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Plaintiff and defendant began living together in 1964. At that time they entered into an oral agreement whereby they would combine their earnings and efforts and would share equally in all property accumulated while they cohabited. Plaintiff averred that, in addition, they agreed to hold themselves out to the general public as husband and wife, although both knew defendant was legally married to another woman. Plaintiff then consented to give up her career as an entertainer in exchange for financial support from defendant for the rest of her life. For the following seven years, plaintiff rendered full-time services as a companion, homemaker, housekeeper, and cook. All property acquired during this period was taken in defendant's name. When the parties separated, defendant continued to support plaintiff for eighteen months, but subsequently refused to provide further support. Plaintiff brought suit to enforce the oral contracts. The trial court granted defendant's motion for judgment on the pleadings and the court of appeals affirmed the dismissal. The California Supreme Court reversed and remanded. Held: Express agreements regarding the distribution of property between nonmarital partners are enforceable except to the extent that they expressly and inseparably rest on a consideration of meretricious sexual services. In the absence of an express agreement, courts may inquire into the conduct of nonmarital partners and apply theories of implied-in-fact agreements, resulting or constructive trusts, quantum meruit, or other equitable remedies in order to protect the parties' reasonable expectations. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

In the United States, the number of couples living together without being married has doubled in the last six years. In apparent response

to the increasing number of unwed couples and to changing social attitudes about marriage and the family, courts have begun to reconsider how property acquired during a nonmarital relationship should be divided and what role the courts should play in such divisions. The California Supreme Court in Marvin v. Marvin reevaluated the California system of nonmarital property division. In addition to considering the cause of action for breach of contract raised by the plaintiff, the court examined the broad issue of the property rights of nonmarital couples in the absence of an express agreement.

This note will discuss the traditional California rules governing the division of property acquired during the cohabitation of a man and woman who are not married, and will evaluate the impact of Marvin upon established remedies. The rights of nonmarital couples in California under Marvin will then be compared to the rights of their counterparts in Washington. Finally, suggestions will be offered for the development in Washington of a doctrine regulating the division of nonmarital property.

I. BACKGROUND

A. The Traditional Policy: The Vallera-Keene Doctrine

A meretricious spouse is one who cohabits with another with the

306, at 4–5 Table F (1977). In 1976, approximately 1.3 million persons lived in 660,000 two-person households in which the head of the household shared quarters with an unrelated adult of the opposite sex. Among individuals who lived alone or with persons not related to them, however, only nine percent lived in two-person households. Id. at 5.


4. The Minnesota Supreme Court recently relied on Marvin in ordering the equal division of real and personal property acquired during a 21-year cohabitation. Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977). In Carlson, the parties lived together without being married (apparently in a meretricious relationship) but held themselves out to the public as a married couple. The trial court held that the full half share of the accumulated property awarded to Ms. Carlson was an irrevocable gift from Mr. Olson in consideration for the wifely and motherly services she performed during the cohabitation. The Minnesota Supreme Court affirmed, stating that the trial court was justified in utilizing its inherent equitable powers to enforce what "all the facts of this particular case" indicated were the reasonable expectations of the parties. 256 N.W.2d at 255. Cf. text accompanying notes 132–37 infra (developments in Washington).

5. The term "meretricious" is defined as "of or relating to a prostitute: having a harlot's traits." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH
knowledge that the relationship does not constitute a valid marriage.\textsuperscript{6} Under the traditional California rule, no community property rights arose from a meretricious relationship.\textsuperscript{7} As a result of the rule, the party holding title to the property accumulated during the period of cohabitation was awarded that property upon termination of the relationship.\textsuperscript{8}

The rule for meretricious couples contrasted sharply with judicial treatment of couples involved in a putative marriage, a relationship in which at least one of the parties has a good faith belief in the validity of a void or voidable marriage. Upon the termination of a putative marriage, accumulated property was in effect divided as community property would be upon the dissolution of a valid marriage.\textsuperscript{9} The proportionate contribution of each "spouse" to the property was immate-

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\footnote{6. Comment, \textit{Rights of the Putative and Meretricious Spouse in California}, 50 \textit{CALIF. L. REV.} 866, 874 (1962). \textit{See also H. CLARK, LAW OF DOMESTIC RELATIONS} 52 (1968). The test is not whether the parties have the capacity to marry, but rather whether the parties know they are not validly married. Comment, \textit{supra} at 874. The cohabitation must last longer than a single night, but the courts have not arrived at a minimum time period which marks the establishment of a meretricious relationship for purposes of judicial division of accumulated property. For examples of relationships which have been held to be meretricious, see Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962) (eighteen years); Hill v. Westbrook's Estate, 39 Cal. 2d 458, 213 P.2d 727 (1950) (sixteen years); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943) (three years).}


\footnote{8. \textit{See notes} 17--32 and accompanying text \textit{infra}.}

rrial.\textsuperscript{10} The putative relationship alone created property rights because the putative spouse could reasonably expect to enjoy the continuing benefits accompanying the status of a valid marriage; equity would therefore protect his or her interest in jointly accumulated property. The meretricious spouse, on the other hand, could not reasonably expect to acquire a continuing interest in property, since he or she knew that the "illicit" relationship did not constitute a valid marriage.\textsuperscript{11}

Although meretricious spouses were denied marital or quasi-marital property rights, they were not precluded from recovering property to which they were otherwise entitled under alternate theories of contract and property law. The California Supreme Court laid the foundation for recovery based on an express contract in \textit{Trutalli v. Meraviglia}.\textsuperscript{12} The court found that the parties in \textit{Trutalli} had entered into two agreements; one to cohabit and one to jointly hold property.\textsuperscript{13} The court stated:

The fact that the parties . . . at the time they agreed to invest their earnings in property to be held jointly between them were living together in an unlawful relation did not disqualify them from entering into a lawful agreement with each other, so long as such immoral relation was not made a consideration of their agreement.\textsuperscript{14}

Later cases continued to enforce express agreements if the consideration for the promise of an ownership interest in property could be distinguished from the parties' sexual relationship.\textsuperscript{15} Similarly, the courts

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\bibitem{10} Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911); Macchi v. La Rocca, 54 Cal. App. 98, 201 P. 143 (1921).
\bibitem{12} \textit{Trutalli v. Meraviglia}, 215 Cal. 698, 12 P.2d 430 (1932).
\bibitem{13} Id. at 700, 12 P.2d at 431.
\bibitem{14} Id. at 701–02, 12 P.2d at 431.
\end{thebibliography}
indicated that express contracts to compensate for the performance of services other than sexual services would be enforced.  

Two cases, *Vallera v. Vallera* and *Keene v. Keene*, established the doctrinal framework for division based on property law. Three theories evolved under which spouses without title to the property accumulated during a nonmarital relationship were allowed recovery: resulting trust, constructive trust, and equitable lien.  

In *Vallera v. Vallera*, a woman brought an action for separate maintenance and division of accumulated property after the termination of a three-year nonmarital relationship. The California Supreme Court held in a four to three decision that a meretricious spouse does not acquire by reason of cohabitation alone an interest in property accumulated during the relationship. The *Vallera* majority stated in

> the consideration is conduct which is illegal or contrary to public policy when the illegal consideration is severable from promises involving legal consideration. **Restatement of Contracts** §§ 606, 607 (1932). A contract in which sexual intercourse is the consideration is illegal, but cohabitation between parties previous or subsequent to a contract does not invalidate the contract. *Id.* § 589; 6A A. Corbin, **Contracts** § 1476, at 622 (1962). See also Note, *Property Rights Between Unmarried Cohabitants*, 50 Ind. L.J. 389, 391–93 (1975).  


17. 21 Cal. 2d 681, 134 P.2d 761 (1943).  


19. A resulting trust arises from the transfer of property under circumstances which give rise to an inference that the transferee was not intended to take a beneficial interest. **Restatement (Second) of Trusts** § 404 (1959). A resulting trust is designed to carry out the unexpressed intentions of the parties. D. Dobbs, **Remedies** 241 (1973). If a nonmarital partner has contributed all or part of the purchase price for specific property, and title is in the name of the other spouse, under a resulting trust theory the partner without title is entitled to a share of the property proportionate to his or her contribution. *See* Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Padilla v. Padilla, 38 Cal. App. 2d 319, 100 P.2d 1093 (1940).  

20. In contrast to resulting or "implied-in-fact" trusts, constructive or "implied-in-law" trusts do not originate from the intent of the parties; rather, they are devices imposed by courts to prevent unjust enrichment and to force restitution to the plaintiff of something that in fairness and good conscience does not belong to the defendant. **Restatement of Restitution** § 160, Comment a (1937). The imposition of a constructive trust results in an in personam order requiring the defendant to transfer specific property in some form to the plaintiff. D. Dobbs, supra note 19, at 242; **Restatement of Restitution** § 160 (1937). If a nonmarital partner is induced to transfer title to the other partner, and can show either actual fraud, or constructive fraud plus a confidential relationship between the parties, courts will impose a constructive trust. Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 333 n.5, 21 Cal. Rptr. 593, 597 n.5 (1962).  


22. 21 Cal. 2d at 684–85, 134 P.2d at 762–63. The court in *Vallera* based its deci-
dictum that if meretricious spouses agreed to pool earnings and share equally in jointly accumulated property, equity would protect the interests of each in the property.\textsuperscript{23} In addition, in the absence of an express agreement, "the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition."\textsuperscript{24} The majority found, however, that the parties in Vallera had not made an express agreement concerning property rights, and that the only assets acquired during the relationship were the man's earnings.\textsuperscript{25} The woman therefore was denied recovery.\textsuperscript{26}

Nineteen years later, in Keene v. Keene,\textsuperscript{27} the supreme court nar-
rowed the basis of recovery for a nonmarital partner without title still further by interpreting the *Vallera* majority's use of the word "funds" to include only money or property of value. The meretricious couple in *Keene* lived together for eighteen years. For the first eight years of the relationship, the woman performed household services, animal husbandry, and farm labor on a ranch previously acquired by the man. The woman subsequently assisted the man in the real estate and furniture business he operated after the ranch was sold. The woman argued that she was entitled, under *Vallera*, to an interest in the property acquired in the man's name during the relationship to the extent that she rendered services beyond housekeeping. The *Keene* court found that she had not proved the elements necessary to establish an interest in the property under a joint venture, a partnership, or a resulting or constructive trust. The court stated that services performed after the purchase of real property do not constitute a contribution giving rise to a resulting trust with respect to such property, even though the services performed may increase the value of the property.

28. 57 Cal. 2d at 659, 371 P.2d at 330, 21 Cal. Rptr. at 594. Justice Peters, dissenting, suggested that the majority's statement of the facts underemphasized key points. *Id.* at 668, 371 P.2d at 336, 21 Cal. Rptr. at 600. Peters argued that the woman's activities went beyond the customary duties of a housewife. From 1938 to 1946, the woman raised a large commercial turkey flock and other poultry flocks, herded and raised sheep and cattle, cleared land for cultivation, and helped sow and harvest vegetable, grain, and nut crops. After the sale of the ranch in 1947, the woman continued to assist the man in his real estate and furniture businesses, although perhaps to a lesser extent. *Id.* at 668–72, 371 P.2d at 336–37, 21 Cal. Rptr. at 600–01.

29. 57 Cal. 2d at 660, 371 P.2d at 331, 21 Cal. Rptr. at 595. See note 30 infra.

30. 57 Cal. 2d at 660, 371 P.2d at 331, 21 Cal. Rptr. at 595. Essentially the court found that there was no express agreement between the parties to establish a partnership or joint venture. California law defines a partnership as an association of two or more persons to carry on as co-owners a business for profit. *Cal. Corp. Code* § 15006(1) (West 1977). In contrast, a joint venture or joint adventure is an undertaking by two or more persons to carry out a single business enterprise for profit. *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P.2d 931 (1947). Knowledge, skill, and services as well as money constitute valid contributions to a joint venture. *Banks v. Puma*, 37 Cal. 2d 838, 236 P.2d 369 (1951). A partnership ordinarily engages in a continuing business, whereas a joint venture is formed for a single transaction or series of transactions. *Keyes v. Nims*, 43 Cal. App. 1, 9, 184 P. 695, 698 (1919). The incidents of both relationships are substantially similar. See *Zeibak v. Nassen*, 12 Cal. 2d 1, 12, 82 P.2d 375, 380 (1938).

31. 57 Cal. 2d at 665, 371 P.2d at 333–36, 21 Cal. Rptr. at 597–600. See note 19 supra.

32. 57 Cal. 2d at 664 n.5, 371 P.2d at 333 n.5, 21 Cal. Rptr. at 597 n.5.

33. *Id.* at 665–68, 371 P.2d at 334–36, 21 Cal. Rptr. at 598–600. Justice Peters, in his dissent, criticized the majority for its narrow interpretation of the term "funds." General contract and trust law, Justice Peters maintained, recognizes that the contribution of personal services can constitute consideration. *Id.* at 672–75, 371 P.2d at 151
With the development of the *Vallera-Keene* doctrine, the legal theories available to a nonmarital partner without title arguing for a share of the property accumulated during the relationship were increasingly restricted. Unless the partner without title could prove an express agreement, there was ample basis for a court to deny recovery. This restriction of remedies constituted an implicit refusal to acknowledge that a nonmarital partner without title, usually a woman who had contributed household services, could reasonably expect to enjoy an ownership interest in the accumulated property. The courts appeared to view meretricious relationships as contrary to public policy and consequently undeserving of the protections the legal system affords conventional domestic relationships.

**B. The Erosion of Tradition: The Cary Doctrine of Familial Rights**

In 1969, the California legislature enacted the Family Law Act, a statute designed to eliminate the concepts of fault and guilt from marriage dissolutions. In addition to creating no-fault divorce, the Act amended the community property laws to provide that community

338–40, 21 Cal. Rptr. at 602–04. Furthermore, although the woman could not claim an interest in the ranch itself, she could possibly establish an interest in the fund created by the sale of the ranch if its value had been increased at least in part by her efforts. *Id.* at 672–73, 371 P.2d at 339, 21 Cal. Rptr. at 603. Justice Peters argued that it could be inferred from the circumstances that the parties intended the joint fund to be held by defendant in trust for plaintiff. He stated: "It certainly does no lasting harm to the law to indulge in the mild presumption that parties intend to deal fairly with each other and that such presumption will be enforced by presuming the intent to create a trust." *Id.* at 674, 371 P.2d at 339, 21 Cal. Rptr. at 603.

Justice Peters concluded that the majority had arbitrarily denied the woman recovery according to its own standards of morality. He observed: 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.


property, with limited exceptions, is to be divided equally upon dissolution of marriage without regard to the fault of either spouse. The Act further specifies that the jointly accumulated or quasi-marital property of a putative marriage is to be divided according to the community property system if the division of the property is in issue.

In *In re Marriage of Cary*, a California court of appeal construed the removal of fault determinations in marriage dissolutions as an indication of a policy determination that concepts of guilt are "no longer relevant in the determination of family property rights, whether there be a legal marriage or not." The court then held that the community property system of the Family Law Act applied to any actual family relation which included cohabitation and the mutual

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36. *Cal. Civ. Code* § 4800 (West Supp. 1977). There are three exceptions to equal division. The court may award any asset to one party as necessary to divide the property on a substantially equal basis where economic circumstances warrant such a division. Second, the court may offset any sum that has been deliberately misappropriated from the community by one party from that party's award of property. Finally, if the net value of the community is less than five thousand dollars, the court may award the entire community to the appearing party. *Cal. Civ. Code* § 4800(b) (West Supp. 1977).

37. *Cal. Civ. Code* § 4452 (West Supp. 1977). The statute defines a putative spouse as a person who believed in good faith that a void or voidable marriage was valid. It defines quasi-marital property as the property acquired during the relationship which would have been community or quasi-community had the marriage not been invalid. *Id.* This statutory scheme is in accord with the common law. See notes 9–10 and accompanying text supra.

38. 34 Cal. App. 2d 345, 109 Cal. Rptr. 862 (1973). Paul and Janet Cary lived together for eight years, and held themselves out as validly married persons, although both knew they were not formally married. They had discussed going through a ceremony at various times, but never followed through. Their four children listed "Paul and Janet Cary" as their parents on birth certificates and school forms. Janet stayed within the home while Paul was employed outside the home. The case is discussed in Note, *In Re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974); Comment, *In re Marriage of Carey: The End of the Putative-Meretricious Spouse Distinction in California*, 12 SAN DIEGO L. REV. 436 (1975); 9 U.S.F.L. REV. 186 (1974).

39. 34 Cal. App. 3d at 352–53, 109 Cal. Rptr. at 866 (emphasis added). The court observed that § 4452 does not penalize or reward putative spouses when one spouse knows of the marriage's infirmity or non-existence and the other does not. Because a court is not permitted to consider the guilt or innocence of the parties in a putative relationship, the Cary court reasoned, such a consideration should not be made in other nonmarital relationships. Otherwise, the court concluded, it would be obliged to:

[P] resume a legislative intent that a person, who by deceit leads another to believe a valid marriage exists between them, shall be legally guaranteed half of the property they acquire even though most, or all, may have resulted from the earnings of the blameless partner. At the same time we must infer an inconsistent legislative intent that two persons who, candidly with each other, enter upon an unmarried family relationship, shall be denied any judicial aid whatever in the assertion of otherwise valid property rights. *Id.* at 352, 109 Cal. Rptr. at 865–66.

40. Sociologists have defined a "family" as "a group defined by a sex relationship
recognition and assumption of the normal rights, duties, and obligations of marriage, regardless of whether the relationship could be characterized as marital, putative, or meretricious.\textsuperscript{41}

The \textit{Cary} court's broad application of the Family Law Act was endorsed a year and a half later by a different court of appeal in \textit{In re Estate of Atherley}.\textsuperscript{42} The \textit{Atherley} court held that meretricious spouses have the same property rights as putative spouses under the Family Law Act.\textsuperscript{43} The court carefully emphasized, however, that it was seeking to protect family property rights, not the rights of all meretricious spouses. Consequently, only long-term, stable meretricious relationships would come within the community property system.\textsuperscript{44} Five months later, in \textit{Beckman v. Mayhew},\textsuperscript{45} another California court criticized and rejected the \textit{Cary-Atherley} construction of the Act in favor

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\item \textsuperscript{41} 34 Cal. App. 3d at 352–53, 109 Cal. Rptr. at 866.
\item \textsuperscript{42} 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975). When Harold Atherley died in 1969, two women filed for a determination of heirship as the surviving spouse. The decedent married Ruth Atherley in 1933, and lived with her until 1947 when he left her for Annette Atherley. Decedent and Annette lived together, pooling their resources to acquire property, until decedent's death. In 1961 decedent obtained a divorce from Ruth in Mexico, and married Annette in Reno, Nevada, in 1962.
\item \textsuperscript{43} Id. at 769, 119 Cal. Rptr. at 48.
\item \textsuperscript{44} The \textit{Atherley} court cautioned: "All meretricious relationships, however, do not automatically trigger this rule." \textit{Id.} In support of its holding the court cited additional changes in California statutes which it viewed as implementing a public policy that sex is an improper basis for discrimination regarding family property rights. The court reasoned that the \textit{Vallera-Keene} doctrine discriminated against women by refusing to attribute economic value to household services, and that to continue to support that doctrine would be inconsistent with the new policy. \textit{Id.} at 769 n.11. 119 Cal. Rptr. at 48 n.11.
\item \textsuperscript{45} 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975). In \textit{Beckman}, the parties lived together for 12 years and did not hold themselves out as married. They did, however, file joint tax returns and held a joint checking account under the man’s name. The man deposited his earnings in the joint account and the woman performed housekeeping duties.
\end{itemize}
of the traditional rule. The Beckman court reasoned that the Family Law Act explicitly deals only with divisions of property at the termination of valid and putative marriages, and that the legislature probably did not intend to change the law dealing with nonmarital relationships. While recognizing that developing social attitudes related to sexual equality may have made the Vallera-Keene doctrine anachronistic, the Beckman court nonetheless concluded that it was bound by the earlier decisions of the state supreme court.

The Cary and Atherley decisions can be viewed as an attempt to separate moral judgments relating to sexual behavior from judicial determinations of property ownership. Unfortunately, the courts in Cary and Atherley were unwilling to characterize the new rule as an evolution of the common law; both relied instead on an arguably inaccurate analysis of changes in statutory law as authority for finding a changed public policy. Moreover, even if an alteration of social mores does make abandonment of the traditional rule appropriate, it is not clear that the Cary-Atherley doctrine is the most desirable solution. The Cary-Atherley doctrine amounts to the restoration of common law marriage in California, with the potential for im-

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46. See notes 5–21 and accompanying text supra.
47. 49 Cal. App. 3d at 535, 122 Cal. Rptr. at 607. The Beckman court reasoned that if the legislature had intended to overrule the Vallera-Keene rule, it would not have chosen such an "extraordinarily indirect, extremely devious and remarkably subtle" method. Id. This assessment of legislative intent was apparently shared by the supreme court in Marvin, which asserted that even if the interpretation of the Cary court concerning the rights of putative spouses under § 4452 was correct, "it does not necessarily follow that a nonmarital partner has an identical right." Marvin v. Marvin, 18 Cal. 3d at 680 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18.
48. 49 Cal. App. 3d at 535, 122 Cal. Rptr. at 607. The concurring judge in Beckman, Justice Paras, disagreed with the majority's conclusion that developing social attitudes may have made the Vallera-Keene rule obsolete, stating that he could find no change in social attitude which would prefer "informal living arrangements to solemnized marriage, nor any reason . . . to suggest one." Id. at 536, 122 Cal. Rptr. at 608.
49. See Comment, supra note 1, at 199–200; Note, supra note 38, at 1232–39. These commentators observe that the Family Law Act does not, on its face, recognize any property rights acquired by people in meretricious relationships. One writer notes that "[i]t is a very long step to imply recognition of community property rights in a meretricious spouse from the Legislature's express purpose of eliminating guilt and fault as grounds for dissolution of marriage, awarding of alimony and division of community property." Comment, supra note 1, at 200.
50. See note 48 supra.
51. The elements of common law marriage are: "(1) an actual and mutual agreement to enter into a matrimonial relationship (2) between parties capable in law of making such an agreement with (3) cohabitation as husband and wife, or a public holding out of each other as husband and wife with (4) mutual assumption of marital duties and obligations [sic]". 9 U.S.F.L. Rev. 186, 202 (1974). These elements are very similar to the elements listed by the Cary court as establishing a relation-
posing an essentially marital status upon individuals who may have deliberately elected to forego the legal prescriptions of a state-regulated union. 52

II. THE COURT'S REASONING

The Marvin majority reaffirmed the traditional rule allowing recovery based on express contracts, 53 and extended recovery to include implied-in-fact contracts. 54 The majority then considered 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." 55 The court answered in the negative, again reaffirming the traditional rule. The majority then instituted a policy designed to fulfill the reasonable expectations of the parties to a nonmarital relationship. Noting that couples choose to forego marriage for various reasons, the majority directed the lower courts to inquire into the conduct of the parties to ascertain the applicability of other legal theories—implied-in-fact contract, implied-in-fact partnership or joint venture, constructive or resulting trust, or quantum meruit. 56

The Marvin majority reviewed the pre-Cary decisions and concluded that the courts' refusal to permit nonmarital partners to utilize successfully theories of implied-in-fact contract or equitable remedies resulted in an unfair distribution of property which was not justified by the reasons advanced to support the denial of relief. First, the majority stated, concepts of punishing a "guilty" partner have no place

52. See notes 75–76 and accompanying text infra.
53. 18 Cal. 3d at 667–75, 557 P.2d at 111–16, 134 Cal. Rptr. at 820–25. The majority specifically found that "no policy precludes the courts from enforcing such agreements." Id. at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. See notes 12–16 and accompanying text supra for a discussion of the traditional rule.
54. 18 Cal. 3d at 683–84, 557 P.2d at 121–22, 134 Cal. Rptr. at 830–31.
55. Id. at 676, 557 P.2d at 117, 134 Cal. Rptr. at 826 (quoting Justice Traynor in Vallera v. Vallera, 21 Cal. 2d 681, 684, 134 P.2d 761, 762 (1943)).
56. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.
when both parties are equally "guilty." Furthermore, the majority observed, to the extent that one partner is "punished" by the denial of relief, the other partner is necessarily rewarded for equally "guilty" conduct by retaining a disproportionately large share of accumulated property.

Third, there is no more reason to presume that personal household services are contributed as a gift than to presume that money or property is contributed as a gift. Fourth, the public policy of protecting the institution of marriage is not served by perpetuating judicial rules resulting in inequitable property distributions in nonmarital relationships. The Marvin majority concluded: "The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."
III. MARVIN'S IMPACT: POTENTIAL THEORIES OF RECOVERY

In Marvin, the California Supreme Court attempted to eliminate historical legal barriers so that a nonmarital partner would have "the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person." The decision presents the potential for the development of a doctrine more responsive to the needs and expectations of nonmarital partners than the traditional policy denying recovery to partners without title in the absence of an express agreement.

As one commentator has noted, three major doctrines historically have precluded the application of otherwise standard legal rules to nonmarital property divisions. First, courts utilized doctrines normally applicable to arm's length business transactions rather than those generally applicable to noncommercial domestic settings. Second, some courts took the position that cohabitation between the parties to an express or implied-in-fact contract rendered the contract illegal and unenforceable. Third, courts refused to attribute economic value to personal household services. The effect of Marvin on each of these historical doctrines will be analyzed in the following sections.

A. Nonmarital Relationships: Business or Family?

Nonmarital partners traditionally have existed in the abyss between the legal treatment of marriage partners and business associates. Both marital and business relationships are the objects of well-developed areas of the law, and could serve as models for the regulation of nonmarital relationships. The threshold question implicitly before the state supreme court in Marvin was whether to treat nonmarital partners as individuals functioning in a setting analogous to a business, or as individuals enjoying a status analogous to marriage.

In effect, the Cary and Atherley courts resolved this implicit issue

62. Id. at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.
64. Id.
65. Id.
66. Id.
in favor of creating a marriage-like status. The Cary-Atherley concept of an "actual family relationship" is functionally indistinguishable from putative or common law marriages. Each focuses on one aspect of a relationship between two people—the fact that they are cohabiting—and then subordinates individual differences by imposing upon all persons within that class a set of legal incidents based on a stereotypical relationship.

The advantage of characterizing a nonmarital relationship as a legal status is that it formalizes the union and simplifies regulation. It aids and protects those people who are poor, or ignorant of the legal consequences of cohabitation, or from cultures which have long accepted informal family relationships. It may also satisfy what some commentators perceive as social pressure in favor of formalized sexual ties.  

68. See the discussion of Cary and Atherley at notes 38-44 and accompanying text supra. "Status" is generally defined as "the condition (as arising out of age, sex, mental incapacity, crime, alienage, or public station) of a person that determines the nature of his legal personality, his legal capacities, and the nature of the legal relations to the state or to other persons into which he may enter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2230 (1961). "Status" has been defined by the courts as a legal personal relationship, not temporary in nature nor terminable at the will of the parties, with which third persons and the state are concerned. Holzer v. Deutsche Reichsbahn Gesellschaft, 159 Misc. 830, 290 N.Y.S. 181, 191 (Sup. Ct. 1936).

69. The same analysis has been applied to marriage. Foster, supra note 3, at 463.


71. Professor Bruch suggests that most persons do not consider the legal ramifications of cohabitation. She states:

Most persons, however, are undoubtedly much less sophisticated concerning financial matters than those who enter express agreements. Indeed, it is much more likely that they enter their relationship either

1. in ignorance of the legal consequences of either marriage or nonmarriage (perhaps the majority of non-lawyers believe that common law marriage exists in all jurisdictions and that protection is granted to stable nonmarital relationships),

2. under the assumption that some legal protections are available, or

3. with absolutely no thought given to the legal consequences of their relationship.

Bruch, supra note 63, at 135. See also Weyrauch, supra note 70, at 101. The parties in Cary apparently thought that they had established a common law marriage, though they knew they were not ceremonially married. Respondent's Reply Brief, In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

72. Bruch, supra note 63, at 101. See generally Arraros, supra note 40.

73. Weyrauch, supra note 70, at 108. In addition, one proponent argued that such an approach is desirable because it would acknowledge the value of stable personal relationships, the fact that children are born of such relationships and should be protected, that persons involved in such relationships make contributions of personal services (particularly women who remain at home), and that there is no single, or unchanging, "morality" in need.
The difficulty with a status model, however, is that the incident package of legal rights and obligations which has been developed may be totally unsuited to the needs and expectations of the individuals involved in a nonmarital relationship. The changing roles of women, advances in birth control methods, and altered attitudes about sex have made it increasingly unrealistic to presume that the same intentions and expectations attend each extramarital cohabitation. Some couples may wish to avoid the permanent commitment that marriage implies, some may cohabit as a prelude to marriage, and some may wish to remain single in order to preserve pension or retirement benefits from a previous marriage. To impose a marriage-like status on adults who have consciously chosen to avoid marriage is not only philosophically objectionable, but may also be constitutionally unacceptable.

In *Marvin*, the California Supreme Court chose to treat nonmarital partners as business associates who happen to be cohabiting, rejecting the *Cary* court's status approach. By characterizing nonmarital relationships as business ventures or economic units, the court left untouched the traditional rule that cohabitation alone does not create in one party any interest in the earnings and property of the other party, and preserved the flexibility needed to deal equitably with the wide
spectrum of nonmarital relationships. Although the court reaffirmed the traditional rule refusing to treat extramarital cohabitation as giving rise to a status, it also modified some of the rule's harsher consequences.

B. Contractual Remedies

Under Marvin, express and implied-in-fact agreements between nonmarital partners are enforceable in the absence of fraud or duress. It is questionable, however, whether Marvin authorizes the application of quasi-contractual or implied-in-law agreements to disputes between nonmarital partners. Consequently, consensual and nonconsensual contractual remedies will be examined separately.

1. Express and implied-in-fact agreements

Two aspects of the court's treatment of contractual remedies are significant: the court's virtual elimination of the defense of illegality to express contracts (unless explicitly based on sexual services), and its extension of enforceable contracts to include implied-in-fact agreements.

Judicial enforcement of consensual agreements is sound policy, and is in harmony with the trend toward non-regulation of the sexual activities of adults. In addition, the court's willingness in Marvin to enforce intentional agreements between nonmarital partners in the absence of fraud, duress, or overreaching is compatible with the arguments of legal scholars who advocate changing the law governing the incidents of marriage from one of status to contract.

78. For a discussion of nonmarital relationships advocating a similar result, see Note, supra note 15, at 401–02 (1975).

79. 18 Cal. 3d at 668–72, 557 P.2d at 112–15, 134 Cal. Rptr. at 821–24.

80. Id. at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

81. California permits married persons to contract as to the ownership of their own property. CAL. CIV. CODE § 5103 (West 1970). Fairness demands that nonmarital partners be given the same control over their property.

82. Professor Bruch states: "Legislatures have decriminalized nonmarital sexual activity, the Constitutional guarantee of sexual privacy has been extended to single people, and courts have sustained parental custody rights in the nonmarital family." Bruch, supra note 63, at 108 (footnotes omitted).

83. See, e.g., Foster, supra note 3, at 463; Gamble, The Antenuptial Contract, 26 U. MIAMI L. REV. 692 (1972); Rieke, The Dissolution Act of 1973: From Status to Contract?, 49 WASH. L. REV. 375 (1974); Weitzman, supra note 3, at 1169. It is also in harmony with what one commentator views as a shift from state regulation
Extending the contractual remedies available to nonmarital partners to include implied-in-fact agreements provides a greater chance of recovery for non-title-holding partners. Past cases have shown that couples often do not verbalize their expectations and intentions, and the courts' traditional refusal to examine the surrounding circumstances to determine the formation and terms of an agreement has usually resulted in one partner retaining all of the accumulated property.

Contractual remedies are attractive because they are flexible enough to reflect the varied intentions and arrangements possible in nonmarital relationships; for example, parties can agree to share equally in all property, or to share equally only in housekeeping expenses, keeping all other assets and earnings separate. The potential range of remedies available to nonmarital partners in California under *Marvin* appears to be broad. A liberal reading of *Marvin* would indicate that express or implied-in-fact agreements of coownership, exchange, joint venture or partnership, and contracts for services are possible theories for recovery.

The *Marvin* court sidestepped the issue of maintenance or "alimony" by rejecting the Cary-Atherley status analysis and treating the plaintiff's allegations of defendant's support obligations as a purely contractual claim. The issue will undoubtedly arise, however, in future cases. Alimony in the marital setting was first conceived of by the courts as compensation to the wife for loss of the husband's support as a result of the termination of the marriage. The trend in California has been to award maintenance for a limited time only, reflecting

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of the formation, effects, and dissolution of marriage to non-regulation. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 Va. L. Rev. 663, 665-66 (1976). Glendon argues that nonregulation of marriage has been accompanied by expanding state involvement with the family—that is, economic and child-related matters—without regard to whether a ceremonial marriage has taken place. *Id.*


85. *See*, e.g., In re Estate of Thornton, 81 Wn. 2d 72, 499 P.2d 864 (1972).

86. *See* Marvin v. Marvin, 18 Cal. 3d at 674 n.10, 557 P.2d at 116 n.10, 134 Cal. Rptr. at 825 n.10.

87. Putative spouses may recover the reasonable value of services rendered without a showing that there was an express contract or that the services were rendered in expectation of monetary reward. The value of support is subtracted from that recovery, however. Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 100-02, 69 P.2d 845, 848 (1937).


the view that divorce should constitute a final and definite termination of the relationship between the parties, with a minimum of future obligations. If maintenance awards are allowed at all between nonmarital partners, a similar philosophy should be followed. To be consistent with Marvin, when support is part of a contract between the parties, the court should enforce the provision unless the result would be unconscionable.

2. Implied-in-law agreements (quasi-contract)

It is not clear whether the Marvin court restricted contractual recovery between nonmarital partners to express and implied-in-fact agreements, or whether quasi-contractual or implied-in-law agreements are also permissible theories of relief. The court's language is ambiguous, but it appears more likely that recovery under Marvin is limited to express and implied-in-fact agreements.

The court summarized its decisions as establishing that "in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations." In its discussion of the traditional refusal to allow recovery on "principles of implied contract or equity," however, the court stated:

But, although parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain. The parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort.

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90. Rheinstein, Division of Marital Property, 12 Willamette L.J. 413, 425 (1976).
91. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831 (emphasis added). In contrast to implied-in-fact remedies, implied-in-law remedies do not originate from the intent or acts of the parties; rather, they are devices imposed by courts to prevent unjust enrichment and to force restitution to the plaintiff of something that in fairness and good conscience does not belong to the defendant. See G. Bogert, Trusts 287 (5th ed. 1973); D. Dobbs, supra note 19, at 241.
92. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.
93. Id. (emphasis added). Since the doctrine of quasi-contract or implied-in-law contracts does not consider the parties' intentions, the doctrine may be applied to situations in which no agreement exists, an implied-in-fact agreement exists, or where one party is hostile to any recovery by the other party. Quasi-contractual recovery results in a money judgment reflecting the court's assessment of the benefits that have accrued to the defendant through the acts of the plaintiff. Restatement of Restitution § 155(1) (1937).
Although this language can be read as approval of quasi-contractual recovery\(^{94}\) for nonmarital partners, it is more probable that the court was hypothesizing rather than decreeing.\(^{95}\) The court carefully limited its discussion to implied-in-fact remedies throughout the rest of the opinion. For example, recovery in quantum meruit, a measure of the value of services rendered under both implied-in-fact and implied-in-law contracts,\(^{96}\) is limited to instances in which a nonmarital partner can show that he or she rendered services with the expectation of monetary reward.\(^{97}\) The only implied-in-law remedy included in the court's list of the specific remedies available is constructive trust theory, already permissible under the *Vallera-Keene* doctrine.\(^{98}\)

Even if the court has not sanctioned quasi-contractual recovery in *Marvin*, it has not precluded the development of such a doctrine.\(^{99}\) If the court does extend theories of recovery to include quasi-contractual recovery, it should carefully identify the types of criteria that delineate a relationship deserving of judicial protection.\(^{100}\) Otherwise, judicial

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\(^{94}\) The court uses the term "implied contract" but it is in fact referring to implied-in-fact contracts. See 18 Cal. 3d at 678 n.16, 557 P.2d at 118 n.16, 134 Cal. Rptr. at 827 n.16.

\(^{95}\) Justice Clark, however, implied that the majority's opinion included nonconsensual remedies. He observed: "By judicial overreach, the majority perform a nunc pro tunc marriage, dissolve it, and distribute its property on terms never contemplated by the parties, case law, or the Legislature." 18 Cal. 3d at 686, 557 P.2d at 124, 134 Cal. Rptr. at 833. It is difficult to ascertain, however, whether Justice Clark was reacting to the majority's endorsement of implied trusts and the allocations of economic value to household services, or whether he was reacting to the possibility of quasi-contractual recovery. See Respondent's Brief, Marvin v. Marvin, No. 44359 (Cal. Ct. App., 2d Dist. July 23, 1975); Petitioner's Supplemental Brief Following Grant of Hearing, Marvin v. Marvin, 18 Cal. 3d 600, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

\(^{96}\) A. Corbin, * supra* note 15, § 20, at 51.

\(^{97}\) 18 Cal. 3d at 684, 557 P.2d at 122–23, 134 Cal. Rptr. at 831–32. This reaffirms the traditional rule. See Hill v. Estate of Westbrook, 39 Cal. 2d 458, 247 P.2d 19 (1952). The majority did nothing pragmatically to increase the frequency or extent of recovery under the theory. It is doubtful that many couples are knowledgeable or sophisticated enough to consider the economic and legal consequences of not marrying or marrying. To condition recovery upon the showing of intent to receive economic benefit in an emotionally loaded situation is unrealistic. The application of this doctrinal requirement, originally designed to fit business transactions, seems inappropriate and unduly restrictive in this context.

\(^{98}\) See text accompanying note 20 *supra*. Putative spouses were traditionally entitled to quasi-contractual relief. Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937).

\(^{99}\) See text accompanying note 94 *supra*.

\(^{100}\) For instance, would the general doctrinal requirement of one party unjustly benefiting at another's expense be sufficient for recovery, or would other elements need to be present? Would the court consider the length of the relationship, the presence of children, or the extent of the parties' assumption of the duties and obligations usually associated with marriage?
intervention under quasi-contractual theory could approach the imposition of a quasi-marital status upon nonmarital partners.\(^{101}\)

C. Economic Value for Personal Services

Under *Marvin*, personal services can constitute a contribution of value justifying the imposition of a constructive trust.\(^{102}\) This reform is long overdue. Recognizing the fact that household services have economic value, economists and social scientists have attempted to estimate the monetary value of those services.\(^{103}\) Indeed, the community property system has always implicitly recognized the value of homemaking and child care.\(^{104}\)

In most marital families, the responsibility of homemaking and child care falls upon one spouse while the other spouse is employed outside the home; and it is probable that the allocation of duties is similar in many, if not most, nonmarital households.\(^{105}\) Consequently, constructive and resulting trusts may be frequently utilized in future disputes over real property accumulated during nonmarital relationships.\(^{106}\)

When there is no real property involved, recovery in quantum meruit for the value of services rendered less the value of support provided may be possible. The California courts traditionally have precluded recovery by presuming that household services provided by a nonmarital partner are intended as a gift.\(^{107}\) As the *Marvin* court indicated,\(^{108}\) this presumption is illogical and unfair. Furthermore, it is in

\(^{101}\) See notes 73–76 and accompanying text supra.

\(^{102}\) 18 Cal. 3d at 683–84, 557 P.2d at 121–22, 134 Cal. Rptr. at 830–31.

\(^{103}\) Economists’ estimates of the market value of the average American housewife’s annual services range from $4,705 to $13,364. OFFICE OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMINISTRATION, RESEARCH AND STATISTICS NOTE NO. 9, *Economic Value of a Housewife at 1* (1975); Galbraith, *A New Economic Role for Women?*, 155 CURRENT 41, 43 (1973). These figures do not reflect the intangible benefits rendered by a family member at home, such as improvement of assets by good management, companionship, and social interaction with neighbors which an employee could not render. Evans, *Property Interests Arising from Quasi-Marital Relations*, 9 CORNELL L.Q. 246, 252, 266 (1924).


\(^{105}\) Bruch, supra note 63, at 112.

\(^{106}\) If record title is held in the name of only one party, coownership is enforceable only under trust theory because of the rules of record title. D. Dobbs, supra note 19, at 240.


\(^{108}\) 18 Cal. 3d at 679, 557 P.2d at 119, 134 Cal. Rptr. at 828.
direct contrast to general contract law, in which it is increasingly presumed that services must be paid for unless it can be shown that they were intended as a gift.\textsuperscript{109}

In his dissent in \textit{Marvin}, Justice Clark implied that the difficulty of measuring the value of household services is one factor that should preclude recovery.\textsuperscript{110} Although valuation is a difficult and complex issue, it is by no means an insurmountable problem. Traditional quantum meruit doctrine involves measuring the economic value of services performed;\textsuperscript{111} nothing logically precludes similar treatment of household services in nonmarital relationships.

IV. REMEDIES AVAILABLE TO NONMARITAL PARTNERS IN WASHINGTON

The law in Washington\textsuperscript{112} basically corresponds to the remedies provided for nonmarital partners under the \textit{Vallera-Keene} doctrine.\textsuperscript{113} Cohabitation alone creates no property interests,\textsuperscript{114} nor does the community property system apply to nonmarital relationships.\textsuperscript{115} Washington does not follow the doctrines of either common law marriage\textsuperscript{116} or putative marriage.\textsuperscript{117} Instead, Washington law distinguishes between meretricious relationships and "innocent relationships," in which either or both of the parties in good faith enters into an invalid marriage.\textsuperscript{118} In the latter class of relationships, Washington

\textsuperscript{109} G. GILMORE, \textsc{The Death of Contract} 88 (1974). Gilmore states: "We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift." \textit{Id}. 110. 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832.
113. \textit{Id}.; \textit{See} notes 17–33 and accompanying text \textit{supra}.
114. \textit{In re} Estate of Sloan, 50 Wash. 86, 96 P. 684 (1908).
118. \textit{Id}. at 737.
courts will award the innocent party or parties a proportion of the accumulated property "as would under all the circumstances be just and equitable." 119

Property acquired in the course of a meretricious relationship, in the absence of some trust relation, belongs to the party holding legal title. 120 The parties are presumed as a matter of law to have intended to dispose of jointly accumulated property exactly as they have disposed of it. 121 This presumption, known as the "Creasman presumption," can be rebutted by "evidence to the contrary." 122 Nonmarital partners without title have used four legal devices in their attempts to rebut the Creasman presumption: implied-in-fact partnership or joint venture, 123 constructive trust, 124 resulting trust, 125 and express or implied-in-fact contract to make a will. 126 The parties to a meretricious relationship have the "same right to contract with each other as domestic strangers," 127 but Washington courts will not assume that parties had an agreement to share property equally in the absence of proof of a conveyance or contractual relationship. 128

The Creasman presumption has been criticized both by commentators 129 and by the Washington courts 130 as resulting in unfair distributions of property, often in opposition to the actual intent

121. Id. at 356, 96 P.2d at 841. The presumption operates in a particularly harsh manner in those cases in which a nonmarital relationship ends with the death of one partner. The combination of the deadman's statute, R.C.W. § 5.60.030 (which provides that a party in interest cannot testify to transactions or statements made by the decedent), with the Creasman presumption operates to preclude the recovery of jointly accumulated property by a non-title holding partner. In re Estate of Thornton, 81 Wn. 2d 72, 79, 499 P.2d 864, 867 (1972); Poole v. Schricte, 39 Wn. 2d 558, 562-63, 263 P.2d 1044, 1048 (1951).
122. Iredell v. Iredell, 49 Wn. 2d 627, 630, 305 P.2d 805, 808 (1957).
123. See In re Estate of Thornton, 81 Wn. 2d 72, 499 P.2d 864 (1972); Poole v. Schricte, 39 Wn. 2d 558, 236 P.2d 1044 (1951).
126. See In re Estate of Thornton, 81 Wn. 2d 72, 499 P.2d 864 (1972). To establish the existence of a contract to make a will, it must be shown (1) that a contract was entered into between the deceased and the plaintiff; (2) that the services contemplated as consideration have been performed; and (3) that the services were performed in reliance upon the contract. Id. at 76, 499 P.2d at 866.
of parties to a nonmarital relationship. Justice Finley deplored the hypocrisy of the rule:

[T] his court . . . 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 . . . 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.

. . . So, although the courts proclaim that they will have nothing to do with such matters, the proclamation in itself establishes, as to the parties involved, an effective and binding rule of law which tends to operate purely by accident or perhaps by reason of the cunning, anticipatory designs of just one of the parties.131

Although the Washington Supreme Court has not yet overruled Creasman,132 it has indicated its willingness to invalidate its "archaic presumption," given the proper case.133 The court has intimated in dictum that it may establish a common law doctrine of property rights similar to the Cary-Atherley doctrine under which property rights, though perhaps not support rights, will be granted upon the termination of a long-term, stable nonmarital family relationship.134 In Latham v. Hennessey135 the court suggested in dictum that it would consider the duration of the relationship, the purpose of the relationship, and the pooling of resources and services for joint projects.136 The court stated that if a long-term, stable family relationship exists,

it is reasonable to assume that each member in some way contributed to the acquisition of the property. A court could then examine the relationship and the property accumulations and make a just and equitable disposition of the property. Also, if warranted by the facts of a particular case, the court could apply the community property laws by analogy to determine the rights of the parties.137

132. The court has, however, restricted Creasman "in its application to its own particular facts." Id. at 313, 311 P.2d at 691.
136. Id. at 554, 554 P.2d at 1059.
137. Id.
Like the Cary-Atherley doctrine, this proposed approach comes close to restoring common law marriage, if it does not in fact restore it. The negative results of a status model have already been discussed. A better approach would be to overrule Creasman, and to refine existing remedies in order to alleviate some of the harsher results of the current doctrine. If a nonmarital couple enters into an express agreement regarding property distribution, that agreement should govern unless it produces unconscionable results. If the facts and circumstances show that there is an implied-in-fact agreement of any kind, that agreement should govern property division. In the absence of an agreement, the courts should use their equity powers to prevent unjust enrichment in accordance with general common law doctrines.

V. CONCLUSION

In Marvin v. Marvin, the California Supreme Court assured nonmarital couples access to judicial relief upon termination of the relationship. By allowing recovery under a variety of contract and trust theories and rejecting a status-based analysis, the court ensured that the judiciary will have the flexibility necessary to deal fairly with the differing expectations of nonmarital couples. It left many issues unresolved, however, including whether nonmarital spouses are entitled to quasi-contractual relief or maintenance, and what form maintenance awards will take if allowed. The court has cleared the way in Marvin for judicial resolution of these issues, but it has not committed itself to a particular course of action.

The Washington Supreme Court has indicated that it will adopt a status-oriented doctrine of nonmarital property division when the problem next comes before it. Before creating a quasi-marital status which may contravene the intentions of many nonmarital couples, the Washington court would do well to examine the California court's solution in Marvin.

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138. See notes 74–76 and accompanying text supra.
139. This result was advocated by amici curiae in Marvin. Brief for Brigitte Bodenheimer, et al., as Amici Curiae at 25, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).