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HEWITT V. HEWITT
CONTRACT COHABITATION
AND "EQUITABLE EXPECTATIONS"
RELIEF FOR MERETRICIOUS
SPOUSES

Well-documented statistics indicate the prevalence of the meretricious relationship¹ as a developing alternative to traditional marriage. Recent studies on non-marital cohabitation² place the number of meretricious spouses³ in excess of 1.3 million persons, a sixteen fold increase since 1960.⁴ Whatever the reasons effectuating this novel development,⁵ judicial recognition of current cohabitation preferences has lagged behind social acknowledgment and partial acceptance.

The lack of litigation between unmarrieds has delayed judicial development of the law regarding meretricious claims. This retardation stems from the obvious fact that, absent statutorily or judicially recognized bonds between the parties, court assistance was unnecessary to dissolve their relationship. Only recently have the courts been confronted with an actual numerical

1. Various terms including "contract marriage," "de facto marriage," "trial marriage," "domestic partnership," and "meretricious relationship" have been used to describe the relation between unmarried cohabitants. An exhaustive vocabulary can be found in Folberg and Buren, *Domestic Partnership: A Proposal For Dividing The Property of Unmarried Families*, 12 WILLAMETTE L.J. 453 n.2 (1976) [hereinafter cited as Folberg and Buren].

2. Cohabitation contemplates more than a single occasion of intimacy, as the term generally connotes that the parties have set up housekeeping with a certain degree of permanence.

3. As used in this note, a meretricious spouse is one who in cohabiting with another knows that the relationship does not constitute a marriage. *Carlson v. Olson*, 256 N.W.2d 249, 252 n.2 (Minn. 1977). A putative spouse is one who, following a marriage ceremony, cohabits with another who is not his spouse because of a marital defect, in the good faith belief that he is married to that person. ILL. REV. STAT. ch. 40, § 305 (1977).

4. NEWSWEEK, Aug. 1, 1977, at 46.

5. The loss of pension and welfare rights through marriage, other prejudicial statutorily based taxes and disbursements by government entities, and personal opinions on marital inflexibility and finalness are the most often mentioned explanations for the increase in non-marital cohabitation. See generally Foster, *Marriage and Divorce in the Twilight Zone*, 17 ARIZ. L. REV. 462 (1975); Milgrim, *Marriage Contracts For Support and Services: Constitutionality Begins At Home*, 49 N.Y.U. L. REV. 1161 (1974); Richards, *Discrimination Against Married Couples Under Present Income Tax Laws*, 49 TAXES 526 (1971); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

expansion in assertions by meretricious spouses.⁶ The courts, however, not being blessed with a developed body of applicable rules, generally have left plaintiffs remediless or have been forced to resort to legal fiction and fabrication in order to arrive at just and equitable results.⁷ Indeed, reliance on court creations has underlied much of the law of non-statutory marital relationships.

Early statutes establishing the requisites for a valid marriage often were devoid of express declarations nullifying marriages contracted without observance of legislative formalities.⁸ Based on the assumption that the failure to proscribe non-statutory marriages was indicative of recognition of other possible marriages,⁹ the court-created doctrine of common law marriage¹⁰ developed in Illinois¹¹ and elsewhere.¹² The declared state policy that marriages should be before witnesses led to the close judicial scrutinization of non-statutory marriages.¹³ Later, when this policy was coupled with growing abuse of the common law doctrine, the combination was sufficient to force its legislative abrogation.¹⁴ While about one-third of the states recognize such marriages,¹⁵ all common law marriages entered into after 1905 are null and void in Illinois.¹⁶ It has been noticed, however, that while legislative extinguishment of the doctrine may have been well-founded, the practice of alternatives to stat-

6. This recent though deliberate expansion is evidenced by the late decision dates of most meretricious cases and the complete absence of authority in many states. See Annot., 31 A.L.R.2d 1255 (1953 & Supp. 1978). Meretricious claims have generally fallen into two classifications: (1) suits against decedents' estates to enforce contract provisions to name a cohabitor in a will, and (2) suits requesting property division and support.

7. Compare *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977) (left plaintiff remediless despite eighteen year cohabitation) with *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977) (fabrication of implied irrevocable gift remedy) and *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974) (fiction-based constructive trust employed).

8. *Port v. Port*, 70 Ill. 484, 486 (1873).

9. *Id.* at 487.

10. Common law marriages are those entered into without solemnization or ceremony. They are given legal effect if two prerequisites are met: (1) an agreement to enter into a matrimonial relation through mutual assumption of marital duties, and (2) cohabitation after the agreement. See *McKenna v. McKenna*, 180 Ill. 577, 54 N.E. 641 (1898).

11. *Heblethwaite v. Hepworth*, 98 Ill. 126 (1880), found both of the common law marriage elements present. The *Port* case set forth the basis for the development of the common law marriage, however, the court held that both prerequisites had not been met.

12. See, e.g., *Billig and Lynch, Common Law Marriage in Minnesota: A Problem in Social Security*, 22 MINN. L. REV. 177, 179 (1938).

13. See *Pike v. Pike*, 112 Ill. App. 243 (1904).

14. See ILL. ANN. STAT. ch. 89, § 4 (Smith-Hurd 1972).

15. H. KRAUSE, FAMILY LAW 59 (1976).

16. ILL. REV. STAT. ch. 40, § 214 (1977).

utory matrimony was not eliminated.¹⁷ Instead only the rules, rights, and remedies applicable to such relationships were abolished.

This void in rights and remedies was never judicially filled in Illinois. Following the public policy based common law rule holding illegal agreements promotive of immorality,¹⁸ Illinois courts, as well as those in sister states, refused to lend their aid where the parties had contemplated non-marital sexual intercourse as any part of an agreement's consideration.¹⁹ In the absence of an express or implied agreement,²⁰ quasi-contractual theories were pleaded in attempts to recover the reasonable value of services rendered within the relationship.²¹ Such claims in quantum meruit²² met with judicial resistance and disallowance of recovery.²³

This judicial hands-off policy slowly began to give way to considerations of justice and equity in other states. The result was that while neither party to a meretricious relation acquired rights by cohabitation alone,²⁴ the fact that the parties lived together without marriage did not render all agreements between them unenforceable.²⁵ With the trend of the judiciary having

17. *Carlson v. Olson*, 256 N.W.2d 249, 251 (Minn. 1977).

18. 6A A. CORBIN, CORBIN ON CONTRACTS § 1476 (1962); RESTATEMENT OF CONTRACTS § 859 (1932).

19. *E.g.*, *Hill v. Estate of Westbrook*, 95 Cal. App. 2d 599, 213 P.2d 727 (1950) (woman's suit to enforce agreement to name her in will); *Drennan v. Douglas*, 102 Ill. 341 (1882) (agreement to provide for meretricious spouse in will); *Vetten v. Wallace*, 39 Ill. App. 390 (1890) (agreement of support between meretricious spouses); *but see Hagen v. MacVeagh*, 288 Ill. App. 1, 5 N.E.2d 577 (1936) (illicit relations did not invalidate agreement by man to support woman, the court severing valid consideration of woman's forbearance to sue on a breach of promise to marry claim).

20. While express contracts arise when the parties make an express agreement, written or oral, implied contracts arise in the absence of express agreement, where the conduct of the parties clearly indicates an intent to contract. 1 A. CORBIN, CORBIN ON CONTRACTS § 18 (1962).

21. Quasi-contracts are court created legal fictions used to imply absent contractual intent or assent for the purpose of achieving equitable results, namely the prevention of unjust enrichment. *People v. Porter*, 287 Ill. 401, 403, 123 N.E. 59, 60 (1919).

22. Quantum meruit is a form of action commonly called quasi-contractual recovery for the value of services rendered. *See BLACK'S LAW DICTIONARY* 1408 (revised 4th ed. 1968).

23. *In re Estate of Thompson*, 337 Ill. App. 290, 85 N.E.2d 840 (1949) (dictum hinting that recovery could have been had if an express contract had been proved).

Illegality and severability of consideration discussions might be irrelevant in suits in quasi-contract. *See Folberg and Buren, supra* note 1, at 466.

24. *See Stevens v. Anderson*, 75 Ariz. 331, 256 P.2d 712 (1953).

25. *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 595 (1973) (enforced oral agreement to convey property because of independent consideration in the form of services); *accord, Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976); *contra, Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977)

moved toward increased tolerance of marriage alternatives, the California Supreme Court decision in *Marvin v. Marvin*²⁶ indicated the extent to which the judicial restructuring of non-marital family law had evolved.

During the past two years, debate has raged concerning the meaning, propriety, and implications of *Marvin's* pro-meretricious decision. Only a few courts of review have been confronted with post-*Marvin* meretricious claims.²⁷ The extensive work of commentators, however, have made up for the lack of reported appellate litigation.²⁸ This debate penetrated the Illinois appellate court system for the first time in *Hewitt v. Hewitt*,²⁹ bringing with it divergent views on judicial, equitable, social, moral, and public policy considerations.

In *Hewitt*, counsel framed issues dealing expressly with the factual situation before the court.³⁰ However, all parties realized that the ultimate question presented for review was whether *Marvin*, with its attendant liberal moral basis and still undetermined limits and implications, should be incorporated

(admitted non-marital cohabitation prevented court enforcement of agreement).

26. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

27. *Vogel v. Pan Am. World Airways, Inc.*, 450 F. Supp. 224 (S.D.N.Y. 1978) (applying California law but distinguishing *Marvin* in not allowing meretricious spouse a statutory cause of action to sue for wrongful death of former cohabitant); *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977) (ignoring *Marvin* in denying relief in case with comparable facts); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977) (approving *Marvin*); *Warren v. Warren*, 579 P.2d 772 (Nev. 1978) (citing *Marvin* without expressing approval or disapproval and affirming denial of relief for failure to prove pooling of resources or partnership agreement, rather than on public policy grounds); *Beal v. Beal*, 282 Or. 115, 577 P.2d 507 (1978) (approving *Marvin* in part); *Edgar v. Wagner*, 572 P.2d 405 (Utah 1977) (without citation to *Marvin*, award affirmed on contract and gift theories despite appellant's public policy contentions); *Hinkle v. McColm*, 89 Wash. 2d 769, 575 P.2d 711 (1978) (citing *Marvin* but not ready to adopt it in toto).

28. See, e.g., Mitchelson and Glucksman, *Equal Protection For Unmarried Cohabitators: An Insider's Look at Marvin v. Marvin*, 5 PEPPERDINE L. REV. 283 (1978) (criticizing case for not delving into constitutional issue raised by co-author as counsel for appellant in *Marvin*); Comment, *Practitioner's Guide To The Wages of Sin*, 52 LA. B.J. 502 (1977) (criticizing *Marvin*); Comment, *Nonmarital Relationships: A Fair Termination Is Possible*, 24 LOY. L. REV. 128 (1978) (approving of *Marvin* in part); 90 HARV. L. REV. 1708 (1977); 30 OKLA. L. REV. 494 (1977); 23 WAYNE L. REV. 1305 (1977). For an excellent California historical perspective, reference should be made to Kay and Anyx, *Marvin v. Marvin: Preserving The Options*, 65 CALIF. L. REV. 937 (1977).

29. 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

30. Whether persons living in a non-marital relationship, by some agreement, express or implied, over long periods of time, holding each other out as husband and wife, are deprived of court protection by virtue of their non-marital cohabitation? Reply Brief for Appellant at 2, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

into Illinois law in toto, rejected outright, or dealt with cautiously, step-by-step.

The significance of *Hewitt* extends well beyond its distinction as a case of first impression in Illinois. Notice is served of the evolution of the meretricious relationship into a judicially recognized living arrangement. The actual shortcomings of traditional marriage are pointed out by dispelling arguments that non-marital cohabitation and the financial fruits thereof are the causes of the institution's seeming breakdown. *Hewitt* also raises doubts as to the propriety of the legislative refusal to deal with meretricious rights in the recent overhaul of Illinois' domestic relations law, especially with the well-publicized *Marvin* opinion having been handed down during its deliberations.³¹ The *Hewitt* decision will probably send lawmakers, who failed to anticipate the future, back to the drafting table for the promulgation of legislation, explaining, approving, or more than likely usurping *Hewitt's* holding.

RECENT SISTER STATE MERETRICIOUS DEVELOPMENTS

Due to the wide publicity afforded the *Marvin* decision,³² the holding was understood by many to be the first of its kind. California, however, had itself enunciated pre-*Marvin* pro-meretricious decisions. *Marvin's* importance stems from its synthesis of meretricious remedies, previously employed individually, in an attempt to catalogue the extensive array of possibilities.

In *Marvin*,³³ the California Supreme Court was confronted

31. Illinois revised its domestic relations law effective October 1, 1977. This revision, which included adoption of a new marriage and marriage dissolution act, ILL. REV. STAT. ch. 40, §§ 101 *et seq.* (1977), was approved Sept. 22, 1977. *Marvin* was decided Dec. 27, 1976. See generally Auerbach, *Introduction To The New Illinois Marriage and Dissolution of Marriage Act*, 66 ILL. B.J. 132 (1977); Heyman, *The Illinois Marriage and Dissolution of Marriage Act: New Solutions to Old Problems*, 12 J. MAR. J. 1 (1978); Kalcheim, *Marital Property, Tax Ramifications, and Maintenance: Practice Under The Illinois Marriage and Dissolution of Marriage Act: A Comparative Study*, 66 ILL. B.J. 324 (1978).

32. Defendant Lee Marvin and plaintiff Michelle Marvin are motion picture and stage performers. The amount in dispute exceeded one million dollars in motion picture rights.

33. The former Michelle Triola, having legally changed her surname to that of the defendant, prayed for a declaratory judgment of her contract and property rights and for the creation of a constructive trust on one-half of the property held in defendant's name. Paramount among her allegations was the claim that the parties seven year cohabitation had been based on an express oral agreement providing for an equal sharing in property acquisitions and a guarantee of support by defendant for plaintiff's life. Plaintiff performed her part of the agreement by foregoing her career as an entertainer so as to perform her duties as a homemaker and companion. Suit was filed when the defendant forced plaintiff from his home and terminated support payments. The trial court dismissed the case on the pleadings and

with conflicting precedents³⁴ and confusing anomalies existing in its own non-marital family law.³⁵ In holding that plaintiff had stated a cause of action in express contract, prior unworkable tests were replaced. The more liberal standard set forth, perceiving that cohabitation without marriage should not in itself invalidate non-marital agreements, provided for enforcement of such agreements except where they were expressly and inseparably based on the consideration of sexual services.³⁶

Marvin rejected the theory that the property of unmarried cohabitators was to be divided according to community property principles applicable to legal and putative spouses.³⁷ This was justified on the ground that meretricious spouses could not have expectations based on the belief that they were married. The court, however, did recognize the need for judicial intervention in order to ascertain the parties' reasonable expectations from their relationship.³⁸ The court, therefore, allowed plaintiff to amend her complaint to state a cause of action in implied contract, and in dicta espoused the view that other equitable reme-

refused leave to amend to state a cause of action in implied contract. An intermediate appellate court opinion of affirmance was withdrawn without being officially published. Excerpts of this opinion can be found in recent family law texts. See, e.g., H. KRAUSE, FAMILY LAW 109 (1976).

34. The court was confronted with competing lines of authority on whether illicit relations, in the form of non-marital cohabitation, rendered express agreements between such cohabitators unenforceable as against public policy. Compare *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430 (1932) (fact that parties were living in immoral relation did not disqualify them from contracting to the extent that such illicit relations were not made a consideration for the agreement, the court severing the valid provisions and enforcing them) with *Heaps v. Toy*, 54 Cal. App. 2d 178, 128 P.2d 813 (1942) (agreement held contrary to good morals and unenforceable because of presumed unlawful relations).

35. *Marvin v. Marvin*, 18 Cal. 3d 660, 669-73, 557 P.2d 106, 112-14, 134 Cal. Rptr. 815, 821-23 (1976). Among anomalies noted in interpreting California case law, was the fact that while express contract claims had been upheld at certain times, recovery on equally well established common law implied contract had been denied. At this time, domestic services were presumed to have been rendered gratuitously, leaving only inputs of property and funds as apportionable items in any relationship. Putative spouses derived rights on equitable and other theories, not available to meretricious spouses, namely in implied partnership and quantum meruit. Some courts, however, interpreted that community property principles of the Family Law Act, CAL. CIV. CODE §§ 4000 *et seq.* (1970), applied to meretricious spouses. See, e.g., *In re Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973) (the theory was that with fault concepts drastically eliminated from the divorce statutes, the presumed fault of immoral sexual intercourse of meretricious spouses should not prevent the statutory principles from applying to them to the same extent as to otherwise "guilty" legal spouses).

36. *Marvin v. Marvin*, 18 Cal. 3d 660, 672, 557 P.2d 106, 114, 134 Cal. Rptr. 815, 823 (1976).

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

38. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

dies could be employed in non-marital cases.³⁹ Among interpretations and reversals of existing law needed to achieve this broad decision, homemaking services were held to be valid and adequate contract consideration.⁴⁰ The presumption that domestic services were rendered gratuitously was replaced by a presumption that unmarrieds intended to deal fairly with one another.⁴¹

Marvin, without delving into historical origins or underlying theories, enumerated the various bases for relief by citing sister state cases utilizing them. The remedies available in certain states include relief arising from an implied agreement of joint venture or partnership⁴² or relief upon a resulting trust.⁴³ Remedies not based on intent have also been employed. These include constructive trust impressions⁴⁴ and quantum meruit

39. A single dissent chastized the majority's venture into equitable remedies, believing it to be unnecessary for the disposition of the case. *Id.* at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832 (Clark, J., concurring and dissenting).

40. *Id.* at 670, 557 P.2d at 113, 134 Cal. Rptr. at 823.

41. *Id.* at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830.

42. The implied partnership or joint venture theory is transformed into a meretricious remedy by applying rules regarding partnership dissolution to the case where one party has died or the relationship has been otherwise terminated. *See* Estate of Thompson, 81 Wash. 2d 72, 499 P.2d 864 (1972). In *Thompson*, the court ruled that the plaintiff had a valid claim against her former cohabitant's estate, based on an implied-in-fact partnership shown by the circumstances. The paramount requisite of a partnership, the sharing of business profits, was shown by the parties' joint operation of a cattle raising business for profit, during seventeen years of cohabitation.

43. Where consideration is advanced to a third person by a grantor, the property is taken in the name of the grantee, and the grantor and grantee are strangers in that they are not married. Therefore, a resulting trust arises in the grantee to hold title subject to the equitable interests of the grantor. RESTATEMENT (SECOND) OF TRUSTS §§ 440 *et seq.* (1965). *See* Hyman v. Hyman, 275 S.W.2d 149 (Tex. Civ. App. 1954) (meretricious spouse held entitled to property, on resulting trust theory, upon showing that purchase was made with funds acquired in whole or in part through her labors). *But cf.* Sugg v. Morris, 392 P.2d 313 (Alaska 1964) (recognizing resulting trust, but reversing on ground that woman failed to prove precise amount of her contribution).

44. Constructive trusts are equitable remedies that arise independent of any actual or presumed intent of the parties, and often operate to frustrate intention. This remedy arises when a party, holding title to property, is subject to an equitable duty to convey it to another, on the ground that retention would unjustly enrich the holder. When title has been acquired fraudulently or unconscionably, equity converts the holder into a trustee for another's benefit. The beneficiary can pray for the subsequent transfer of title or the forced sale and payover of the profits thereof. *See generally* RESTATEMENT OF RESTITUTION §§ 160 *et seq.* (1937); G. BOGERT and G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 77 (5th ed. 1973). This remedy has been judicially employed in meretricious cases. *See, e.g.,* Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974). In *Omer*, constructive fraud or unconscionability was sufficient reason to impose a constructive trust upon a man, who directed his own marriage dissolution for citizenship purposes,

fictions.⁴⁵ An implied irrevocable gift theory has also found favor in one jurisdiction.⁴⁶ Other theories have been advanced by commentators and not yet accepted or rejected.⁴⁷ The common thread underlying each of these remedial devices appears to be the realization that parties to non-marital relationships enter or remain involved because of personal expectations of future benefits. However, this thread was not picked up by the *Hewitt* trial court.

FACTS AND THE ORDER OF THE TRIAL COURT

Mrs. Hewitt's amended complaint⁴⁸ prayed for the court to award her a fair portion of the property and earnings of the defendant, to compel him to make support payments to plaintiff and the couple's minor children,⁴⁹ or alternatively, to divide the

though he continued to cohabit with his former wife. During this period, the woman followed the man's advice and worked to acquire property for their future joint benefit upon their previously planned remarriage. Title to the property was held severally by the man, however, and upon the woman's suit, the man was converted into a constructive trustee for her benefit.

45. Quantum meruit arises by operation of law, in that legal fiction is used to impose quasi-contractual liability in the absence of assent or even in the presence of express dissent. While constructive trusts deal with the prevention of unjust enrichment in property acquisitions, quantum meruit is concerned with the unjust enrichment of one who has been benefited by services received from one who rendered them with the expectation of monetary return. Since the unjust enrichment of the recipient is the basis for quantum meruit recovery, the amount to be paid is often the reasonable value of the services to the recipient. *See, e.g.,* *Olwell v. Nye and Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1946). Since homemaking services are within *Marvin's* contemplation of this remedy, a woman's recovery could be the amount that the man would have to pay a housekeeper, not necessarily the same value the work would be worth to her. *See generally* Brunch, *Property Rights of De Facto Spouses Including Thoughts on the Value of the Homemaker's Service*, 10 FAM. L. Q. 101 (1976).

46. *See* *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977). In *Carlson*, 21 years of cohabitation ended with the woman suing for partition and the man claiming that, with the exception of a sum received from the woman's parents, all family funds had been supplied through his efforts. Citing *Marvin* for its position on the availability of equitable remedies in meretricious situations, the court partitioned the property one-half to each party. The justification for this result was that an implied irrevocable gift had occurred between the parties.

47. *See* *Folberg and Buren, supra* note 1, at 474 (non-business partnership based solely on domestic cohabitation and equitable lien theories of recovery).

48. Plaintiff's original pleading had been a complaint for divorce, alleging fifteen years of cohabitation subsequent to a 1960 marriage in Iowa. On defendant's motion, the complaint was dismissed, when plaintiff conceded that there had been no statutory or common law marriage which the court could recognize.

49. Defendant admitted paternity, making a separate action on the child support issue unnecessary. *See generally* ILL. REV. STAT. ch. 106 3/4, § 51 *et seq.* (1977).

parties' joint tenancy holdings and impress a constructive trust on the jointly accumulated property held severally by the defendant. The trial court, compelled to take the well-pleaded facts as true in deciding on a defendant's motion to dismiss,⁵⁰ dealt only with the plaintiff's version of the parties' domestic relationship.

Prior to June of 1960, the parties were Illinois residents attending an Iowa college. When the plaintiff became pregnant, the defendant told her they were husband and wife, that no marriage ceremony was needed, and that he would share his life, earnings, and property with the plaintiff. The parties subsequently held themselves out as husband and wife. During fifteen years of cohabitation, Mrs. Hewitt devoted her efforts to assisting the defendant in obtaining his professional education and the establishment of his now lucrative dentistry practice.⁵¹ Though plaintiff received paychecks for assisting in the office, these monies were used for family purposes. This financial input was also supplemented by plaintiff's services as homemaker and mother.

The trial court dismissed the complaint for failure to state a cause of action cognizable under Illinois contract or partnership law, noting that the state required all such claims for property division be based on a valid marriage, which was absent from the facts pleaded.⁵²

THE OPINION OF THE APPELLATE COURT

On appeal, Mrs. Hewitt argued that the trial court had erred in dismissing her complaint, advancing contentions similar to those espoused in favor of the *Marvin* appellant.⁵³ Justice Trapp reversed the trial court judgment and remanded the case, concluding that the appellant had neither participated in a meretricious relationship nor conducted herself in such a manner

50. See, e.g., *Acorn Driving School v. Bd. of Educ. of Leyden High School Dist. No. 212*, 27 Ill. 2d 93, 187 N.E.2d 722 (1963).

51. Defendant practiced pedodontia, a branch of dentistry concerned with children. It was also alleged that plaintiff's mother and father, himself a dentist, financially assisted defendant's educational advancement.

52. 62 Ill. App. 3d at 863, 380 N.E.2d at 456 (1978).

53. Appellant argued for an adoption of *Marvin's* holding that an agreement between unmarried cohabitants should be enforced, absent a finding that its basis was the consideration of purely sexual services. She said that such circumstances were not shown by the pleaded facts, which the court was forced to assume were true. She also claimed that the power of equity, to prevent the unjust enrichment of Mr. Hewitt, at her expense, was not limited by the conceded absence of a legal marriage. Brief for Appellant at 6, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

that precluded relief.⁵⁴ In deciding that appellant had not participated in a meretricious relationship, the court looked to the precise dictionary definition of the terms *meretricious* and *concubine*, and concluded that the pleaded facts, showing the *conventional, respectable, and ordinary family lifestyle* of these unmarried parties, prevented reference to Mrs. Hewitt as even remotely related to a prostitute.⁵⁵

Mr. Hewitt argued that appellant's claim should be defeated on the public policy restriction that such quasi-divorce property rights do not attach, absent a valid marriage contract.⁵⁶ The court's inquiry regarding this contention was centered in three areas: the new Illinois Marriage and Dissolution of Marriage Act,⁵⁷ the criminal statutes dealing with illicit relations,⁵⁸ and the *Marvin* decision. The court impliedly denied that the new Marriage Act restricted the granting of contract and property rights to married couples only. While realizing that the underlying purposes of the Act is to strengthen and preserve the integrity of marriage and to safeguard family relationships,⁵⁹ it noticed that no provision of the Act undertook to prohibit cohabitation without marriage.⁶⁰ The court, however, apparently struggling with appellee's contentions,⁶¹ was compelled to conclude that appellant had "for more than fifteen years lived within the *legitimate boundaries of a marriage* and family relationship of a most conventional sort."⁶²

Investigation shifted to the criminal statutes and the offense of fornication was scrutinized.⁶³ It was obvious to the court that all illicit cohabitation is not proscribed in Illinois. In attempting to ascertain the extent of criminal sanctions over non-marital co-

54. 62 Ill. App. 3d at 869, 380 N.E.2d at 460 (1978).

55. *Id.* at 863, 380 N.E.2d at 456 (emphasis added).

56. Brief for Appellee at 2, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

57. ILL. REV. STAT. ch. 40, §§ 101 *et seq.* (1977).

58. *Id.* ch. 38, §§ 11-7, 8.

59. *Id.* ch. 40, § 102.

60. The court also observed that the Hewitt's relationship did not amount to a statutorily prohibited marriage. *See generally id.* § 212.

61. Mr. Hewitt's argument was not that non-marital cohabitation was prohibited by the act, but rather that the legislature's refusal to provide for dissolution relief upon termination of non-marital cohabitation indicated the state's choice not to recognize non-statutory relationships, like that of the Hewitts. Brief for Appellee at 4, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

62. *Id.* at 864, 380 N.E.2d at 457 (1978) (emphasis added).

63. ILL. REV. STAT. ch. 38, § 11-8(a) provides "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." The court realized that the adultery provisions were inapplicable because neither party had a living legal spouse.

habitation, attention was focused on the "open and notorious" language. After a reference to a recent case delimiting the breadth of this phrase, the pleaded facts were held not to be suggestive of an offense transgressing public policy.⁶⁴

The court's third inquiry resulted from appellant's request for application of *Marvin* to this case. In light of the absence of Illinois authority⁶⁵ and the comparability of the factual situations,⁶⁶ the *Hewitt* court took liberty to quote extensively from *Marvin*. The principles extracted from *Marvin's* express contract and public policy holding suggest that "[t]he fact that a man and woman live together without marriage and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses" and that no public policy precludes enforcement of such agreements, at least where they do not rest on the inseparable consideration of meretricious sexual services.⁶⁷ Appellee's public

64. In *People v. Cessna*, 42 Ill. App. 3d 746, 356 N.E.2d 621 (1976), defendant's adultery conviction was reversed, based on the fact that knowledge of the illicit intercourse did not extend publicly beyond the family of his alleged paramour. Relying heavily on language espousing the view that notoriety of adultery, like the possible fornication in the facts before them, had to extend beyond the cohabitation or intercourse, to the fact of the absence of a marital relation, the *Hewitt* court recognized no crime had been committed in its factual situation. The absence of a valid marriage between the Hewitts had first been publicly disclosed by appellee's 1975 motion to dismiss the original divorce complaint. See 62 Ill. App. 3d at 865, 380 N.E.2d at 458 (1978).

65. While the parties were in agreement that this was a case of first impression in Illinois, each placed differing significance on the absence of prior case law. Mrs. Hewitt merely implored the court to extend *Marvin* to fill the recognized void. Mr. Hewitt contended that this concession by the appellant was itself supportive of his position. Brief for Appellant at 3, Brief for Appellee at 2, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

66. Mr. Hewitt had attempted to distinguish *Marvin*. He claimed that *Marvin's* discussion of relief not based on an express contract was mere dictum. He also pointed out that while the *Marvin's* express contract involved the requisite bilateral promises, Mrs. Hewitt had not promised anything. Brief for Appellee at 7, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978). The only distinguishing factor even mentioned in *Hewitt* was the fact that the *Marvin* appellee had been married to another during the first few years of his cohabitation with the appellant. The overall facts were still held to be clearly comparable. 62 Ill. App. 3d at 865, 380 N.E.2d at 458 (1978).

67. *Id.* at 866, 380 N.E.2d at 458 (1978). In Illinois, attempting to sever valid from illegal consideration has resulted in conflicting judicial positions. Compare *Hagen v. MacVeagh*, 288 Ill. App. 1, 5 N.E.2d 577 (1936) (severing forbearance to sue on a legal claim from illicit conduct between the contracting parties) with *Frederick v. Frederick*, 44 Ill. App. 3d 578, 358 N.E.2d 398 (1976) (antenuptial agreement held totally unenforceable where single clause granted unexercisable power of appointment for purpose of escaping federal estate tax assessment).

policy contentions having been dispelled, the court moved to review other theories advanced on his behalf.

The assertion that Mrs. Hewitt's improper conduct should be punished by leaving her without a remedy was answered by reference to *Marvin's* dispensation of a similar argument. Calling attention to the fact that appellee was equally guilty, and that punishing one of two guilty parties rewards the other, a pure guilt basis for denial of relief was not given effect.⁶⁸

Mr. Hewitt's argument that his former cohabitant should be denied recourse to equity by the doctrine of "unclean hands"⁶⁹ was dispelled by quoting from a concurring opinion in *West v. Knowles*.⁷⁰ In *West*, Justice Finley suggested that when courts disassociate themselves from matters involving non-marital relationship termination, they create binding law allowing the party in possession of or having sole title to property, at the end of the meretricious relationship, to cunningly retain the entire benefit of the parties' joint labors.⁷¹ The *Hewitt* court took cognizance of this possible unfairness, and refused to be bound by such a hands-off policy.⁷² With the last of appellee's policy defenses disposed of, appellant was held to have stated a cause of action in express contract.⁷³ The court also observed that no public policy precluded other forms of relief from being

68. See 62 Ill. App. 3d at 866-7, 380 N.E.2d at 459 (1978).

69. Since it is assumed that both parties were necessary components for any immoral relation here, it appears that appellee's reliance rested on an "unclean hands" corollary, "equity will not aid a wrongdoer against another in equal fault."

70. 50 Wash. 2d 311, 311 P.2d 689 (1957). The state of Washington has a developed body of case law on meretricious claims. In *Creasman v. Boyle*, 31 Wash. 2d 345, 196 P.2d 835 (1948), a rule was set down that in the absence of a trust relation, property acquired during a meretricious relationship belonged to the person who held title. In *West*, this rule was limited to a presumption arising when there was no evidence of intention ascertainable from the circumstances. This presumption still has not been overruled. See *Hinkle v. McCole*, 89 Wash. 2d 769, 575 P.2d 711 (1978). Its effect, however, has been limited by recent decisions. See notes 42 and 44 *supra*. See generally 48 WASH. L. REV. 635 (1973).

71. 50 Wash. 2d 311, 316, 311 P.2d 689, 692-3 (1957) (Finley, J., concurring).

72. See 62 Ill. App. 3d at 867, 380 N.E.2d at 459 (1978). *Hewitt* fits into this state's "unclean hands" trend. Illinois courts have said this defense is not to be favored. *E.g.*, *Bonner v. Westbound Records*, 49 Ill. App. 3d 543, 364 N.E.2d 570 (1977). Evidencing the state's disinterest in "unclean hands" defenses, the state legislature abolished the divorce defense of recrimination. See ILL. REV. STAT. ch. 40, § 403(c) (1977). This defense had precluded the divorce of parties who had each been guilty of marital misconduct or fault grounds of equal stature. See, *e.g.*, *Mogged v. Mogged*, 55 Ill. 2d 221, 302 N.E.2d 293 (1973) (reversed lower court decree granting both parties a divorce for mental cruelty).

73. 62 Ill. App. 3d at 867, 380 N.E.2d at 459 (1978).

granted.⁷⁴ An examination of the basis for other possible remedies was undertaken.

The court, realizing that it needed to look no further than *Marvin* for persuasive arguments, adopted its rationale that unmarried cohabitants do have expectations arising from their relationship and judicial barriers blocking the way of their fulfillment must be removed.⁷⁵ In concluding that the *Marvin* reasoning was sound, even though partially dicta, appellant was held to have stated causes of action in implied contract, implied partnership or joint venture, resulting and constructive trust, and quantum meruit.⁷⁶

Discussing the ramifications of its holding, the court denied that it had judicially revived a form of the legislatively abolished common law marriage.⁷⁷ The court also believed that the marriage institution had not been denigrated by its opinion, as it was noted that the appellee's theory would, in most cases, provide encouragement to the wealthy or potentially wealthy to avoid marriage so as to retain all property and earnings at the expense of his or her mate.⁷⁸

SQUARING ILLINOIS LAW WITH THE TREND TOWARD MERETRICIOUS JUSTICE

Hewitt's predecessors had injected uncertainties into this developing area of the law. Even the vocabulary of non-marital cohabitation has perplexed the courts, and the *Hewitt* court was no exception. The court, in using laymen's dictionary definitions indicating that "meretricious" refers to prostitution,⁷⁹ correctly pointed out that, in this sense, appellee's reference to Mrs. Hewitt as a meretricious spouse was without merit. The phrases "meretricious relationship" and "meretricious spouse" have recently been employed, however, in a broader sense as

74. *Id.* While the trial court limited its memorandum dismissal to theories of implied contract, joint venture, and partnership, appellant's brief suggested causes of action in express contract, resulting and constructive trusts, and quantum meruit. The appellate court in *Hewitt* assumed that the trial court ruling on these other counts would have been the same. See *id.* at 863, 380 N.E.2d at 456.

75. The court defined such expectations by saying "[t]he parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding, the courts will fairly apportion property accumulated through mutual effort." *Id.* at 868, 380 N.E.2d at 460.

76. *Id.* See notes 42-45 *supra*.

77. *Id.*

78. *Id.* at 868-9, 380 N.E.2d at 460.

79. The word "meretricious" was derived from the Latin verb, *merere*, meaning: to earn pay. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 821 (1976).

merely descriptive of the relationship, and the parties, where they know they are living together without being married.⁸⁰ The *Hewitt* court refused to adopt this modern meaning of "meretricious." Since agreements resting on "meretricious sexual services" are unenforceable, it was apparently feared that describing Mrs. Hewitt as a meretricious spouse was incompatible with granting her a cause of action in express contract. Reference to appellant as a meretricious spouse would not have undermined the court's holding. It is not the presence of a modern meretricious relationship nor the reference to one as a meretricious spouse that prevents recovery.⁸¹ Rather it is the finding that prostitution-like meretricious *sexual services* formed the cohabitation basis; and there appears to be a well-delineated difference between prostitution and living together for mutual benefit.⁸² While this preliminary misconception by the court, upon analysis, actually serves to explain the new meretricious claim rule, other portions of the opinion fare poorly in an attempt to set forth a state policy for non-marital relationships. This failure is the direct result of the court's unwillingness to focus on the major themes of the appellate arguments, most notably appellee's public policy contentions.

Three distinct public policy notions were involved in *Hewitt*. The court concentrated on but two of them, never dealing with the essence of the third, which was the gist of appellee's argument. One discussion dealt with whether non-marital cohabitation, with its presumed attendant immoral sexual intercourse, renders the agreements of unmarrieds unenforceable for want of legal contract consideration. Limiting invalidity of consideration to the promise or performance of services as a paramour, in actuality, should render future discussions of this nature irrelevant in situations where the parties promised to perform the same duties normally associated with married life. Even where anticipated sexual conduct forms part of the reason for the co-

80. See, e.g., *Carlson v. Olson*, 256 N.W.2d 249, 252 n.2 (Minn. 1977); *Workmen's Compensation Appeal Bd. v. Worley*, 23 Pa. Commw. Ct. 357, 358, 352 A.2d 240, 241 (1976) (rejected woman's theory that "meretricious" is descriptive only of parties holding themselves out as married, holding that the term includes situations where a man and woman live together with or without pretense of marriage); *Coolidge, Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866, 873 (1962); 48 WASH. L. REV. 635 (1973) (the state of Washington has often used the term meretricious as synonymous with non-marital). The modifier "spouse" following "meretricious" seems to evidence the basis of this modern definition, as something entirely different from prostitution.

81. See, e.g., *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974).

82. See *Marvin v. Marvin*, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976) (emphasis added).

habitation, valid domestic services can support the contract of cohabitation.

The inquiry into whether Mrs. Hewitt's conduct offended state public policy was limited to the criminal and marriage statutes. With respect to the criminal fornication statute, it is apparent that no such offense was ascertainable from the pleadings, at least if the "open and notorious" language is interpreted as in *People v. Cessna*.⁸³ The Committee Comments, however, report the intention to proscribe conduct adverse to key interests sought to be protected, and list among those interests "the protection of the marriage institution from sexual conduct which tends to destroy it."⁸⁴ Those advocating that non-marital cohabitation is itself destructive of the marital institution could argue that appellant's conduct, though not criminally punishable, was violative of the state public policy as evidenced by the legislature's comments. The court, however, after setting out these committee comments, failed to deal with this possible interpretation. With neither of the Hewitts having been married to another person during their cohabitation, the opinion could have been strengthened by interpreting the sexual conduct tending to the destruction of the marriage institution as contemplating the offense of adultery, where at least one offender has a living legal spouse.

The court, without expressly meeting appellant's contention that the new Illinois Marriage and Dissolution of Marriage Act was irrelevant in discussions of unmarried persons,⁸⁵ impliedly rejected this argument by frequently analyzing various provisions. While the *Hewitt* court quoted extensively from *Marvin*, it bypassed one of its more important premises. *Marvin*, confronted with lower court opinions awarding meretricious spouses relief according to community property principles of statutory marriage legislation,⁸⁶ rejected theories that such acts were at all applicable, and concluded that the rights of unmarried persons are to be fixed entirely by judicial decision.⁸⁷ This

83. 42 Ill. App. 3d 746, 356 N.E.2d 621 (1976). See note 64 *supra*.

84. ILL. ANN. STAT. ch. 38, §§ 11-1 *et seq.* (Smith-Hurd 1972).

85. The new Act could not be seriously questioned in a chronological sense. Appellant's original complaint had been filed and dismissed prior to the October 1, 1977 effective date of the Act. ILL. REV. STAT. ch. 40, § 801(b) states, however, that "[t]his act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered." The trial court judgment on this amended count was rendered in 1978.

86. See, e.g., *In re Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973) (construing CAL. CIV. CODE §§ 4000 *et seq.* (West 1970)).

87. *Marvin v. Marvin*, 18 Cal. 3d 660, 683, 557 P.2d 106, 120, 134 Cal. Rptr. 815, 829 (1976).

rationale could have been used by the *Hewitt* court if it wished to exclude examination of the Illinois Marriage Act from adjudications of non-marital rights. The court, however, believed it was necessary to study the Act as one setting forth the state's domestic public policy. While it was appellant's contention that was dispelled, the adverse effect fell upon appellee, as the court's central examination of the marriage statutes was misdirected.

When the court dealt with public policy in terms of illegality of consideration and appellant's conduct, it focused its attention on whether illicit cohabitation was in and of itself, against public policy. This is evidenced by the fact that the court's primary emphasis in scrutinizing the marriage statutes dealt with whether non-marital cohabitation was in some way prohibited. The inquiry should have been directed to whether the granting to unmarrieds, of state protection over contract and property rights, was within the purview of the legislative restructuring of Illinois family law. Indeed appellee's public policy based rebuttal had centered on the assumption that the legislature's refusal to provide guidelines for the problems of unmarried cohabitation, during the 1977 overhaul of Illinois' domestic relations law, indicated the state's choice to limit recognition of relationships to those based on legal or putative marriages. The fact that the well-publicized *Marvin* opinion had been rendered during the deliberations seems to buttress this position. It is one thing to say that one's agreements and conduct are not violative of public policy. It is another to hold that public policy recognizes a type of relationship and the conferring of rights upon participants. This is especially true in Illinois, where the state retains a strong interest in marriage to the extent that it is considered a partner in a three party marital relationship.⁸⁸

While the Illinois statutes take no position expressly dealing with meretricious relationships, close scrutinization and realistic interpretation reveal the state's disapproval of the conferring of rights upon unmarried cohabitants. The refusal to recognize common law marriages could be construed as rejecting the contended existence of the meretricious relationship and corresponding rights, where such relationship appears to be an attempt to enter into a common law marriage. The *Hewitt*

88. *Johnson v. Johnson*, 381 Ill. 362, 366, 45 N.E.2d 625, 627 (1943). While concepts of marital misconduct have been eliminated from property division and maintenance claim determinations, Illinois has refused to adopt a no-fault divorce doctrine. This retention of fault grounds and the sanctions against collusive obtainment of divorce suggest the great willingness of the legislature to preserve the marital institution. See ILL. REV. STAT. ch. 40, §§ 401-504 (1977).

facts suggest such an attempt. When appellant became pregnant, appellee thereupon suggested that the parties were married. Their agreement to enter into a matrimonial relationship through assumption of marital duties would have met one underlying prerequisite for a common law marriage.⁸⁹ The other element, cohabitation between the parties, could not be seriously contested.

With the foregoing in mind, the most troublesome merger of thoughts in this opinion is the court's conclusion that it has not judicially revived the legislatively abolished common law marriage. This suggestion may be seriously doubted when it is attempted to be squared with the court's view that Mrs. Hewitt lived *within the legitimate boundaries of a marriage*.⁹⁰ To add to this confusion, the court, after saying that the parties had lived within the boundaries of a marriage, met appellee's punishment defense remarks by referring to the Hewitts as equally guilty persons.⁹¹ This backed the court into a corner. The "legitimate boundaries" premise was apparently needed to support the development of meretricious relief, yet the court could not say the parties were free from legal or moral guilt for fear of having the opinion branded as that of three men trying to impose their sense of moral values on the people at large.

In arguing that state disapproval of granting rights to meretricious spouses is implicit in the Illinois statutory scheme, an interpretation of the putative spouse doctrine⁹² lends credence to this theory. Good faith believers in the validity of their invalid marriages are extended rights up to the time of their knowledge of the marital invalidity. Once notice of a defect is received and the party has imputed to him the realization that he is cohabiting illicitly, no rights accrue. It can be contended that the rights cut off by receipt of knowledge are those vis-a-vis a legal spouse, and that knowledge would not prevent the derivation of meretricious rights. The argument could be made, however, that such provision evidences an intent to extend state protec-

89. See note 10 *supra*.

90. 62 Ill. App. 3d at 864, 380 N.E.2d at 457 (1978) (emphasis added).

91. *Id.* at 866-7, 380 N.E.2d at 459.

92. ILL. REV. STAT. ch. 40, § 305 (1977). See note 3 *supra*. Contrary to other states in which solemnization is sufficient, an actual marriage ceremony is an essential element of the Illinois putative spouse definition. A marriage can be solemnized before witnesses without actual ceremony. *Bowman v. Bowman*, 24 Ill. App. 165, 172 (1888). To solemnize a marriage means no more than to enter into a marriage contract before third persons for the purpose of giving it notoriety and certainty. BLACK'S LAW DICTIONARY 1564 (revised 4th ed. 1968). A ceremony appears unnecessary for a legal Illinois marriage, as a marriage is valid if it is licensed, solemnized, and registered as statutorily provided. ILL. REV. STAT. ch. 40, § 201 (1977).

tion, of whatever variety, only to the limits of good faith belief in moral cohabitation. Unfortunately, the court completely bypassed this discussion. This failure, when coupled with the court's refusal to counter appellee's argument that the Marriage Act, as a whole, evidenced an intent not to reward meretricious spouses, shows the opinion's focus, on whether non-marital cohabitation was prohibited, was clearly misdirected. The court would have benefited from deciding that the Marriage Act was inapplicable to this case, and following *Marvin*, adjudicated the parties' rights solely by judicial decision.

The conspicuous absence of discussion on other recent meretricious claim cases, such as *Carlson v. Olson*,⁹³ is troubling. *Carlson*, a Minnesota decision, could have been used to show that *Marvin* is not merely an outgrowth of California's liberal interpretation of the morality of non-marital cohabitation. The total reliance on *Marvin* as precedent is regrettable, because it leaves the opinion susceptible to criticisms based on certain differences between the family law of California and Illinois. *Marvin* dealt with a pure community property system, with each legal spouse acquiring a one-half interest in property accumulated during marriage. In Illinois, separate property concepts prevail up to the time of marriage dissolution.⁹⁴ It appears to be a greater step to award title to a meretricious spouse where separate title concepts are so strongly rooted, as compared to where notions of equality of interest are paramount to title.

Both *Marvin* and *Hewitt* recognized state policy promotive of marriage. A greater pro-marriage public policy is evidenced, however, where stringent grounds for divorce are required in contradistinction to the presence of no-fault doctrines facilitating dissolutions. While California has adopted a degree of no-fault, Illinois is one of only three jurisdictions restricting disso-

93. 256 N.W.2d 249 (Minn. 1977). One possible explanation for the *Hewitt* court's refusal to discuss the case is that the *Carlson* holding spoke, not in a contractual sense, but in terms of an implied irrevocable gift, a theory not advanced by Mrs. Hewitt. Appellee had pointed out this distinction. Brief for Appellee at 7, *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).

94. Illinois recognizes no rights of a spouse in the other's separate property during marriage. Title irrelevancy and the presumption that property acquired during marriage is "marital property" arises upon dissolution only. Even then "marital property" is not divided one-half to each spouse, as in community property states. Instead, division is made after consideration of all ten listed relevant factors. ILL. REV. STAT. ch. 40, § 503 (1977). See generally Auerbach, *Introduction To The New Illinois Marriage and Dissolution of Marriage Act*, 66 ILL. B.J. 132 (1977); Heyman, *The Illinois Marriage and Dissolution of Marriage Act: New Solutions to Old Problems*, 12 J. MAR. J. 1 (1978).

lutions to proven marital fault.⁹⁵ This also exemplifies Illinois' reluctance to follow the family law leads of other states, as was done in *Hewitt*.

Exemplifying California's pre-*Marvin* non-marital liberalism, putative spouses were allowed implied partnership and quantum meruit remedies, and cases suggested there was no difference in putative and meretricious rights.⁹⁶ Illinois' stricter view is shown by limitation of putative rights to property division and possible maintenance, without quantum meruit allowance, during good faith belief in moral cohabitation. From the foregoing, *Hewitt* appears to have usurped a much greater barrier than was faced by the *Marvin* court.

While the court adopted *Marvin* wholeheartedly, it is unfortunate that attention was not directed to the warnings of the dissenting justice, who preferred a narrower decision which would not attempt to solve the entire meretricious claim area without considering the ramifications.⁹⁷ Instead, this court of first impression set out the *Marvin* laundry list of remedial devices,⁹⁸ without a word as to the effect of the merger of these out-of-state developments with existing Illinois law. Had the court scrutinized present Illinois partnership law,⁹⁹ it is probable that the inapplicability of the implied partnership remedy to *Hewitt's* facts would have been apparent. Directions to this effect should have accompanied the court's opinion. An essential partnership feature, the carrying on of a business for profit,¹⁰⁰ was unascertainable from the pleaded facts. Granted the appellant had worked for appellee's dentistry practice and received a paycheck. The receipt of a portion of business profits, however, is insufficient inference of a partnership when in the form of em-

95. Compare CAL. CIV. CODE §§ 4506 *et seq.* (West 1977) with ILL. REV. STAT. ch. 40, § 401 (1977). For a headcount of jurisdictions retaining fault grounds exclusively versus those adopting the various forms and degrees of no-fault, reference should be made to Freed and Foster, *Divorce In The Fifty States: An Outline*, 11 FAM. L. Q. 297, 300 (1977) (includes probable national trends and local changes).

96. See, e.g., *In re Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). See generally 12 SAN DIEGO L. REV. 436 (1974).

97. One question which would have been worth discussion is whether it is equitable to impose the obligations of lawful spouses onto parties who expressly rejected matrimony to avoid them. See *Marvin v. Marvin*, 18 Cal. 3d 660, 687, 557 P.2d 106, 123, 134 Cal. Rptr. 815, 832 (1976) (Clark, J., concurring and dissenting). This problem has led authors to suggest that future cohabitants will draw up agreements expressly disaffirming certain rights and obligations. See 90 HARV. L. REV. 1708, 1717 (1977); 23 WAYNE L. REV. 1305, 1317 (1977).

98. See notes 42-45 and accompanying text *supra*.

99. See generally ILL. REV. STAT. ch. 106-1/2 (1977).

100. *Id.* § 6(1); *Teed v. Parsons*, 202 Ill. 455, 458, 66 N.E. 1044, 1046 (1903).

ployee wages.¹⁰¹ By allowing recovery in quantum meruit, the court expands domestic relief in the face of "gratuitous domestic services presumption" precedents denying recovery for the value of rendered services.¹⁰² If meretricious parties are to be deemed as living in a family relationship for purposes of quasi-divorce property divisions, there is no reason why they should not be bound by a state policy presumption on rendering services within that family relationship.

By allowing Mrs. Hewitt various causes of action, the opinion is subject to a criticism leveled at *Marvin* by its dissenter. Failing to heed Justice Clark's warning, the *Hewitt* court's list of remedies is not explained in terms of when they may or may not be used. It is conceivable under *Marvin* and *Hewitt* that a cohabitor could receive one-half of the property on a contract theory, demand a bonus in expectation-based remedies, and sue for the value of services in quantum meruit.¹⁰³ By failing to enunciate concrete remedial guidelines, the court opens dangerous pitfalls for the unwary.

HEWITT'S EFFECT ON ILLINOIS MARRIAGE AND THE FUTURE OF NON-MARITAL FAMILY LAW

Non-marital causes of action having been stated, reflections upon the impact of *Hewitt* on the marital institution must necessarily follow. That the institution has fallen on hard times recently has been statistically documented and theoretically explained.¹⁰⁴ In Illinois, no plausible claim could be advanced that judicial rewarding of non-marital cohabitation has taken its toll on marriage. *Hewitt* is the preliminary appellate opinion

101. ILL. REV. STAT. ch. 106-1/2, § 7(4)(b) (1977); *Schumann-Heink v. Folsom*, 328 Ill. 321, 324, 159 N.E. 250, 252 (1928). Even in Washington, the state of its development, the implied partnership appears unemployable as a meretricious remedy, absent a true business venture between the parties. *See Omer v. Omer*, 11 Wash. App. 386, 389, 523 P.2d 957, 960 (1974) (dicta); 48 WASH. L. REV. 635, 640 (1973).

102. In order to recover in quantum meruit, a plaintiff must show that he rendered services with the expectation of monetary return. In Illinois, however, a presumption that services are rendered gratuitously among family members can be overcome only by proof of an express or implied-in-fact contract. *Dempski v. Dempski*, 27 Ill. 2d 69, 72, 187 N.E.2d 734, 736 (1963). The family relationship giving rise to this presumption need not be based on blood or affinity. *In re White's Estate*, 15 Ill. App. 3d 200, 203, 303 N.E.2d 569, 570 (1973). A meretricious family conceivably would be within the scope of the *White* rationale. *See In re Estate of Thompson*, 337 Ill. App. 290, 85 N.E.2d 840 (1949) (failure of meretricious type claim for services rendered was based on absence of contract rather than on a public policy against non-marital cohabitation).

103. *See Marvin v. Marvin*, 18 Cal. 3d 660, 687, 557 P.2d 106, 123, 134 Cal. Rptr. 815, 832 (1976) (Clark, J., concurring and dissenting).

104. *See* note 5 *supra*.

recognizing such "fruits of cohabitation." Instead, the commentators have explained the trend away from marriage as grounded in the implied rewards of not being subjected to prejudicial statutory enactments and the overall inflexibility and finalness of marriage.¹⁰⁵

It is highly doubtful that this decision alone will have so marked an effect as to lead to a "meretricious marriage" boom at the expense of legal marriage. Actually, for every person who would consciously enter non-marital cohabitation solely because dissolution rights now attach, there should be another, whose previous intention to cohabit without financial obligation, being frustrated, leaves no reason for avoiding marriage, save the aforementioned statutory, inflexibility, and finalness problems. The foregoing anomaly suggests that the most noticeable change occasioned by *Hewitt* is that a different class of persons will now be most apt to avoid marriage. Prior to this case, the wealthy had the best reason for not marrying. Now the party wishing to "cohabit into money" can best justify non-marriage. From a property standpoint, it appears that the *Hewitt* non-marital policy is neither more nor less destructive or promotive of marriage than prior hands-off positions. This case, however, may be hailed in the future as laying the groundwork upon which a more perfect marital institution could be built. By pointing out the real causes of dissatisfaction with marriage, the court impliedly invited the legislature to encourage marriage by affirmatively strengthening the institution rather than negatively punishing those with different cohabitation preferences.

Based on a sense of justice and equity, quasi-divorce relief may now be afforded a deprived meretricious spouse in Illinois. Competing theories should clash in the immediate future. Some will advocate complete equal protection for the meretricious spouse vis-a-vis legal spouses.¹⁰⁶ Rights to intestate and elec-

105. *Id.* See *Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 869, 380 N.E.2d 454, 460 (1978).

106. The United States Supreme Court has acted in this general area. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (statute prohibiting contraceptive use except by marrieds held violative of equal protection clause). Briefly stated, the equal protection argument contends that the structuring of one's own home life as he desires is a fundamental right requiring strict equal protection scrutiny and a compelling state interest to usurp it. The basis for this position is that the family unit, and not marriage, is the backbone of society, and that continued legal distinctions based on marital status further neither marriage nor the family unit. See Mitchelson and Glucksman, *Equal Protection For Unmarried Cohabitators: An Insider's Look at Marvin v. Marvin*, 5 PEPPERDINE L. REV. 283 (1978).

Two courts have not opted for strict scrutiny in upholding state laws against equal protection challenges by meretricious spouses. See *Vogel v. Pan Am. World Airways*, 450 F. Supp. 224 (S.D.N.Y. 1978) (California's

tive shares of decedents' estates, standing to sue for wrongful death, and ability to receive various government benefits are only a few of the possible areas where these equal protection arguments may be employed.¹⁰⁷ Contentions that dependency rather than morality should be the determinative standard have already been successful.¹⁰⁸ Others will seize this "non-marital" rights doctrine, attempting to extend its rationale to multiple party and homosexual living arrangements.¹⁰⁹

Many will point to *Hewitt* as granting flexibility and rights superior to those of legal spouses. Greater freedom to contract is evidenced by the enforceability of oral non-marital contracts in contradistinction to the strict writing requirements for antenuptial agreements.¹¹⁰ This double standard can be remedied by including agreements of meretricious spouses within the Statute of Frauds.¹¹¹ Promoters of marital flexibility, however, will raise doubts as to the need for written antenuptial promises. It will also be pointed out that the type and possible cumulation of *Hewitt* remedies financially rewards meretricious spouses to a greater extent than legal spouses upon dissolution of mar-

wrongful death statute, CAL. CIV. PROC. CODE § 337 (West 1977), found rationally based in terms of fostering marriage and preventing possible fraudulent meretricious claims); *Matter of Lacey*, 34 Or. App. 877, 580 P.2d 1032 (1978) (workmen's compensation statute found to rationally distinguish between childless unmarried couples excluded from coverage and married couples and unmarried cohabitants with dependent children whose losses are compensable).

107. Interesting arguments can be made wherever statutes use the terms "husband", "wife", or "spouse." See, e.g., ILL. REV. STAT. ch. 38, § 11-1 (1977) (excepting "wife" from class of possible rape victims). Doubts may be raised as to the constitutionality of fornication statutes. See generally Brodie, *Privacy: The Family and the State*, 1972 U. ILL. L. F. 743 (1972); Annot., 41 A.L.R.3d 1338 (1972).

108. See, e.g., *West v. Barton-Malow Co.*, 394 Mich. 334, 230 N.W. 2d 545 (1975) (woman held to be an eligible dependent for workmen's compensation benefits upon death of man she cohabited with for thirteen years).

109. See generally Comment, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573 (1973); 30 OKLA. L. REV. 494, 497 (1977).

110. An oral antenuptial agreement is void under the statute of frauds. E.g., *Lee v. Central National Bank and Trust Co. of Rockford*, 26 Ill. App. 3d 394, 397, 308 N.E.2d 605, 607 (1974) (construing ILL. REV. STAT. ch. 59, § 1 (1977)).

111. On February 21, 1979, House Bill 507 was introduced in the Illinois General Assembly for the purpose of amending the Statute of Frauds, ILL. REV. STAT. ch. 59 (1977). The proposed legislation, in pertinent part provides that "[w]here one party seeks recovery against another based solely upon the relationship of the two persons while living together as partners when not married to each other or based upon services performed as a consequence of such a relationship, there can be no recovery under any theory of law, including but not limited to [listing remedial theories recognized in *Hewitt*], unless there is a legal written contract between the parties specifying the obligations and expectations of the parties based on the relationship." The prohibition applies whether the services relied on are sexual, family-like, or designed to advance business efforts.

riage.¹¹² More importantly, many will wonder about basing the new meretricious relief doctrine on the "expectations of the parties." In some cases of non-marital cohabitation, the breadwinner's expectations may be to cohabit without financial obligation. It is difficult to see how imposing the obligations of a lawful spouse onto one whose expectations were to cohabit without marital responsibility can be justified on a theory that, as one of the parties, his or her expectations are to be taken into consideration.

CONCLUSION

The problems of meretricious relationships, dormant so long in Illinois, can be taken lightly no longer. Indeed, in probably the single most important phrase of the *Hewitt* opinion, the court warned that "the courts should be prepared to deal realistically and fairly with the problems which exist in the life of the day."¹¹³ Extension of this warning to the Illinois legislature is the next logical step. The fact that this opinion was rendered by an intermediate appellate court, with an appeal still pending, naturally delimits *Hewitt's* overall impact.¹¹⁴ For the present, however, *Hewitt* is the law of meretricious claims for Illinois. In its positional and precedential perspectives, the case appears to be another small step toward national recognition of the meretricious relationship as at least a quasi-legal one,¹¹⁵ that requires not only judicial intervention on behalf of injured litigants, but also the expansion of legislative efforts designed to deal with the contentions certain to be raised in the future.

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112. While the *Hewitt* remedies are conceivably cumulative, in Illinois, maintenance upon dissolution is conditioned upon the lack of sufficient property apportioned to a spouse and the inability to supplement that amount through employment or other means. ILL. REV. STAT. ch. 40, § 504 (1977). Homemaker's services are considered in dissolution proceedings, but only to the extent of divisions of "marital property." See *id.* § 503. A former statute prevented wives and husbands from recovering compensation for services. See ILL. REV. STAT. ch. 68, § 8 (1975). This statute has been repealed by the new domestic relations act, yet it is doubtful that legal spouses are now allowed a suit in quantum meruit. The judicial presumption that domestic services are rendered gratuitously between family members, while possibly limited by *Hewitt*, remains in effect as to legal spouses. See note 102 *supra*.

113. 62 Ill. App. 3d at 869, 380 N.E.2d at 460 (1978).

114. *Hewitt v. Hewitt*, No. 51264 (Ill. filed Oct. 6, 1978). Oral arguments are scheduled for May, 1979.

115. Statistics indicate that there is a growing tendency of state courts to cite sister state family law decisions. See [1976] 3 FAM. L. REP. (BNA) ¶ 2066 (Interstate Citation Survey).

