marriage, courts will divide the accumulated property as though the parties were legal spouses upon proof that the

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7. For a discussion of the problems inherent in this aspect of the court's holding, see note 44 infra.

8. Only about one-third of the states still recognize common law marriage. See Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 Harv. L. Rev. 1708, 1711 n.33 (1977). In Minnesota a "[l]awful marriage . . . may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized . . . so to do. Marriages . . . not so contracted shall be null and void." Minn. Stat. § 517.01 (1976)(originally enacted in 1941), as amended, Minn. Stat. § 517.01 (Supp. 1977). In *Baker v. Baker*, 222 Minn. 169, 23 N.W.2d 582 (1946), the court held that this statute precluded application of the divorce statute to unmarried cohabitants.


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parties had agreed they were married\textsuperscript{10} and had thereafter cohabited or held themselves out as husband and wife.\textsuperscript{11} Similarly, under the putative marriage doctrine, courts have granted quasi-marital property rights to unmarried cohabitants upon proof of a good faith belief that a valid marriage existed.\textsuperscript{12}

wife allowed support payments under divorce statute); Baker v. Mays & Mays, 199 S.W.2d 279 (Tex. Civ. App. 1946) (common law wife had insurable interest allowing her to recover under terms of deceased husband's life insurance policy).

10. This agreement (\textit{per verba de praesenti}) may be either express or implied. See Roy v. Industrial Comm'n, 97 Ariz. 98, 397 P.2d 211 (1964); Shelton v. Belnap, 155 Tex. 37, 282 S.W.2d 682 (1955). \textit{But see} Anderson v. Anderson, 235 Ind. 113, 131 N.E.2d 301 (1956)(implied agreement not recognized). An agreement to be married in the future that is followed by sexual intercourse (\textit{per verba de futuro cum copula}) is rarely recognized as a valid means of creating a marriage. See, e.g., Peacock v. Peacock, 196 Ga. 441, 26 S.E.2d 608 (1943) (marriage \textit{per verba de futuro cum copula} abhorrent to public policy of state). \textit{But see} Hurd v. Hurd, 194 Ala. 613, 616, 69 So. 885, 886 (1915)(quoting Chancellor Kent's statement that agreement in future tense followed by consummation creates valid marriage).

11. See, e.g., Drewry v. State, 208 Ga. 239, 65 S.E.2d 916 (1951); Anderson v. Anderson, 235 Ind. 113, 131 N.E.2d 301 (1956); Fahrer v. Fahrer, 36 Ohio App. 2d 208, 304 N.E.2d 411 (1973); 52 Am. Jur. 2d Marriage § 43 (1970). In a few jurisdictions, courts have recognized a common law marriage solely on the basis of an agreement to be married. See, e.g., Great N. Ry. v. Johnson, 254 F. 683 (8th Cir. 1918)(applying Missouri law); Hulett v. Carey, 66 Minn. 327, 69 N.W. 31 (1896).

12. For the purposes of property distributions, most courts treat putative marriages as though they were valid legal marriages and divide the property in accordance with marriage dissolution statutes. See, e.g., Hager v. Hager, 553 P.2d 919 (Alas. 1976) (Mexican marriage invalid; property divided equitably in accordance with divorce statute); Figoni v. Figoni, 211 Cal. 354, 295 P. 339 (1931)(though entered into in good faith, relationship later discovered to be incestuous and therefore void; property divided equitably in accordance with divorce statute); Buck v. Buck, 19 Utah 2d 161, 427 P.2d 954 (1967)(bigamous marriage annulled; property divided as though parties had been married). Other courts distribute property according to equitable principles without regard to the marriage dissolution statute. See, e.g., Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937)(quasi-contract); Lazarevich v. Lazarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948)(parties continued cohabitation after final divorce decree was entered without their knowledge; woman allowed to recover value of household services under a quasi-contract theory); Knoll v. Knoll, 104 Wash. 110, 176 P. 22 (1918)(marriage contracted within six months of divorce void; property treated as partnership property); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908)(bigamous marriage void; property divided in "just and equitable" manner).

Some jurisdictions have codified the putative marriage doctrine. For instance, under Louisiana law, "[t]he marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith," La. Civ. Code Ann. art. 117 (West 1952), and "[i]f only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage," id. art. 118. See Funderburk v. Funderburk, 214 La. 717, 38 So. 2d 502 (1949) (relying on this statute to treat property of putative marriage as community property); cf. Minn. Stat. § 517.01 (Supp. 1977) (validating marriage performed by one who was not authorized to perform marriages but whom the parties believed in good faith to be so authorized).
In the absence of a common law or putative marriage, however, courts have deemed the cohabitation "meretricious" and have refused to recognize any property rights arising out of the relationship. The effect of this refusal is to vest full ownership of the jointly accumulated property in the party who holds legal title and to penalize parties who, because of the confidential, loving, and trusting nature of the relationship, do not make conscious efforts to establish legal rights to property acquired and shared during the relationship.\(^\text{13}\)

This mechanical and formalistic treatment of the property interests of unmarried cohabitants has been justified on two grounds. First, its harsh effects on the noncontributing party are seen as necessary to deter immorality.\(^\text{14}\) For a variety of reasons, this rationale has come under increasing criticism by both courts and commentators.\(^\text{15}\) It is not clear that such relationships actually are repugnant to con-

\(^{13}\) See, e.g., Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948).

\(^{14}\) The refusal to allow recovery in meretricious relationship cases has most commonly been seen from the judge's view of the relationship as repugnant to society's moral standards. See, e.g., Chirelstein v. Chirelstein, 12 N.J. Super. 468, 483, 79 A.2d 884, 891 (1951) ("Meretricious is the adjective form of the noun meretrix, a prostitute."). Some judges express their disapproval more colorfully:

We are here confronted with a situation in which good morals would offer no brief in behalf of either party. In fact, if it were possible we would be inclined to dismiss them both with the Shakespearean denunciation "A plague o' [n] both your houses!" However, we are compelled by precedent to reverse the decree of the Chancellor. We do so reluctantly because the appellant Joe is lucky that he isn't in jail for the crime of adultery and in our view the manner in which he concluded the affair is reprehensible. By the same token the appellee Julia Mae has little in the way of good morals to commend her to the conscience of equity.


\(^{15}\) Under such circumstances, this court and the courts of other jurisdictions have, in effect, sometimes said, "We will wash our hands of such 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.

Moreover, even if they are, it is difficult to see how the public morals are served by finding the parties equally guilty of immoral conduct but then, in effect, punishing one party while awarding the other a windfall. A court's duty to prevent injustice is certainly as great as its duty to discourage sexual immorality. Finally, it is doubtful that refusing to recognize or enforce property rights between meretricious parties actually deters such relationships. Few parties beginning familial relationships, whether legally married or not, seriously contemplate the termination of the relationship, much less what rule of law will govern the distribution of their property should they separate. If one of the parties is aware of the rule of law and seeks to obtain the benefits of such a relationship without subjecting his property to claims of a spouse, the rule denying relief to the non-title holding partner may actually encourage unmarried cohabitation.

The second justification advanced to support the traditional rule is prevention of fraud. Fraud becomes a problem whenever a person asserts rights to property based on a familial relationship that, in fact, has never existed. It is important to distinguish the contexts in which such claims may arise, however. A valid marriage license may be a convenient administrative tool for determining whether such a relationship has existed for the purpose of state-conferred benefits. But when only rights inter se are involved, other proof of confidential family relationships should be acknowledged. Where a familial relationship between the parties is proved or, as in Carlson,
where it is admitted, the danger of fraud inter se is no greater than it is in a legally sanctioned marriage. In fact, when the trial court is permitted to look at all the evidence before deciding whether a familial relationship has existed,\textsuperscript{21} it is more likely that fraud will be uncovered than when a marriage license is treated as conclusive proof of such a relationship.

Increasingly skeptical of the supposed dangers of fraud and immorality and disturbed by the inequity of a rule that distributes the property accumulated by unmarried cohabitants strictly according to legal title, a number of courts have struggled to find a rationale on which to base a more equitable property distribution. These efforts have led courts to use legal and equitable doctrines developed in other contexts to mitigate the harshness of the traditional rule.\textsuperscript{22} Perhaps the most expansive and certainly the most widely publicized decision to employ this approach is \textit{Marvin v. Marvin},\textsuperscript{23} where the California Supreme Court held that an unmarried cohabitant could sue to enforce an express contract to divide property accumulated during the relationship.\textsuperscript{24} Going beyond the issue presented, the court also indicated that a non-title holding party might rely on the doctrines of implied-in-fact contract, resulting trust, constructive trust, and implied-in-law contract to recover property acquired during cohabitation.\textsuperscript{25}

Although these doctrines may partially ameliorate the harsh effects of the traditional rule, they are of little practical use to most unmarried cohabitants. Borrowed as they are from other contexts, they are not readily applicable to the facts of a typical meretricious relationship. For example, the theories of resulting\textsuperscript{26} and constructive

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\item \textsuperscript{21} For a discussion of the relevant factors, see text accompanying notes 62-68 infra.
\item \textsuperscript{22} \textit{See generally} Bruch, \textit{supra} note 15, at 114-26; Folberg & Buren, \textit{supra} note 15, at 462-79.
\item \textsuperscript{23} 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). For a discussion of \textit{Marvin} and its relation to modern trends, see Comment, \textit{supra} note 8.
\item \textsuperscript{24} \textit{See} 18 Cal. 3d at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825. The female plaintiff and the male defendant (actor Lee Marvin) had cohabited without marriage for over five years. All property acquired during this time, including over one million dollars in motion picture rights, was placed in defendant's name. Plaintiff alleged that under an oral agreement between the parties she was entitled to half the acquired property and to support payments.
\item \textsuperscript{25} \textit{See id.} at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32. For a detailed discussion of these and other theories upon which a party to a meretricious relationship might rely in asserting rights to accumulated property, see Bruch, \textit{supra} note 15, at 114-26; Folberg & Buren, \textit{supra} note 15, at 462-79.
\item \textsuperscript{26} Although the resulting trust has never been recognized in Minnesota, see \textit{Minn. Stat.} § 501.07 (1976)(originally enacted in 1858), some courts have found that a resulting trust arises where one party pays for the property and another takes legal
trust can be relied on only when the plaintiff has contributed tangible property, since contributions of services do not generally give rise to these trust relationships. Thus, in the common situation where

Application of the resulting trust theory could allow a meretricious spouse to recover more than a similarly situated legal spouse. When it is shown that the alleged beneficiary and the alleged trustee are married, the one who holds title is deemed to have received the property as a gift from the other, and absent a showing that no gift was intended, the presumption of a trust does not arise. See Becchelli v. Becchelli, 109 Ariz. 229, 508 P.2d 59 (1973); McGean v. McGean, 339 A.2d 384 (D.C. 1975); Hall v. Bone, 210 Or. 98, 309 P.2d 997 (1957). The gift fiction is not applied when the relationship is meretricious. See Albae v. Harbin, 249 Ala. 201, 30 So. 2d 459 (1947); Masgai v. Masgai, 460 Pa. 453, 333 A.2d 861 (1975); RESTATEMENT (SECOND) OF TRUSTS § 442, comment a (1959); Folberg & Buren, supra note 15, at 471.

27. A court will impose a constructive trust when it finds (1) that a person holding legal title to property has obtained it through fraud or mistake, either directly from another or by purchasing it with money supplied by another, and (2) that the titleholder would be unjustly enriched if allowed to retain the property. In such cases the legal owner is deemed to be a constructive trustee, holding the property for the benefit of the person he has wronged. See, e.g., Dietz v. Dietz, 244 Minn. 330, 70 N.W.2d 281 (1955) (mother who transferred property to son and herself as joint tenants in consideration for his promise to support her for life held entitled to regain title under a constructive trust theory upon son’s breach of contract). See generally RESTATEMENT OF RESTITUTION §§ 163-171 (1937); Bruch, supra note 15, at 125-26; Folberg & Buren, supra note 15, at 473; Jennings & Shapiro, The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies, 25 MINN. L. REV. 667 (1941).


The one exception is when one party renders services to a property owner in consideration for which title is transferred to another. In such a case, the transferee holds the property in trust for the party rendering the services. See Keene v. Keene, 57 Cal. 2d 657, 666, 371 P.2d 329, 334, 21 Cal. Rptr. 593, 598 (1962).
one party to a meretricious relationship works outside the home while the other party performs services in the home, the trust doctrines provide no relief for the latter. Although services rendered in an arm’s-length transaction may support a finding of an implied-in-fact or implied-in-law contract, courts have consistently presumed that household services performed during a meretricious relationship are gratuitous. An unmarried homemaker is therefore afforded no protection by these doctrines. The express contract, implied-in-fact contract, and resulting trust theories are also often inapplicable to meretricious relationships because they require that the parties manifest their intent to distribute property in a certain manner.

29. In the context of meretricious relationships, some courts have been willing to find an implied-in-fact contract to form a partnership or to pool resources if the conduct of the parties, particularly the manner in which each contributed services or capital during the relationship, indicates that they intended to make such an agreement. See, e.g., Hyman v. Hyman, 275 S.W.2d 149 (Tex. Civ. App. 1954)(implied pooling agreement); In re Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972)(implied partnership); Poole v. Schrichte, 39 Wash. 2d 558, 236 P.2d 1044 (1951)(implied partnership).


The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either express or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances . . . .

See generally Folberg & Buren, supra note 15, at 466-68.

30. When it is shown that one party has received an inequitable share of property or services, a court may rely on the theory of implied-in-law contract and order restitution. The policy underlying this remedy is prevention of unjust enrichment. See, e.g., Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959); Continental Forest Prods., Inc. v. Chandler Supply Co., 95 Idaho 739, 518 P.2d 1201 (1974). See generally Bruch, supra note 15, at 124-25; Folberg & Buren, supra note 15, at 469-70; see also cases cited in note 12 supra (applying quasi-contract theory to putative marriages). Meretricious parties have occasionally attempted to base claims on a quasi-contract, see, e.g., Hill v. Estate of Westbrook, 39 Cal. 2d 485, 247 P.2d 19 (1952), and the theory was specifically endorsed in Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122-23, 134 Cal. Rptr. 815, 831-32 (1976), but it appears that no court has actually allowed recovery on that basis.


32. See Bruch, supra note 15, at 116-23; Folberg & Buren, supra note 15, at 462,
Such manifestations are likely to be absent or misleading in a meretricious relationship because its trusting, confidential nature makes full consideration or expression of the future distribution of the property improbable.\textsuperscript{33} Moreover, application of these "intent" theories requires the parties to undertake the difficult task of proving that they did not consider sexual activity to be a part of the consideration for the agreement.\textsuperscript{34}

The Carlson case provides an excellent illustration of the inadequacy of the various traditional doctrines as applied to meretricious relationships. Because there was no evidence of the parties' intent to distribute their property, the express contract, implied-in-fact contract, and resulting trust rationales were inapplicable, even if the court had been willing to separate the sexual services from the consideration for the agreement. Since Ms. Carlson's contribution to the relationship consisted mainly of household services, there was no judicially recognized contribution of property to which resulting or constructive trusts could have been applied, and insufficient consideration to support implied-in-law or implied-in-fact contracts.

Perhaps recognizing the inappropriateness of these general doctrines, but nevertheless convinced that Ms. Carlson should be able to recover, the Minnesota Supreme Court determined that the situation "necessitate[d] the creative application of traditional common-law and equitable principles."\textsuperscript{35} After quoting extensively from the Marvin opinion,\textsuperscript{36} the court adopted the mutual irrevocable gift ra-
tionale relied on by the trial court. Exactly how such a theory operates in this context is unclear, however. It does not appear to be based on traditional gift doctrine, since the court made no mention of the essential elements of a gift—donative intent and surrender of control—perhaps because there was little evidence of either. Although the fact that the parties took title to their home in joint tenancy could have supported an inference of intent to make a gift, reliance on that fact would have been contrary to a previous Minnesota Supreme Court case that clearly held that placing property in joint tenancy does not alone establish donative intent. Further, since some of the parties' property was not held in joint tenancy, a presumption that the parties intended to divide jointly held property equally does not explain the court's equal division of all their property. The trial court's rationale for applying the gift theory was further obfuscated by its determination that the gift to Ms. Carlson was "in consideration for the wifely and motherly services she performed during the period of their cohabitation." The supreme court did not discuss the obvious anomaly of a "gift" for which consideration is given.

The Carlson court's use of a theory that is inconsistent with a realistic characterization of the facts of the case is unfortunate. Because it did little more than state its conclusions that Ms. Carlson should recover half the property and that a gift rationale accomplishes that result, the law is left in an unsettled state, and future

37. See 256 N.W.2d at 255.
39. Mr. Olson testified that the joint tenancy arrangement was used for survivorship purposes and specifically denied ever making a gift of a fifty percent interest to Ms. Carlson. See Brief for Appellant at 2, Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977). "The record contains no testimony substantiating the elements of a gift, [Ms. Carlson] herself unequivocally testified that there was no gift, and neither of the parties litigated the issue." Id. at 9-10. Ms. Carlson's brief neither affirms nor denies these assertions.
40. See Jezo v. Jezo, 23 Wis. 2d 399, 129 N.W.2d 195 (1964). See also note 6 supra.
41. See Kempf v. Kempf, 288 Minn. 244, 179 N.W.2d 715 (1970).
42. "The home and some personal property were in joint tenancy." 256 N.W.2d at 255 (emphasis added).
43. Id. at 250-51.
44. The Carlson court also authorized the use of a partition action to divide equally both real and personal property without carefully analyzing Minnesota law concerning partition actions.

Although the court correctly asserted that the general rule in other jurisdictions allows partition of personal property, see id. at 255, it ignored the fact that the Minnesota statute authorizing partition actions applies only to real property, see Minn. Stat. § 558.01 (1976). The court cited Swogger v. Taylor, 243 Minn. 458, 68 N.W.2d 376 (1955), for the proposition that partition actions are governed by equitable
litigants have no predictable guide for determining what facts are necessary to show the existence of this sort of irrevocable gift.

The extent to which courts, like the Carlson court, have strained to apply traditional doctrines to meretricious relationships in order to reach equitable results emphasizes the compelling need to develop a coherent legal principle under which unmarried cohabitants' property rights may be determined. The problem common to all attempts to fit meretricious relationships into existing legal formulations is that traditional doctrines, in focusing on the intent or contribution of the parties, are unrelated to the factor that justifies judicial intervention: the parties' relationship itself. Since it is the confidential, trusting nature of the relationship that makes a person like Ms. Carlson vulnerable to the vagaries of happenstance or a scheming partner, that relationship should form the basis of a legal principle allowing her to claim rights in the property.

In a variety of other contexts, legislatures and courts have recognized that parties to confidential relationships often do not make efforts to protect themselves and have developed doctrines that operate to effect equitable property distributions between such parties. The clearest expression of this policy appears where the parties' relationship gives rise to a judicially imposed "fiduciary duty." When such a fiduciary relationship is found to exist, courts carefully scrutinize any agreements made between the parties and refuse to enforce such agreements if it appears that one party to the relationship has taken unfair advantage of the other. A person seeking to retain advantages gained by an agreement made during the relationship bears the burden of showing that the transaction was fair.

Contracts between parties who have or anticipate a familial rela-

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principles despite their statutory base. 256 N.W.2d at 255. The Swogger case, however, dealt with the methods of distribution available to courts in partition actions and did not consider the broader question at issue in Carlson: whether equitable doctrines should be applied to determine the parties' respective shares. See 40 Minn. L. Rev. 730 (1956).

45. See notes 26-34 supra and accompanying text.
46. See note 15 supra.
48. See, e.g., Westerbeck v. Cannon, 5 Wash. 2d 106, 120, 104 P.2d 918, 924 (1940) (person standing in a fiduciary relationship to another "not allowed to derive any profit or advantage from the relation between them, except upon proof of full knowledge and consent of such other") (quoting 4 R.C.L. Cancellation of Instruments § 7, at 493 (1914)).
tionship have long been subject to close judicial examination. For example, courts have scrutinized antenuptial agreements to ensure that one prospective spouse does not, through fraud or undue influence, cause the other to forgo rights arising out of marriage. In order for such an agreement to be valid, it must have been entered into in good faith and with full disclosure of the value of the property involved. The need for protection in this situation has been seen by the courts to be so compelling that if the agreement even appears inequitable, unjust, or unreasonable, a presumption of fraud or non-disclosure arises, and the party asserting the validity of the contract bears the burden of rebutting that presumption. Like antenuptial contracts, contracts between spouses are carefully examined for signs of fraud or undue influence.

The policy of encouraging fair dealings between confidential parties not only results in the refusal to enforce unjust agreements, but also operates in the formal familial context to impose affirmative duties on one party or the other. Thus, in a marriage dissolution action, one spouse may be required to transfer property held in his or her name to the other spouse as the court deems just. The transfer of property may be continued in the form of alimony for a period after the relationship has terminated.

50. See, e.g., Towson v. Moore, 173 U.S. 17, 21 (1899) (parent—child); Claggett v. Claggett, 204 Minn. 558, 284 N.W. 363 (1939) (mother-in-law—daughter-in-law); Prescott v. Johnson, 91 Minn. 273, 97 N.W. 891 (1904) (parent—child); cf. RESTATEMENT OF RESTITUTION § 166(d) (1937) (“A confidential relation is particularly likely to exist where there is a family relationship . . . .”).


52. See Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962).


54. See C. Foote, R. Levy, & F. Sander, supra note 51, at 892-93. This policy is most strongly expressed in an Iowa statute that voids all contracts between husband and wife pertaining to property rights. See IOWA CODE § 597.2 (1977). In Minnesota, interspousal contracts concerning real estate are invalid. See MINN. STAT. § 519.06 (1976).

55. See, e.g., MINN. STAT. §§ 518.58-.59 (1976)(giving courts broad powers to provide for property distribution in marriage dissolution actions).

56. See id. § 518.55. Although the basis for alimony usually has been spoken of in terms of a duty of the husband to support his wife, see, e.g., Wetmore v. Markoe, 196 U.S. 68 (1904); Swanson v. Swanson, 233 Minn. 354, 46 N.W.2d 878 (1951), as it has become more common for women to pay for the support of their former husbands, another rationale for alimony has been suggested—the need of the receiving spouse in relation to the other spouse's ability to pay, see Lefler v. Lefler, 264 So. 2d 112, 113-14 (Fla. Dist. Ct. App. 1972) (purpose of alimony is “to provide nourishment, sustenance and the necessities of life to a former spouse who has neither the resources nor ability to be self-sustaining”). Both need and ability to pay will often vary in proportion to the extent that property has been distributed disproportionately during the marriage.
Even when intimate parties have not been legally married, other judicial and legislative doctrines have been applied to further the policy of protecting those who, because of a confidential relationship, are not likely to look out for their own interests. When a purported marriage is annulled because of incest or bigamy, legislatures and courts have been willing to impose an equitable property distribution upon the intimate parties despite the absence of a legal spousal relationship. Similarly, the putative marriage doctrine protects those with a good faith belief in the legal validity of a marriage, usually by allowing such persons recourse to the same remedies afforded legal spouses.

Each of these doctrines indicates a strong social policy running through the law in favor of ensuring fairness between parties who, because of the confidential, trusting nature of their relationship, are unlikely to take care of their own interests. This policy applies with equal force to unmarried cohabitants, and there is no sound reason why the courts should not demand that such parties treat each other fairly.

Courts could ensure this fair treatment by first determining

57. See Mixon v. Mixon, 51 Mich. App. 696, 216 N.W.2d 625 (1974) (bigamous marriage annulled; court relied on marriage dissolution statute to divide property in fair and equitable manner); MINN. STAT. § 518.54 (1976) (property acquired during “marriage” that is later annulled to be treated as property acquired during a valid marriage).

58. See note 12 supra.


The question whether the courts should require meretricious parties to deal fairly with one another raises the issue of whether this problem is more appropriately resolved by legislative or judicial action. Although a thorough discussion of conflicting jurisprudential philosophies is beyond the scope of this Comment, it appears that the case for judicial resolution is relatively strong in this instance. First, there is no clear legislative mandate precluding judicial recognition of rights arising out of nonmarital living arrangements. The statutory requirement that all lawful marriages be licensed and solemnized is not such a mandate since it merely prevents unmarried cohabitants from enforcing marital rights. See Carlson v. Olson, 256 N.W.2d 249, 252 (Minn. 1977); Baker v. Baker, 222 Minn. 169, 172, 23 N.W.2d 592, 594 (1946). Second, since the problem of protecting parties to meretricious relationships is likely to be perceived as a moral issue, a legislative resolution may be impossible. In such cases, courts should act to rectify the inequities that have arisen as a result of, or have been perpetuated by, legislative inaction. Cf. Wright, The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?, 54 CORNELL L. REV. 1, 6 (1968) (footnote omitted):

If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so. For “nature abhors a political vacuum as much as any other kind,” and if the legislatures do not live up to their constitutional responsibilities, the Court must act to fill the vacuum.

Given the inequities that result from the traditional rule according conclusive effect
whether the parties' relationship has been such as to warrant judicial protection and, if so, presuming, absent clear evidence of a contrary intent, that the parties have agreed to treat each other fairly with respect to property acquired and shared during their relationship.\(^6^0\) This presumption is consistent with the reasons for protecting such parties and provides a practical and predictable means for resolving disputes between ex-cohabitants.

Since the rationale for reapportioning property interests between unmarried cohabitants is the protection of parties in close and confidential relationships, the party seeking to overcome legal title must be able to show that such a relationship has existed. Absent this showing, the parties should be presumed, as strangers are, to have dealt with each other at arm's length and to have made a reasoned "bargain." The standard here proposed for determining the existence of such a confidential relationship between unmarried cohabitants is whether the relationship is "sufficiently familial" to warrant a presumption that they intended to deal fairly with each other.\(^6^1\)

The "sufficiently familial" standard, while necessarily broad in order to advance the interests of justice in a wide variety of circumstances, is a manageable judicial standard of a type not unfamiliar to the courts. The concept of "family," though perhaps difficult to define, is not so indefinite that it could not be ascertained by the trier to legal title and the absence of any sound basis for tolerating those inequities, judicial intervention is appropriate.

60. See Comment, supra note 8, at 1715-16.

61. The phrase "sufficiently familial" is rapidly becoming a term of art. See Folberg & Buren, supra note 15, at 480; Comment, supra note 8, at 1716. As is proposed here, Folberg and Buren suggest that the existence of such a relationship should cause rights to jointly accumulated property to vest in the parties. In requiring an "actual and ostensible family relationship and a union that has been in existence for a substantial period of time," Folberg & Buren, supra note 15, at 480, they appear to require that the parties be "married" in every respect but the ceremonial before the relation is deemed sufficiently familial. Once such a relationship has been established, Folberg and Buren's proposal further provides that property divisions between the parties would be handled in accordance with the state's marital property distribution laws. See id. at 482-84; accord, Comment, supra note 8, at 1715-16 (by implication).

In both of these latter respects, the approach proposed in this Comment differs from that of Folberg and Buren. First, the relationship would not have to be "familial" to a degree sufficient to warrant treating the parties as if they were married; all that would be required is that it be sufficiently confidential and trusting to warrant a presumption that they intended to treat each other fairly. See text accompanying notes 62-68 infra. Second, a finding of a sufficiently familial relationship would not trigger divorce and partnership statutes with respect to these parties, although such statutes could provide a court with guidance in exercising its equitable powers. See notes 71-72 infra and accompanying text. A statutory approach is inappropriate both because of its lack of flexibility and because it is probably contrary to the Minnesota Supreme Court's ruling in Baker v. Baker, 222 Minn. 169, 23 N.W.2d 582 (1946).
of fact. The Washington Supreme Court has suggested that the existence of a long-term, stable, nonmarital family relationship could be ascertained by considering such factors as continuous cohabitation, the duration of the relationship, the purpose of the relationship, and the pooling of resources and services for joint projects. 62 Judicial determinations in analogous contexts may also provide useful criteria for defining familial relationships. For instance, in jurisdictions that recognize common law marriage, courts have identified several factors as relevant to determining whether a spousal relationship exists. Predominant among these are cohabitation, 63 which in this context contemplates not merely an occasional act of sexual intercourse but living together as husband and wife, 64 and representations by the parties that they are husband and wife such that others are aware of the familial relationship. 65 Similarly, in determining the applicability of the putative marriage doctrine, 66 courts have considered such normal incidents of marriage as time spent together, support of a family, and assumption of parental roles. 67 All of these factors would clearly be relevant to determining whether unmarried cohabitants have a familial relationship.

It should be noted that this list is hardly exhaustive, that none of these factors should be regarded as indispensable, and that their relative importance may vary as the combination of factors changes. They are offered merely as examples of the types of considerations that should guide the trier of fact in determining whether the parties have maintained a family-like relationship. Where such a finding is made, the policies that generally justify judicial protection of parties in close, confidential, and trusting relationships justify similar protection for the meretricious couple. 68

63. See cases cited in note 11 supra.
66. See note 12 supra.
68. Although the policy of protecting parties in confidential relationships, if logically extended, would apply to all familial relationships, regardless of the sex of the parties or the number of persons cohabiting, courts may wish to limit application of this policy to monogamous, heterosexual relationships. Such a limitation could only be explained as a deferral to broadly held notions of morality. Although there is evidence of a rapid change in the attitude of society toward nonmarital cohabitation between heterosexual couples, see note 16 supra, similar attitudinal changes toward homosexual or polygamous relationships are not as evident, see, e.g., Doe v. Commonwealth’s Attorney, 403 F. Supp. 1199 (1975) (antisodomy statute constitutional as ap-
Once an unmarried cohabitant has convinced the trier of fact that such a relationship has existed, he or she should be entitled to rely on a presumption that the parties have agreed to treat each other fairly with respect to the property accumulated during that relationship.\(^9\) Of course, the presumption may be rebutted by clear evidence of a contrary intent,\(^8\) but absent such evidence, the policy that demands fairness between intimates in a marital context should likewise demand fairness between those who, though unmarried, are no less in need of judicial protection. Thus, upon proof that the couple has had a sufficiently familial relationship, either party should be able to petition the court for a decree of specific performance of the implied-in-law “contract” that would direct the other party to relinquish as much property as would be consistent with a contract to deal fairly with the other party with respect to mutually accumulated property.

This “fairness” principle has long been used to divide property accumulated by parties to a familial relationship. The appropriate considerations are similar to those used under many marriage disso-

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\[^{\text{8}}\text{Minneapolis Star, Nov. 18, 1977, \S A, at 1, col. 2; Lichtenstein, Poll Finds Public Split on Legalizing Homosexual Acts, N.Y. Times, July 19, 1977, at 17, col. 1. The argument against extending judicial protection because it would violate public morality thus appears stronger in the latter case. Nevertheless, since parties to close and confidential homosexual or polygamous relationships may well need the same protection as persons in more traditional family situations, a court’s duty to promote fairness and justice may conflict with its desire to discourage sexual immorality, and determining which policy should prevail will not be an easy task. For an argument that treating parties in pari delicto because of their “immoral” conduct does not promote public morality, see note 15 supra; text accompanying note 17 supra.}

\[^{\text{9}}\text{Surely it is more sensible to place the burden upon individuals to state clearly their desire to bring about inequitable results, than to impose such results upon large numbers of people who live together without marriage with no articulated division of financial responsibility. To do otherwise is to imply in law an unconscionable contract . . . .}

\[^{\text{10}}\text{For example, the parties could form an express contract that either indicates that no property rights are to be based on the relationship or specifically provides for a particular distribution of the accumulated property. See Polberg & Buren, supra note 15, at 489 n.209. This type of agreement would be subject to the close examination usually applied to confidential relationships, see notes 47-58 supra and accompanying text, but absent fraud or overreaching, it should be enforceable, see Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Another alternative for avoiding operation of the presumption is to take steps to prevent the appearance of a familial relationship. Couples could take such precautions as holding themselves out as single, using their own last names, and maintaining separate bank accounts. See Comment, supra note 8, at 1718-19 (citing M. King, Cohabitation Handbook: Living Together and the Law 19 (1975)).}
olution statutes, and include the relative fault of the parties, the contribution of services and property each made to the relationship, the general financial condition in which the parties will be left upon termination, and the allocation of responsibility to care for any children born of the relationship.

The facts of Carlson would easily justify a finding of a familial relationship. The parties had lived together for 21 years, raised a son, and held themselves out as spouses. In addition, they held their home in joint tenancy and shared their property without making any effort to keep ownership distinct. In short, Carlson presents a paradigm case for the presumption that the parties have agreed to treat each other fairly. Furthermore, an equal distribution of the property between the parties is consistent with the enforcement of such an agreement under the Carlson facts. Both parties worked during the relationship, Ms. Carlson in the home and Mr. Olson in other employment. Although Ms. Carlson received no remuneration for her labor, in the absence of evidence to the contrary it is reasonable to presume that the labor of both parties made the accumulation of the property possible. At the time of the court's decision, there was no evidence that one party was in greater need of the property than the other; both were employed and capable of self-support. Under these circumstances, an equal division of the property was an appropriate means of enforcing an implied agreement between the parties to treat each other fairly.

The Carlson court thus reached what seems to be a just result. Moreover, by indicating its willingness to take a flexible approach to a problem that has traditionally and unjustly been resolved mechanically, the court laid important groundwork for a more equitable determination of the property interests of unmarried cohabitants. It is only the court's rationale that is weak, for it neither explains the result in Carlson nor provides reliable guidance for the future. The approach suggested here is intended to meet that weakness through a rational extension of the long-established policy of protecting parties to an intimate relationship who, because of the nature of that relationship, do not adequately establish or protect their individual property rights. By explaining distributions in light of the parties' actual relationship, the proposal provides a predictable and equitable means of determining the property rights of unmarried couples without resorting to tortured factual characterizations or inappropriate legal theories.

72. See Latham v. Hennessey, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059-60 (1976); Recent Developments, supra note 31, at 644 n.44.
73. 256 N.W.2d at 250.