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CAVEAT AMATOR: "THE STATE OF AFFAIRS" IN ILLINOIS AFTER HEWITT V. HEWITT

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In the past few years many jurisdictions have recognized property and contractual rights arising out of relationships between unmarried cohabitants. The Illinois Supreme Court recently refused, however, to follow this trend and denied such rights to unmarried cohabitants. Authors Grant and Hyink contrast the leading decision favoring unmarried cohabitants' rights with the Illinois Supreme Court's position and conclude that the Illinois decision could trigger unnecessarily harsh results. To minimize this possibility, the authors propose a balancing test that articulates factors deserving of the Illinois courts' consideration when determining the scope of unmarried cohabitants' rights.

The contractual and property rights of individuals who choose to cohabit without marrying have been the center of considerable controversy among the state courts. The Illinois Supreme Court recently announced its position on this subject in a decision that greatly limits the rights of unmarried cohabitants. In Hewitt v. Hewitt, the court concluded that the Illinois Marriage and Dissolution of Marriage Act (IMDMA) disfavors "the grant[ing] of mutually enforceable property rights to knowingly unmarried cohabitants." Although the supreme court did not completely eliminate the rights of these couples, a broad interpretation of the court's decision could lead to this unfortunate result. To prevent the wholesale denial of mutually enforceable contractual and property rights between unmarried cohabitants, the Hewitt decision must be put in perspective.

The Illinois Supreme Court found that the particular relationship involved in Hewitt posed a unique threat to the institution of marriage. Had the

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1. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).
3. 77 Ill. 2d at 66, 394 N.E.2d at 1211. Unless otherwise indicated in this article, the term "cohabitants" refers to persons of opposite sex who live in the same household and engage in sexual intercourse.
4. Although a marriage is more than a civil contract, suits for breach of a promise to marry are allowed because of the contractual nature of marriage. Smith v. Hill, 12 Ill. 2d 588, 147 N.E.2d 321 (1958). Once the parties marry, however, their relationship is governed not by their contract, but by state law. In Maynard v. Hill, 125 U.S. 190 (1888), the United States Supreme Court explained the state's role in defining the rights and duties of married parties.
court recognized the rights alleged by Victoria Hewitt, it would have sanctioned a nontraditional family relationship akin to common law marriage, which has been illegal in Illinois for seventy-five years. According to the court, allowing unmarried cohabitants to avoid some of the burdens of marriage\(^5\) while obtaining some of its benefits\(^6\) could result in fewer marriages, especially in light of other economic disincentives to marriage, such as potential tax advantages or more favorable social security benefits for unmarried persons.\(^7\) Fearing that encouraging unmarried cohabitant relationships

When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. . . . It is, rather a social relation, like that of parent and child . . . .

*Id.* at 211, quoting Adams v. Palmer, 51 Me. 480, 483, 484-85 (1863).

5. For example, because the Hewitts were not married they were free to dissolve their relationship without first obtaining approval of the state. See Sutton v. Leib, 199 F.2d 163, 164-65 (7th Cir. 1952) (noting that Illinois decisions consistently hold that a void marriage is an absolute nullity for all purposes and that no judicial proceedings are required to establish its invalidity). Such an arrangement saves the parties the time and expense required to dissolve a valid marriage.

6. Among these benefits are certain property rights. Generally, the property rights of married persons fall into two broad categories: property rights existing while both spouses are alive and property rights which arise upon the death of either spouse. While both spouses are alive, upon dissolution of their marriage, all property acquired with income earned during the marriage is subject to division between the living spouses. ILL. REV. STAT. ch. 40, § 503 (b) (1977). The trial court first classifies the property as "marital property" or "nonmarital property," *id.* § 503(a)(1)-(6), and then equitably divides the marital property between the parties, *id.* § 503(c)(1)-(10), if they have failed to enter into a separation agreement disposing of their property. *Id.* § 502(b)-(c). A dependent spouse also has a right to maintenance, formerly known as alimony, *id.* § 504(b), which essentially is monetary support for a dependent spouse. The trial court determines the amount and duration of the maintenance. *Id.*

Upon the death of a spouse, if the surviving spouse renounces the decedent's will, the Illinois Probate Act provides the surviving spouse a guaranteed claim to either one-third or one-half of the decedent's estate, depending on the existence of descendants. ILL. REV. STAT. ch. 110 1/2, § 2-8 (1977). Under intestate succession laws a surviving spouse is entitled to the entire estate if there are no descendants. *Id.* § 2-1.


7. The Social Security Act may encourage unmarried cohabitation by reducing benefits to widows or widowers who remarry. 42 U.S.C. § 402(e)(1)(A) (1976) (widow's monthly insurance benefit only available to the widow if she has not remarried. See Foster, *Marriage and Divorce*
would "weaken marriage as the foundation for . . . family-based society."
the supreme court rejected Victoria Hewitt's claims in order to preserve the
state's role as protector of family relationships.

Recognizing certain mutually enforceable property rights will not, how-
ever, encourage the abandonment of marriage; consequently, these rights
should be enforceable. In Hewitt's wake, Illinois judges and lawyers face
the difficult task of distinguishing between valid and invalid claims asserted
by unmarried cohabitants. Anticipating potential doctrinal conflicts among
the courts, this Article suggests a method by which disputes between unmar-
ried cohabitants may be judged as consistent with or contrary to the public
interest as announced by the Hewitt court. Central to this proposal is the
belief that judicial efforts to preserve the institution of marriage must be
balanced against the goal of preventing unjust enrichment of one unmarried
cohabitant at the expense of the other.

This proposed balancing test would bar actions to enforce private contrac-
tual alternatives to marriage and various other attempts to establish property
rights upon mere proof of cohabitation or performance of domestic services
by one of the parties to the relationship. On the other hand, the balancing

in the Twilight Zone, 17 ARIZ. L. REV. 462, 471-72 (1975). Widows or widowers also may
lose payments under public or private pension plans if they remarry. See Foster, supra at 472,
Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 CALIF. L. REV. 1169, 1209
(1974) (loss of pension and social security benefits may deter many widows from remarrying). In
addition, federal income tax law provides a greater zero bracket amount for single persons than
for married persons. See I.R.C. § 63(b)-(d). As a result, couples may be encouraged to
remain unmarried and maximize their federal income tax exemptions, especially when their
incomes are equal. For a detailed analysis of the comparative effects of the Tax Reform Act of
1969 upon single individuals and married couples, emphasizing the Act's discriminatory impact
upon married couples, see Richards, Discrimination Against Married Couples Under Present

8. 77 Ill. 2d at 58, 394 N.E.2d at 1207.
9. See IL. STAT. ch. 40, § 102(2) (1977). The preservation of family relationships
centers on the institution of marriage. For example, husband-wife relationships in marriage may
not be dissolved unless a court finds that the petitioner has proven that the respondent commit-
ted acts that are set forth as grounds for dissolution of marriage in § 401 of IMDMA. Id.
§ 401. Furthermore, the grounds for dissolution must have arisen "without cause or provocation
by the petitioner." Id. § 401(d). Of course, unmarried couples freely may dissolve their relationship
without state approval. See note 5 supra.

Moreover, parent-child relationships are most secure in marriage, because both parents share
custodial responsibility for their children. If one parent dies, the other automatically assumes all
custodial duties. On the other hand, the custodial rights of an unmarried father are unclear,
especially if a finding of paternity has not been made. Hence, it does not necessarily follow that
when an unmarried mother dies the father of the illegitimate children will assume responsibility
for their care.

10. For instance, rights based upon a partnership agreement should be recognized where
the partners are unmarried cohabitants, because enforcement of such business agreements will
not give unmarried persons an advantage unavailable to married persons.

11. For a discussion of unjust enrichment in the context of unmarried cohabitation, see
Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?
77 MICH. L. REV. 47 (1978) [hereinafter cited as Casad]. See also notes 102-112 and accompan-
ying text infra.
approach would permit unmarried cohabitants to enforce agreements "independent" of their cohabitant relationship and to recover wrongfully or unjustly acquired property interests. To demonstrate the utility of this proposed test, a hypothetical conflict between unmarried cohabitants is presented. Before applying the proposed balancing test, this Article examines developing case law that permits unmarried cohabitants to enforce property rights arising out of the cohabitants' relationship. The Hewitt decision is then contrasted with the California Supreme Court's decision in Marvin v. Marvin, which involved similar facts but reached an opposite result. Based on this background discussion, the hypothetical fact situation is reconsidered and the proposed balancing test applied.

HYPOTHETICAL DISPUTE BETWEEN UNMARRIED COHABITANTS

Five years ago Andy and Beth decided to live together in Illinois. Andy has been employed by the United States Postal Service for eight years, while Beth has performed all domestic services in the home. Two children were born of their relationship. Shortly after they began cohabiting, Beth orally promised to share all her earnings with Andy. Although Andy and Beth never specifically discussed the possible division of any property acquired during their cohabitation, they executed a written agreement in which Andy promised to take care of Beth for as long as she lived in consideration for her promise to adopt his surname. Their agreement expressly provided that sexual relations were not part of the consideration.

Based on an oral partnership agreement to share all profits and losses equally, Andy and Beth operated a grocery store located beneath their apartment. They were joint lessees in separate ten-year lease agreements for both the apartment and the grocery business. Two years ago, Andy and Beth also became joint obligees on a $5,000.00 loan agreement for a three-year term. The money from the loan was used to remodel the grocery store.

Last year, Andy purchased vacation property with some funds set aside from his paycheck. Although he had earned the money during the period of unmarried cohabitation with Beth, title to the property was placed solely in Andy's name. Two months ago, Beth received an inheritance of $1,000,000.00, to be paid to her in installments of $50,000.00 each year for twenty years. After receiving the first installment, she transferred $50,000.00 to Andy for the purpose of purchasing a "dream home" in the suburbs. Despite his promise to place the home in joint tenancy, Andy intentionally entered title to the real estate in his name alone.

Last month, Andy left Beth and the children for the companionship of Clair. Before he left, Andy withdrew $10,000.00 from the partnership checking account. As a result, Beth was not only unable to restock the grocery store shelves, but she also could not meet the monthly apartment rent and

the monthly installment due on the remodeling loan. Beth now faces possible eviction from the apartment, a suit for breach of the lease agreement, and the bank's threat to sue for breach of the loan agreement.

Andy denies any responsibility for the joint business obligations assumed during the cohabitation period. He intends to avoid being served with a summons, believing that the creditors will prefer to sue Beth when they learn of her recent sizeable inheritance. Further, Andy refuses to acknowledge that Beth may have a property interest in either parcel of real property acquired during their cohabitation period. Andy has agreed to honor, however, the entry of a default judgment against him under the Paternity Act and an order establishing his duty to pay $200.00 per month in child support to Beth.

On the advice of her attorney, Beth is considering several possible actions against Andy. One is a mandatory injunction directing Andy's specific performance of his written agreement to take care of Beth for the rest of her life. Requesting partition of the vacation property purchased by Andy is another option. The partition complaint would be based upon the existence of an implied-in-fact contract to divide equally all real property acquired during their cohabitation period. Alternatively, Beth could base her partition request on an equitable interest enforceable by a constructive trust or an implied-in-law contract. Beth also might include a quantum


15. An agreement not fully expressed in words but understood by the parties and evidenced by their conduct is termed an implied-in-fact contract. Such an agreement is "proved" by circumstantial evidence. D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 4.2, at 234 (1973) [hereinafter cited as Dobbs].

16. A constructive trust is an equitable remedy analogous to an implied-in-law contract. Neither implied-in-law contracts nor constructive trusts arise as a result of the parties' inferred intentions; rather, they are obligations imposed upon defendant to prevent unjust enrichment and to force a transfer of that which in fairness belongs to the plaintiff. See Dobbs, supra note 15, § 4.3, at 240-48.

Other well-known authorities describe the constructive trust in terms similar to Professor Dobbs' description. For example, Justice Cardozo stated that "a constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919). Dean Pound called a constructive trust a "specific restitution of a received benefit in order to prevent unjust enrichment." Pound, The Progress of the Law, 33 HARV. L. REV. 420, 421 (1920). See generally Monaghan, Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity, 38 U. DET. L. J. 10, 11-12 (1960); RESTATEMENT (SECOND) OF TRUSTS § 160 (1957). See also Ray v. Winter, 67 Ill. 2d 296, 305, 367 N.E.2d 678, 680 (1977) (if a person purchases land for another and later
meruit count to recover for the domestic services she rendered during the couple's five years together. Beth also could bring an accounting action to recover the money Andy improperly withdrew from the partnership bank account. Further, Andy could be joined as a third party defendant with Beth in any litigation to enforce the apartment and store leases or the bank loan agreement. Finally, Beth might establish her equitable interest in the suburban "dream home" by alleging alternatively the existence of a resulting trust, a constructive trust, or an implied-in-law contract. Before examining the viability of each of Beth's possible legal actions, it is important to understand the results of past efforts to strike a balance between the prevention of unjust enrichment and the preservation of marriage as an institution.

FROM COMMON LAW MARRIAGE TO MARVIN AND HEWITT

Since the nineteenth century, American jurists have recognized the doctrine of common law marriage. The status of common law spouse was conferred upon those who could prove both an agreement to marry and

refuses to convey it, equity will raise a constructive trust to compel its conveyance); Freiders v. Dayton, 61 Ill. App. 3d 873, 882, 378 N.E.2d 1191,1198 (2d Dist. 1978) (doctrine of constructive trust operates "when one party holds property which in equity . . . should be possessed by another").

17. Quantum meruit is the concept most frequently used for implied-in-law or quasi-contractual relief in the context of unmarried cohabitation. Quantum meruit compensates a plaintiff who has performed services but has not been paid. The plaintiff must have had a reasonable expectation of payment for the services rendered. DOBBS, supra note 15, § 4.2, at 234-38. See Chudnovski v. Eckels, 232 Ill. 312, 317, 83 N.E. 846, 847 (1908) (by reason of the relation of the parties or the existence of an obligation or duty, a contract may be implied by law). In O'Neil & Santa Claus, Ltd. v. Xtra Value Imports, Inc., 51 Ill. App. 3d 11, 15, 365 N.E. 2d 316, 319 (3d Dist. 1977), the court stated that to be successful upon an implied-in-law contract or quantum meruit action, plaintiff must prove: (1) performance of services; (2) the reasonable value of those services; and (3) the receipt by the defendant from the plaintiff of a benefit which would be unjust for him or her to retain without paying the plaintiff. Id. The court noted that a contract implied-in-law is equitable in nature. Id.

18. A partnership is "an association of two or more persons to carry on as co-owners a business for profit." ILL. REV. STAT. ch. 106½, § 6(1) (1977). A partnership agreement is actually a question of the parties' intention; a verbal agreement is sufficient to establish a partnership. See id. § 7. In a partnership, the parties contribute their own services or property and carry on the business for their common benefit. Kurtz v. Kurtz, 10 Ill. App. 2d 310, 315, 134 N.E.2d 609, 611 (1st Dist. 1956).

19. A resulting trust is similar to an implied-in-fact contract because in both contexts the intent of the parties is inferred from circumstantial evidence. These remedies may be termed "intent-enforcing," as distinguished from the fraud-preventing devices of constructive trust and quasi-contract. The resulting trust is premised on the parties' trust agreement. For example, if A pays the purchase price of Blackacre but B takes legal title to Blackacre, an inference arises that the parties intended for B to hold Blackacre in trust for A. Therefore, A, who retains beneficial interest in Blackacre, may force B to convey legal title. DOBBS, supra note 15, § 4.3, at 240-41.

20. Fenton v. Reed, 4 Johns 52 (N.Y. 1809), is the earliest American case to advocate the principle of common law marriage. In Fenton, the court did not require proof of actual mar-
cohabitation as husband and wife. Parties to a common law marriage were required to obtain a divorce before remarriage, a fact that discouraged informal relationships.

The legal recognition of common law marriage creates numerous problems. Foremost among these are cohabitants' attempts to establish inheritance rights by fraudulently alleging the existence of a common law marriage. Common law marriages also frustrate the statutory requirements that couples be physically examined by doctors before marriage and that they be of a certain age. Further, common law marriages confer property rights upon the parties without any public record to verify the existence of marital status. Because of these drawbacks, few states today recognize common law marriages.

21. Prior to its express statutory abolition in Illinois in 1905, Act of May 13, 1905, § 4, 1906 Ill. Laws 317, a common law marriage consisted of two elements. The first requirement was a mutual agreement to presently assume the relation of marriage. Heymann v. Heymann, 218 Ill. 636, 75 N.E. 1079 (1905). Second, the parties had to cohabit as husband and wife with the full assumption of marriage status in every legal aspect. Hutchinson v. Hutchinson, 196 Ill. 432, 63 N.E. 1023 (1902).

22. Once a marriage was established under the common law, all the incidents of a valid marriage attached, and the parties became bigamists if they remarried without first obtaining a divorce. See Hilen v. People, 156 Ill. 511, 519, 41 N.E. 181, 183 (1895).


25. See id. § 203(1).


Despite the abolition of common law marriage in many states, some couples have continued to live together without marriage. Courts, therefore, have developed other means for preventing unjust enrichment. None of


Legal presumptions and the putative spouse doctrine once constituted the primary means by which unmarried parties obtained mutually enforceable property rights in states not recognizing common law marriage. Upon proof of cohabitation and reputation as husband and wife, a presumption arises that a valid marriage has occurred. The burden of proof then shifts to the party contesting the existence of a valid marriage. See, e.g., King v. Clinchfield R.R., 131 F. Supp. 219 (E.D. Tenn. 1955) (contest party must defeat presumption by clear proof that marriage was void and irregular); Foster v. Diehl Lumber Co., 77 Idaho 26, 287 P.2d 282 (1955) (presumption of marriage on basis of cohabitation rejected only by compelling evidence); In re Lando’s Estate, 112 Minn. 251 (1910) (marriage presumed where parties lived together as husband and wife); Hilton v. Roylance, 25 Utah 129, 69 P. 660 (1902) (where persons live together as husband and wife, marriage always should be presumed), Newson v. Fleming, 165 Va. 89, 181 S.E. 397 (1935) (burden on contesting party to show no valid marriage). Interestingly, although Tennessee law does not permit common law marriage, the presumption of marriage in Clinchfield, supra, was strong enough to establish a valid marriage. Use of legal presumptions therefore may result in the establishment of a less vulnerable relationship than that proven by unmarried cohabitants in many common law marriage states. See Stein, supra note 23, at 280-82.

Even in common law marriage states, however, the weight given presumptions can affect the outcome of a case. For example, Alabama gives no benefit to legal presumptions, although it permits common law marriage. Turner v. Turner, 251 Ala. 295, 37 So. 2d 186 (1948). Similarly, in Pennsylvania, also a common law marriage state, cohabitation and reputation only give rise to a weak presumption. Baker v. Mitchell, 143 Pa. Super. Ct. 50, 17 A.2d 738 (1941).

Louisiana long has recognized the so-called putative marriage, where an honest and reasonable belief in the existence of a marriage by one or both of the parties results in the conferment of
these judicial attempts attracted much attention until the 1976 decision of the California Supreme Court in *Marvin v. Marvin*.29 Acknowledging that the rapidly increasing numbers of unmarried cohabitants revealed changing social values,30 the *Marvin* court held that such cohabitants could enter into legal rights on a putative spouse. Succession of Marinoni, 183 La. 776, 164 So. 797 (1935). In *Marinoni*, the parties obtained a license but observed no other formalities; however, putative marriage situations do involve some ceremony. See Comment, *The Necessity of Ceremony in a Putative Marriage*, 10 Tul. L. Rev. 435 (1936). For discussion of the putative spouse doctrine in Illinois, see Comment, *Rights of the Putative Spouse under Section 305 of the Illinois Marriage and Dissolution of Marriage Act*, 1978 S. Ill. U.L.J. 423 [hereinafter cited as *Rights of the Putative Spouse*].

Other devices also have been used to secure mutually enforceable property rights between unmarried cohabitants, such as independent contracts, resulting trusts, constructive trusts, express agreements, quantum meruit and implied contracts. See, e.g., *Sugg v. Morris*, 392 P.2d 313 (Alaska 1964) (resulting trust); *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962) (resulting trust); *Hill v. Estate of Westbrook*, 39 Cal. 2d 458, 247 P.2d 19 (1952) (in dictum, quantum meruit recognized); *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430 (1932) (unlawful agreement to cohabit held severable from agreement to pool all resources that were then to be invested by man for joint benefit); *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 585 (1973) (express agreement to divide equally property accumulated during cohabitation); *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976) (express agreement to share equally all property accumulated during period of unmarried cohabitation); *Hymen v. Hymen*, 275 S.W.2d 149 (Tex. Civ. App. 1954) (resulting trust); *Estate of Thornton*, 81 Wash. 2d 72, 499 P.2d 864 (1972) (in dictum, implied contract, implied partnership, and joint venture recognized); *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974) (constructive trust).

Finally, New Hampshire law permits a surviving cohabitant to recover a share of a deceased partner’s property if cohabitation is established for three years preceding the partner’s death. *N.H. Rev. Stat. Ann.* § 457.39 (1968).

29. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The parties had cohabited for seven years. All real and personal property acquired by the couple during that period had been taken in the name of the defendant, Lee Marvin. The plaintiff asserted that she was entitled to one-half of the property and to support payments, basing her suit on an alleged express oral contract consisting of three promises: (1) that plaintiff and defendant would pool their earnings; (2) that they would equally share in all property acquired; and (3) that defendant would support plaintiff. *Id.* at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825. The trial court granted the defendant judgment on the pleadings, thereby denying the plaintiff a trial on the merits. On appeal, the California Supreme Court determined that an express contract may have existed between the parties and concluded that “so long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.” *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. Judgment for the defendant therefore was reversed and the case was remanded for trial on the merits. In April 1979, the Los Angeles Superior Court finally determined that no express or implied contract and no trust of any type existed between the parties. For purposes of “rehabilitation,” the plaintiff was awarded $104,000.00. *Marvin v. Marvin*, No. C23303 (Cal. Super. Ct. Apr. 18, 1979). See 5 Fam. L. Rep. (BNA) 2502 (1979).

30. 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. United States government figures show that during the past twenty years the number of two-person households consisting of an unrelated man and woman has increased at least sixteen times. Between 1960 and 1970 the number of unmarried couples increased eightfold. 2 U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, table 11 at 4B; 2 U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, table 15 at 4B. The number of unmarried couples doubled between 1970 and 1977. In 1970, 654,000 unmarried cohabitants were reported, with the number of persons choosing such living ar-
mutually enforceable express oral contracts. The court limited its approval of such contracts, however, to those in which the consideration did not expressly include sexual relations. In dicta, it suggested that numerous remedies were available to prevent unjust enrichment, including implied contract, partnership agreement or joint venture, quantum meruit, constructive trust, or resulting trust. Since Marvin, other jurisdictions similarly have recognized mutually enforceable property rights between unmarried cohabitants. Until the Hewitt case, however, Illinois appeals courts had not examined this problem area.

31. A conflict had developed among the districts of the California Appellate Court over the rights of unmarried cohabitants. Early California Supreme Court decisions allowed unmarried cohabitants to enter into express contracts concerning the division of property jointly accumulated during their cohabitation. See Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932). The Vallera court, in dicta, asserted that equitable considerations were not present in nonmarital relationships. 21 Cal. 2d at 685, 134 P.2d at 761. Relying on this dicta, California appellate courts denied unmarried cohabitants recovery on claims alleging contracts implied-in-law or implied-in-fact. See Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1946). Because of these and other cases, California law apparently allowed recovery only if the unmarried couple entered into an express agreement. The California Supreme Court in Marvin eliminated the distinction between express contracts and other relief and made all such relief available to unmarried cohabitants. 18 Cal. 2d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

32. The issue in Marvin was whether an agreement to pool resources, equally divide any property accumulated during cohabitation, and support the plaintiff created legal obligations. The California Supreme Court previously had recognized that unmarried cohabitants could enter into enforceable contracts regarding the ownership of property acquired during their cohabitation. Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932). The mere act of cohabitation did not of itself invalidate such an agreement. Because the court found that the Marvins' agreement did not rest upon unlawful consideration, the court honored it, noting, however, that agreements based upon illegal consideration still would be deemed unenforceable. 18 Cal. 2d at 667-69, 557 P.2d at 111-12, 134 Cal. Rptr. at 820-21.

33. 18 Cal. 3d at 669-73, 557 P.2d at 112-15, 134 Cal. Rptr. at 821-24.

34. Id. at 675-85, 557 P.2d at 116-22, 134 Cal. Rptr. at 825-32.

35. See, e.g., Dosek v. Dosek, No. 218977 (Conn. Super. Ct. Oct 4, 1978) (agreement to pool resources and equally divide accumulated property enforced); Beaton v. LaFord, 79 Mich. App. 373, 261 N.W.2d 327 (1977) (partition of real property held in joint tenancy granted although male cohabitant legally married to another woman); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977) (partition of real and personal property held in joint tenancy granted on assumption parties intended it to be divided on equal basis); Humiston v. Bushnell, 118 N.H. 759, 394 A.2d 844 (1978) (theories of joint venture and quantum meruit used in proceeding against decedent's estate); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (oral support agreement enforced because consideration was not explicitly based on sexual relations); Marrone v. Marrone, 69 A.D. 2d 898, 415 N.Y.S.2d 892 (3rd Dept. 1979) (although recovery by plaintiff was denied because no express agreement existed, policy established that mutually enforceable property rights may be based upon express agreements); McCullon v. McCullon, 96 Misc. 2d 962, 410 N.Y.S.2d 226 (Sup. Ct. 1978) (implied agreement for alimony and a division of prop-
Victoria Hewitt and Robert Hewitt were Illinois residents attending Grinnell College in Iowa. In 1960, they fell in love and Victoria became pregnant. Robert and Victoria agreed to live together as husband and wife without a formal marriage ceremony. In addition, Robert orally promised Victoria that he would share with her "his life, his future, his earnings and his property." Robert and Victoria informed their parents that they were married and for fifteen years thereafter they represented themselves as husband and wife.

In 1975, Robert and Victoria Hewitt ceased to cohabit. Victoria subsequently filed for divorce in Illinois, alleging the existence of a common law marriage entered into in Iowa. Victoria Hewitt's complaint alleged that in reliance on Robert's promises she had devoted her efforts to his professional education and his establishment in the practice of pedodontia by obtaining financial assistance from her parents and by working for him. Although she was paid for these services, she had placed her payroll checks in a common fund with Robert. Substantially through her efforts, Robert was earning over $50,000.00 annually at the time of the litigation and had accumulated substantial property. Title to this property was held either in joint tenancy with Victoria or individually by Robert in his name. The complaint also alleged that Victoria had greatly assisted Robert as a wife and mother by participating in social activities designed to enhance his social and professional reputation. The trial court dismissed the complaint, finding no property enforced in part by constructive trust; Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978) (partition of real property held in joint tenancy granted); Edgar v. Wagner, 572 P.2d 405 (Utah 1977) (forced sale of real property held in joint tenancy granted although plaintiff knew defendant was already married). Contra, Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977) (quantum meruit and constructive trust denied because fact of cohabitation constituted immoral consideration); Davis v. Misiano, 366 N.E.2d 752 (Mass. 1977) (no duty to support plaintiff where cohabitation lasted only one year and defendant had wife in another state); McCall v. Frampton, 99 Misc. 2d 159, 415 N.Y.S.2d 81 (1977) (partition of personal property denied where title held solely by one cohabitant).

36. The plaintiff informally adopted Robert Hewitt's surname when they began living together as husband and wife in 1960. Illinois provides a statutory process for changing one's name. ILL. REV. STAT. ch. 96, § 1-3 (1977). Illinois courts have held, however, that compliance with the statute is not required. Reinken v. Reinken, 351 Ill. 409, 184 N.E.2d 639 (1933); People v. Arnold, 3 Ill. App. 2d 678, 279 N.E.2d 430 (1955).

37. 77 Ill. 2d at 53, 394 N.E.2d at 1209. See also APPENDIX, para. 1. 38. Hewitt v. Hewitt, No. 75-C-1237 (Cir. Ct. Champaign Cty. Oct. 19, 1975). Because three children were born of the nonmarital relationship, the plaintiff simultaneously sought to establish the paternity of the minor children and to determine the question of child support. At the time the divorce action was dismissed, the defendant admitted paternity of his children, and thus the issue of child support was resolved without further litigation. 77 Ill. 2d at 52-53, 394 N.E.2d at 1205.

39. See APPENDIX.
basis for recognizing a common law marriage.\textsuperscript{40} Thereafter, Victoria was
directed to file an amended complaint making more definite the nature of
the joint tenancy property she sought to divide.

The amended complaint set forth four alternative claims.\textsuperscript{41} Under each,
Victoria sought to obtain one-half of all property acquired either in joint
tenancy or individually by the defendant during the relationship. The trial
court also dismissed the amended complaint, holding that public policy of
Illinois required evidence of a valid marriage before such property claims
could be considered.\textsuperscript{42}

The Illinois Appellate Court for the Fourth District reversed,\textsuperscript{43} holding
that the plaintiff had stated a cause of action upon an express oral con-
tract.\textsuperscript{44} It rejected the defendant’s characterization of Victoria Hewitt as a
meretricious spouse,\textsuperscript{45} noting that the Hewitts had “enjoyed a most conven-
tional, respectable, and ordinary family life.”\textsuperscript{46} The appellate court also
noted that the record did not suggest the existence of a prohibited mar-
riage\textsuperscript{47} nor a violation of any criminal statute.\textsuperscript{48} After reviewing the Marvin
decision at length, the appellate court stated that “courts should be prepared
to deal realistically and fairly with . . . [contemporary] problems”\textsuperscript{49} and held

\begin{itemize}
\item \textsuperscript{40} Illinois law recognizes valid common law marriages entered into by citizens of other
Hewitts did not enter into a common law marriage in Iowa, however, because they never
legally resided together in Iowa. See In re Estate of Fisher, 176 N.W.2d 801 (Iowa 1970)
(common law marriage recognized where a present agreement to be husband and wife was
followed by continuous cohabitation).
\item \textsuperscript{41} Because of potential confusion regarding the nature of the claims presented in Hewitt,
the entire text of the amended complaint (Count IV to the original complaint) appears in the
APPENDIX. The supreme court characterized the relief as a resulting trust, an implied-in-fact
contract, a constructive trust, and an implied-in-law contract or quantum meruit. 77 Ill. 2d at
53, 394 N.E.2d at 1205.
\item \textsuperscript{42} 77 Ill. 2d at 54, 394 N.E.2d at 1205-06.
\item \textsuperscript{43} Hewitt v. Hewitt, 62 Ill. App. 3d 861, 380 N.E.2d 454 (4th Dist. 1978), rev’d, 77 Ill. 2d
\item \textsuperscript{44} Id. at 867-69, 380 N.E.2d at 459-61. Contrary to the appellate court’s finding, it should
be noted that the facts alleged in the plaintiff’s amended complaint did not constitute an
adequate basis for an express oral contract. Robert only promised to “share his life, his future,
his earnings and his property” with the plaintiff. This promise could not even provide the basis
for a unilateral contract because the promise did not request action or forbearance by Victoria in
return for Robert’s promise. Thus, it is more accurately characterized as an unenforceable,
gratuitous promise, although Robert’s promise was a fact from which his intent to enter into an
agreement with Victoria could have been inferred. See note 15 \textsuperscript{supra}.
\item \textsuperscript{45} 62 Ill. App. 3d at 863, 380 N.E.2d at 456.
\item \textsuperscript{46} Id. at 863, 380 N.E.2d at 457.
\item \textsuperscript{47} Types of marriages are set forth in Ill. Rev. Stat. ch. 40, § 212 (1977).
\item \textsuperscript{48} The criminal statute defining fornication provides: “Any person who cohabits or has
sexual intercourse with another not his spouse commits fornication if the behavior is open and
law interpreting the requirement of “open and notorious” sexual intercourse excluded conven-
tional family relationships which did not openly flaunt accepted standards of morality in the
1976).
\item \textsuperscript{49} 62 Ill. App. 3d at 869, 380 N.E.2d at 460.
\end{itemize}
that Illinois public policy did not preclude enforcement of the express oral contract between the Hewitts. Moreover, it approved the implied contractual and equitable remedies recognized in the *Marvin* decision.\(^{50}\)

On appeal, the Illinois Supreme Court reversed.\(^{51}\) After rejecting the *Marvin* court’s contractual analysis,\(^{52}\) the *Hewitt* court held that Illinois public policy, as expressed by IMDMA, prohibited recognition of Victoria Hewitt’s contentions. The supreme court declared that the relationship involved in *Hewitt* was “not the kind of arm’s length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind.”\(^{53}\) The court’s primary rationale in support of its decision comprehended a broad construction of IMDMA.\(^{54}\) Underlying the

\(^{50}\) Id. at 875, 380 N.E.2d at 459.

\(^{51}\) 77 Ill. 2d at 66, 394 N.E.2d at 1211. The trial court found that the parties held certain property in joint tenancy, and therefore directed the plaintiff to amend her pleading to request a division of the jointly held property. The amended complaint sought a division of not only joint tenancy property, but also property held solely in the defendant’s name. The trial court, however, denied all relief sought. Pending appeal to the supreme court, the parties divided the jointly held property. Interview with Marshall J. Auerbach, Attorney for the Defendant, Robert Hewitt, by telephone (Dec. 27, 1979); Interview with Burt Greaves, Attorney for the Plaintiff, Victoria Hewitt, by telephone (Jan. 4, 1980). The supreme court, therefore, was not confronted with the issue of whether unmarried cohabitants may partition property held in joint tenancy.

\(^{52}\) The *Marvin* decision and its progeny, see cases cited in note 35 supra, can be criticized for two reasons. First, these cases may encourage unmarried cohabitation by providing remedies that effectively produce the financial security normally incident to marriage. The subtle promotion of alternatives to traditional marriage by these decisions is most apparent in those cases in which the plaintiff successfully asserts a right to property held by a former mate merely on the basis of the act of cohabitation. Allowing property rights on the basis of the relationship itself is simply a return to common law marriage under a different name. See generally Reiland, *Hewitt v. Hewitt: Middle America, Marvin and Common-Law Marriage*, 60 CHI. B. REG. 84, 88-90 (1978).

The second criticism is that by adopting a contract law approach as the means of determining whether contracts between unmarried cohabitants should be enforced, the *Marvin* court may encourage private contractual alternatives to marriage. As a result of the modern movement to give unwed cohabitants financial security in their quasi-marital relationships, the judiciary is sanctioning a new type of family arrangement independent of conventional marriage. It is this danger that the *Hewitt* court sought to prevent, by deferring to the legislature’s policy of strengthening family relationships pursuant to IMDMA. Moreover, it is evident that the Illinois Supreme Court did not wish to usurp the legislative function by resurrecting a form of common law marriage. See notes 60-67 and accompanying text infra.

\(^{53}\) 77 Ill. 2d at 61, 394 N.E.2d at 1209.

\(^{54}\) ILL. REV. STAT. ch. 40, §§ 101-802 (1977). The court cited four sections of IMDMA that set forth the public policy against enforcement of private contractual alternatives to marriage. See ILL. REV. STAT. ch. 40, §§ 214, 305, 401, 102 (1977 & Supp. 1979). Section 214 invalidates common law marriages in Illinois entered into after 1905. *Id.* § 214. Section 305 recognizes putative marriages where a marriage ceremony was conducted and the petitioner seeking equitable relief had a good faith belief that he or she was married. *Id.* § 305. Section 401 retains the requirement of a showing of fault for dissolving a marriage. *Id.* § 401. Finally, section 102 provides, in pertinent part, that “[t]his Act shall be liberally construed and applied to promote its underlying purposes, which are to: (1) provide adequate procedures for the solemnization and registration of marriage; (2) strengthen and preserve the integrity of marriage and safeguard family relationships.” *Id.* § 102.
court's reasoning was a concern with the ramifications of granting legal status to relationships between unwed cohabitants. According to the court, public policy dictated that the Hewitts' mutual property rights be analyzed neither on pure contract principles nor on the basis of fairness between the parties, and it stated that "of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage."

In contrast to the Illinois Supreme Court's focus on broad social implications is the California Supreme Court's emphasis on honoring the intention of the individuals as well as preventing unjust enrichment. The premises underlying each court's analysis underscore the dichotomy. Both courts examined their respective statutes governing marital relations, but the Marvin court considered the California Family Law Act inapplicable to the distribution of property acquired by unmarried cohabitants. The Marvin court supported its position by noting that the California statute did not address the issue of property rights of unmarried cohabitants and that its legislative history did not reveal any consideration of the subject. The California Supreme Court, therefore, concluded that such relationships were subject solely to judicial decision and recognized that various judicial remedies were available in such cases.

The Hewitt court, in direct contrast, based its analysis on the premise that IMDMA, rather than common law, governed the rights of unmarried cohabitants, even though the statute does not specifically address the subject. To justify this conclusion, the supreme court noted that the leg-

55. 77 Ill. 2d at 56-57, 394 N.E.2d at 1207.
56. Id.
57. 18 Cal. 3d at 665, 681, 557 P.2d at 110, 120, 134 Cal. Rptr. at 819, 829.
58. Id. at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.
59. Id. at 665, 681, 557 P.2d at 110, 120, 134 Cal. Rptr. at 819, 829.
60. 77 Ill. 2d at 61, 394 N.E.2d at 1209.

Several strong arguments oppose the Hewitt court's application of IMDMA, a statute primarily intended to govern the rights and obligations attendant to valid marriages. First, the putative spouse doctrine, introduced into Illinois by IMDMA, indicates the legislature's desire to extend the rights and obligations of marital status to the "most deserving" class of unmarried cohabitants. It does not necessarily follow, however, that IMDMA was enacted to govern the property rights of unmarried individuals who do not have a marital or quasi-marital status.

A second argument is that the decision in Marvin was widely publicized during the deliberations on IMDMA. See Note, 12 J. MAR. J. PRACT. & PROC. 435, 450 (1979). Nevertheless the legislature chose not to mention the subject of nonmarital cohabitation in the statute. 77 Ill. 2d at 61, 394 N.E.2d at 1209. In fact, the General Assembly tabled a bill, H.B 507, 81st G.A., 1979 Sess., that would have eliminated implied contracts based upon cohabitation. See 2 LEGIS. REFERENCE BUREAU, LEGISLATIVE SYNOPSIS AND DIGEST NO. 22, at 1238 (1979). Another bill designed to require cohabitation contracts to be in writing is still pending in the Senate Judiciary Committee (S.B. 332, 81st G.A., 1979 Sess.). Such legislation indicates the General Assembly's belief that IMDMA should not govern unmarried cohabitant property rights. The rejection of H.B. 507 demonstrates the unwillingness of Illinois legislators to distinguish the contractual rights of individuals on the basis of marital status.

Another argument against the Hewitt decision is that the comments to the criminal statute on fornication, ILL. ANN. STAT. ch. 38, § 11-8(a) Committee Comments at 294-95 (1977) (Smith-Hurd 1979), disclose the legislature's belief that the institution of marriage and normal family
islative policy favoring the strengthening and preserving of marriage would be undercut by judicial decisions that tended to encourage unmarried cohabitation. Significantly, the Hewitt court also noted the legislative reaffirmation of a long-standing policy prohibiting common law marriages through enacting IMDMA, and viewed the Hewitts’ relationship as “something resembling the judicially created common law marriage our legislature outlawed in 1905.” The court further reasoned that the legislature’s rejection of no-fault divorce indicated a strong pro-marriage policy that reaffirmed the traditional doctrine of marriage as a civil contract between the husband, the wife, and the state. By refusing to allow the marriage status to become a mere contract terminable-at-will, IMDMA vindicates the state’s strong interest in domestic relations. Thus, the supreme court interpreted the legislature’s retention of the fault concept as proof that Illinois public policy disfavors private contractual alternatives to marriage. The Hewitt court’s final reason for concluding that IMDMA governs the rights of unmarried cohabitants was that the statute established for the first time in Illinois the civil law concept of putative spouse. The court apparently interpreted this legislative recognition of only one narrow group of nonmarital relationships as prohibiting judicial recognition of any other class of unmarried cohabitants. Accordingly, by negative inference, IMDMA’s policy of safeguarding marriage would have been contravened by judgment in Victoria Hewitt’s favor.

relationships are not threatened by sexual intercourse that is not “open and notorious.” See People v. Cessna, 42 Ill. App. 3d 746, 749, 356 N.E.2d 621, 623 (5th Dist. 1976) (open and notorious behavior by definition means that such behavior is prominent, conspicuous, and generally known and recognized by the public).

61. 77 Ill. 2d at 61, 394 N.E.2d at 1209, citing ILL. REV. STAT. ch. 40, § 102 (1977).
62. Id. at 61, 394 N.E.2d at 1209.
64. 77 Ill. 2d at 58, 394 N.E.2d at 1208.
65. Id. at 63, 394 N.E.2d at 1210. See note 5 supra. Contrary to the court’s implication of the legislature’s firm rejection of the no-fault concept, it could be argued that IMDMA has weakened the fault requirement. Although § 401 (2) provides that marital dissolution shall be decreed if the court finds the necessary grounds “without cause or provocation by the petitioner,” § 406 states that “the conduct of the petitioner, unless raised by the pleadings, is not a bar to the action, nor a proper basis for the refusal of a decree of dissolution of marriage.”
66. Id. at 64, 394 N.E.2d at 1210.
67. Id. The Illinois Supreme Court in Hewitt expressly exempted individuals defined as putative spouses by § 305 of IMDMA from the legal effect of the Hewitt decision. The Act defines a putative spouse as:

Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. ILL. REV. STAT. ch. 40, § 305 (1977). Once putative spouses learn that they are not married, however, they lose their special status. They therefore are subject to the Hewitt holding and may not acquire additional property rights by continuing to cohabit with persons to whom they know they are not legally married. See generally Rights of the Putative Spouse, supra note 28.
The Hewitt court's chief objective, thus, was the preservation of traditional marriage as commanded by IMDMA. The court was concerned that a decision granting unmarried cohabitants enforceable property rights similar or superior to those enjoyed by married couples would encourage the abandonment of marriage. For example, in a situation similar to that presented in Hewitt, a court logically might, by analogy to IMDMA's "marital property" concept, divide property upon the termination of a nonmarital relationship. This approach, of course, would necessitate a formal court proceeding tantamount to divorce, and therefore unmarried cohabitants would have less reason to marry. They would have the option of the court's intervention in their property settlements, yet they would not be bound by the legal responsibilities attendant to a licensed marriage. Where children are involved, custody rights and support duties also would become critical.

Recognition of a quasi-marital status also might promote litigation over the right of a surviving unmarried cohabitant to assert various claims upon the death of his or her mate, including inheritance claims, wrongful death or loss of consortium actions, and suits to recover workmen's compensation benefits. On the other hand, as long as unmarried cohabitants lack any legal obligation to support each other, they will be unable to obtain property rights comparable to those granted a surviving spouse or a spouse seeking maintenance. The Hewitt court's express refusal to grant a quasi-marital status to unwed couples demonstrates the court's reluctance to create a duty of maintenance for unmarried cohabitants in Illinois. Additionally, the court prohibited private contractual alternatives to marriage, which indicates that private agreements to provide maintenance are void as attempts to obtain the incidents of marriage without a formal ceremony. Therefore, by denying unmarried cohabitants quasi-marital status and certain contractual rights, the Hewitt court preserved the legal benefits of marriage for married couples alone. Without such rights, unmarried cohabitation appears significantly less attractive than marriage and, therefore, less threatening to traditional marriage.

Consistent with its goal of preserving traditional marriage, the Hewitt court denied the plaintiff the intent-enforcing remedies of implied-in-fact

68. See note 6 supra for a summary of property rights incident to a valid marriage.
71. See note 6 supra.
72. 77 Ill. 2d at 60, 394 N.E.2d at 1208-09.
73. This view is supported by the supreme court's reversal of the appellate court's decision that maintenance was an available remedy for Victoria Hewitt. See 77 Ill. 2d at 66, 394 N.E.2d at 1211.
74. 77 Ill. 2d at 61-62, 394 N.E.2d at 1209.
75. Professor Dobbs uses the terminology "intent-enforcing remedies" to emphasize similarities between contractual and equitable remedies based upon implied intent. Dobbs, supra note 15, § 4 at 234.
contract and resulting trust, as well as the fraud-preventing remedies of constructive trust and quantum meruit. As the Marvin court noted, however, denying these remedies is not a just or effective way of promoting and preserving marriage. The Marvin court cogently reasoned that refusing unmarried cohabitants such remedies effectively encourages "the income producing partner to avoid marriage and thus retain the benefit of all of his or her accumulated earnings." The Hewitt court avoided this issue by deferring to the legislature. Indeed, the court stated that "the law governing the rights of parties in this delicate area ... involves evaluation of sociological data and alternatives ... best suited to the superior investigative and fact-finding facilities of the legislative branch." The court, thus, left Victoria uncompensated for fifteen years of service as a homemaker and allowed Robert to keep all of the couple's accumulated property held in his name alone.

The court also analyzed the Hewitt complaint in contract law terms, discussed the rule barring enforcement of contracts in consideration of illicit sexual relations, and criticized recent decisions in other jurisdictions limit-

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76. "Fraud-preventing remedies" are of both legal and equitable origin and seek to avoid unjust enrichment. Dobbs, supra note 15, §§ 4.2 & 4.3, at 229-56.
77. 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.
79. 77 Ill. 2d at 61, 394 N.E. 2d at 1209.
80. Establishing the value of homemaker services is discussed in Bruch, Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker Services, 10 Fam. L.Q. 101, 110-14 (1976) [hereinafter cited as Bruch]. Valuing homemaker services requires a court to hear testimony about the respective performances of each cohabitant and then set off the lesser claim against the greater. To determine the value of each party's services, the court examines the market value of the services rendered. See generally Bruch, supra, at 105-09; Casad, supra note 11, at 52-53; Havighurst, Services in the Home—A Study of Contract Concepts in Domestic Relations, 41 Yale L.J. 386, 398-99 (1932).
81. Illicit sexual relations have been defined as "any form of unlawful sexual intercourse such as fornication or adultery." Black's Law Dictionary 674 (5th ed. 1979). The Restatement of Contracts, however, includes noncriminal sexual intercourse in its prohibition of contracts for sexual services. Restatement of Contracts § 589, Comment a (1932). Thus, if a promise of sexual services is part of a given exchange of promises, the agreement is illegal. If an agreement for sexual services occurs after forming an earlier valid agreement, however, subsequent sexual intercourse will not invalidate the already existing agreement. Id. (Illustration 6). Neither is a contract induced by past sexual services illegal. Id. (Illustration 4). According to the Hewitt decision, however, a promise to enter into a consensual marriage for which there is no statutory provision is illegal. By rejecting Victoria Hewitt's claim that a separate, valid agreement had been reached, the court ignored cases from other jurisdictions that hold such agreements separable and enforceable. See note 35 supra.

The Hewitt court cited Wallace v. Rappleye, 103 Ill. 229 (1882), as the leading statement of Illinois public policy against agreements in consideration of future illicit sexual relations. 77 Ill. 2d at 58-59, 394 N.E. 2d at 1208. The Wallace court holding, however, turned upon the invalidity of consideration based on past sexual services. Wallace involved an action to enforce an alleged oral agreement between the decedent and his former household employee to make their illegitimate child his heir. The sexual relationship between the parties was criminal not only because the decedent was married to another woman, but also because the employee was only
ing the scope of the rule and allowing couples to enter into mutually enforceable contracts.\textsuperscript{82} The court stated:

[I]t would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in \textit{these relationships} contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity.\textsuperscript{83}

The court, therefore, inferred sexual relations as part of the consideration for agreements between parties to “these relationships.” Unfortunately, the definition of “these relationships” is and will remain imprecise until future case law establishes the scope of the rule set forth in \textit{Hewitt}.\textsuperscript{84}

\textsuperscript{82} 77 Ill. 2d at 60, 394 N.E.2d at 1208-09. The supreme court implied that if the trend in other jurisdictions continues, only contracts for which the sole consideration is sexual intercourse will be illegal. Other state supreme courts have enforced agreements in which at least part of the consideration was cohabitation, finding no violation of public policy. In Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977), the court concluded that the agreement between the parties was not based upon meretricious sexual services. The plaintiff, therefore, was granted partition of all property acquired during the twenty-one years the parties lived together and held themselves out to be husband and wife. In Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the California Supreme Court held that a “contract between nonmarital partners is unenforceable only \textit{to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services}.” Id. at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. The Marvin court defined a contract in consideration of illicit sexual relations as an agreement that requires payment for sexual services, “for such a contract is, in essence, an agreement for prostitution and unlawful for that reason.” Id. at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. In Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976), the court considered a contract whereby the plaintiff was to receive one-half of all property accumulated by the parties during the agreement. In return, the plaintiff agreed to live with the defendant, providing him with all the amenities of married life. Id. at 423, 547 P.2d at 144-45. The court concluded that sexual intercourse was not the primary consideration for the contract. Id. at 427, 547 P.2d at 147.

\textsuperscript{83} 77 Ill. 2d at 60, 394 N.E.2d at 1209 (emphasis added).

\textsuperscript{84} The class of persons within the definition of “these relationships” obviously includes couples like the Hewitts who engage in ongoing, family-type relationships and hold themselves out as husband and wife to the public. The Hewitts represent, however, only one extreme on a continuum of unmarried cohabitant relationships. At the other extreme would be a household containing two persons of the same sex not engaged in a homosexual relationship. Between the two extremes is an unlitigated area; Illinois courts must determine which members of that class violate the state’s public policy.

Certainly not all nonmarital cohabitant relationships equally rival the institution of marriage. Obviously, roommates who do not engage in sexual relations pose no threat to the traditional family structure. When unmarried cohabitants enter an ongoing sexual relationship within which
Any application of the illegal sexual consideration rule in future Illinois litigation must take into account the court's "independent matters" exception. As the court stated, "cohabitation by the parties may not prevent them from forming valid contracts about independent matters, for which it is said the sexual relations do not form part of the consideration." The contract...

they find emotional gratification and stability, however, the institution of marriage is for them replaced by an alternative more suited to their needs. The Illinois public policy favoring the integrity of marriage therefore would be violated only when mutually enforceable property rights are granted to unmarried cohabitants engaging in a relationship comparable to traditional marriage.

The degree of cohabitation or intimacy necessary to bar mutually enforceable property rights between unwed cohabitants is not easily ascertained. Since § 510 (b) of IMDMA characterizes marital cohabitation as a "resident, continuing conjugal" relationship, the developing case law pertaining to that section may provide some guidance for defining nonmarital cohabitant relationships. The few cases that have construed § 510 (b) suggest that the petitioner must show prolonged cohabitation, In re Marriage of Junge and Junge, 73 Ill. App. 3d 767, 392 N.E.2d 313 (5th Dist. 1979) (cohabitation of nearly one year held sufficient to meet requirement), repeated sexual intercourse, In re Support of Halford, 70 Ill. App. 3d 609, 388 N.E.2d 1131 (5th Dist. 1979) (three or four instances of intercourse over a three-year period held sufficient to establish requirement), and residence in the same household for more than fifty percent of the cohabitation period. Schoenhard v. Schoenhard, 74 Ill. App. 3d 296, 392 N.E.2d 764 (2d Dist. 1979) (cohabitation during approximately fifty percent of the period failed to meet requirement).

If these cases construing § 510 (b) are used to define nonmarital relationships injurious to the institution of marriage, individuals who engage in more casual sexual relationships should be able to employ contractual and equitable theories of relief against their mates. This result would be consistent with Hewitt because a casual sexual relationship is not as close as a familial relationship. A part-time conjugal relationship offers much less opportunity to create a stable, emotional setting than a full-time one. Because the integrity of marriage is less threatened by romantic relationships of limited duration, Illinois public policy should not preclude the use of contractual and equitable remedies by the part-time unmarried cohabitant where the duties alleged are not based on promises of sexual relations.

Another unanswered question is whether homosexual cohabitants should be considered part of the class of unmarried cohabitants who violate the Illinois public policy favoring marriage. Homosexual marriages are implicitly precluded by IMDMA. ILL. REV. STAT. ch. 40, § 201 (1977). Unlike parties to an illegal common law marriage, however, homosexuals cannot legally marry; therefore, homosexual relationships do not pose a threat to the integrity of marriage.

Whether discrimination against any of these classes of unmarried cohabitants is permissible under the equal protection clause of the 14th amendment to the United States Constitution is beyond the scope of this Article. See generally Mitchelson & Glucksman, Equal Protection for Unmarried Cohabitants: An Insider's Look at Marvin v. Marvin, 5 Pepperdine L. Rev. 283 (1978).

85. 77 Ill. 2d at 59, 394 N.E.2d at 1208, citing 6A A. Corbin, Corbin on Contracts § 1476 (1962). The meaning of "independent matters" undoubtedly will be the subject of many future suits. Professor Corbin's treatise on contracts contains several examples of enforceable contracts between unmarried cohabitants. See, e.g., 6A A. Corbin, Corbin on Contracts § 1476 (1962). The Hewitt court certainly could not have intended to declare that illicit sexual relations will be implied in all contracts between unmarried cohabitants, without qualifying its reference to § 1476 of Professor Corbin's treatise. Several cases cited in § 1476 allow relief where the sexual relations were as clearly interwoven with the enforceable agreement as in Hewitt. The pivotal, though unstated, concern in these cases appears to be the claim upon which relief is granted. Where assets were transferred or where a contract for purposes other than payment for services or division of accumulated property was alleged, relief was granted. See, e.g., Zytka v. Dmochowski, 302 Mass. 63, 18 N.E.2d 332 (1938) (quantum meruit for
tual independent matters exception is, however, of limited utility in determining the validity of contracts between unmarried persons because the *Hewitt* court explicitly stated that contract law did not control the determination of the Hewitts' entitlement to mutually enforceable property rights. Because IMDMA rather than the common law of contracts governs the rights of unwed couples, the *Hewitt* court's "independent matters" exception probably will not affect significantly the outcome of future disputes between unmarried cohabitants. The real significance of the "independent matters" exception is its suggestion of the court's willingness to recognize some yet undefined rights consistent with the *Hewitt* opinion.

In order to eliminate any confusion created by *Hewitt*, the supreme court should adopt a balancing test to be applied on a case-by-case basis. Such a test would allow the implementation of public policy favoring marriage established by section 102(2) of IMDMA as well as minimization of the harsh consequences of that policy whenever possible. The test should weigh the social benefit of dismissing a given complaint to protect traditional marriage against the personal hardship and social detriment that result when one cohabitant is unjustly enriched at the expense of another. Such a situation is best illustrated by applying the balancing test to the hypothetical situation described at the beginning of this article.

**APPLICATION OF THE BALANCING TEST**

*Private Contractual Alternatives to Marriage*

The written agreement executed by Andy and Beth exemplifies an express private contractual alternative to marriage. In their agreement, Beth promised to assume Andy's surname in exchange for Andy's promise financially to support Beth until her death. The agreement explicitly denied any consideration of sexual relations. Technically, the agreement is a valid bargained-for exchange because each party has given something of value. Further, the agreement arguably does not violate public policy because sexual relations are explicitly excluded from the consideration.

Such an agreement is, however, an obvious attempt to supply the nonmarital relationship with an incident of marriage, namely maintenance. Permitting the establishment of maintenance rights by private agreement

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86. 77 Ill. 2d at 57-58, 394 N.E.2d at 1207. See text accompanying note 55 supra.

87. It may be argued that this agreement falls within the independent matters exception because it is in writing and contains a clause which explicitly denies consideration of sexual relations. This argument, however, could be applied in a mechanical fashion to circumvent completely the *Hewitt* court's clear pro-marriage stance.

greatly enhances the financial security of unmarried cohabitants and consequently diminishes the importance of marriage as a source of financial protection. Because the Hewitt court criticized private alternatives to marriage and emphasized the state’s interest in preserving the integrity of marriage, the supreme court probably would void Andy and Beth’s agreement as contrary to public policy because it undermines marriage by making unmarried cohabitation more financially secure.

The second proposed action in the hypothetical illustrates another potential threat to marriage. As the basis of her action to partition Andy’s vacation property, which was purchased with funds set aside from his paycheck, Beth might allege the existence of an implied-in-fact agreement to divide all earnings equally. To prove the agreement, she must contend at trial that the surrounding circumstances of her relationship with Andy support an inference of an intention to divide equally all income earned during the term of cohabitation. Under contract principles, Beth’s theory could establish an implied-in-fact contract. Although some jurisdictions have awarded relief based on such agreements, the Hewitt court rejected this approach. If former cohabitants could acquire half of the property accumulated by their former mates during the relationship they might enjoy rights unavailable to married persons, who in most instances must rely on the domestic relations court’s substantial involvement in the disposition of marital property. Absent a valid separation agreement, married persons cannot contractually

89. 77 Ill. 2d at 60-62, 394 N.E.2d at 1209.
90. In cases involving implied-in-fact contracts, the courts examine the nature of the relationship to determine the intent of the parties concerning post-relationship support. See Note, Beyond Marvin: A Proposal for Quasi-Spousal Support, 30 STAN. L. REV. 359, 382-83 (1978).
92. 77 Ill. 2d at 60, 394 N.E.2d at 1209. See text accompanying notes 54-56 supra.
93. See ILL. REV. STAT. ch. 40, § 503(c). The statute sets out ten factors to guide the court in dividing marital property between spouses “in just proportion”:

1. the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;
2. the value of the property set apart to each spouse;
3. the duration of the marriage;
4. the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;
5. any obligations and rights arising from a prior marriage of either party;
6. any antenuptial agreement of the parties;
7. the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
8. the custodial provisions for any children;
9. whether the apportionment is in lieu of or in addition to maintenance; and
10. the reasonable opportunity of each spouse for future acquisition of capital assets and income.
94. See id. § 502. Under Illinois law, a separation agreement between married people is valid only if it is made in contemplation of immediate separation. Stenson v. Stenson, 45 Ill.
abrogate the court's power to determine the division of their property upon
dissolution. Hence, if a court accepted Beth's implied-in-fact contract theory
based on the meretricious relationship, it would effectively bestow greater
rights upon her and Andy than would be available if the two actually had
married. Because of the Hewitt court's strong reluctance to grant additional
rights to unmarried cohabitants, the implied contract between Andy and
Beth probably would be characterized as a contractual alternative to mar-
riage and thus void.

Property Rights Inferred From Proof of Cohabitation or Domestic Services

The theory presented in Beth's third action is that she has an equitable
interest in Andy's vacation property because her domestic services made its
acquisition possible. When an unmarried couple lives together for several
years, frequently one party assumes the domestic chores of the household
while the other works outside the home. An inequitable situation arises
upon dissolution of the relationship if one of the parties, usually the wage
earner, holds legal title to all property accumulated during the relationship.
Under the Hewitt rationale, however, Illinois courts could not divide the
vacation property held by Andy because Beth's claim is based solely on their
continuous conjugal relationship.95 Beth's alternative contentions, that her
interest in the vacation property is based on either a constructive
96 trust
or an implied-in-law contract,97 similarly would be rejected because the Hewitt
court refused such relief to Victoria Hewitt.

A fourth cause of action for compensation of domestic services on the
theory of quantum meruit98 presents a more difficult problem. IMDMA

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95. The Illinois Supreme Court rejected Victoria Hewitt's similar claim to property based on
her domestic services. 77 Ill. 2d at 66, 394 N.E.2d at 1211.
96. The theory behind this contention is that Beth's contribution to the household consti-
tuted a part of the consideration exchanged for the vacation home. Thus, even though Andy
holds the legal title, equity considers him a constructive trustee holding part of the property for
Beth's benefit. A court of equity can compel Andy to deliver title to Beth or compensate her to
the extent of her interest in the property.
97. The basis of this argument is that the law should impose an obligation upon Andy be-
cause Beth has placed in his possession the equivalent of money—her domestic services—
which enabled him to purchase the vacation property. Thus, even if the court concludes that
Andy and Beth lacked any intention to contract, under the implied-in-law contract theory the
court could disregard the lack of intent and impose an obligation upon Andy as a matter of law.
98. In Marvin, the court stated that before quantum meruit relief will be granted, it must
be shown that the services were rendered with the expectation of a monetary award. 18 Cal.
3d at 684, 557 P.2d at 123-24, 134 Cal. Rptr. at 831-32. In Hill v. Westbrook's
Estate, 95 Cal. App. 2d 599, 213 P.2d 727 (1950), the court relied upon similar reasoning to
award relief and sever the part of the agreement depending upon sexual consideration. Upon
retrial, however, the court found that it could not sever the agreement. 39 Cal. 2d 458, 247
(the court granted quantum meruit relief to the putative spouse in lieu of spousal support).
recognizes that homemaker services have economic value, but such services represent only one of several factors to be considered by courts when dividing marital property upon dissolution of marriage. A married homemaker cannot bring a separate action for the value of homemaker services under IMDMA. A decision allowing Beth’s quantum meruit action thus would give Beth an action unavailable to married homemakers. Such an advantage might have the effect of discouraging marriage, which would be inconsistent with the public policy of enhancing the institution of marriage relative to its alternatives. Beth’s quantum meruit action, therefore, would be denied.

**Agreements Independent of Cohabitant Relationships**

As the Hewitt court acknowledged, contracts between unmarried cohabitants concerning independent matters not in consideration of sexual relations are valid in Illinois. As noted above, however, the application of the “independent matters” exception must be reconciled with enforcing the public policy of strengthening and preserving the integrity of marriage and family relationships. Illinois public policy and the “independent matters” exception do not conflict if the definition of “independent matters” encompasses only relationships between unmarried cohabitants that are analytically unrelated to the incidents of marriage. For instance, business agreements involve the recognition of rights independent of and distinct from obligations normally associated with marriage and therefore such agreements should be enforced. Following this reasoning, Illinois courts should allow Beth’s action for an accounting of Andy’s use of partnership assets. Similarly, as a joint obligee in the lease and loan agreements, Beth would be allowed to bring a counterclaim against Andy for contribution if she is sued by the landlord or bank.

A refusal to recognize Beth’s mutually enforceable contractual and property rights under the partnership, lease, and loan agreements would be an unnecessarily severe means of discouraging nonmarital cohabitation. Because the rights Beth seeks are not comparable to the incidents of marriage, granting relief in these actions would not place her in a position superior to married individuals under similar circumstances. The prevention of unjust enrichment in this case thus outweighs any possible social benefits attained by denying Beth property rights against Andy.

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100. Id. § 503(c)(1)-(10).
101. 77 Ill. 2d at 59, 394 N.E.2d at 1208. The court rejected, however, the contention that agreements in consideration of cohabitation involve contracts separate and independent from those based on the consideration of sexual activity. Id. at 60, 394 N.E.2d at 1209. Hence, a contract for housekeeping services probably would not be considered severable from the agreement to cohabit in a nonmarital relationship.
102. Business agreements are defined herein as transactions for financial profit involving a third-party consumer.
Restitution of Unjustly Retained Property Interests

Regardless of the Hewitt court’s decision to deny Victoria Hewitt any right to property accumulated during cohabitation, Hewitt should not be read as an abrogation of the cohabitants’ separate rights in their property acquired prior to or separate from cohabitation. If separately owned property were transferred from one cohabitant to the other for investment purposes, for example, the transferring cohabitant should be allowed to recover the transferred property or its value.103 Simply put, couples should not lose the right to restitution of their separate, prior-owned property merely because they knowingly choose to live together.

It is important to note that the Hewitt court did not consider this theory, as the Hewitt complaint did not allege that Victoria transferred any property interests to Robert, who later invested in property and took title in his name.104 Constructive trust,105 resulting trust,106 and implied-in-law contract107 are appropriate remedies for restitution of wrongfully acquired property interests, such as the legal title to the suburban home Andy acquired with Beth’s funds. The Hewitt decision, therefore, should not be interpreted as barring these restitutionary remedies to unmarried cohabitants.

103. Recovering transferred property or its value is accomplished under the law of restitution. The field of restitution generally “involves all those situations in which a person who holds property (or has consumed it) must deliver it (or its value) to the claimant in order to prevent the unjust enrichment of the holder. Monaghan, Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity, 38 U. Det. L.J. 10, 10 (1960). See Dobbs, supra note 15, § 4.2-4, at 229-60, for a detailed discussion of the various common law and equitable actions courts have developed to effectuate restitution. See also notes 15-19 supra. For a discussion of these remedies in the context of unmarried couples, see Casad, supra note 11, at 51-52.

104. Plaintiff’s amended complaint alleged the following bases for her claim:
   (1) that because defendant promised he would “share his life, his future, his earnings and his property” with her and all of defendant’s property resulted from the parties’ joint endeavors, plaintiff is entitled in equity to a one-half share; (2) that the conduct of the parties evinced an implied contract entitling plaintiff to one-half the property, accumulated during their “family relationship”; (3) that because defendant fraudulently assured plaintiff she was his wife in order to secure her services, although he knew they were not legally married, defendant’s property should be impressed with a trust for plaintiff’s benefit; (4) that because plaintiff has relied to her detriment on defendant’s promises and devoted her entire life to him, defendant has been unjustly enriched.

77 Ill. 2d at 53, 394 N.E.2d at 1205. Although the plaintiff’s parents provided financial assistance to defendant to help him establish his pedodontia practice, the complaint did not seek the restitution of the parents’ money. 77 Ill. 2d at 53, 394 N.E.2d at 1205. This transfer of funds could constitute a remediable unjust enrichment, assuming no gift was intended. Based on the amended complaint and the way the court framed the issue in Hewitt, however, the parents’ transferred funds were not at issue.

105. See note 16 supra.

106. See note 19 supra. See, e.g., Suwalski v. Suwalski, 40 Ill. 2d 492, 495, 240 N.E.2d 677, 679 (1968) (resulting trust is created by law based on the intent of the parties, inferred from their conduct); Bozeman v. Sheriff, 42 Ill. App. 3d 228, 231, 355 N.E.2d 624, 625-26 (1st Dist. 1976) (resulting trust is created by law and arises from the presumed intention of the parties).

107. See notes 16 & 17 supra.
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The law of restitution aims to prevent the unjust enrichment of a party who holds legal title to real or personal property where title has been acquired with consideration furnished by another. Restitutionary remedies thus return to the plaintiff something that fairly does not belong to the defendant. Because unmarried cohabitants rarely enter into express agreements detailing their economic expectations, these restitutionary remedies assume unusual importance in resolving nonmarital property disputes.

The hypothetical suburban home purchased with Beth's funds but with title held in Andy's name provides an example of a remediable unjust enrichment in cohabitation situation. To allow restitution, a court should analyze three fundamental elements involved: the cognizable benefit to Andy, whether Andy's benefit was obtained at Beth's expense, and whether Andy's retention of the benefit was unjustified.

These elements are satisfied by the facts in the hypothetical because holding title to the house is of obvious benefit to Andy, and title was obtained at Beth's expense as she provided the purchase money. Andy's retention of the title is unjustified because

108. See Keith & Nelson, Cohabitation: New Views on a New Lifestyle, 6 FLA. ST. U.L. REV. 1393, 1397 (1978) [hereinafter cited as Keith & Nelson]; Note, Property Rights Between Unmarried Cohabitants, 50 IND. L.J. 389, 396 (1975) [hereinafter cited as Property Rights of Cohabitants]. See also Scanlon v. Scanlon, 6 Ill. 2d 224, 230, 127 N.E.2d 435, 438 (1955) (resulting trust is created by operation of law from the presumed intention of the parties when the consideration for the purchase of land is furnished by one party while the title is taken in the name of another, and the evidence must be clear, convincing and unmistakable); Zelickman v. Bell Fed. Sav. & Loan Assoc., 13 Ill. App. 3d 578, 586 301 N.E.2d 47, 53 (1st Dist. 1973) (resulting trust is generally defined as limited to situations in which land or other property is bought with the money of one person and title is taken in the name of another) (dictum). See generally Casad, supra note 11, at 51-52.

109. Keith & Nelson, supra note 108, at 1395-96. See Bruch, supra note 80 at 135; Property Rights of Cohabitants, supra note 108, at 394. Professor Bruch observed that most persons enter into their unmarried cohabitation relationship "either in ignorance of the legal consequences of either marriage or non-marriage, ... under the assumption that some legal protections are available, or with absolutely no thought given to the legal consequences of their relationship." Bruch, supra note 80, at 135.

110. These three factors are set out and explained in some detail in Casad, supra note 11, at 52-57. See generally 1 G. PALMER, LAW OF RESTITUTION §§ 1.7-1.8 (1978).

111. Two Illinois cases have dealt with similar fact situations involving unmarried cohabitants and have granted restitutionary relief to the cohabitant who provided the purchase money. See McDonald v. Carr, 150 Ill. 204, 37 N.E. 225 (1894); Flowers v. Anderson, 49 Ill. App. 2d 15, 198 N.E.2d 111 (1st Dist. 1964). In McDonald, the supreme court stated the applicable rule:

Where real property is purchased and paid for by one person and the legal title is taken in the name of another person, the parties being strangers to each other,—that is, not a wife or child, or person standing in that relation,—a resulting trust immediately arises from the transaction, and the person to whom the land is conveyed will hold it in trust for the one who paid the purchase money.

150 Ill. at 207, 37 N.E. at 225. The facts revealed that the plaintiff provided money for the purchase of property which the defendant placed in his name. The plaintiff was under the impression that she was married to the defendant, unaware of defendant's previous marriage to another, which was still legally in effect. The court concluded that the plaintiff was a legal
no evidence of donative intent on Beth's part exists and because Andy intentionally put title solely in his name after promising Beth that he would obtain title in joint tenancy. Accordingly, Andy should compensate Beth for the unintended benefit she conferred upon him. This is, of course, an unusually clear case under the various restitutionary theories, because Beth supplied all the money.

Allowing actions to recover vested property interests unjustly retained by either cohabitant would not greatly enhance the attractiveness of unmarried cohabitation. Separate, vested property interests are unrelated to the cohabitation arrangement and therefore protecting such interests does not undermine traditional marriage by encouraging "illicit" relationships. By allowing restitution of vested property interests, Illinois courts would not be conferring any new property rights upon unmarried cohabitants, but simply would be affording traditional relief to such persons where their property is unjustly retained by another.

"stranger" to the defendant and held that a resulting trust arose in plaintiff's favor as to the property purchased with her funds. Id. at 207-08, 37 N.E. at 226-27. See generally Keith & Nelson, supra note 108, at 1400; ANNOT., 31 A.L.R.2d 1255, 1286-87 (1953).

*McDonald* was followed more recently in *Flowers v. Anderson*, 49 Ill. App. 2d 15, 198 N.E. 2d 111 (1st Dist. 1964). In *Flowers* the plaintiff, a man, sought the imposition of a resulting or constructive trust in his favor as to certain property for which he allegedly furnished all or part of the consideration required for its purchase. The title to the property was held in the name of the defendant, a woman who had cohabited with him for over 13 years. Similar to *Hewitt*, the *Flowers* complaint alleged that the plaintiff and defendant had entered into "an exclusively close social and economic relationship" and that plaintiff had shared in defendant's personal life, including consortium, as well as earnings "to the same degree, and in every aspect, which a legally wedded and devoted husband would share." 49 Ill. App. 2d at 17, 198 N.E.2d at 112. After noting that there was no Illinois case exactly on point, the *Flowers* court relied on *McDonald* as support for its conclusion that a resulting or constructive trust could arise under the facts alleged in the complaint. Id. at 21, 198 N.E.2d at 114. The *Flowers* court characterized the facts as involving "meretricious partners" similar to the facts in *Williams v. Burlington*, 159 Fla. 618, 32 So. 2d 273 (1947). 49 Ill. App. 2d at 21, 198 N.E.2d at 114. For a discussion of *Williams*, see Keith & Nelson, supra note 108, at 1398. It is therefore clear that Illinois affords restitutionary relief to unmarried cohabitants as to separate, vested property interests that are unjustly retained or that unjustly enrich one cohabitant at the expense of another.

*112. Flowers v. Anderson*, 49 Ill. App. 2d 15, 198 N.E.2d 111 (1st Dist. 1964), involved property purchased entirely with funds of one cohabitant as well as property purchased with funds jointly contributed by the cohabitants, where both types of property were held in the name of only the woman cohabitant. It seems, therefore, that the Illinois courts will provide restitutionary relief as to funds supplied by the cohabitant, even where those funds do not constitute the entire consideration for the purchase of the property. See note 111 supra. Courts can "trace" funds into an interest in the specific property purchased with those funds. For a discussion of tracing in the unmarried cohabitant context, see Casad, supra note 11, at 60-61. See generally DOBBS, supra note 15, § 5.16, at 421-30.

*113. As Professor Casad noted, "[t]he right of knowingly unmarried couples . . . must . . . spring from legal sources other than the law of marriage [such as] basic principles of tort, contract, trust, property, and unjust enrichment." Casad, supra note 11, at 61. The *Hewitt* decision therefore should not be read as eliminating those various non-marriage based legal rights as to unmarried cohabitants, but simply as a refusal to recognize any new rights arising out of the cohabitant relationship itself.
CONCLUSION

By failing to balance the public policy opposing unjust enrichment against the public policy supporting marriage, the Hewitt court created uncertainty concerning nonmarital contractual and property rights. Further litigation seeking to clarify the law in these areas seems predictable as attorneys attempt to distinguish their clients' situations from the facts in Hewitt. Just how much unjust enrichment the supreme court will permit before it awards some rights to unmarried cohabitants is difficult to foretell.

The history of American jurisprudence demonstrates the willingness of courts to employ creative means to prevent unjust enrichment. Such judicial activism should occur, however, within a consistent conceptual framework that balances the public interest in the preservation of marriage against the public policy opposing unjust enrichment. Considerable social benefit would be obtained by adopting a balancing test to determine when unmarried cohabitants should be afforded mutually enforceable property rights. The resulting benefit would be the establishment of a consistent set of laws that would prevent the most severe cases of unjust enrichment while providing adequate protection for the institution of marriage.
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

VICTORIA HEWITT, et al

Plaintiffs

vs.

ROBERT M. HEWITT,

Defendant

No. 75-C-1237

COMPLAINT

COUNT IV

Now comes VICTORIA L. HEWITT, plaintiff herein, and with leave of
court first had and obtained files her additional Count IV herein and says:
1. That the plaintiff, VICTORIA L. HEWITT, and the defendant,
ROBERT N. HEWITT, prior to June 23, 1960, were Illinois residents attending
Grinnell College in the State of Iowa and that on or about said date, the
defendant, ROBERT N. HEWITT, told the plaintiff herein that they were
husband and wife and that they would thereafter live together as husband
and wife and that no formal marriage ceremony was necessary to the ac-
complishment of that purpose and the defendant furthermore stated that he
would thereafter share his life, his future, his earnings and his property with
the plaintiff herein.
2. That on or about said time, the parties immediately announced their
marriage to their respective parents and did thereafter from that time for-
ward, hold themselves forth as husband and wife.
3. That the plaintiff, in reliance upon the representations and promises of
the defendant herein, held herself forth as the wife of the defendant and
devoted her entire efforts from that day forward until the time of the filing
of this complaint, to the successful completion of the professional education
of the defendant, and thereafter to his successful establishment of his prac-
tice of pedodontia. That the plaintiff enlisted the aid of her father, who was a
practising dentist, in giving assistance to the defendant and the plaintiff also
encouraged her parents to give financial help to the parties as well and
throughout the entire period the plaintiff relied upon the promises of the
defendant made in 1960 and believed throughout said time that she was the
lawfully wedded wife of the defendant and entitled by virtue of his promises
to her, to support for herself and security for herself and the three children
that she bore [sic] him and at no time prior to the institution of the instant
cause did the defendant repudiate his earlier promise or seek to declare the relationship of the parties a nullity.

4. That during the period that the parties lived together as aforesaid, the plaintiff, in addition, assisted the defendant in his professional career by virtue of her own special skills and although the plaintiff was given a payroll check for her services, said monies were immediately passed back into the "family" funds and used for the "family" purposes.

5. That the defendant, at the time of said marriage, was without any funds and presently enjoys an income in excess of $80,000.00 per year and has acquired large amounts of property both in joint tenancy with the plaintiff wherein they are described as husband and wife and also large amounts of separate property which were the direct result of the assistance, encouragement, industry, and thrift of the plaintiff herein.

6. That the plaintiff herein has devoted her entire adult life from the year 1960 onward until the time of the filing of this complaint, to the professional and pecuniary advancement of the defendant and the three children of the parties hereto and that the efforts of the plaintiff were made entirely upon her reliance upon the promises of the defendant that their joint efforts would be jointly rewarded and that they were in truth and in fact a family seeking to insure a wholesome, satisfactory and successful life for the parties and their children.

7. That the plaintiff verily believes that all of the property of the defendant, whether or not said properties are held in joint tenancy, is the result of the efforts and the assistance of the plaintiff in their joint endeavors and that the plaintiff should be entitled equitably to an equal division of the property of the parties, whether or not said property is titled as the parties as joint tenants and husband and wife or whether said property stands in the sole name of the defendant or in some other form where the legal title is in another and the beneficial interest in the defendant.

8. That the plaintiff prays in the alternative, that the court enforce the implied contract of the parties as evidenced by the conduct of the parties from and after 1960 until the day of this complaint and grant to the plaintiff her equal share of the profits and properties accumulated by the parties during their family relationship.

9. That the plaintiff was led to believe, by the defendant, that he was granting to her the protection and security of a marriage and was led to believe that they were partners within the family relationship and that the defendant, knowing that the alleged marriage was not in fact a legal marriage, nevertheless, continued to assure the plaintiff that she was his wife and continued to hold himself forth as the husband of the plaintiff and the father of their minor children and continued, by such duplicity and misrepresentation, to secure to himself enormous benefits to be gained from the service, devotion, thrift, industry and dedication to the family that the plaintiff invested in the family relationship and that the property of the defendant should be impressed with a trust to protect the plaintiff from the frauds and deceptions of the defendant.
10. That the plaintiff, throughout the seventeen years when the defendant represented to her and to all the world that they were husband and wife, has relied upon such representations to her detriment and has unjustly enriched the defendant by granting to the defendant every assistance that a wife and mother could give, including numerous social activities engaged and designed to enhance the defendant's social and professional reputation, many voluntary good works attached to various local charities, and that the endeavors of the plaintiff throughout those years have prevented her from seeking for herself an independent status in life and she is now unable at this time to undertake a new arrangement and career without being granted her fair share of the defendant's wealth and income that she has directly contributed to.

WHEREFORE, plaintiff prays that the Court will hear evidence on the issues tendered herein and will grant to the plaintiff her just and fair share of the property, profits and earnings of the defendant and order a proper provision for the support and maintenance of the plaintiff and the minor children of the parties; or in the alternative, that the Court divide the entire joint tenancy holdings of the parties and impress a trust upon all of the property being held by the defendant or on the defendant's behalf that has been acquired through the joint efforts and endeavors of the plaintiff and defendant, and for such other and further relief as to the Court may seem just.

Plaintiff

STATE OF ILLINOIS : 
: SS
COUNTY OF CHAMPAIGN :

VICTORIA HEWITT, being first duly sworn on oath deposes and says that she has read the foregoing Count IV, that she knows the contents thereof and that the same are true.

Plaintiff

Subscribed and sworn to before me this _____ day of March, 1977.

LAW OFFICES OF BURT GREAVES Notary Public
Attorneys for Plaintiff

Champaign, Illinois . . .