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The Old Morality Lives on in Illinois

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THE OLD MORALITY LIVES ON IN ILLINOIS

Hewitt v. Hewitt

77 Ill. 2d 49, 394 N.E.2d 1204 (1979)

In our society, men and women increasingly live together without benefit of a marriage ceremony.[1] When these relationships end, problems of property rights frequently arise over the issue of whether one cohabitant has any claim against property acquired by the other cohabitant during the relationship. In *Hewitt v. Hewitt*,[2] the Illinois Supreme Court addressed this issue for the first time. Reversing a decision by the lower court,[3] the supreme court found that property claims arising out of a cohabitational relationship were unenforceable because the enforcement of such claims would violate public policy.[4] One of the main concerns of the Illinois Supreme Court was that recognition of enforceable property rights in this situation would amount to judicial recognition of common law marriage.[5]

This case comment will analyze the *Hewitt* decision in light of case holdings from other jurisdictions concerning cohabitational property rights. The law of contracts will be examined in the area of illegality and public policy as applied in this case. It will be shown that the Illinois Supreme Court reached an unjust result. Finally, attention will be given to the methods cohabitants can use to order their financial affairs to avoid the pitfalls of *Hewitt*.

HISTORICAL BACKGROUND

Prior to *Hewitt*, the question of property rights between two people who have lived together without being married had not been addressed in Illinois. However, similar cases had arisen in other states.[6] The ju-

1. Census figures for 1970 show about eight times as many couples living together without being married as cohabited in 1960. Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226, 1226 (1974).
2. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).
3. 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978).
4. 77 Ill. 2d at 66, 394 N.E.2d at 1211.
5. *Id.* at 65-66, 394 N.E.2d at 1211.
6. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1974); *In re* Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); *In re* Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 826 (1973); Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81

dicial treatment of these cases covers a broad range from a strictly "hands off" approach[7] to the provision of a forum for adjudication of property rights.[8]

The traditional view of contracts involving cohabitation as part of the consideration is that such contracts are unenforceable.[9] This comes from the position reflected in the Restatement of Contracts that "[a] bargain in whole or in part for or in consideration of illicit sexual intercourse or a promise thereof is illegal."[10] Therefore, "where a man and woman have contracted with each other to cohabit illegally, a court will not require the woman to perform her promise nor will it require the man to pay for her services."[11]

A stance frequently taken by courts faced with cohabitational property rights problems is typified in *Creasman v. Boyle*.[12] In *Creasman*, a man and woman lived together for years, and the woman managed the property acquired by the two of them. When she died, the man discovered that all the property they had acquired was held in her name. The Washington Supreme Court held that where the parties were aware of the illegal character of their relationship, the court will aid neither party and the property will belong to the one in whose name it is found.[13] The *Creasman* court created a presumption that the parties to a cohabitational relationship intended to hold and dispose of the property just as they actually did.[14]

California has modified the harshness of the illegality rule by narrowing its scope. In *Trutalli v. Meraviglia*,[15] a man and woman lived together for eleven years and had two children. The woman claimed

(1977); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Warren v. Warren, 579 P.2d 772 (Nev. 1978); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); McCall v. Frampton, 418 N.Y.S.2d 752, 99 Misc. 2d 159 (1979); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976); Hyman v. Hyman, 275 S.W.2d 149 (Tex. 1954); Edgar v. Wagner, 572 P.2d 405 (Utah 1977); Hinkle v. McColm, 89 Wash. 2d 769, 575 P.2d 711 (1978); *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972); West v. Knowles, 50 Wash. 2d 311, 311 P.2d 689 (1957); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948); Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974).

7. *See, e.g.*, Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948).

8. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

9. Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950).

10. RESTATEMENT OF CONTRACTS § 589 (1932).

11. Rehak v. Mathis, 239 Ga. 541, 543, 238 S.E.2d 81, 83 (1977) (Hill, J., dissenting).

12. 31 Wash. 2d 345, 196 P.2d 835 (1948).

13. *Id.* at 351-52, 196 P.2d at 838-39. It is interesting to note that this is the only case which this author has found where a man claimed a right to property acquired during a cohabitational relationship.

14. *Id.* at 353, 196 P.2d at 841.

15. 215 Cal. 698, 12 P.2d 430 (1932).

that they had mutually agreed that she should perform all necessary household services and that all property acquired by either was to be held by the man for their joint benefit. The man claimed that the agreement was unenforceable because it was based upon immoral consideration. The California Supreme Court found that an express agreement to pool earnings and share in joint accumulations of property was a contract separate from the agreement to cohabit and was therefore enforceable.[16]

The broad scope of *Trutalli* was narrowed, however, by subsequent decisions. In *Vallera v. Vallera*,[17] decided in 1943, the California Supreme Court found that, absent an express agreement to share property, one party to a live-in relationship was entitled to share in the other's property only to the extent that he or she could show monetary contribution toward the acquisition of the property. In 1962, the court in *Keene v. Keene*[18] went further, holding that a woman's services as homemaker and helpmate did not give her any rights to property held in her cohabitant's name, absent a cash contribution toward acquisition of the property, because such services were presumed to be a gift.

These rules have been criticized because of their harshness. Traditionally, the woman's contribution to a cohabitational relationship has been in the form of services as homemaker, and thus a double standard was created.[19] Although both parties knowingly entered into the relationship, the woman is punished because her contribution is frequently in non-monetary form.[20] Further, "[t]he rule often operates to the great advantage of the cunning and shrewd, who wind up with possession of the property or title to it in their names at the end of a so-called meretricious relationship."[21] While a court may proclaim that a "hands off" approach will be used, the effect is to create a rule of law which aids the "cunning, anticipatory designs of just one of the parties."[22]

Because of inequities fostered by the traditional approaches, and possibly in recognition of changing societal mores, the more recent decisions in California and other states have recognized property rights of cohabitants. Because California has been in the forefront of this trend, two California decisions merit examination.

The trend started in 1973 when a California appellate court

16. *Id.* at 699, 12 P.2d at 431.
17. 21 Cal. 2d 681, 134 P.2d 761 (1943).
18. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).
19. *Id.* at 664, 371 P.2d at 336, 21 Cal. Rptr. at 600 (Peters, J., dissenting).
20. *Id.*
21. West v. Knowles, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957) (Finley, J., concurring).
22. *Id.*

decided *In re Cary*.[23] The Carys lived together for eight years and had four children. While both parties knew that they were not married, they held themselves out to the community as married. The court held that the Carys' relationship was that of a "family," thus coming within the purview of the family law act.[24] The court found that California community property law applied in the adjudication of their property rights.[25]

In 1976, the California Supreme Court decided the landmark case of *Marvin v. Marvin*.[26] Michelle Triola Marvin brought suit against actor Lee Marvin for one-half of all the money he had earned during their seven year live-in relationship. She alleged that he had promised expressly to share with her all of his property acquired during their relationship. The *Marvin* court recognized that the traditional approach to cohabitational property rights had led to inequitable results. However, the court rejected the community property approach of *Cary*. The court instead took a contract approach, holding that a contract between unmarried cohabitants is "unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."[27] The court found that Michelle Marvin's complaint stated a cause of action under an express oral contract,[28] reasoning that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[29] Further, the court suggested other possible theories of recovery as acceptable: implied contract,[30] implied partnership or joint venture,[31] and quantum meruit.[32] The court reasoned that "the law should be fashioned to carry out the reasonable expectations of the parties."[33] The California Supreme Court then remanded the *Marvin* case to the trial court for a factual determination based upon the court's holding.[34]

23. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).
24. CAL. CIV. CODE §§ 4000-5138 (West 1978).
25. 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 866.
26. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1979).
27. *Id.* at 669, 557 P.2d at 112, 134 Cal. Rptr. at 821 (emphasis in original).
28. *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.
29. *Id.*
30. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.
31. *Id. See also In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972).
32. 18 Cal.3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. *See also* Hill v. Estate of Westbrook, 39 Cal. 2d 458, 462, 247 P.2d 19, 20 (1952); Gauthier v. Laing, 96 N.H. 80, 70 A.2d 207 (1950).
33. 18 Cal. 3d at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825.
34. In a much publicized trial decision, Michele Triola Marvin was awarded $104,000 for rehabilitation purposes under the trial court's power to fashion an equitable remedy. [1979] FAM. LAW REP. (BNA) 3077.

Since *Marvin*, a number of other states have faced the cohabitational property rights issue. The Oregon Supreme Court adopted the express and implied contract theories of *Marvin* in *Beal v. Beal*.[35] The relevant inquiry in *Beal* was the intention of the parties. The Oregon court noted that, absent an express written agreement, it must look at the facts of the situation to see "what the parties implicitly agreed upon."[36] The court determined that "joint acts of a financial nature can give rise to an inference that the parties intended to share equally."[37] Minnesota adopted *Marvin*'s focus on the reasonable expectations of the parties when faced with a partition suit between a couple who had cohabited for twenty-one years.[38] New Jersey[39] and Utah[40] have adopted the express contract theory of *Marvin* as a basis of recovery. New York has adopted the *Marvin* rationale with regard to express and implied contracts.[41] Only Georgia has denied any basis for recovery. In a two-page opinion, the Georgia Supreme Court held that the traditional contract illegality approach was applicable and the court, therefore, denied any recovery.[42]

HEWITT V. HEWITT

Facts of the Case

Victoria Hewitt met the defendant, Robert Hewitt, in college in Iowa.[43] Victoria contends that when she became pregnant in 1960, Robert told her that no formal marriage ceremony was necessary. They would live together as husband and wife and he would share "his life, his future earnings and his property with her. . . ."[44] Victoria and

35. 282 Or. 115, 577 P.2d 507 (1978).
36. *Id.* at 118, 577 P.2d at 510.
37. *Id.*
38. Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977). In *Carlson*, Laura Carlson petitioned for partition of a house owned in joint tenancy with Oral Olson, who cross-petitioned claiming that he had provided all the consideration for the purchase of the house. The court held that Olson had intended an irrevocable gift to Carlson and therefore ordered partition. *Id.* at 255.
39. Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (recovery based upon express oral agreement).
40. Edgar v. Wagner, 572 P.2d 405 (Utah 1977) (recovery based upon express oral contract).
41. McCullon v. McCullon, 410 N.Y.S.2d 226 (1978) (recovery based upon Pennsylvania common law marriage recognized by the New York court; court also recognized cause of action based upon express or implied contract). *But see* McCall v. Frampton, 415 N.Y.S.2d 752, 99 Misc. 2d 159 (1979) (no cause of action because woman married to another man during period of cohabitation).
42. Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977). Faced with an eighteen-year cohabitational relationship, the court in *Rehak*, with little analysis, held that any contract between the parties was void because of illegal or immoral consideration.
43. 77 Ill. 2d at 53, 394 N.E.2d at 1205.
44. *Id.*

Robert announced to their families that they were married. When Robert entered dental school, he was financially assisted by Victoria's parents. Victoria contends that she assisted defendant in his pedodontia[45] practice, for which she was paid. However, she placed those funds in the family pool of earnings. After three children and fifteen years together, the parties decided to end their relationship.

Victoria initially sued for divorce in Champaign County, Illinois. When Robert moved to dismiss that action, she conceded that there had not been a marriage ceremony. Since common law marriage is no longer recognized under Illinois statute,[46] the divorce complaint was dismissed. Victoria amended her complaint, requesting that the court grant her "an equal share of the profits and properties accumulated by the parties"[47] during their cohabitation. Her complaint gave the following four bases for recovery on her claim. First, that Robert's promise to "share . . . his earnings and property" with her was a contract entitling her to one-half of all his property accumulated during their "joint endeavors."[48] Second, the conduct of the parties evinced an implied contract. Third, because Robert fraudently assured Victoria that they were married, his property should be impressed with a trust for her benefit. Finally, Victoria argued that, since she relied upon Robert's promises to her detriment, Robert had been unjustly enriched.[49]

Decisions of the Lower Courts

The trial court dismissed Victoria's amended complaint.[50] The court found that her complaint failed to state a cause of action because Illinois law and public policy demanded that her claims be based upon a valid legal marriage.[51] However, the court did find that Victoria was entitled to child support.[52]

The appellate court unanimously reversed the trial court. The court, basing its decision upon the reasoning of *Marvin*, held that Vic-

45. Pedodontia is a specialized field of dentistry dealing only with children.

46. Illinois does not recognize common law marriages contracted in the state after 1905. ILL. REV. STAT. ch. 40, § 214 (1979). Illinois courts have stated that they will recognize common law marriages contracted in states which recognize them. *E.g.*, Jambrone v. David, 16 Ill. 2d 32, 156 N.E.2d 569 (1959); Newton v. Lehman, 105 Ill. App. 2d 442, 244 N.E.2d 830 (1969).

47. 77 Ill. 2d at 52, 394 N.E.2d at 1205.

48. *Id.* at 53, 394 N.E.2d at 1205.

49. *Id.*

50. *Id.* at 54, 394 N.E.2d at 1206.

51. *Id.*

52. *Id.* The trial court found that it was unneccessary for Victoria to bring a separate action under the Illinois Paternity Act, ILL. REV. STAT. ch. 40, §§ 1351-1368 (1979).

toria had stated a cause of action based upon an express oral contract.[53] The court further stated that the theory of implied contract or equitable relief based upon allegations of misrepresentations also might be available to Victoria.[54]

The appellate court found that the Hewitts' relationship did not violate public policy.[55] The court refused to characterize the relationship between Robert and Victoria as meretricious,[56] finding instead that it was a stable, family relationship.[57] The relationship did not violate any criminal statutes.[58] The Illinois Criminal Code makes adultery an offense,[59] but in this case neither party had a living spouse. Nor does the Illinois prohibition against fornication apply since that statute states that any person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.[60] By judicial interpretation, the fornication statute applies only when the behavior is "prominent, conspicuous and generally known and recognized by the public,"[61] but does not proscribe conduct which is essentially private or discreet.[62] Thus, the appellate court found that the Hewitts' conduct did not violate its interpretation of public policy.

Finally, the appellate court rejected the concept of moral guilt as a factor in its decision. The court stated, "[i]ndeed to the extent that denial of relief 'punishes' one partner, it necessarily rewards the other by permitting him to retain a disproportionate amount of the property. Concepts of 'guilt' thus cannot justify an unequal division of property between two equally 'guilty' persons."[63] The court found the reasoning of *Marvin* particularly persuasive because of the Hewitts' long term relationship. However, the court distinguished *Marvin* on its facts because Lee Marvin was married during three years of his cohabitation

53. Hewitt v. Hewitt, 62 Ill. App. 3d 861, 867, 380 N.E.2d 454, 459 (1978).
54. *Id.* at 867, 380 N.E.2d at 459.
55. *Id.*
56. *Id.* at 863, 380 N.E.2d at 456-57. The court relied upon the 1973 edition of the NEW COLLEGIATE DICTIONARY which defined meretricious as "of or relating to a prostitute." *But see* Comment, *Rights of the Putative and Meretricious Spouse in California*, 50 CAL. L. REV. 866, 873 (1962) which defines a meretricious spouse as "[o]ne who cohabitates with another knowing that the relationship does not constitute a valid marriage. . . ." The latter is the common legal definition. *See, e.g.*, Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).
57. 62 Ill. App. 3d at 865, 380 N.E.2d at 457.
58. *Id.*
59. ILL. REV. STAT. ch. 38, § 11-7 (1979).
60. *Id.* § 11-8(a) (emphasis added).
61. Illinois v. Cessna, 42 Ill. App. 3d 746, 749, 356 N.E.2d 621, 623 (1976).
62. Illinois v. Potter, 319 Ill. App. 409, 49 N.E.2d 307 (1943).
63. 62 Ill. App. 3d at 867, 380 N.E.2d at 459, *citing* Marvin v. Marvin, 18 Cal. 3d 660, 682, 557 P.2d 106, 121, 134 Cal. Rptr. 815, 830 (1976).

with Michelle[64] which, in Illinois, would have been a criminal offense.[65] The appellate court focused upon whether the Hewitts' relationship violated public policy. When the court found that it did not, it applied the full range of *Marvin*'s reasoning to find a cause of action for Victoria.

The Supreme Court Decision

On appeal, the Illinois Supreme Court reversed the decision of the appellate court, finding "that the plaintiff's claims are unenforceable for the reason that they contravene the public policy implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants."[66]

The supreme court found the appellate court's reasoning flawed. While relying upon the *Marvin* court's pure contract theory, the appellate court had emphasized the conventional family relationship.[67] The supreme court questioned whether the appellate court felt that a stable family relationship was a prerequisite to a *Marvin* theory of recovery.

The supreme court hesitated to decide property rights of cohabitants solely upon contract principles where broad policy questions were involved.[68] While the appellate court focused upon whether the *relationship* had violated public policy, the supreme court focused upon whether the *granting of a cause of action* would violate public policy. The supreme court specifically looked at whether recognition of property rights between cohabitants would weaken the institution of marriage and whether judicial recognition of cohabitational property rights would revive common law marriage.[69]

The traditional rule in Illinois has been that "[a]n agreement in consideration of future cohabitation between the plaintiffs is void."[70] The court noted, however, that "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."[71] The court rejected case law from other jurisdictions which held that express agreements to pool earnings are supported by in-

64. 62 Ill. App. 3d at 865, 380 N.E.2d at 458.
65. *See* text accompanying note 59 *supra*.
66. 77 Ill. 2d at 66, 394 N.E.2d at 1211.
67. *Id.* at 57, 394 N.E.2d at 1207.
68. *Id.* at 57-58, 394 N.E.2d at 1207-08.
69. *Id.*
70. *Id.* at 59, 394 N.E.2d at 1208, *citing* Wallace v. Rappleye, 103 Ill. 229, 249 (1882).
71. 77 Ill. 2d at 59, 394 N.E.2d at 1208. *See* RESTATEMENT OF CONTRACTS §§ 589, 597

dependent consideration and are not invalidated by the parties' cohabitation.[72] The court stated that it would be more candid to recognize common law marriage than to display "the naivete we believe involved in the assertion that there are involved in 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."[73]

Because the facts alleged in this case clearly would have constituted a common law marriage under pre-1905 law,[74] the court found that recognition of Victoria's property rights would have the effect of resurrecting common law marriage.[75] The court noted that, even in states where common law marriages are recognized, courts have questioned that policy, finding that common law marriage is a "fruitful source of perjury and fraud"[76] and that it weakens the public estimate of the sanctity of marriage.[77] The supreme court reasoned that, since the legislature had abolished common law marriage, any change in the status of common law marriages would have to come from the legislature.[78]

The *Hewitt* court questioned whether it is appropriate to grant legal status to "a private arrangement substituting for the institution of marriage sanctioned by the State."[79] The court found a strong legislative policy in favor of marriage, as expressed in the Illinois Marriage and Dissolution of Marriage Act. The purpose of the act is to "strengthen and preserve the integrity of marriage and safeguard fam-

(1932). *Accord*, Cougler v. Fackler, 510 S.W.2d 16 (Ky. 1974); Taylor v. Frost, 202 Neb. 652, 276 N.W.2d 656 (1979).

72. 77 Ill. 2d at 59, 394 N.E.2d at 1208. *See, e.g.*, Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932); Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976).

73. 77 Ill. 2d at 60, 394 N.E.2d at 1209.

74. *Id.* at 63, 394 N.E.2d at 1210. The elements of common law marriage are an agreement between a man and woman to take each other as husband and wife and to live together and present themselves to the world as such. McKenna v. McKenna, 180 Ill. 577, 579-80, 54 N.E. 641, 642 (1899); Cartwright v. McGown, 121 Ill. 388 (1887); Port v. Port, 70 Ill. 484 (1873).

75. 77 Ill. 2d at 65-66, 394 N.E.2d at 1211. *Accord*, Reiland, *Hewitt v. Hewitt: Middle America, Marvin and Common Law Marriage*, 60 CHI. B. REC. 84, 90 (1978). However, the author of this comment on the appellate court decision also observed that "on the facts presented, to deny Victoria a cause of action would have been to reward Robert for the couple's failure to go through a formal marriage ceremony."

76. Baker v. Mitchell, 143 Pa. Super. 50, 17 A.2d 738 (1941).

77. Sorensen v. Sorensen, 68 Neb. 483, 100 N.W. 930 (1904). For a general discussion of the history of common law marriage, *see In re* Estate of Soeder, 7 Ohio App. 2d 271, 220 N.E.2d 547 (1966).

78. 77 Ill. 2d at 66, 394 N.E.2d at 1211.

79. *Id.* at 61, 394 N.E.2d at 1209.

ily relationships."[80] The court found this statement strengthened by the fact that the Illinois Marriage and Dissolution of Marriage Act retained the concept of fault as grounds for obtaining a divorce. The marriage relationship thereby was prevented from becoming a "private contract terminable at will."[81] As further proof of a strong legislative policy favoring marriage, the court cited the adoption of the concept of the putative spouse who has legal status for only as long as he or she has a good faith belief in the validity of the marriage.[82] The court saw all of these factors as a legislative policy favoring marriage which would be undermined by recognition of cohabitational property rights.[83]

ANALYSIS

In *Hewitt*, the court took a two-pronged approach to public policy.[84] The court feared that recognition of Victoria Hewitt's cause of action would be equal to judicial recognition of common law marriage[85] and that recognition of the cause of action would weaken the institution of marriage.[86] Both of these public policy arguments bear examination.

The court saw a recognition of Victoria's claims as a form of judicial re-establishment of common law marriage which had been outlawed by the legislature.[87] However, the underlying basis of Victoria's claims are substantially different from common law marriage. To prove a common law marriage, it must be shown that the parties involved agreed to take each other as husband and wife and that they lived together and presented themselves to the world as married.[88] Once these elements are established, the parties are treated by the courts as married and are accorded the full range of marital rights.[89]

80. ILL. REV. STAT. ch. 40, § 102(2) (1979).
81. 77 Ill. 2d at 64, 394 N.E.2d at 1210.
82. *See* ILL. REV. STAT. ch. 40, § 305 (1979).
83. 77 Ill. 2d at 64-65, 394 N.E.2d at 1210.
84. Public policy can be found in the Constitution, laws, and the decisions of the courts. United States v. Grace Evangelical Church, 132 F.2d 460 (7th Cir. 1943); Electrical Contractors Ass'n v. Schulman Elec. Co., 391 Ill. 333, 63 N.E.2d 392 (1945); Zeigler v. Illinois Trust & Sav. Bank, 245 Ill. 180, 91 N.E.1041 (1910); Bruno v. Gabhauer, 9 Ill. App. 3d 345, 292 N.E.2d 238 (1972).
85. 77 Ill. 2d at 65-66, 394 N.E.2d at 1211.
86. *Id.* at 64, 394 N.E.2d at 1210.
87. ILL. REV. STAT. ch. 40, § 214 (1979).
88. McKenna v. McKenna, 180 Ill. 577, 579-80, 54 N.E. 641, 642 (1899).
89. *See* McCullon v. McCullon, 410 N.Y.S.2d 226 (1978). The court recognized a Pennsylvania common law marriage and therefore applied New York divorce law to award the woman both alimony and a property settlement.

The bases for Victoria's actions were pure contract theories rather than marital rights theories. An express contract "is proven by an actual agreement or by the expressed words used by the parties."[90] A contract implied in fact is shown by looking at the acts and conduct of the parties to see if a contract is evinced.[91] When a contract is proven, the parties do not gain rights outside those of the contract terms.[92] Thus, while the remedy of a property settlement would be the same in this case for both common law marriage and contract, the actions have a different basis and can have differing consequences.

Contract theory has provided other states with an effective means to adjudicate cohabitational property rights. Because only rarely are the parties involved sophisticated enough to enter into express written agreements,[93] courts have to look to the conduct of the parties to see what they intended. Where parties have maintained separate financial arrangements, courts have taken their conduct as evidence that they did not intend to share in joint accumulations of property.[94] However, where courts have found long term relationships with the parties pooling their finances, contract theory has provided a basis to grant recovery.[95] Thus, contract theory is flexible enough to avoid imposing burdens upon those who live together but choose to keep their financial affairs separate while it prevents inequities between those who agree to pool their resources. Our society has created circumstances where cohabitation becomes advantageous. Because marriage would result in loss of pension or social security benefits, many people choose cohabitation as an alternative.[96] Similarly, where marriage would result in an increased federal income tax burden, cohabitation becomes an alternative.[97] For these people, contract theory can be an aid to ordering their financial affairs.

The supreme court reasoned that a recognition of cohabitational

90. *In re* Brumshagen's Estate, 27 Ill. App. 2d 14, 23, 169 N.E.2d 112, 116-17 (1960).

91. Anderson v. Biesman & Carrick Co., 287 Ill. App. 507, 4 N.E.2d 639 (1936).

92. *See* City of Chicago v. Chicago Ry. Co., 228 Ill. App. 579 (1923).

93. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 102 (1976).

94. *See* Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1974); Warren v. Warren, 579 P.2d 772 (Nev. 1978); Hinkle v. McColm, 89 Wash. 2d 769, 575 P.2d 711 (1978).

95. *See* Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978); Edgar v. Wagner, 572 P.2d 405 (Utah 1977). *Contra*, Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977).

96. *See, e.g.*, Foster, *Marriage and Divorce in the Twilight Zone*, 17 ARIZ. L. REV. 462, 471-72 (1975).

97. *See* Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708, 1714 n.49 (1977). *See generally* Richards, *Discrimination Against Married Couples Under Present Income Tax Laws*, 49 TAXES 526 (1971).

property rights would weaken the institution of marriage. However, the policy set by the *Hewitt* court may have the effect of discouraging marriage because of the rewards available to the income producing party.[98] There is no incentive for the income producing partner to marry when, by not marrying, he can keep all the financial gains of the joint relationship to himself. This policy appears to work against strengthening the institution of marriage.

The essence of the supreme court's decision is to adopt a rule similar to that of *Creasman v. Boyle*,[99] with the court aiding neither party and the property belonging to the one in whose name it is found. However, the *Creasman* rule was based upon the fact that the cohabitational relationship was illegal in the state of Washington. The Illinois Supreme Court did not comment upon the finding of the appellate court that the Hewitts' relationship had violated no Illinois laws. In fact, the court studiously avoided any discussion of guilt. However, guilt remains an underlying theme. By deciding that public policy prohibits judicial recognition of any property rights acquired during cohabitation, the court has created a rule which punishes one of the parties and rewards the other. Both parties in this case are equally guilty of participating in a meretricious relationship, yet the court has rewarded Robert to Victoria's detriment.

The *Hewitt* court was not faced with the question of how it would treat an express written contract between cohabitants. However, the court's statement that it is naive to believe that contracts arising from cohabitational relationships can be separate and independent from sexual activity[100] appears to reject even written agreements in these cases. This poses a definite hardship on Illinois residents who choose an alternative living arrangement. The logical extension of the *Hewitt* decision is that people who choose to live together without marrying will have few, if any, means to enforce their private economic agreements.

AVOIDING THE *HEWITT* RESULT

Joint ownership of property may be a viable alternative to a contractual agreement between cohabitants. Property could be held by co-

98. Marvin v. Marvin, 18 Cal. 3d 660, 683, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1979). *Accord, In re* Cary, 34 Cal. App. 3d 345, 353, 109 Cal. Rtpr. 862, 866 (1973).

99. 31 Wash. 2d 345, 196 P.2d 835 (1948). *See* text accompanying notes 12-14 *supra*.

100. 77 Ill. 2d at 60, 394 N.E.2d at 1208-09. In contrast, it is interesting to note that a New York court accepted as fact the assertion that during the last fifteen years of a twenty-eight year cohabitational relationship, no sexual activity was a part of that relationship. McCullon v. McCullon, 410 N.Y.S.2d 226, 96 Misc. 2d 962 (1978).

habitants either as tenants in common or as joint tenants with right of survivorship.[101] Trusts may be an additional alternative.

Under tenancy in common, each co-tenant holds an equal undivided interest in the whole property,[102] which could then be sold or devised to another by will.[103] This form of joint ownership may be the best means of holding property where the cohabitants wish to share with one another while they both are alive but on the death of one of them they wish the property to pass to someone other than the surviving cohabitant. For example, individuals who both have children from a previous marriage or relationship may want to choose this form of ownership so, at their death, each one's share of the property would pass to his or her children.

Joint tenancy with right of survivorship is another alternative. Each joint tenant holds an undivided one-half interest in the whole property.[104] Upon the death of one of the joint tenants, the surviving joint tenant then owns a fee simple interest in the entire property by operation of law.[105] Where cohabitants wish to own property jointly with each one's interest passing to the other at death, joint tenancy with right of survivorship appears to be the best means of sharing property.

Cohabitation should not affect the parties' rights to jointly owned property. The recent case of *Edwards v. Miller*[106] supports this proposition. In *Edwards*, a couple cohabited for seventeen years, owning their house in joint tenancy. When they parted, the man traded this piece of property for another by obtaining the woman's signature through fraud. The court impressed a constructive trust, finding that the trial court properly had found the woman was a joint tenant in the property.[107] In *Hewitt*, the appellate court noted that some of the Hewitts' property was held in joint tenancy;[108] however, the supreme court decision dealt only with Victoria's claim against property held solely by Robert.[109] Thus, it appears that cohabitation will not change the parties' rights to jointly owned property. Therefore, joint ownership provides a means of equitably sharing property acquired during a cohabitational relationship.

101. *See* ILL. REV. STAT. ch. 76, § 1-13 (1979).
102. Markoe v. Wakeman, 107 Ill. 251 (1883).
103. Mittel v. Karl, 133 Ill. 65, 24 N.E. 553 (1890).
104. *In re* Taggart's Estate, 15 Ill. App. 3d 1079, 305 N.E.2d 301 (1973).
105. Porter v. Porter, 381 Ill. 322, 45 N.E.2d 635 (1943).
106. 61 Ill. App. 3d 1023, 378 N.E.2d 583 (1978).
107. *Id.* at 1029, 378 N.E.2d at 588.
108. 62 Ill. App. 3d at 861, 380 N.E.2d at 454-55.
109. 77 Ill. 2d at 52, 394 N.E.2d at 1205.

Another means for cohabitants to own and share property is by means of a trust. The cohabitors could convey already acquired property into the trust or establish a trust and have the trust acquire property. Using a trust to hold and share property would provide cohabitors with more flexibility than would jointly owned property. The cohabitors could serve jointly as trustees[110] and yet allocate the beneficial interest in the trust to themselves in equal or unequal shares as they wished. Rather than owning an undivided interest in a whole piece of property by trust agreement, cohabitors could allocate specific items of property to one or the other and therefore avoid partition problems while as trustees they could keep control over their total wealth. Thus, Illinois trust law appears to offer an alternative to contracts which cohabitors could use to order their financial affairs.

CONCLUSION

While the trend in other states has been to recognize that contract or equitable principles may give rise to property rights between cohabiting parties, the Illinois Supreme Court has gone in the other direction. The court has found cohabitational property rights unenforceable because of a strong legislative policy in favor of marriage. The supreme court feared that recognition of property rights in these circumstances would weaken the institution of marriage and also be a revival of common law marriage. The court left to the legislature the question of what solutions, if any, should be authorized in situations like this.

The *Hewitt* court, however, did not take note of the basic, underlying differences between contract theory and common law marriage. Many other states have used contract theory to provide equitable results in these cases without imposing burdens on those who choose a live-together life style. In light of the increase in cohabitational relationships, it is to be hoped that, at another time, the Illinois Supreme Court or the Illinois legislature will see the matter in a different light.

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110. Trustees may hold legal title as joint tenants and also be beneficiaries because their beneficial interest is held as tenants in common. Commercial Cas. Ins. v. North, 320 Ill. App. 221, 50 N.E.2d 434 (1943).