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Property Rights Between Unmarried Cohabitants

Robert C. Angermeier
Indiana University School of Law

Property Rights Between Unmarried Cohabitants

Despite varying degrees of social disapproval, illicit cohabitation has always been more attractive than marriage to some couples. When entering into such an arrangement, however, couples seldom consider the consequences of an eventual separation. When disputes have arisen concerning the rightful ownership of property acquired during an illicit cohabitation, courts have not provided orderly and predictable resolutions. They have been torn by the conflict between their duty to provide peaceful arbitration of disputes, preventing unjust and perhaps violent resolutions, and their perceived responsibility to preserve morality by not sanctioning a practice which is morally offensive to a large segment of society.[1] Courts sometimes turn their backs on illicit cohabitants, preferring to deny relief rather than "dirty their hands." When courts have ruled on the merits, the extent of the intervention has been limited. Thus, the number of cases in which satisfactory relief has been afforded is small.

The scope of this note is twofold. First, it will suggest ways in which parties to an illicit cohabitation can minimize the possibility of disputes. Second, it will analyze the manner in which courts have traditionally resolved disputes over the rightful ownership of property and will offer suggestions for improving this process.

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[1] Many judges have spoken directly or indirectly of this tension, often reflecting their moral revulsion toward the practice:

> 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.

Smith v. Smith, 108 So. 2d 761, 763 (Fla. 1959) (brackets in original).

> Generally the conscience of the court is not aroused to invoke equitable powers to rescue those from the results of their illegal practices when that is the only basis for granting relief. The parties here not only violated the permanent established public policy of all society but also violated the expressed criminal statutes of the state of Arizona. . . .
>
> We cannot establish the precedent of assisting those who deliberately choose to substitute illegal cohabitation for lawful wedlock, especially when the only basis for such assistance is the mere fact that they have chosen such a status.

Stevens v. Anderson, 75 Ariz. 331, 335–36, 256 P.2d 712, 715 (1953).

PREVENTION OF DISPUTES

A system of laws is concerned with both resolving disputes and minimizing the number of disputes that arise. The adage "an ounce of prevention is worth a pound of cure" is particularly appropriate when considering the thorny problems that may arise when illicit cohabitation terminates.

Disputes over the ownership of property acquired during the relationship may arise in two ways: the parties may separate voluntarily; or one party may die.[2] Property disputes could be minimized if couples initially would agree to a procedure for its orderly disposition. Courts generally enforce these agreements:

> If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property.[3]

While parol agreements have been enforced, a written agreement is preferable. The primary drawback of a parol agreement is the difficulty in proving its existence. In many cases conflicting testimony is offered;[4] moreover, if one party is deceased a Dead Man's Statute may prevent the survivor's testimony.[5]

The practice of entering into private law agreements finds its counterpart in antenuptial agreements. These agreements establish ex contractu rights between spouses upon dissolution of the marriage. They effectively circumvent the public law resolution dictated by divorce statutes.[6] Illicit cohabitants could adopt similar private law agreements

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[2] Of course parties to an illicit cohabitation could grant the surviving party a legal interest in his or her estate. Cohabitation alone, however, will not give a surviving party any interest in the estate. The draftsman of an agreement between illicit cohabitants for the disposition of property should be careful to avoid possible Statute of Wills problems that arise when a gift of property is made contingent upon death.

[3] Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).

[4] *See* Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Willis v. Willis, 48 Wyo. 403, 49 P.2d 670 (1955).

[5] *See* Lovinger v. Anglo Cal. Nat'l Bank, 110 Adv. Cal. App. 623, 243 P.2d 561 (1952). For a typical Dead Man's Statute see IND. ANN. STAT. § 34-1-14-6 (Code ed. 1973):

> In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, . . . any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate . . . .

[6] While these agreements were originally designed to take effect upon the death of a spouse, recent cases have upheld agreements contemplating divorce. *E.g.*, Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970):

> With divorce such a commonplace fact of life, it is fair to assume that

to avoid unpredictable and frequently inequitable public law treatment.

Several approaches to private agreements may be used. An obvious advantage of private agreements is their adaptability to the needs and expectations of the parties.[7] For example, an agreement could minimize the commingling of assets by specifying the property contributed by each party. If both parties have independent incomes, the agreement could specify the extent to which the incomes would be pooled. If the parties plan to become business partners, the agreement could delineate their respective rights and duties. Further, if either party intends to assume a domestic role, the agreement could assign value to those services. In the event of a dispute, an agreement could provide for arbitration.[8] Finally, the parties, in contemplation of the dissolution of the relationship through death, might plan the distribution of their estates. The possibilities are endless. The point is to realize that, with foresight, parties contemplating cohabitation without marriage could fashion an agreement which would meet their needs and expectations while avoiding the unpredictable and inadequate public law result.

A common impediment to the enforcement of agreements between cohabitants is the defense of illegality.[9] Illicit cohabitation is illegal in most states,[10] and against public policy in others.[11] A contract is unen-

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many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail.

[7] People who illicitly cohabit cover a wide spectrum of society spanning both class and age barriers. While the typical stereotype is the college-age, counter-culture type, the cases indicate that at least among those couples who end up in court, the length of the cohabitation is commonly more than ten years with joint assets sometimes exceeding $50,000. Also consider the increasingly common practice of unmarried senior citizens living together to avoid a reduction in Social Security benefits.

[8] Fifteen states, including Indiana, have adopted the Uniform Arbitration Act. AM. JUR. 2D DESK BOOK, Doc. No. 129 (Supp. 1974). IND. ANN. STAT. § 34-4-2-1 (Code ed. 1973) provides:

> A written agreement to submit to arbitration . . . an existing controversy or a controversy thereafter arising is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. If the parties to such an agreement so stipulate in writing, the agreement may be enforced by designated third persons, who shall in such instances have the same rights as a party under this act. This act also applies to arbitration agreements between employers and employees or between their respective representatives . . . .

[9] RESTATEMENT OF CONTRACTS § 589 (1932) provides:

> A bargain in whole or part for or in consideration of illicit sexual intercourse is illegal; but subject to this exception such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.

[10] *See, e.g.*, CAL. PENAL CODE § 269a (West 1970); IDAHO CODE § 18-6604 (1948); IND. CODE § 35-1-82-2 (1971), IND. ANN. STAT. § 10-4207 (1956 Repl.); ME. REV. STAT. ANN. tit. 17, § 2151 (1964); MONT. REV. CODES ANN. § 94-4107 (1969).

forceable when all or part of the consideration is conduct which is illegal or contrary to public policy. Corbin states:

> A bargain between two persons is not made illegal by the mere fact of an illicit relationship between them, so long as that relationship constitutes no part of the consideration bargained for and no promise in the bargain is conditional upon it. . . . Agreements made by the parties with respect to money or property are enforceable if they are quite independent of the illicit relationship.[12]

With notable exceptions courts have enforced such agreements, avoiding the defense of illegality by finding that the agreement was free of illicit consideration,[13] or that equity required judicial intervention.[14] In *Bridges v. Bridges*[15] the parties had acquired both real and personal property during their six years of cohabitation. When they separated, the woman sued alleging an oral contract to pool assets and share accumulations. The man contended the agreement was illegal and thus unenforceable. The court disagreed:

> Nowhere is it expressly testified to by anyone that there was anything in the agreement for the pooling of assets and the sharing of accumulations that contemplated meretricious relations as any part of the consideration or as any object of the agreement.[16]

Illegality has been unsuccessfully raised as a defense to a variety of agreements including those to pool earnings and share property,[17]

> Kinsey described the general attitude of the average person toward sex laws: The sex laws and the upper level persons who defend them are simply hazards about which one has to learn to find his way. Like the rough spots in a sidewalk, or the traffic on a street, the sex laws are things that one learns to negotiate without getting into much trouble; but that is no reason why one should not walk on sidewalks, or cross streets, or have sexual relations.

A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 391 (1948).

[11] *See* Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Willis v. Willis, 48 Wyo. 403, 49 P.2d 670 (1935).

[12] 6A A. CORBIN, CORBIN ON CONTRACTS § 1476, at 622 (1962) (footnote omitted).

[13] *E.g.*, Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951).

[14] "Equity does not demand that its suitors shall have led blameless lives." Loughran v. Loughran, 292 U.S. 216, 229 (1934). *See also* Mitchell v. Fish, 97 Ark. 444, 134 S.W.2d 940 (1911), and Williams v. Bullington, 159 Fla. 618, 622, 32 So. 2d 273, 275 (1947), where the court analogized: "One might recoil under the knowledge that another's home was paid for with the proceeds of bootleg liquor but there is no theory under the law that it could be confiscated for that reason."

[15] 125 Cal. App. 2d 359, 270 P.2d 69 (1954).

[16] *Id.* at 363, 270 P.2d at 71.

[17] Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951).

partnerships,[18] and resulting trusts.[19] A notable successful use of the defense is *Wellmaker v. Roberts*,[20] where a couple decided to build a house and live together. It was agreed that the woman would finance the construction and that the man would provide the labor. After completing the house, the man breached the agreement and began living with another woman. The first woman sued in contract for return of her money. The court denied relief because part of the consideration under the contract was a promise to cohabit illicitly. The illegality defense which was raised by the man and accepted by the court resulted in a windfall for the man and penalized the woman. While this case appears to be the exception rather than the rule, it highlights the inequitable results of recognizing the defense of illegality.

By initially agreeing to the disposition of acquired property, one party will be unable to contend that what began as an illicit relationship has since matured into a common law marriage.[21] Common law marriage could be used as either a sword or a shield. If a common law marriage exists, disposition of property is prescribed by divorce law, which could mean a sizable increase in an individual's claim.[22] Thus, if one party suspects the disposition of property under the divorce law would be more generous, he could take the offensive by petitioning for divorce.[23]

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[18] Fernandez v. Garza, 88 Ariz. 214, 354 P.2d 260 (1960).

[19] Williams v. Bullington, 159 Fla. 618, 32 So. 2d 273 (1947).

[20] 213 Ga. 740, 101 S.E.2d 712 (1958).

[21] A general definition of common law marriage is provdied in H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (1968):

> In theory there is general agreement among American cases as to the requirements for a valid common law marriage. These include, in addition to bare present consent . . . a mutual assumption of the marital relationship. Or, as some cases put it, not only must there be a present agreement to be man and wife, but the parties must "hold themselves out" to the world as married, or they must publicly and professedly live as husband and wife.

Id. § 2.4, at 47–48 (footnotes omitted). Other commentators have been less willing to advance a general definition.

> A valid definition of common law marriage without infinite qualifications can hardly be found. All we have are approximations which demonstrate ambiguous and vacillating notions of some more or less informal kind of marital status. Whatever hazy notions we have vary not only from jurisdiction to jurisdiction but from case to case within a recognizing jurisdiction . . . . Again, the shades of non-recognition may vary from case to case. A good deal may depend on how the issue comes up.

Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 91 (1960) (footnote omitted). *See also* Stein, *Common-Law Marriage: Its History and Certain Contemporary Problems*, 9 J. FAM. L. 271 (1969).

[22] For example, under the divorce laws alimony might be awarded. In community property states community property would be created, while in other states a "fair and equitable" division of property would occur. These resolutions are not afforded illicit cohabitants.

[23] *See, e.g.*, Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

Conversely, if a party seeks a partition and settlement of property, the other, who suspects that divorce laws provide a more generous disposition of property, could raise the existence of a common law marriage as a defense.[24] The doctrine of common law marriage will seldom provide conclusive determinations of the rights in property acquired during illicit cohabitation and will surely give rise to many judicial headaches. A well-drafted agreement would foreclose the possibility that the issue would ever be raised.

It is hoped that parties to an illicit relationship will use foresight in their dealings. However, in many cases the nature of the relationship makes it doubtful that they will. Thus the remainder of this inquiry will focus upon the judicial resolution of disputes over ownership of property acquired during illicit cohabitation.

JUDICIAL RESOLUTION OF DISPUTES

Shortcomings of Traditional Approaches

While judicial intervention in the affairs of illicit cohabitants has

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Similarly, where one party is deceased, the survivor, by claiming common law marriage, could pursue his or her rights as a surviving spouse.

[24] Fourteen states and the District of Columbia recognize common law marriage. *See* H. CLARK, *supra* note 21, § 2.4, at 45 n.9 (1968). In the remaining jurisdictions, common law marriage has been abolished by case law or statute. However, in many of these jurisdictions the doctrine survives in several ways. In some states people living together are presumed to be legally married. In Indiana, the General Assembly declared common law marriages "null and void." IND. ANN. STAT. § 31-1-6-1 (Code ed. 1973). Nevertheless, the Indiana Supreme Court ruled the statute inapplicable in Reger v. Reger, 242 Ind. 302, 316, 177 N.E.2d 901, 907 (1961),

> [w]here the parties in good faith have gone through the legal formalities necessary to consummate a marriage and through innocent ignorance they are unaware of a legal impediment that exists preventing such marriage, and thereafter the legal impediment is removed or disappears, a continued living together of such parties as husband and wife raises a presumption of a marriage which is not nullified by the statute . . . .

See also Note, *The Formalities Essential to a Valid Marriage in Indiana,* 34 IND. L.J. 643, 662–64 (1959).

If there is sufficient testimony that the couple never held themselves out as married, they should have little difficulty overcoming the presumption. However, if one party is deceased, the Dead Man's Statute may make it extremely difficult to overcome the presumption.

Another confusing twist in the law of common law marriage is that some states recognize the doctrine only in limited circumstances. *E.g., In re* Keig's Estate, 59 Cal. App. 812, 140 P.2d 163 (1943); Brown's Adm'r v. Brown, 308 Ky. App. 796, 215 S.W. 971 (1958); Damron v. Damron, 301 Ky. App. 636, 192 S.W.2d 741 (1945). While courts may be willing to recognize a common law spouse who is claiming workman's compensation benefits they are reluctant to recognize the same spouse's claim against the decedent's estate. This phenomenon is discussed in Stein, *Common-Law Marriage: Its History and Certain Contemporary Problems,* 9 J. FAM. L. 271 (1969).

For these reasons a defense or offense of common law marriage is not likely to succeed, although, because of the unsettled state of the law, the possibility of course exists.

been cautious, courts have enforced a variety of agreements, including partnerships, trusts, agreements to pool funds and share property, and agreements to pay for services. In many instances, such approaches produce inequitable results. In every instance prediction of the final outcome is difficult.

If the evidence establishes an express partnership between the parties, courts will apply the established law of partnership.[25] In *Fernandez v. Garza*,[26] an elderly couple lived together for ten years. Initially both parties contributed rental residential property, using the profits for their support and the acquisition of additional property. The Supreme Court of Arizona held that the agreement to acquire property and divide profits established the essential elements of a partnership.

Courts have found an implied partnership based on the circumstances surrounding the relationship.[27] In several cases, however, the claim of an express partnership has failed due to insufficient evidence. Generally, if the couple has organized a commercial venture for profit, the partnership approach, assuming it can be proved, provides for the orderly disposition of property.[28] If no commercial venture exists, this

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[25] *E.g.*, Fernandez v. Garza, 88 Ariz. 214, 354 P.2d 260 (1960); Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940 (1911).

The UNIFORM PARTNERSHIP ACT § 40 provides in part:

> In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> (a) The assets of the partnership are:
>
> I. The partnership property,
>
> II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.
>
> (b) The liabilities of the partnership shall rank in order of payment as follows:
>
> I. Those owing to creditors other than partners,
>
> II. Those owing to partners other than for capital and profits,
>
> III. Those owing to partners in respect of capital,
>
> IV. Those owing to partners in respect of profits.

Forty-five states have adopted the Uniform Partnership Act. AM. JUR. 2D DESK BOOK, Doc. No. 129 (Supp. 1974).

[26] 88 Ariz. 214, 354 P.2d 260 (1960).

[27] *E.g.*, *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972). It may be more difficult to prove an implied partnership between illicit cohabitants than between ordinary people in business because of the court's reluctance to sanction the illicit relationship. The Supreme Court of Washington followed this practice prior to *Thornton, supra*. *See* 48 WASH. L. REV. 635, 639 (1973).

[28] *E.g.*, Moralez v. Velez, 18 F.2d 519 (1st Cir. 1927); Latronica v. Gennoni, 205 Cal. 559, 271 P. 1054 (1928).

For example, in Fernandez v. Garza, 88 Ariz. 214, 354 P.2d 260 (1960), the parties operated a real estate business. *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972), involved a ranching operation.

> Partnership is a branch of our commercial law; it has developed in connection with a particular business association, and it is, therefore, essential that the operation of the act should be confined to associations organized for profit.

UNIFORM PARTNERSHIP ACT § 6, Official Comment.

approach is seldom effective in resolving disputes.[29]

Courts have also enforced agreements to pool earnings and to share property. A typical case is *Barlow v. Collins*[30] in which the parties illicitly cohabited for eight years while maintaining separate jobs. When differences arose the man left, taking with him the contents of their joint bank account. The woman sued, alleging the parties had made an oral agreement to pool earnings and share accumulated property. Rejecting defendant's contention that no agreement had been made, the court ordered the bank account divided equally.

Pooling agreements, however, must be express and will not be implied.[31] As discussed earlier, the existence of such agreements may be difficult to prove.[32] Especially if the testimony is in conflict, the moral attitude of the trier of fact, conscious or not, may color the decision. Because only express agreements are enforced, the class of disputes in which this approach provides guidance is narrow.[33]

Where a party furnishes all or part of the consideration, but title to the property is in the other party, courts have employed the doctrines of resulting and constructive trusts to determine ownership.[34] The typical case occurs when the nontitled party contributes funds to the purchase of real property, and subsequently claims an equitable interest.[35] In order to establish a resulting trust, however, the nontitled

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[29] A party alleging the existence of a partnership is still vulnerable to the defense of illegality. *See* text accompanying notes 11–20 *supra.*

[30] 166 Cal. App. 2d 274, 333 P.2d 64 (1959).

[31] Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951).

[32] *See* notes 4–5 *supra* & text accompanying.

[33] The requirement that agreements be express ignores reality. It is inconceivable that extended cohabitations exist without agreements, just as it is doubtful that a couple suddenly awakens one day to find themselves sharing the same household. The relationship is more likely a series of tacit agreements which may never be expressed. When courts decline to imply agreements from the surrounding circumstances, the law is at odds with reality. Query whether such a policy is designed as punishment for what is considered immoral conduct.

[34] G.G. BOGERT & G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 74 (5th ed. 1973) describe a resulting trust:

> Where one pays the consideration for a transfer of real or personal property, but has the title taken in the name of another, it is presumed or inferred that the payor intended the grantee to be a trustee for the payor.

On the other hand, according to Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919):

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee . . . .

[35] *E.g.,* Williams v. Bullington, 159 Fla. 618, 32 So. 2d 273 (1947); Orth v. Wood, 354 Pa. 121, 47 A.2d 140 (1946); Walberg v. Mattson, 38 Wash. 2d 808, 232 P.2d 827 (1951).

party must overcome the presumption that parties intend to dispose of property in the exact manner in which it is titled.[36] Courts require proof of resulting trusts to be "beyond a reasonable doubt"[37] or even "clear, explicit, unequivocal, precise, convincing and indubitable."[38] In addition, recovery has been denied where the claimant failed to establish the precise amount of the purchase price contributed by each party.[39] Because trust doctrine recognizes only actual monetary contributions toward the acquisition of property, and then only upon a strong showing of proof, it is of limited utility.[40]

In the absence of an express agreement neither party may recover the value of services rendered.[41] Specifically, housekeeping and homemaking services will not create an interest in property acquired during the relationship.[42] In *Willis v. Willis*[43] the couple illicitly cohabited for almost eight years. The man owned a rooming house and tavern where the woman worked as a hostess, singer, and housekeeper. When the cohabitation ended, the woman sued alleging an implied promise to pay for her services. The Supreme Court of Wyoming upheld the trial court's refusal to compensate the woman for her services.

> Not only does the relationship as husband and wife negative that of a master and servant, but such cohabitation, being in violation of principles of morality and chastity, and so against public policy, the law will not imply a promise to pay for services rendered under such circumstances.[44]

While the law normally implies a promise to pay from the rendition and acceptance of services, courts have held that a contrary presumption is created by illicit relations between the parties.[45]

Traditional approaches to the resolution of disputes over ownership of property acquired during illicit cohabitation have several short-

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[36] Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948). For a detailed discussion of this case, see 48 WASH. L. REV. 635 (1973).

[37] Smith v. Smith, 108 So. 2d 761 (Fla. 1959).

[38] Wosche v. Kraning, 353 Pa. 481, 46 A.2d 220 (1946).

[39] McQuin v. Rice, 88 Cal. App. 2d 914, 199 P.2d 742 (1948).

[40] A further problem is that by recognizing only actual monetary contributions, inequity results. Consider the situation where real property is purchased and titled in one party, although both parties contribute their labor toward the improvement of the property. The appreciation from their joint effort benefits only the titled party.

[41] Lovinger v. Anglo Cal. Nat'l Bank, 110 Adv. Cal. App. 623, 243 P.2d 561 (1952); Hill v. Westbrook's Estate, 95 Cal. App. 2d 599, 213 P.2d 727 (1950); *In re* Estate of Thompson, 337 Ill. App. 290, 85 N.E.2d 840 (1949).

[42] *E.g.*, Gjurich v. Fieg, 164 Cal. 429, 129 P. 464 (1913).

[43] 48 Wyo. 403, 49 P.2d 670 (1935).

[44] *Id.* at 437, 49 P.2d at 681.

[45] Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

comings. First, the legal doctrines were developed for application to arm's-length business dealings. While such an approach may provide equitable results where the partners to the illicit relationship are actually business partners, it ignores the broad class of cases where no traditional business motives exist. Second, the general requirement that agreements be express often raises insurmountable problems of proof for the party claiming an interest in property. Finally, the refusal of courts to recognize the value of services contributed produces a harsh result in that the party contributing household and often child-rearing services is left without relief.

The overall effect of a business approach is usually easy to predict. Those relationships which resemble business ventures receive orderly and predictable results, while those relationships which resemble a traditional marriage, particularly where one party plays a domestic role, do not.[46] Thus, if the parties cannot characterize their relationship in a business context, the law will not intervene. Clearly, the manner in which courts have traditionally resolved disputes requires rethinking.

Suggested Approaches

There are several ways in which courts could avoid harsh results when resolving disputes over ownership of property acquired during illicit cohabitation. Most importantly, any reappraisal will require the recognition that illicit sexual relations are of minor legal significance, especially in light of the larger legal responsibilities associated with the normal day-to-day activities of running a household. Further, courts must recognize that public morality is not served by pursuing a policy which rewards one party at the expense of the other.[47] Moreover, when courts refuse to resolve disputes, opposing parties are left to pursue self-help. This often means the stronger will prevail, with an even greater potential for inequitable and unjust results.

Courts could pursue two different tacks to achieve more equitable

[46] Clearly, women assuming a domestic role receive a more favorable distribution of property under the marriage laws than under the business venture approach.

[47] In terms of legal consequences, one party to an illicit cohabitation is likely to enjoy the best of both worlds. The wage-earning, property-acquiring party will often have title to the property acquired during the cohabitation while receiving domestic services from the other party, who acquires no interest in the property and receives no credit for the value of the services. Justice Curtis, dissenting in Vallera v. Vallera, 21 Cal. 2d 681, 687, 134 P.2d 761, 764 (1943) stated:

> Just because the man who in the instant case was equally guilty, earned the money to buy the property, should not bar the woman from any rights at all in the property, although her services made the acquisition possible. Such a rule gives all the advantages to be gained from such a relationship to the man with no burdens.

results. Theoretically, illicit cohabitants exist in the limbo between marriage partners and business partners. Since each of these statuses has well-developed law for the disposition of property, characterization of illicit cohabitation as similar to either status would provide an orderly guide for disposition.[48]

One approach would be characterization of illicit cohabitation as closely akin to marriage. Analogous to illicit cohabitation is the situation where a couple, unaware of a legal impediment, believes they are validly married. In those cases courts generally hold that a party acting in the good faith belief that a valid marriage exists acquires an equitable interest in joint acquisitions.[49] In addition, the law in this situation recognizes the value of domestic services so that both parties acquire an interest in the property.[50]

Of course the only difference between couples who are not validly married due to an impediment and those couples who are illicitly cohabiting is that the first couples think they are married. While of course neither couple is married, the disposition of property between the couple who thought they were married proceeds in a more equitable fashion.[51]

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[48] Of course, one could postulate a new status to resolve this difficulty. But practically, it is doubtful that any court would go so far as to affront the legislatively sanctioned institution of marriage. Nor would it necessarily be practical to create unnecessary complexity.

[49] Reger v. Reger, 242 Ind. 302, 177 N.E.2d 901 (1961). *See* Feig v. Bank of Italy Nat'l Trust & Savings Ass'n, 218 Cal. 54, 58, 21 P.2d 421, 422 (1933): "[Where the husband] innocently and in good faith believed himself at all times to be the lawful husband of the decedent, he is entitled to an equitable apportionment of the gains made by their joint efforts." *See also* Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920); Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624 (1951).

> But independently of the statute of divorce, we think the court had authority to decree, not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding and, within its equity power, the district court had full jurisdiction to give adequate relief to the parties. The division that was made was eminently equitable and just.

Buckley v. Buckley, 50 Wash. 213, 219, 96 P. 1079, 1081–82, *quoting* Werner v. Werner, 59 Kan. 399, 402, 53 P. 127, 128 (1898).

[50] *E.g.*, Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E.2d 801 (1942). Even where courts are willing to make a "fair and equitable" disposition of property, the treatment falls short of the protections afforded by divorce statutes because neither party is liable for support or alimony. The courts have found a middle ground which produces equitable results while preserving the state-sanctioned institution of marriage as the favored status.

[51] In some cases the "spouse" seeking relief believed in good faith the marriage was valid while the other knew all along it was invalid. Yet in providing a "fair and equitable" settlement, courts have passed up an opportunity to punish the bad faith partner. Compare illicit cohabitation where both parties know that no valid marriage exists, but where courts allow a result that punishes one party while rewarding the other. *E.g.*, Reese v. Reese, 132 Kan. 438, 295 P. 690 (1931); Walker v. Walker, 330 Mich. 332, 47 N.W.2d 633 (1951).

The presence of "good faith" or "bad faith" should not justify different treatment in these two situations. This is especially true where a "fair and equitable" settlement is afforded although only one party acted in good faith. In *Reese v. Reese*,[52] a couple lived together for 40 years. While one party knew the marriage was invalid because he was previously married and not divorced, the other learned of the previous marriage after 34 years. Thus for six years the parties cohabited in "bad faith." Nevertheless, the court upheld a fair and equitable accounting of property upon the termination of the relationship, indicating that "bad faith" is not such a salient factor, or at least not an insurmountable barrier.

The other approach would be to characterize illicit cohabitation as an economic venture.[53] This characterization would leave intact the traditional notion that illicit cohabitation alone does not create any interest in the earnings and accumulations of the other party.[54] To varying degrees, households formed by illicit cohabitants are in fact economic ventures. At a minimum there are economic advantages to sharing food and shelter expenses.[55] By excluding domestic services from the definition of illicit cohabitation, the value of those services could be recognized as a contribution toward the business venture.[56] Similarly, a broad view of the economic nature of acquiring property and maintaining a household supports the same equitable result.[57]

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[52] 132 Kan. 438, 295 P. 690 (1931).

[53] While some courts claim to be doing exactly this, such proclamations are dubious in light of the burden of proof imposed. *See* text accompanying notes 37–40 *supra*.

[54] Justice Traynor, in Vallera v. Vallera, 21 Cal. 2d 681, 684, 134 P.2d 761, 762–63, (1943), stated the general rule:

> The controversy is thus reduced to the question whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship. It has already been answered in the negative.

[55] This is essentially what college roommates are doing. It is usually cheaper for two people to live together than for two to live alone. It would indeed seem unlikely that one roommate would claim an interest in a stereo which the other purchased merely because they were living together at the time. In short, cohabitation alone would not create an interest in property.

[56] Justice Peters, dissenting in Keene v. Keene, 57 Cal. 2d 657, 671, 371 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962), urged a narrow construction of illicit cohabitation: "[T]he quoted rule merely holds that the plaintiff is not entitled to share in their accumulations by reason of the 'cohabitation alone,' and Mr. Justice Traynor, speaking for the majority, was very careful to so limit the rule."

[57] Justice Curtis, dissenting in Vallera v. Vallera, 21 Cal. 2d 681, 686–87, 134 P.2d 761, 764 (1943) suggested:

> 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

If both parties are financially independent—for example wage earners and property accumulators in their own right—then the economic venture would not justify the creation of mutual property interests.[58] But as economic interdependence increases, mutual interests in property acquired during cohabitation arise. On one hand both parties could be partners in a business venture outside the household; on the other hand one party could function economically outside the household while the other performs domestic services at home. Although a division of labor exists in the latter situation, a common purpose remains.[59]

Characterization of illicit cohabitation as an economic venture should not depend on the existence of an express agreement:

> Obviously, if the two were not illegally living together, the woman could recover. In that event it would be a plain business relationship and a contract would be implied. Illicit cohabitation does not invalidate an otherwise valid relationship. The man is not entitled to benefit from such nonwifely services simply because the two have illegally cohabitated.[60]

By implying an agreement the parties are treated as any other joint venturers, without regard to the illicit cohabitation.[61] Judge Anderson, dissenting in *Morales v. Velez*,[62] urged the above approach:

> Lack of chastity does not invalidate otherwise legal business rela-

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should be protected.

See also note 47 *supra*.

[58] Where economic cooperation is minimal between the parties, they are in essentially the same position as college roommates. The legal consequences should be the same: living together should not in itself create any mutual property interests.

[59] In effect the party operating outside the household is saved either the time or expense of maintaining a household. If he lived alone he would hire someone to maintain his household or do it himself. When parties cohabitate, an economic unit exists with both parties' labor directed toward its success. A division of labor between the parties should not destroy the common purpose.

[60] Keene v. Keene, 57 Cal. 2d 657, 672, 371 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962) (Peters, J., dissenting).

[61] This notion has been a persistent theme of many of the dissenting opinions found in cases dealing with illicit cohabitation. For example, *see* Justice Peters' dissent in *id.* at 672, 371 P.2d at 338, 21 Cal. Rptr. at 602. *See also* Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 764 (1943) (Curtis, J., dissenting); Bracken v. Bracken, 52 S.D. 252, 217 N.W. 192 (1927).

In Hayworth v. Williams, 102 Tex. 308, 314, 116 S.W. 43, 46 (1909), the court supported this position:

> If she and Thomas Jefferson were working together to a common purpose and the proceeds of labor performed by them became the joint property of the two, then she would occupy the position that a man would have occupied in relation to Thomas Jefferson under the same circumstances; each would own the property acquired in proportion to the value of his labor contributed to the acquisition of it.

[62] 18 F.2d 519 (1st Cir. 1927).

> tions. Their unchaste relations were, on this record, a mere incident of their association for business purposes. . . . Rights accruing out of labor and property embarked in a joint venture are not destroyed by the existence of unchaste sex relations between the joint venturers.[63]

In short, an approach which emphasizes the economic realities of illicit cohabitation, allowing property to be distributed considering the value of capital contributions, the value of services, and a fair share of the profits, may be the best solution to these disputes.[64]

CONCLUSION

The failure of illicit cohabitants to anticipate the eventual dissolution of their relationship will often leave the disposition of jointly acquired property to the unsettled common law. Many potential problems could be avoided if the parties initially agree to a framework for the orderly disposition of property acquired throughout the relationship. Traditionally, judicial resolution of these disputes has been marked by an unwillingness to develop a body of law for the equitable distribution of property. Thus, the number of cases where adequate relief has been granted is small. To correct this, courts should treat illicit cohabitation as an essentially economic venture in which the disposition of property acquired during the relationship should take into consideration the value of capital contributions, the value of services, and a fair share of the profits.

ROBERT C. ANGERMEIER

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[63] *Id.* at 521.

[64] Treating illicit cohabitation as a "joint venture" would produce the desired result without straining the rather flexible doctrine. *See* Davis v. Webster, 136 Ind. App. 286, 198 N.E.2d 883 (1964).