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## Domestic Relations—Breach of Promise to Marry: Relic Revisited to Exclude Expectation Damages—*Stanard v. Bolin*, 88 Wn. 2d 614, 565 P.2d 94 (1977)

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**DOMESTIC RELATIONS—BREACH OF PROMISE TO MARRY: RELIC RE-  
VISITED TO EXCLUDE EXPECTATION DAMAGES—*Stanard v. Bolin*, 88 Wn.  
2d 614, 565 P.2d 94 (1977).**

Plaintiff, relying on defendant's proposal of marriage, trained a replacement for her job, placed her home for sale, sold her furniture, and incurred normal expenses incidental to a future union.<sup>1</sup> One month before the date of marriage, defendant informed plaintiff he would not fulfill his promise of marriage; she subsequently became ill, repurchased her home furnishings, and cancelled all wedding plans. Plaintiff brought suit for breach of promise to marry,<sup>2</sup> seeking damages for (1) direct pecuniary losses; (2) pain, impairment to health, humiliation, embarrassment; and (3) loss of the expected financial security of marriage.<sup>3</sup> The superior court dismissed the complaint for failure to state a claim upon which relief could be granted.<sup>4</sup> In a seven to two decision, the Washington Supreme Court reversed and remanded for trial, modifying the remedy of the cause of action to exclude damages for loss of future financial security.<sup>5</sup> *Stanard v. Bolin*, 88 Wn. 2d 614, 565 P.2d 94 (1977).

Breach of promise to marry is a common law action that originated in an era in which the contractual exchange of mutual promises to marry was the product of serious family negotiations concerning the

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1. *Stanard v. Bolin*, 88 Wn. 2d 614, 616, 565 P.2d 94, 95 (1977).

2. For a discussion of breach of promise to marry, see H. CLARK, DOMESTIC RELATIONS §§ 1.1-9 (1968); Brockelbank, *The Nature of the Promise to Marry—A Study in Comparative Law* (pts. I-II), 41 ILL. L. REV. 1, 199 (1946).

3. Brief for Appellant at 2, *Stanard v. Bolin*, 88 Wn. 2d 614, 565 P.2d 94 (1977). Such damages are traditional in breach of promise suits. See C. MCCORMICK ON DAMAGES § 111 (1935). Expectation damages for loss of financial security of marriage are intended to place the plaintiff in the same position as if the marriage contract had been performed. See *id.* § 111, at 399-400.

4. *Stanard v. Bolin*, No. 229654 (Wash. Super. Ct., Spokane County, Mar. 17, 1976) (memorandum decision on motion to dismiss). The trial judge found the common law action of breach of promise incompatible with contemporary conditions, noting the following considerations: (1) the modern conception of an engagement as a trial period rather than a binding contract; (2) disregard of fault in the 1973 Washington Dissolution of Marriage Act; and (3) the action's potential for abuse. *Id.* at 4-5.

5. There seems to be no other court which has modified damages for breach of promise to marry in this fashion. See Annot., 73 A.L.R.2d 553, 561-66 (1960) (general rule permits expectation damages in breach of promise suits).

financial implications of the union.<sup>6</sup> Consistent with this emphasis on the property and bargaining aspects of the contract to marry, courts had awarded damages for breach of an engagement based upon loss of the bargain—the expected financial value of the marriage.<sup>7</sup> With property concerns largely incidental to the modern marriage formation, the outmoded justification for such damages has come under attack.<sup>8</sup> Changes in the perception of marriage as well as extensive criticism concerning abuses of breach of promise suits<sup>9</sup> have prompted legislatures in eighteen states to modify or abolish the cause of action by enacting “anti-heartbalm statutes.”<sup>10</sup>

This note contends that the *Stanard* court’s elimination of one element of damages fails adequately to redress abuses inherent in breach of promise actions. It also argues that this archaic method of compensation for a broken engagement<sup>11</sup> should be legislatively eliminated.<sup>12</sup> After examining *Stanard* and developing an alternative rationale available to the court, this note will discuss such remedial legislation.

## I. REASONING OF THE *STANARD* COURT

Because the cause of action for breach of promise to marry originated in common law and has not been addressed by the Washington legislature, the *Stanard* court had the power to test the “continued via-

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6. The contractual basis of breach of promise to marry is to be distinguished from the common law tort actions of alienation of affections (wrongful interference with the marital relationship), *see, e.g.*, *Swearingen v. Vik*, 51 Wn. 2d 843, 322 P.2d 876 (1958); criminal conversation (adultery), *see, e.g.*, *Lankford v. Tombari*, 35 Wn. 2d 412, 213 P.2d 627 (1950); and seduction (enticement to have sexual intercourse), *see, e.g.*, *Opitz v. Hayden*, 17 Wn. 2d 347, 135 P.2d 819 (1943).

7. *See, e.g.*, *Bundy v. Dickinson*, 108 Wash. 52, 182 P. 947 (1919).

8. *See, e.g.*, H. CLARK, *DOMESTIC RELATIONS* § 1.1 (1968).

9. *See, e.g.*, Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979 (1935); Wright, *The Action for Breach of the Marriage Promise*, 10 VA. L. REV. 361 (1924).

10. *See Stanard v. Bolin*, 88 Wn. 2d at 618 n.1, 565 P.2d at 96 n.1, for a listing of the statutes. The term “anti-heartbalm” describes legislation countering the use of breach of promise suits to soothe the aching heart of the aggrieved party. If a statute specifically abolishes actions on breach of promise, it is generally held to likewise bar suits to recover damages for fraudulent promises to marry. *See* note 45 and accompanying text *infra*.

11. Prior to *Stanard*, the most recent breach of promise to marry suit to reach the Washington Supreme Court was *Armitage v. Hogan*, 25 Wn. 2d 672, 171 P.2d 830 (1946) (action sought only the return of money and gifts given).

12. No court has abolished this cause of action, but the *Stanard* court indicated it had the power to do so. *See* note 13 and accompanying text *infra*.

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bility in the light of present-day society” of the cause of action.<sup>13</sup> The court identified five criticisms of the cause of action:<sup>14</sup> (1) it can be used for blackmail;<sup>15</sup> (2) it can unduly inhibit what is meant to be a trial period;<sup>16</sup> (3) it is particularly subject to abuse by sympathetic juries;<sup>17</sup> (4) it is essentially tortious and penal in nature but allowed under the guise of a contract action;<sup>18</sup> (5) damage awards unjustly allow recovery for loss of expected economic and social position.<sup>19</sup>

The majority opinion dismissed the first three criticisms as

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13. 88 Wn. 2d at 617, 565 P.2d at 96. In support of this proposition, the court cited *Freehe v. Freehe*, 81 Wn. 2d 183, 500 P.2d 771 (1972) (interspousal immunity); *Pierce v. Yakima Valley Mem. Hosp. Ass'n*, 43 Wn. 2d 162, 260 P.2d 765 (1953) (charitable hospital immunity); and *Wyman v. Wallace*, 15 Wn. App. 395, 549 P.2d 71 (1976), *petition for review granted*, 88 Wn. 2d 1010 (1977) (alienation of affections).

14. 88 Wn. 2d at 618, 565 P.2d at 96.

15. The threat of bringing suit to coerce an out-of-court settlement from an innocent party might be the greatest abuse of the action. See *Pavlicic v. Vogtsberger*, 390 Pa. 502, 136 A.2d 127, 130 (1957) (“not unusual in threatened breach of promise suits that the defendant preferred to buy his peace through a monetary settlement rather than be vindicated by a trial which might leave his good name in shreds”). The potential for blackmail is enhanced by the relative ease of establishing the marital agreement. Mutual promises to marry are specifically exempted from the statute of frauds, WASH. REV. CODE § 19.36.010(3) (1976), and the contract is often implied from circumstantial evidence. H. CLARK, DOMESTIC RELATIONS § 1.2 (1968); Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474, 477-78 (1929); L. Rieke, *Domestic Relations Cases and Materials*, 1-2 (rev. ed. 1964) (unpublished casebook in University of Washington law library). See generally *Kelly v. Drumheller*, 150 Wash. 185, 272 P. 731 (1928).

16. Existence of the cause of action lessens the functional utility of the engagement. For example, the detection of conflicting personalities will not relieve a reneging engaged party from potential liability, absent mutual rescission. See Brockelbank, *The Nature of the Promise to Marry—A Study in Comparative Law* (pts. I-II), 41 ILL. L. REV. 1 at 9-10, 199 at 202-03 (1946).

17. There is wide jury discretion in assessing the damages for such amorphous injuries as humiliation. See Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979, 983 (1935). Even in jurisdictions where punitive damages are forbidden (such as Washington, *Conrad v. Lakewood General Hosp.*, 67 Wn. 2d 934, 410 P.2d 785 (1966)), an exemplary award might be made under the recognized damage categories of embarrassment or humiliation. In breach of promise suits, the defendant’s wealth “usually has a more potent effect upon the size of the verdict than any doctrinal instruction about damages.” C. McCORMICK, *supra* note 3, § 111, at 399.

18. Although acknowledging its contractual basis, many authorities characterize the cause of action as essentially *ex delicto* in nature because of the difference in treatment between marital promises and other contracts regarding survival of the action, mitigation of damages, the statute of frauds, the bargaining nature, defenses, and the particular damages recoverable (*i.e.*, pain, humiliation, punitive damages). See, *e.g.*, Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474, 474-90 (1929); Wright, *The Action for Breach of the Marriage Promise*, 10 VA. L. REV. 361, 370-75 (1924). This may explain the *Stanard* court’s characterization of the cause of action as “quasi-contract, quasi-tort.” 88 Wn. 2d at 622, 565 P.2d at 98.

19. This argument reflects the evolution of societal and legal attitudes toward economic motivations to marry. See notes 6-8 and accompanying text *supra*.

insufficient to justify abolishing the action.<sup>20</sup> In an attempt to reconcile the conflicting contract and tort theories behind breach of promise suits, the *Stanard* court simply classified the action as "quasi-contract, quasi-tort."<sup>21</sup> The court accepted the final argument, objecting to compensation for loss of expected financial advantage, but only to the extent of limiting recoverable damages. The court reasoned that because the primary motivation to marry is love rather than financial gain, nonexistent economic expectations should not be recoverable.<sup>22</sup> In its decision to retain the modified cause of action, the court was guided by an overriding concern that a deserving plaintiff should be provided legal protection as long as objections to the cause of action could be minimized.<sup>23</sup>

## II. AN ALTERNATIVE REASONING PROCESS

Although the *Stanard* court's "quasi-contract, quasi-tort" treatment of breach of promise actions can be reconciled with the characterization of several commentators,<sup>24</sup> a better analysis would rely exclusively on contract theory. The double "quasi" labeling of the action creates confusion because "quasi-contract" is improperly used,<sup>25</sup> and because the label is an unnecessary mixing of contract and tort law.

20. Concerning the potential for coercion, the court found it difficult to envision a defendant who would rather marry than pay for the injuries caused by her breach, or a plaintiff who would bring suit to force an unstable marriage. 88 Wn. 2d at 621-22, 565 P.2d at 98. Although the state should not encourage doubtful marriages, the court believed parties should not be free to end an engagement without liability for potential injuries. *Id.* at 621, 565 P.2d at 98. The court dismissed the jury abuse argument because it placed too little faith in the objectivity of the jury and courts. *Id.* at 620-21, 565 P.2d at 97.

21. *Id.* at 617-18, 622, 565 P.2d at 96, 98. See also note 18 *supra*.

22. 88 Wn. 2d at 619-20, 565 P.2d at 97. Although economic advancement may be an incident of the marriage (whether expected or not), the elimination of this damage element is desirable because it lessens the potential for blackmail and makes consideration of the defendant's wealth irrelevant, thus decreasing the danger of sympathetic jury awards.

23. Justice Utter, joined by Justice Dolliver, dissented. They found sufficient authority to abolish the action in the policies announced by the court of appeals in *Wyman v. Wallace*, 15 Wn. App. 395, 549 P.2d 71 (1976), *petition for review granted*, 88 Wn. 2d 1010 (1977); the legislative intent behind Washington's Dissolution of Marriage Act; and the criticisms listed by the *Stanard* majority. 88 Wn. 2d at 622-24, 565 P.2d at 98-99. See Part III-A *infra*.

24. See note 18 *supra*.

25. Quasi-contract is a misnomer in this context because the contract to marry is not implied in law for reasons of justice, as the term is commonly defined. see A. CORBIN, CONTRACTS § 19 (abr. ed. 1952); it rests upon mutual promises between the parties.

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Injuries could be adequately compensated under consequential and reliance contract damages. This analysis would be more consistent with the contractual basis of the cause of action—the exchange of mutual promises to marry.<sup>26</sup> In addition, the jury's appraisal of damages in a contract case is subject to greater judicial scrutiny than in a tort suit.<sup>27</sup> This closer supervision would help quell the criticism of excessive jury awards in breach of promise suits.<sup>28</sup>

A strictly contractual approach can adequately compensate a breach of promise plaintiff. Personal injuries in breach of promise actions, such as humiliation or loss of health, have traditionally been compensable under principles of tort law<sup>29</sup> despite the contractual basis of the action. Contractual analysis need not foreclose such damages, because humiliation or loss of sleep can reasonably be contemplated as consequential damages flowing from a refusal to fulfill a promise to marry.<sup>30</sup> Indeed, the foreseeability of such consequential

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26. Treatment of breach of promise suits under contract law would also be compatible with the characterization of marriage as contractual. See Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375 (1974).

27. Courts reviewing the appropriateness of damage awards are more deferential toward the jury's determination in tort cases than in contract cases. A tort damage award will not be disturbed on appeal unless it is the result of passion or prejudice on the part of the jury, or if the amount of the award shocks the sense of justice of the appellate court. See, e.g., *Hogenson v. Service Armament Co.*, 77 Wn. 2d 209, 217–18, 461 P.2d 311, 316 (1969); *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn. 2d 386, 395–96, 261 P.2d 692, 697–98 (1953). This has also been the review standard in breach of promise suits in Washington. *Bundy v. Dickinson*, 108 Wash. 52, 56, 182 P. 947, 949 (1919). A consequential damage award in a contract action, which would include emotional and physical harm in a breach of promise suit, will be upheld if it was both reasonably foreseeable, *Wilkins v. Grays Harbor Com. Hosp.*, 71 Wn. 2d 178, 186, 427 P.2d 716, 721 (1967), and supported by sufficient evidence to afford a reasonable basis for estimating the damage, *Prier v. Refrigeration Eng'r Co.*, 74 Wn. 2d 25, 31, 442 P.2d 621, 625 (1968). Professor McCormick stated that in actions for breach of contract, as opposed to tort, "legal rules furnish standards of compensation which can be applied with more definiteness, and the trial judge can properly require a closer conformity in the verdict to his own belief as to the proper amount to be arrived at from an application of the standard to the facts." C. McCormick, *supra* note 3, § 18, at 72.

28. See note 17 and accompanying text *supra*.

29. See *Rieger v. Abrams*, 98 Wash. 72, 77, 167 P. 76, 78 (1917) (damages in breach of promise actions are governed by principles which apply to actions for personal torts).

30. As a general rule, damages for mental suffering are not allowable in actions for breach of contract, but an exception has been recognized when the benefit contracted for is a nonpecuniary interest. C. McCormick, *supra* note 3, at § 145. When the subject matter of a contract directly affects the feelings, happiness, or personal welfare of one of the parties, recovery may be had for mental suffering proximately caused by its breach. *Id.* The exception is narrowly construed, but its rationale does include breach of promise to marry, even under a contractual treatment of damages. *Id.*; S. WILLISTON, *CONTRACTS* § 1341 (3d ed. 1968).

damages is heightened by the emotions and intimacies of the surrounding circumstances. Generally, expenses incurred in preparing to perform a contract are recoverable as damages for its breach.<sup>31</sup> Wedding expenses subsequent to the exchange of mutual promises to marry clearly fall within this category of reliance damages. Since the injuries which concerned the *Stanard* majority are fully compensable by recovering consequential and reliance contract damages, no advantage can be derived from the use of the "quasi-contract, quasi-tort" classification.

The *Stanard* court recognized both the existence of reliance damages and the foreseeability of certain personal injuries,<sup>32</sup> yet failed to confine the cause of action to contract law. Nevertheless, continued retention of breach of promise, even under the alternative contractual analysis, preserves the blackmail potential and inhibits the engagement trial period. A legislative remedy is preferable to this outmoded cause of action.

### III. ABOLISHING BREACH OF PROMISE ACTIONS

#### A. *Modern Domestic Relations Policy*

In 1973, Washington's domestic relations policy underwent a dramatic change with the adoption of the "no-fault" Dissolution of Marriage Act.<sup>33</sup> In contrast to the adversarial framework of the prior divorce statute,<sup>34</sup> the present act attempts to establish ground rules whereby the parties can dispense with accusations and part amica-

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31. See, e.g., *Lloyd v. American Can Co.*, 128 Wash. 298, 222 P. 876 (1924), cited with approval in *Paduano v. Boespflug Constr. Co.*, 66 Wn. 2d 527, 532, 403 P.2d 841, 845 (1965) ("It is well established that actual expenditures to the date of a breach of contract are compensable in damages.").

32. 88 Wn. 2d at 619, 565 P.2d at 96-97.

33. WASH. REV. CODE ch. 26.09 (1976). The *Stanard* majority failed to consider the general policy implications behind this Act, an omission fatal to an internally consistent body of domestic relations law. Both the dissent and the trial judge properly considered the dissolution act. See 88 Wn. 2d at 623, 565 P.2d at 98-99 (Utter, J., dissenting); *Stanard v. Bolin*, No. 229654 at 4-5 (Wash. Super. Ct., Spokane County, Mar. 17, 1976) (memorandum decision on motion to dismiss).

34. Divorce Act of 1949, 1949 Wash. Laws, ch. 215 (repealed 1973). See Rieke, *supra* note 26, at 387-88.

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bly.<sup>35</sup> Legislative recognition of the inherent problems of the "fault" system and the consequent adoption of the dissolution act indicate a preference for private resolution rather than state intervention in the area of domestic relations.<sup>36</sup>

The legislative "hands off" policy towards dissolution of the marital relationship would seem broad enough to encompass the formation process. It would be anomalous to prompt a reluctant party to perform an unconsidered promise to marry through the threat of a civil suit for failure to consummate that promise, and then to offer a lenient statutory escape through the dissolution act.<sup>37</sup> It is incongruous to award fault-based damages following a broken engagement when they have been specifically eliminated from dissolutions of marriage.<sup>38</sup> A rational system would extend the preference for private solutions exemplified in the dissolution act to the breach of promise situation.

Another recent expression of the policy of nonintervention in the area of marital relations is provided in *Wyman v. Wallace*,<sup>39</sup> a progressive 1976 decision of the Washington Court of Appeals.<sup>40</sup> The

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35. Rieke, *supra* note 26, at 378. The fault determination under the old statute regulated the ability to obtain a divorce as well as ancillary relief. By stressing compensation rather than penalization under the new dissolution act, the possibility of reconciliation is no longer hindered by an accusatory process. See Holman, *A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act*, 9 GONZ. L. REV. 39, 39 (1973).

36. See Rieke, *supra* note 26, at 394-99. In effect, the marriage is terminable at will because the mere allegation by one party that the marriage is "irretrievably broken" is sufficient to grant dissolution under the Washington Act. WASH. REV. CODE § 26.09.030 (1976). When a private solution cannot be reached, the disposition of property is determined upon consideration of the nature and extent of community and separate property, the duration of marriage, and the economic circumstances of each spouse rather than upon a basis of fault. *Id.* § 26.09.080. Under the Act, maintenance orders are also granted "without regard to marital misconduct." *Id.* § 26.09.090 (1). See also Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 665 (1976).

37. Marital turnover is hardly desirable, but theoretically could be promoted by the existing law. For example, two days before the marriage ceremony, X decides not to marry Z, and is concerned about financial repercussions. Conceivably, the least costly route would be to perform the marriage, then immediately initiate dissolution proceedings. The cost might include a maintenance award mutually agreed upon or judicially determined. In light of the short duration of the marriage, however, a small award would be likely. Benefits of this tactic would include avoiding a breach of promise suit and its potential abuses (e.g., embarrassing trial, coerced out-of-court settlement, and large jury award).

38. See note 36 *supra*.

39. 15 Wn. App. 395, 549 P.2d 71 (1976), *petition for review granted*, 88 Wn. 2d 1010 (1977).

40. The *Wyman* court's action contrasts with that of other courts which have allowed the legislature to determine whether to abolish actions for alienation of affec-

court concluded that the common law tort action of alienation of spousal affections should be abolished, basing its decision on essentially the same criticisms identified by the *Stanard* majority.<sup>41</sup> The continuing precedential value of *Wyman* is questionable because, immediately prior to the *Stanard* decision, the Washington Supreme Court granted a petition to review.<sup>42</sup> A reversal of *Wyman* would represent further judicial divergence from Washington's "hands off" domestic relations policy concerning marital matters and accentuate even more the need for remedial legislation.<sup>43</sup>

### B. Considerations in Drafting an Anti-Heartbalm Statute

Adoption of an anti-heartbalm statute in Washington would remove this coercive and penal cause of action,<sup>44</sup> but such a statute

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tion. See Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585, 593-96 (1977); 12 GONZ. L. REV. 545 (1977). The *Wyman* decision was limited to the action for alienation of the affections of a spouse by an unrelated third party. "It [did] not abolish actions for the alienation of the affections of a child." 15 Wn. App. at 400 n.4, 549 P.2d at 74 n.4.

41. Criticisms found persuasive included (1) the judicially created action is incompatible with present day society, (2) the action is in the nature of legalized blackmail, (3) the damages are essentially penal in nature, (4) the measurement of damages is uncertain, and (5) the interests the action seeks to protect are outweighed by the harm it engenders. 15 Wn. App. at 397-401, 549 P.2d at 72-74. Cf. notes 14-19 and accompanying text *supra* (criticisms identified in *Stanard*). The *Wyman* court applied a standard of review of a common law action which the *Stanard* court also adopted. See note 13 and accompanying text *supra*.

42. 88 Wn. 2d 1010 (1977). Because marriage involves a deeper personal commitment than an engagement, the societal concern to compensate and protect would presumably be greater in the marital action for alienation of affection. Thus, the refusal to abolish breach of promise to marry in *Stanard* indicates a probable supreme court reversal of *Wyman*. However, an affirmance of *Wyman* is not foreclosed. *Stanard* may be distinguished on two grounds. First, breach of promise is based on contract while alienation of affections sounds in tort. Second, the purpose behind the breach of promise action, compensation for an unfulfilled contract, may be achieved to a greater extent than the purposes behind the alienation of affections cause of action, which are deterring "home wreckers" and compensating for loss of the marital companion. See H. CLARK, DOMESTIC RELATIONS § 10.2, at 267 (1968).

43. Many anti-heartbalm statutes attack collectively breach of promise to marry, alienation of affections, criminal conversation, and seduction. See, e.g., CAL. CIV. CODE § 43.5 (West Cum. Supp. 1975-1976); FLA. STAT. ANN. § 771.01 (West Cum. Supp. 1976); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976).

44. Legislative abolition of breach of promise to marry actions has an advantage over judicial abolition because it permits integration of legislative domestic relations policies instead of case-by-case development. Despite challenges based upon deprivation of a legal remedy, the constitutionality of anti-heartbalm legislation in general has been upheld. See, e.g., *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815, appeal dismissed, 301 U.S. 667 (1936); 52 COL. L. REV. 242, 243-45 (1952). *Contra*, *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946) (unconstitutional taking of contractual right).

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should take into account the interests of both parties. Gifts between engaged persons and expenses in anticipation of marriage are potentially troublesome, because abolition of breach of promise suits should not inadvertently condone the unjust enrichment of one party. A damage suit for fraud would circumvent the purpose of an anti-heartbalm statute by allowing essentially the same cause of action under a different name.<sup>45</sup> Permitting a quasi-contractual suit seeking restitution, however, would be statutorily consistent and prevent unjust enrichment.<sup>46</sup>

The return of engagement gifts has generally been restricted to situations in which the gifts were conditioned on the performance of marriage<sup>47</sup> and were given by the nonbreaching party.<sup>48</sup> Many courts have narrowly construed the category of "gifts made in anticipation of

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45. Disallowing suits on fraudulent promise to marry under anti-heartbalm statutes is the better and majority view. If such tort suits were allowed, the coercive potential would remain even though the strict elements of fraud must be proven. *See, e.g.,* A.B. v. C.D., 36 F. Supp. 85 (E.D. Pa. 1940), *aff'd per curiam*, 123 F.2d 1017 (3d Cir.), *cert. denied*, 314 U.S. 691 (1941); Thibault v. Lalumiere, 318 Mass. 72, 60 N.E.2d 349 (1945); Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N.Y.S.2d 97 (1938); 70 HARV. L. REV. 1098, 1099 (1957); 9 STAN. L. REV. 406, 409 (1957). *Contra*, Langley v. Schumacker, 46 Cal. 2d 601, 297 P.2d 977 (1956). The California legislature abolished actions based on fraudulent promises to marry in 1959. CAL. CIV. CODE § 43.4 (West Cum. Supp. 1978). *See also* 18 U. PITT. L. REV. 667, 670 (1957) (barring actions for fraud under an anti-heartbalm statute "would protect fraud as serious as that which it was enacted to prevent").

46. *See* Gikas v. Nicholis, 96 N.E. 177, 71 A.2d 785 (1950); 3 VILL. L. REV. 387, 390-91 (1958). Early decisions by the Massachusetts and New York courts forbade any suit remotely resembling a breach of promise action. Thibault v. Lalumiere, 318 Mass. 72, 60 N.E.2d 349 (1945); Andie v. Kaplan, 263 App. Div. 884, 32 N.Y.S.2d 429, *aff'd per curiam*, 288 N.Y. 685, 43 N.E.2d 82 (1942) (action to recover money and jewelry given in anticipation of marriage). The Massachusetts court abandoned its extremist position in 1959. De Cicco v. Barker, 339 Mass. 457, 159 N.E.2d 534 (1959). The New York legislature abrogated its position in 1965. N.Y. CIV. RIGHTS LAW § 80-b (McKinney 1976). *See* Goldstein v. Rosenthal, 56 Misc. 2d 311, 288 N.Y.S. 2d 503 (1968).

47. Gikas v. Nicholis, 96 N.H. 117, 71 A.2d 785 (1950) (the policy of unjust enrichment allowed the return of a ring given under the implied condition that marriage would follow, but other gifts were characterized as incidental to the marital request and hence not recoverable); Pavlicic v. Vogtsberger, 390 Pa. 502, 136 A.2d 127 (1957).

48. Beberman v. Segal, 6 N.J. Super. 472, 69 A.2d 587 (1949). For a lengthy listing of other cases, see Annot., 46 A.L.R.3d 578, at § 3 (1972). This qualification is made in jurisdictions with and without anti-heartbalm statutes. *Id. Contra*, Gaden v. Gaden, 29 N.Y.2d 80, 272 N.E.2d 471, 323 N.Y.S.2d 955 (1971) (fault irrelevant in restitution of gifts). Great Britain has abolished breach of promise as a cause of action and dispensed with consideration of fault in recovery of conditional gifts. Engagement rings are placed in the separate category of absolute gifts, however, "so as to preserve the right of the wronged woman to throw the ring into the river rather than return it to her former fiancé." 33 MOD. L. REV. 534, 536 (1970).

marriage" to limit recovery to engagement rings, a result which fails fully to prevent unjust enrichment.<sup>49</sup> A preferable approach, followed in New York, recognizes a rebuttable but "strong presumption of law that any gifts made during an engagement period are given solely in consideration of marriage, and are recoverable if the marriage does not materialize."<sup>50</sup> The purposes of restitution and the avoidance of publicizing private matters are also defeated by conditioning the return of gifts upon a determination of fault.<sup>51</sup>

Upon failure of an engagement, expenses in preparation for marriage have customarily fallen on the woman. An extension of no-fault and quasi-contractual principles to this area would treat the couple as a partnership, equally bearing the economic burden of their unsuccessful endeavor.<sup>52</sup> In allocating the expense of aborted wedding plans, gifts given during the engagement period between the parties

49. See, e.g., *Gikas v. Nicholis*, 96 N.H. 177, 71 A.2d 785 (1950).

50. *Friedman v. Geller*, 368 N.Y.S.2d 980, 981 (Civ. Ct. N.Y. 1975). The presumption is based on N.Y. CIV. RIGHTS LAW § 80-b (McKinney 1976), which states that the statutory abolition of breach of promise suits should not be construed to bar a cause of action for the recovery of a gift given in contemplation of marriage. The *Friedman* court granted summary judgment for the return of a ring and joint banking deposit to avoid turning the courtroom into a "grotesque marketplace" of private matters which the anti-heartbalm statute sought to end. 368 N.Y.S.2d at 983. The presumption of recovery is rebuttable by clear and convincing evidence. *Id.* at 982.

Gifts between engaged parties, however, are not reclaimable upon termination of an engagement when both parties were aware at the time of engagement that one of them was married. *Adams v. Jensen-Thomas*, 18 Wn. App. 757, 571 P.2d 958 (1977). This common law rule remains sound. Such gifts could not be conditioned on the parties' future marriage, because such contracts would be in "violation of the [pre-existing] marital duty and are contrary to morality and public policy." *Id.* at 761, 571 P.2d at 960 (citing with approval *Jones v. Allen*, 14 Wn. 2d 111, 119, 127 P.2d 265, 269 (1942)).

51. In addressing the application of N.Y. CIV. RIGHTS LAW § 80-b (McKinney 1976) (gifts made in contemplation of marriage), the New York courts embarked on a desirable path:

To require a determination of fault in order to entitle one to recover engagement gifts would simply condone [breach of promise to marry as a cause of action] in yet another form. . . .

. . . .

. . . Just as the question of fault or guilt has become largely irrelevant to modern divorce proceedings . . . , so should it also be deemed irrelevant to the breaking of the engagement.

*Gaden v. Gaden*, 29 N.Y.2d 80, 88, 272 N.E.2d 471, 476, 323 N.Y.S.2d 955, 962 (1971). Prior to the promulgation of the statute in 1965, New York courts had refused to acknowledge any action even incidentally related to breach of promise. See note 46 *supra*.

52. If parties mutually benefit from the engagement period, the allocation of expenses in a recovery should be equal. As in the restitution of gifts, fault should not be a consideration because a breaching party may in good faith realize the marriage would be unsuccessful.

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could be claimed as a setoff, provided that the arrangement is mutually agreeable.<sup>53</sup>

Protecting a partner from nonpecuniary injuries resulting from a wedding cancellation, such as humiliation and embarrassment, may be an area in which compensation is not socially desirable. In the realm of personal relationships such as marriage and engagement, it seems preferable to dispense with legal intervention and to allow social customs and values to control the accepted norms of conduct.<sup>54</sup>

## IV. CONCLUSION

The *Stanard* court, in its commitment to compensate an aggrieved plaintiff, resurrected a little-used, archaic cause of action. The court's modification of recoverable damages removed one onerous aspect of breach of promise suits, but other problems remain. Legislative abolition offers the best solution. Such legislation, however, should explicitly preserve quasi-contractual remedies to ensure protection of reliance on marital promises, to secure restitution of gifts given during an engagement, and to provide an equitable division of wedding expenses.

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53. Requiring an agreement would prevent a donee from retaining a donor's family heirloom given during engagement by claiming it as a setoff against wedding expenses. Imposing an undesired gift upon the donee as a setoff measure would also be avoided.

54. The Marriage Dissolution Act shows a preference toward private solutions. See notes 33-38 and accompanying text *supra*. The termination of an engagement is not so different that it should require state intrusion to regulate conduct.