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# Cohabitation in Illinois: The Need for Legislative Intervention

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# COHABITATION IN ILLINOIS: THE NEED FOR LEGISLATIVE INTERVENTION

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## INTRODUCTION

Nearly forty years ago, the Illinois Supreme Court in *Hewitt v. Hewitt*[1] ruled against a woman who sought property from her partner of fifteen years with whom she shared three children, but whom she never married. In doing so, the court determined that it would not recognize equitable or contractual rights based on marriage-type relationships between unmarried cohabitants.[2] Recently, in *Blumenthal v. Brewer*,[3] the Illinois Supreme Court had the opportunity to once again weigh in on the issue. However, despite the Court's acknowledgement that societal norms and values towards unmarried couples living together have changed significantly in the past forty years, it nevertheless upheld *Hewitt* and denied a woman's equitable claims from her partner of twenty-five years with whom she shared three children, but could not marry.[4]

The *Hewitt* case was an outlier to begin with—it came in a decade when cohabitation had catapulted into the limelight[5] and most states began

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1. Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979).

2. *Id.* (holding that Mrs. Hewitt could not recover an equal share of profits and properties accumulated by her and her partner of fifteen years because such a claim contravened public policy disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants).

3. Blumenthal v. Brewer, 2016 IL 118781, ¶ 81, 69 N.E.3d 834, 858.

4. *Id.* (barring plaintiff's claim for restitution as it contravenes the public policy implicit in the Illinois Marriage and Dissolution Act). Notably, a significant aspect of this case was that it involved a same-sex couple who did not have the option to marry in Illinois. A discussion of equal protection and due process claims can be found in the amicus curiae briefs submitted by the American Civil Liberties Union of Illinois and Lambda Legal Defense & Education Fund, Inc. However, given the United States Supreme Court's holding in *Obergefell v. Hodges* legalizing same-sex marriage, issues of constitutional rights of same-sex couples regarding marriage rights will not be addressed in this Note. 135 S. Ct. 2584 (2015).

5. Around 1970, statutory restraints on cohabitation—such as false registration laws, which prevented unmarried couples from checking into a hotel—and customary restraints—such as landlords refusing to rent to unmarried couples—were removed, and by 1998, the number of unmarried cohabit-

to recognize at least some property-sharing rights between cohabiting couples. Today, Illinois remains one of only three states that refuses to recognize any contractual rights of cohabiting couples regarding property and support unless those contractual rights are entirely collateral to the relationship.[6] Now that *Hewitt* has been reaffirmed, the court's decision, along with Illinois's policy on cohabitating couples, has come under much criticism in the popular press.[7] Upon examination, it is clear that the Illinois Supreme Court is being motivated by a policy goal that is not actually being served.

Part I will serve as an overview of the basis for the Illinois policy on unmarried cohabitants, as stated in *Hewitt*. Part I will then look at post-*Hewitt* cases to see how Illinois courts have interpreted *Hewitt*'s holding and reveal how courts actually treat contractual rights between unmarried cohabitants in Illinois. Finally, Part I will examine the holding in *Blumenthal v. Brewer*,[8] to show how it has also failed to accomplish *Hewitt*'s underlying policy goal. Moreover, *Blumenthal*'s holding has perpetuated the unjust results from *Hewitt* by unfairly withholding protections from nonmarital couples while not actually serving the purported public policy purpose of favoring marriage. This Note argues that, given the Illinois

ing couples increased eightfold, from 523,000 in 1970 to 4.2 million in 1998. THEODORE CAPLOW ET AL., THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000, at 72 (2001); *see also* Joanna L. Grossman, *The Broken Clock: The Illinois Supreme Court Affirms Misguided, 37-Year-Old Ban on Economic Rights for Cohabiting Couples*, JUSTIA (Aug. 30, 2016), https://verdict.justia.com/2016/08/30/broken-clock-illinois-supreme-court-affirms-misguided-37-year-old-ban-economic-rights-cohabiting-couples [https://perma.cc/4PNC-QRW6 ] ("Once a rare and secreted practice, couples began to 'shack up' in large number in the 1970s due to changing sexual mores and the advancement of women's rights. This was a stark change from the past in which cohabitation was not only the subject of social disapproval, but was also a criminal act in many states.").

6. Georgia and Louisiana are the other two states that will not enforce contracts between unmarried cohabitants. *See* Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) (refusing to enforce express and implied contracts between unmarried cohabitants because the agreements rest on immoral and illegal consideration); Schwegmann v. Schwegmann, 441 So. 2d 316, 324 (La. Ct. App. 1983) (holding that, "[u]nder present Louisiana law, unmarried cohabitation does not give rise to property rights analogous to or similar to those of married couples").

7. *See* Grossman, *supra* note 5; Robert McCoppin, *Illinois Supreme Court Rejects Property Division for Unmarried Couples*, CHI. TRIB. (Aug. 20, 2016, 1:06 AM), http://www.chicagotribune.com/news/local/breaking/ct-illinois-supreme-court-domestic-partners-property-ruling-met-20160819-story.html [https://perma.cc/6C6Y-TE64]; Tom Joaquin, *Still Locked Out: In Blumenthal v. Brewer, Illinois Supreme Court Refuses Property Division for an Unmarried Couple*, WOODHULL FREEDOM FOUND. (Aug. 30, 2016), http://www.woodhullfoundation.org/2016/sex-and-the-law/still-locked-out-in-blumenthal-v-brewer-illinois-supreme-court-refuses-property-division-for-an-unmarried-couple/ [https://perma.cc/3XZA-R5UA]; Jim Dey, *State High Court Upholds 1979 Ruling in Uncommon Case*, NEWS-GAZETTE (Aug. 23, 2016, 6:00 AM) http://www.news-gazette.com/news/local/2016-08-23/jim-dey-state-high-court-upholds-1979-ruling-uncommon-case.html [https://perma.cc/7KSP-GKEX].

8. 2016 IL 118781, 69 N.E.3d 834.

Supreme Court's refusal to judicially construct a policy on the economic rights of cohabitants, the Illinois legislature should step in.

Part II reviews how other states treat marriage-type contractual rights between unmarried cohabitants and, in doing so, reveals the options available for the Illinois legislature. As will be shown, there is a spectrum of contractual rights granted to unmarried cohabiting couples ranging from virtually none to granting unmarried cohabitants many of the same rights granted to married couples. Each approach offers different benefits and pitfalls for both cohabitants and courts.

In Part III, I suggest that the Illinois legislature should adopt a statutory scheme allowing unmarried cohabitants to enter into enforceable express agreements regarding their property and financial rights, even where such agreements are entered in contemplation of cohabitation. Additionally, I argue that the legislature should create statutory guidelines detailing when, and under what circumstances, unmarried cohabitants can bring claims seeking property or financial rights under the theory of implied contract. Such a statutory scheme will accomplish the underlying policy goal in *Hewitt*—limiting cases between unmarried cohabitants—and put an end to the current unjust practice in Illinois in which unmarried cohabitants are denied any legal protections.

## I. ILLINOIS LAW ON COHABITATION AGREEMENTS

### *A.* Hewitt v. Hewitt

In 1979, the Illinois Supreme Court first spoke on the ability of two unmarried, cohabiting partners to establish contractual or equitable rights in the case of *Hewitt v. Hewitt*. After the plaintiff, Victoria Hewitt, became pregnant while the couple was attending college together, the defendant, Robert Hewitt, promised her that he would "share his life, his future, his earnings and his property" with her.[9] From then on, the couple's relationship looked very much like a marriage.[10] They lived together for fifteen years, conceived and raised three children, purchased property together and established a dental practice.[11] Victoria gave Robert "every assistance a

9. Hewitt v. Hewitt, 394 N.E.2d 1204, 1205 (Ill. 1979).

10. Hewitt v. Hewitt, 380 N.E.2d 454, 457 (Ill. App. Ct. 1978), *rev'd*, 394 N.E.2d 1204 (Ill. 1979), *and overruled by* Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979) (finding that the couple lived "a most conventional, respectable and ordinary family life").

11. Robert was a successful dentist who had relied on Victoria's support, including money she borrowed from her parents, while he went to school and set up his dental practice. *Hewitt*, 394 N.E.2d at 1205.

wife and mother could give, including social activities designed to enhance his social and professional reputation."[12]

When the couple broke up,[13] Victoria sought "an equal share of the profits and properties accumulated by the parties"[14] under theories of implied contract, constructive trust and unjust enrichment.[15] The circuit court dismissed her complaint finding "that Illinois law and public policy require such claims to be based on a valid marriage."[16] The appellate court, adopting the California Supreme Court's decision in *Marvin v. Marvin*,[17] reversed the circuit court's decision and found that plaintiff had a cause of action based on an express oral contract.[18]

On appeal, the supreme court unanimously reversed the appellate court's holding.[19] In doing so, the court expressly rejected *Marvin* and relied heavily on the public policy judgments expressed by the legislature in enacting the Illinois Marriage and Dissolution of Marriage Act. However, upon examination, it becomes clear that the Court's reasoning is flawed.

### 1. The Court's Rejection of *Marvin*: Faulty Reasoning

One of the main reasons the Illinois Supreme Court refused to recognize contractual or equitable rights arising from cohabitation was its rejection of the reasoning in *Marvin*. Specifically, the Illinois Supreme Court read *Marvin* as stating that, if the courts were to recognize that common law principles of express contract govern express agreements between unmarried cohabitants, then they must also recognize common law principles of implied contract, equitable relief and constructive trust in the absence of such an agreement.[20]

According to the *Hewitt* court, it would be unlikely that couples who lived together would enter into express agreements regulating their proper-

12. *Id.*

13. Victoria, thinking they were married, initially filed for divorce, which the circuit court dismissed since the parties had never been married. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1206.

17. 557 P.2d 106 (Cal. 1976) (allowing for the enforcement of express contracts, so long as it was not explicitly founded on the consideration of sexual services, as well as implied contracts and equitable remedies, when warranted by the facts of the case); *see also Hewitt*, 394 N.E.2d at 1206 (finding that the appellate court "adopted the reasoning of the California Supreme Court in the widely publicized case of *Marvin v. Marvin*").

18. The appellate court noted that the "single flaw" in the Hewitt's relationship was the lack of a valid marriage, thus, Victoria should not be denied relief based on public policy grounds. *Hewitt*, 394 N.E.2d at 1206.

19. *Id.* at 1211.

20. *Id.* at 1207.

ty rights.[21] That being the case, many of the cases brought would rely on implied contracts or equitable principles which would, in turn, "result in substantial amounts of litigation . . . [and] necessarily involve details of the parties' living arrangements."[22] Thus, in an attempt to avoid this resulting extensive litigation, the court concluded that it could not recognize express agreements. In sum, the court's argument looks something like this: If we allow A (express contracts between unmarried cohabitants), then we must allow B (implied contracts and equitable relief between unmarried cohabitants); we do not want B, as it would result in large amounts of exhaustive litigation, so we cannot allow A.

This argument rests on a faulty premise (if A, then B). The *Hewitt* court indicated that this premise was established in *Marvin*, but that is an exaggeration. The court in *Marvin* merely held that "in the absence of an express agreement, the court *may* look to a variety of other remedies in order to protect the parties' lawful expectations."[23] *Marvin* did not say that when there was no express agreement the court *must* recognize another remedy. Furthermore, the *Hewitt* court failed to explain why, if *Illinois* were to allow express contracts between unmarried cohabitants, it would also be forced to recognize implied contracts and equitable relief. After all, even if that is what *Marvin* held, courts in Illinois would be in no way bound by that holding. Finally, this premise is clearly not followed in other areas of law where courts require that a contract be in writing,[24] so why must it be followed in this area? The *Hewitt* court offered no explanation as to why the recognition of express agreements between unmarried cohabitants would automatically lead to the need for recognition of implied agreements and equitable rights.

The *Hewitt* court could have determined that only express agreements would be recognized, thereby avoiding the unwanted litigation it feared would result from implied and equitable claims while also giving unmarried cohabitants greater certainty regarding their property and financial situations. Indeed, as discussed in Part II.C *infra*, many states, post-*Marvin*, opted to only enforce express agreements between unmarried cohabitants.

21. *Id.*
22. *Id.*
23. *Marvin*, 557 P.2d at 122 (emphasis added).
24. *See* Illinois Frauds Act, 740 ILL. COMP. STAT. ANN. 80/1–80/18 (West 2017).

### 2. Public Policy and the Illinois Marriage and Dissolution of Marriage Act: False Incentives

The *Hewitt* court ultimately concluded that contracts between unmarried cohabitants were unenforceable because they contravene public policy the court thought implicit in the Illinois Marriage and Dissolution of Marriage Act ("IMDMA").[25] The court found that the IMDMA's purpose was clearly to "strengthen and preserve the integrity of marriage and safeguard family relationships."[26] The court was reluctant to allow judicial recognition of property rights between unmarried cohabitants for fear that it would "potentially enhanc[e] the attractiveness of a private arrangement over marriage."[27] Therefore, in an effort to protect marriage and reduce any incentive for couples to live together without marrying, the court concluded that allowing Victoria to claim contractual rights based on an express oral agreement would contravene the IMDMA and her claims were thus unenforceable.[28] As a consequence of deciding not to marry, Victoria was understandably denied relief under the IMDMA. However, in the name of protecting marriage, she was also denied any equitable or contractual rights arising out of her relationship with Robert. Thus she was left with fewer rights than single people, who can easily enter into enforceable property-sharing arrangements with others, including roommates or family members.

The *Hewitt* court conceivably relied so heavily on legislative policy in a further attempt to avoid litigating claims involving contractual rights between unmarried cohabitants. Rather than simply granting to unmarried cohabitants the same right to enter into an enforceable agreement regarding property and financial rights as those not in a sexual relationship, the court flatly rejected any equitable or contractual rights and left it to the legislature to update Illinois public policy. In its view, "[t]here are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships," and the legislature is better suited to make such determinations.[29] Therefore, the *Hewitt* court held that Illinois courts would not recognize any equitable or contractual rights between unmarried cohabitants, other than those about completely independent mat-

25. *Hewitt*, 394 N.E.2d at 1211.

26. *Id.* at 1209 (quoting Ill. Rev. Stat. 1977, ch. 40, para. 102 (current version at 750 ILL. COMP. STAT. ANN. 5/102)).

27. *Id.*

28. *Id.* at 1211.

29. *Id.* at 1207.

ters, for which sexual relations do not form part of the consideration and do not closely resemble those arising from conventional marriages.[30]

### *B. Post-*Hewitt*: Is the Illinois Supreme Court's Policy Goal Being Served?*

The *Hewitt* court's strict ban on all types of contractual and equitable rights has left unmarried cohabitants with very few legal options. While the *Hewitt* court recognized "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,"[31] it denied that contracts between cohabitants could be severable from that sexual relationship.[32] In other words, the only contracts that can be enforced are those between cohabitants who are not having sex with each other.[33] Therefore, in an attempt to get around this strict ban on any contract in which sex forms part of the consideration, unmarried cohabitants seeking property or financial rights have had to resort to trying to prove that they entered into an agreement entirely independent of their romantic relationship. As can be seen in Illinois's case law, these claims generally manifest themselves as equitable claims.

#### 1. Claims Held Independent from Cohabitation

Two Illinois appellate court cases demonstrate instances where the court held that contractual rights between unmarried cohabitants were sufficiently separate from the cohabiting relationship so as to render the enforcement of those rights appropriate: *Spafford v. Coats*[34] and *Kaiser v. Fleming*.[35]

The plaintiff in *Spafford*, Donna Spafford, sought a constructive trust on several vehicles that the parties purchased during their cohabitation, several of which were financed by a loan which Donna obtained, and others

30. *Id.* at 1208.

31. *Id.*

32. *Id.* at 1209.

33. The court noted that several sister states had recognized that housekeeping and homemaking services could constitute the consideration for an enforceable contract between cohabitants, severable from the illegal contract founded on sexual relations, or that agreements in which the consideration was cohabitation may still be valid. *Id.* at 1208. However, the court rejected this notion and found it would be "more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete . . . involved in the assertion that there are 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." *Id.* at 1209.

34. 455 N.E.2d 241 (Ill. App. Ct. 1983).

35. 735 N.E.2d 144 (Ill. App. Ct. 2000).

to which she contributed a substantial portion of the purchase price.[36] In addressing the trial court's denial of equitable relief based on public policy as stated in *Hewitt*, the *Spafford* court examined the basis underlying that decision:

> [T]he real and underlying concern of the supreme court in *Hewitt* was that judicial recognition of mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would in effect grant to unmarried cohabitants substantially the same marital rights enjoyed by married persons, resurrect the doctrine of common law marriage, and contravene the public policy enunciated by the Illinois legislature to strengthen and preserve the integrity of marriage.[37]

The court went on to distinguish the situation before it from the situation in *Hewitt* and stated that Donna Spafford's claims were based on evidence that she substantially contributed to the consideration for the purchase of several vehicles, whereas Victoria Hewitt had based her claims primarily upon the rendition of housekeeping and homemaking services.[38] Thus, the court concluded that "where the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages . . . the public policy expressed in *Hewitt* does not bar judicial recognition of such claims."[39]

Similarly, in *Kaiser* the court found that the plaintiff Barbara Kaiser's, claim in equity was "substantially independent" from her relationship with defendant and allowed her to recover money she had contributed toward her former cohabiting boyfriend's mortgage.[40] The parties had been living together in an unmarried relationship when the defendant suggested to Barbara, who had previously received a lump sum payment from the dissolution of her prior marriage, that she use that money to help him pay off his mortgage.[41] Barbara subsequently gave the defendant a check for $47,188.38, the amount remaining on his mortgage, which he used to pay off the mortgage.[42] While living together, the parties shared expenses, but Barbara eventually moved out after the relationship became strained.[43]

36. *Spafford*, 455 N.E.2d at 242.
37. *Id.* at 245.
38. *Id.*
39. *Id.*
40. *Kaiser*, 735 N.E.2d at 148.
41. *Id.* at 146.
42. *Id.*
43. *Id.*

Barbara tried to get the money she contributed to the mortgage back, but defendant refused, telling her that he would repay her the amount when the property sold and deduct her share of the utility bills that he paid while she lived in the property.[44] The court distinguished Barbara's case from a previous case, *Ayala v. Fox*, where the court held that the plaintiff did not have an equity interest in a property she lived in with the defendant even though she contributed to the mortgage, taxes, and insurance payments.[45] In distinguishing *Ayala*, the *Kaiser* court concluded that unlike the plaintiff there, "plaintiff here alleged rights substantially independent from her nonmarital relationship with the defendant. . . . Further, the plaintiff in *Ayala* sought additional relief akin to a marital relationship and based her claims on the fact that she and the defendant 'lived together as husband and wife.'"[46]

Both of these cases involved plaintiffs asserting equitable rights. As their decisions indicate, Illinois courts are hesitant to grant equitable rights to unmarried cohabitants, and will do so only where plaintiff has adequate evidence that the consideration for the agreement arose from something other than the relationship itself, and where the relief sought does not closely reflect traditional marital rights. More importantly, these cases indicate how the goal expressed in *Hewitt* is being undermined under the current state of Illinois law. The *Hewitt* court wanted to avoid cases that rely on equitable principles, but as the above cases exemplify, unmarried cohabitants *are* bringing cases based on equitable principles. All litigants have to do is be careful not to allege that they were in a "marriage-type" relationship, or that sex was in any way contemplated as part of the agreement. Litigants who successfully do so are able to have their equitable claims heard by the court, which in turn requires the court involving itself in the details of the parties' living arrangement. Thus, the very situation *Hewitt* sought to avoid—substantial litigation involving details of the parties' living arrangement—has manifested itself with the help of a little shrewd lawyering.

### 2. Claims Held Dependent on Cohabitation

Some Illinois courts have continued to deny relief to unmarried cohabitants who bring claims based on a "marriage-like" or "quasi-marital" relationship. In *Costa v. Oliven*,[47] Eugene Costa sued Catherine Oliven, with

44. *Id.*
45. Ayala v. Fox, 564 N.E.2d 920, 922 (Ill. App. Ct. 1990).
46. *Kaiser*, 735 N.E.2d at 148 (quoting *Ayala*, 564 N.E.2d at 921)).
47. 849 N.E.2d 122, 123 (Ill. App. Ct. 2006).

whom he had lived with for twenty-four years in an unmarried, "quasi-marital" relationship, for imposition of a constructive trust, an accounting, and payment of unpaid wages and financial compensation.[48] After twelve years of cohabitation, a child was born to the parties on May 5, 1992, at which time Costa assumed the role of a stay-at-home dad.[49] According to his complaint, Oliven "wielded much influence and superior bargaining power over [plaintiff] . . . and successfully obtained title to almost every possession the couple acquired through joint labor and efforts."[50] Nevertheless, the court, relying on *Hewitt*, denied Costa relief based on constructive trust and accounting holding that public policy precluded unmarried cohabitants from having an equitable interest in the other's property.[51]

Despite the holdings in *Spafford* and *Kaiser*, claimants who do not rely solely on the basis of a marriage-like relationship, but rather on some economic contribution, may still be denied relief. The Second District in *Ayala v. Fox*,[52] extended *Hewitt*'s limitations from property claims based on the providing of domestic services to claims based on financial contributions to the acquisition of shared property.[53]

Anita Ayala and Lawrence Fox cohabitated together for twelve years, beginning in 1976.[54] At Fox's suggestion, they agreed to jointly pay for the construction of a new home, and Fox promised Ayala that the title to the property would be transferred to them as joint tenants and that plaintiff would receive one-half of the equity of the house in the event their relationship terminated.[55] In reliance on the promise, they obtained a $48,000 loan to pay for the construction of the house.[56] The house was completed in September 1978, and for ten years the parties cohabitated there and both contributed to the mortgage payments—however, during the first three years of cohabitation, Fox was unemployed and Ayala made the majority of the mortgage, tax and insurance payments.[57] The parties split up in 1988.[58]

48. *Id.* at 123 (alteration in original).
49. *Id.*
50. *Id.*
51. *Id.* at 125.
52. 564 N.E.2d 920, 922 (Ill. App. Ct. 1990).
53. *Id.*
54. *Id.* at 920.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

Fox did not in fact transfer title to the couple as joint tenants, nor did he pay Ayala half of the equity in the property.[59] Instead, he put the property in a land trust.[60] Ayala brought suit for a half interest in the realty and half of the personal property based on theories of promissory estoppel, unjust enrichment and fiduciary duty.[61] The trial court dismissed the complaint, finding that *Hewitt* barred claims based on property disputes between cohabitants.[62] The appellate court affirmed, and in doing so, distinguished *Spafford*.

According to the court, the plaintiff in *Spafford* "did not seek recovery based on rights closely resembling those arising from a conventional marriage or on rights founded on proof of cohabitation," whereas Ayala, whose claim was "intimately related to her cohabitation with Fox," was seeking recovery "based on rights closely resembling those arising from a conventional marriage, namely, an equitable interest in the 'marital' residence."[63] As noted by one commentator, "[t]he court effectively shifted the inquiry from the *basis* for the claim (e.g., the nature of the consideration provided) to the *nature* of the claimed property," so that a claimant seeking an interest in a vehicle could do so—since joint ownership of vehicles is not integral to cohabitation—but a claimant seeking an interest in a residence could not because it "too closely resembles a spouse's interest in the marital home."[64]

This case is difficult to reconcile with *Kaiser* and *Spafford*, given their factual similarities. In all three cases, plaintiffs made financial contributions to acquiring property titled in the names of their male cohabitants. However, in *Kaiser* and *Spafford*, cohabitation did not preclude plaintiffs from recovering their interest in the property, but in *Ayala* it did. The distinction seems to be in the relief sought, and the grounds plaintiffs based their claims on. While the plaintiffs in *Kaiser* and *Spafford* merely sought constructive trusts over the amount contributed to shared property, the plaintiff in *Ayala* sought fifty percent of the equity in the home and half of the personal property accumulated during the marriage, which according to the courts, resembled marital rights too closely.[65] Furthermore, the plain-

59. *Id.*
60. *Id.*
61. *Id.* at 921.
62. *Id.*
63. *Id.* at 922.
64. Jan Skelton, Hewitt *to* Ayala*: A Wrong Turn for Cohabitants' Rights*, 82 ILL. B.J. 364, 368 (1994).
65. *See Ayala*, 564 N.E.2d at 922; Kaiser v. Fleming, 735 N.E.2d 144 (Ill. App. Ct. 2000).

tiffs in *Spafford* and *Kaiser* did not base their claims on the fact they had "lived together as husband and wife," as the plaintiff in *Ayala* did.

Thus, as indicated by Illinois case law, Illinois courts will only enforce equitable rights where the relief sought does not closely resemble rights arising out of conventional marriages, and where the claim is not reliant on the relationship itself as part of the consideration, but rather some form of financial contribution. For whatever reason—perhaps because couples (or their lawyers) know that contracts between unmarried couples will not be enforced in Illinois and thus they do not enter into them, or perhaps because those couples who do enter into contracts assume they will be enforced and thus do not challenge them in court—Illinois appellate courts have not addressed claims between unmarried cohabitants based on express contracts. As a result, it remains unclear what exactly a contract between unmarried cohabitants would have to look like in order to be enforceable.

### 3. Policy Goal in *Hewitt* Is Not Being Served

As these cases have shown, *Hewitt*'s policy goal of avoiding litigation between unmarried cohabitants is not being served. By banning everything—express contracts, implied contracts and equitable relief—the *Hewitt* court has actually allowed for litigation between unmarried cohabitants. Moreover, the reasons given by the *Hewitt* court for rejecting agreements between unmarried cohabitants[66] have not proven realistic. First, the court's attempt at limiting litigation by refusing to recognize express agreements is clearly not working. Recall that the *Hewitt* court stated, if courts were to recognize express contracts, then they would also have to recognize implied contracts and equitable remedies; and, since most couples would not enter into express agreements, the result would be a flood of cases based on implied or equitable claims that would necessarily involve details of the couple's living arrangement.[67] But as the case law indicates, the very situation the *Hewitt* court sought to avoid is happening.

Unmarried cohabitants, being unable to enter into express agreements with their partners, must bring equitable claims to assert their property rights which necessarily involve details of the couple's relationship. Rather than couples being able to enter into an agreement regulating their property and financial rights, and thus avoiding the need for courts to determine such rights, unmarried cohabitants seeking property rights are forced to seek equitable remedies (but none that are too close to marital rights) which

66. *See supra* Parts I.A.1 and I.A.2.

67. Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979).

involves the court delving into the couple's relationship and the circumstances surrounding their agreement to determine whether the consideration was separate enough from their cohabitation so as to not defy the public policy expressed in *Hewitt*. The *Hewitt* court's goal of avoiding this litigation would have been better served simply by allowing express agreements, so that unmarried cohabitants could have greater certainty regarding their property and financial rights and would know that failing to have such an agreement would likely defeat any claim.

The *Hewitt* court's second basis for rejecting agreements between unmarried cohabitants is equally unrealistic. As discussed in Part I.A.2 above, the court placed much emphasis on the legislature's supposed public policy favoring marriage, feared discouraging marriage by judicially recognizing property rights between unmarried cohabitants, and refused to recognize any equitable or contractual rights between unmarried cohabitants. However, there is nothing to indicate that Illinois's refusal to enforce cohabitation agreements has incentivized more couples to marry, or disincentivized couples from living together unmarried.[68] In fact, in recent years, Illinois's percentage of unmarried couples living together has continued to increase, while that of married couples living together has decreased.[69] If anything, in its attempt to make marriage more desirable, by withholding from unmarried cohabitants the rights associated with marriage, the *Hewitt* court created a one-sided incentive.[70] Partners who are more likely to perform non-economic work within the family, generally women, would have the incentive that the *Hewitt* court imagined—marry their partners in order to gain the protections of equitable distribution and maintenance. However, the other partner might have the opposite incentive—avoid marriage, but reap its benefits, in order to secure sole ownership of wages and property

68. Grossman, *supra* note 5 ("[F]amily law incentives are hard to predict because people seldom know or understand the legal backdrop against which they form families; and even when they do know, they act from the heart rather than the head.").

69. *Selected Social Characteristics in the United States: 2011–2015 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP02&prodType=table [https://perma.cc/6R9P-H2MA]; *Selected Social Characteristics In the United States: 2006–2010 American Community Survey 5–Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP02&prodType=table [https://perma.cc/6R9P-H2MA].

70. *See* Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution and Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1424 (2011) (pointing out that denying remedies because there has been unmarried cohabitation punishes only one of the two cohabitants and enriches the other). "Such an unequal outcome itself might weaken rather than strengthen the institution of marriage because it creates an incentive for the more financially savvy partner to opt out of marriage." *Id.*

accumulated during the relationship.[71] Thus, at best, the *Hewitt* court's attempt to "preserve the integrity of marriage" incentivizes just the non-economic working partner to marry; at worst, it disproportionately advantages the breadwinner.[72]

### *C.* Blumenthal v. Brewer

Given the track record of cases following *Hewitt*, one would have expected the Illinois Supreme Court to reevaluate its position on cohabitation agreements when given the chance decades later. But rather than learning from *Hewitt*'s shortcomings, and recognizing the vast legal and social changes that have taken place since, the Illinois Supreme Court simply reiterated *Hewitt*'s main, albeit flawed, holding in *Blumenthal v. Brewer*[73]: Illinois courts will not enforce equitable or contractual (express or implied) rights between cohabiting couples based on their marriage-like relationship because Illinois public policy, expressed by the legislature, favors marriage.[74] As in *Hewitt*, the Illinois Supreme Court seems to have been motivated by its desire to avoid litigating these claims and has once again used the fear of discouraging marriage to justify leaving it up to the legislature.

#### 1. Background

Dr. Jane E. Blumenthal and Judge Eileen M. Brewer maintained a twenty-six-year domestic partnership and raised three children together, but never married.[75] Following the birth of their children, Brewer stayed home as their children's primary caregiver and spent the greater amount of time in domestic tasks, which allowed Blumenthal to focus on her medical career and become the family's primary breadwinner.[76] "As a consequence of the allocation of their respective responsibilities in the family following the birth of their children, Blumenthal came to earn two to three times as much

71. The Illinois Appellate Court in *Blumenthal* also addressed these potential unintended consequences of the *Hewitt* ruling. Blumenthal v. Brewer, 2014 IL App (1st) 132250, ¶ 32, 24 N.E.3d 168, 179, *rev'd in part, vacated in part*, 2016 IL 118781, 69 N.E.3d 834 ("The ruling, however, may have the contrary effect—refusing to hear claims between unmarried cohabitants creates an incentive for some to not marry. A cohabitant who by happenstance or design takes possession or title to jointly-acquired assets is able to retain them without consequence when their 'financially vulnerable' counterpart is turned away by the courts." (quoting Kovacic-Fleischer, *supra* note 70)). It also argued that the decision of *Hewitt* may have had the contrary policy effect of actually discouraging marriage because, by refusing to hear claims between unmarried cohabitants, the courts create an incentive for some to not marry.

72. *See* Costa v. Oliven, 849 N.E.2d 122 (Ill. App. Ct. 2006).

73. Blumenthal v. Brewer, 2016 IL 118781, 69 N.E.3d 834.

74. *Id.* ¶ 87, 69 N.E.3d at 860.

75. *Id.* ¶ 2, 69 N.E.3d at 839; *Blumenthal*, 2014 IL App (1st) 132250, ¶ 1, 24 N.E.3d at 169.

76. *Blumenthal*, 2014 IL App (1st) 132250, ¶¶ 5-6, 24 N.E.3d at 170.

annually as Brewer."[77] However, during their entire relationship, the couple commingled their assets, including savings and investments.[78] Using funds from their joint account, between 2000 and 2008, Blumenthal purchased an ownership interest in her medical practice group.[79] Brewer contended that she allowed Blumenthal to make this investment using their joint account "with the reasonable understanding and expectation that she, Brewer, would continue to benefit from the earnings derived from [the medical group]."[80]

Blumenthal and Brewer ended their relationship in 2008, at which time Brewer ceased benefitting from the earnings of the medical practice as Blumenthal retained the entire interest in the medical group.[81] After the relationship ended, Blumenthal sought partition of the family home she shared and jointly owned with Brewer.[82] Brewer counterclaimed for various common-law remedies, including sole title to the home as well as an interest in Blumenthal's ownership share in the medical group "so that the couples overall assets would be equalized."[83] Brewer claimed that Blumenthal was unjustly enriched and requested that the court create a constructive trust from Blumenthal's share of the annual earnings of the group or any proceeds from the sale of Blumenthal's interest in the group that was attributable to Brewer's earnings or inheritance during their relationship.[84]

At the trial level, Blumenthal argued that Illinois public policy, as stated in *Hewitt*, did not allow for implied contract claims based on nonmarital cohabitation.[85] The circuit court dismissed all counts of Brewer's

77. *Id.* ¶ 6, 24 N.E.3d at 170.

78. *Blumenthal*, 2016 IL 118781, ¶ 46, 69 N.E.3d at 848.

79. *Id.*

80. *Id.* Furthermore, "'[i]t was [the couple's] understanding that Brewer would not suffer any financial disadvantage from the way in which [they] allocated their parenting and career responsibilities' and 'it was [always] their practice to share equally the same home, food, automobiles, vacations, vacation property, and to the extent they could, savings and investments.'" *Blumenthal*, 2014 IL App (1st) 132250, ¶ 6, 24 N.E.3d at 171 (alteration in original).

81. *Blumenthal*, 2016 IL 118781, ¶ 46, 69 N.E.3d at 848.

82. *Id.* ¶ 2, 69 N.E.3d at 839.

83. *Id.* ¶ 3, 69 N.E.3d at 839. Counts I, II, IV, and V of Brewer's counterclaim all concerned the partition of the parties' Chicago home and were dismissed after the circuit court's judgment setting the value of the home and allocating the home's equity between the parties. *Id.* ¶¶ 21–43, 69 N.E.3d at 842–48. Count III concerned Brewer's request that the court impose a constructive trust on Blumenthal's medical group to remedy unjust enrichment or, in the alternative, for restitution. *Id.* ¶ 45, 69 N.E.3d at 848. Count III was the only appealable claim, and therefore, the only claim considered by the Illinois Supreme Court under the *Hewitt* analysis. *See id.* ¶¶ 45–91, 69 N.E.3d at 848–60.

84. *Id.* ¶ 46, 69 N.E.3d at 848.

85. *Blumenthal*, 2014 IL App (1st) 132250, ¶ 15, 24 N.E.3d at 173.

counterclaim, finding them barred as a matter of law by the Illinois Supreme Court's ruling in *Hewitt*.[86]

The Illinois Court of Appeals vacated the dismissal of Brewer's counterclaim by the circuit court and remanded for consideration of the parties' remaining arguments, mainly, whether Brewer's counterclaims satisfied the necessary elements of an implied contract.[87] On appeal Brewer argued that the legislative policies underlying the *Hewitt* decision either no longer existed or had been substantially modified, and thus the trial court's reliance on the *Hewitt* opinion was misplaced.[88] She contended that at the time *Hewitt* was decided, "it was public policy to treat unmarried relationships as illicit," but in the decades since *Hewitt* was decided, the Illinois legislature had made profound legislative changes that, in effect, implicitly overruled *Hewitt*'s categorical restriction on claims by unmarried partners.[89] Blumenthal responded that *Hewitt* "was not based on a legislative policy to stigmatize or penalize cohabitants for their relationship, but was instead based on a statute that abolished common law marriage." Furthermore, Blumenthal argued that *Hewitt* remains good law "because it gives effect to Illinois' ongoing public policy that individuals acting privately by themselves cannot create a marriage relationship and that the government must be involved in the creation of that bond."[90]

The appellate court found merit in both parties' arguments, but ultimately agreed with Brewer's claims, finding that "the public policy to treat unmarried partnerships as illicit no longer exist[ed], that Brewer's suit [was] not an attempt to retroactively create a marriage, and that allowing her to proceed with her claims . . . [did] not conflict with [Illinois's] abolishment of common law marriage."[91] In support of its decision, the appellate court adopted Brewer's list of post-*Hewitt* legislative policy changes[92] as evidence that "public policy has shifted dramatically in the ensuing 35 years and that ongoing application of *Hewitt* is no longer justified."[93]

86. *Blumenthal*, 2016 IL 118781, ¶ 10, 69 N.E.3d at 841.

87. *Blumenthal*, 2014 IL App (1st) 132250, ¶ 40, 24 N.E.3d at 183.

88. *Id.* ¶ 16, 24 N.E.3d at 173.

89. *Id.* ¶ 16, 24 N.E.3d at 173–74. The legislative policies Brewer relied upon include the repeal of the criminal prohibition on nonmarital cohabitation, the prohibition of differential treatment of marital and nonmarital children, the adoption of no-fault divorce, the establishment of civil unions for both opposite-sex and same-sex partners, and the extension of other significant protections to nonmarital families. *Id.* ¶ 16, 24 N.E.3d at 173.

90. *Id.* ¶ 17, 24 N.E.3d at 174.

91. *Id.* ¶ 18, 24 N.E.3d at 174.

92. *Id.* ¶¶ 22–28, 33–35, 24 N.E.3d at 176–77, 180–81; *see supra* note 89 and accompanying text.

93. *Id.* ¶ 22, 24 N.E.3d at 176.

Accordingly, the appellate court found *Hewitt*'s holding was misplaced.[94] Moreover, rather than an attempt to retroactively redefine the couple's relationship to receive the benefits of a legal marriage, as argued by Blumenthal, the court viewed Brewer's counterclaim as a claim to have the same common-law property rights as others who are not in a cohabiting, unmarried relationship.[95] Thus, Brewer's counterclaim was remanded to the circuit court.

### 2. The Illinois Supreme Court Weighs in Again

On appeal, the Illinois Supreme Court rejected Brewer's invitation to overrule *Hewitt* and held that it remained good law.[96] After resolving counts I, II, IV and V of Brewer's counterclaim on other grounds,[97] the court turned to its discussion of *Hewitt* with respect to count III which sought a constructive trust on Blumenthal's medical practice to prevent unjust enrichment, or in the alternative, restitution.[98] The court found these equitable remedies inappropriate since, "[w]hen considering the property rights of unmarried cohabitants, [the court's] view of *Hewitt*'s holding ha[d] not changed."[99] Thus, such equitable claims could not be recognized. The court concluded, "[o]ur decision in *Hewitt* bars such relief if the claim is not independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy, implicit in the statutory scheme of the Marriage and Dissolution Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants."[100]

The court reiterated the holding in *Hewitt* without addressing its problems. First, the court stated that "unmarried individuals may make express or implied contracts with one another, and such contracts will be enforceable if they are not based on a relationship indistinguishable from marriage."[101] But the court offered little assistance to litigants trying to determine whether their agreement is adequately independent of their relationship so as to allow equitable or contractual rights. In an apparent at-

94. *Id.* ¶¶ 36–38, 24 N.E.3d at 182.

95. *Id.*

96. Blumenthal v. Brewer, 2016 IL 118781, ¶ 64, 69 N.E.3d at 853.

97. The Illinois Supreme Court found the appellate court's judgment with respect to counts I, II, IV, and V (common-law claims related to the partition of the couple's home) to be "fatally flawed" for two reasons unrelated to *Hewitt*: (1) the appellate court lacked jurisdiction to entertain the appeal from dismissal of those counts as it was not a final judgment, and (2) the appellate court had no authority to overrule the *Hewitt* decision and remained bound by it. *Id.* ¶¶ 21–29, 69 N.E.3d at 842–44.

98. *Id.* ¶ 45, 69 N.E.3d at 848.

99. *Id.* ¶ 63, 69 N.E.3d at 853.

100. *Id.* ¶ 73, 69 N.E.3d at 856.

101. *Id.* ¶ 87, 69 N.E.3d at 860.

tempt to draw a line between independent and dependent claims, the court found that, where there is an indication that the unmarried cohabiting couple desired to live in a marriage-type relationship by "commingl[ing] their personal property and their finances," or "pool[ing] their assets and finances" to use in making purchases "to better their family situation," any claim seeking mutually enforceable property rights would be barred.[102] This fuzzy line may invite even more litigation by opening the door to unmarried cohabitants who can argue that they did not pool their assets, or did not buy that car/make that investment/buy that house to better their family situation.

Second, the court stated that any change in *Hewitt's* interpretation of Illinois public policy regarding unmarried cohabitants must be made by the legislature.[103] The court underwent a detailed discussion rejecting Brewer's arguments that various post-*Hewitt* legislative enactments indicate a public policy shift in regard to unmarried couples and their children.[104] Contrary to Brewer's assertion that such enactments indicate that the application of *Hewitt* is no longer justified, the court viewed these enactments—along with the fact that the statutory prohibition against common-law marriage has remained "completely untouched and unqualified"[105]—as an indication that the legislature had acquiesced to *Hewitt*'s holding.[106] The court concluded that it would "leave it to the legislative branch to determine whether and under what circumstances a change in the public policy governing the rights of parties in non-marital relationships is necessary."[107] Therefore, the court remained resolute that Illinois public policy favoring marriage is best served by withholding contractual and equitable rights from non-marital couples, regardless of what unfair consequences might result.

102. *Id.* ¶¶ 70–73, 69 N.E.3d at 855–56. For Brewer, this meant her claim to an interest in the medical group was barred since the court determined that the investment in the medical group was "an investment for the family . . . intimately related and dependent on Brewer's marriage-like relationship with Blumenthal." *Id.* ¶ 71, 69 N.E.3d at 855.

103. *See id.* ¶¶ 74–81, 69 N.E.3d at 856–58.

104. *Id.*

105. *Id.* ¶ 76, 69 N.E.3d at 857.

106. *Id.* ¶ 77, 69 N.E.3d at 857. However, as pointed out by Justice Theis in her dissent, the legislature's silence on the rights of cohabitants does not necessarily indicate its rejection of claims brought by unmarried cohabitants asserting contractual or equitable rights. *Id.* ¶ 112, 69 N.E.3d at 866 (Theis, J., dissenting) ("Simply because the legislature has taken some action in the domestic relations arena does not mean that this court cannot act as well.").

107. *Id.* ¶ 80, 69 N.E.3d at 858.

### *D. Looks Like a Job for the Legislature*

The *Blumenthal* court's refusal to overrule *Hewitt*, coupled with its failure to draw a concrete line for determining what claims are adequately independent from the cohabitation to be considered enforceable, has left Illinois with a problem: the Illinois Supreme Court's underlying policy goal—avoid litigating property claims between unmarried cohabitants—is not being served. Claims between unmarried cohabitants continue to manifest themselves in the only way conceivable—one partner asserts an equitable claim for which the consideration is something other than the relationship itself and seeks relief that does not look too much like marital rights.[108] And not only do these claims manifest themselves, but the meritorious ones actually win.[109] Thus, there seems to be some situations where the courts deem the cohabitant worthy of receiving property rights, but without a clear indication of what relationships are worthy of recognition, litigation may continue to increase as cohabitation increases.

If the Illinois Supreme Court is going to continue to refuse to judicially determine the rights and obligations of unmarried cohabitants concerning property and financial rights, then the legislature must take action. By giving courts and litigants something to rely on, the legislature can limit the quantity and type of claims brought by cohabitants—thus accomplishing the aim of the supreme court—while also ensuring that those relationships that are most worthy of recognition are protected.

## II. WHAT ARE OUR OPTIONS?

Although no state has a statutory scheme specifically addressing the rights and obligations of unmarried cohabitants, forty-seven states enforce some form of relief based on a cohabitating relationship.[110] The contractual rights granted to unmarried cohabitants ranges from virtually none—as is the case in Illinois, Georgia and Louisiana where courts refuse to enforce any agreement regarding property and support between unmarried cohabitants unless it is entirely collateral to the intimate relationship[111]—to rights very similar to those given to married couples. Washington State, for example, essentially treats cohabitating couples the same as married couples

108. *See supra* Part I.B.

109. *See supra* Part I.B.1.

110. Illinois, Georgia, and Louisiana are the only three states that have disapproved of enforcing all forms of relief based on a cohabiting relationship. *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979); Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994); Schwegmann v. Schwegmann, 441 So. 2d 316, 326 (La. Ct. App. 1983).

111. *Hewitt*, 394 N.E.2d at 1211; *Long*, 441 S.E.2d at 476; *Schwegmann*, 441 So. 2d at 325.

upon termination of the relationship.[112] The majority of states will enforce express or implied contracts between cohabitants, and grant equitable relief.

Thus, the Illinois legislature has a variety of options available to it in deciding what type of agreements between unmarried cohabitants will be recognized. This section will examine how other jurisdictions have chosen to handle allocating property rights after unmarried cohabitants end their relationships and the benefits and detriments associated with each approach.

### *A.* Marvin v. Marvin*: Express Agreements, Implied Agreements, and Equitable Relief Recognized*

As previously discussed, the first court to directly speak on the law's role in regulating cohabitational relationships was the California Supreme Court in *Marvin v. Marvin*.[113] There, actor Lee Marvin was romantically involved with Michele Triola, and they lived together for over five years until they eventually split.[114] Triola sued Marvin for support and one-half of the property acquired during the course of their relationship based on an oral agreement they had to "combine their efforts and earnings and [] share equally any and all property accumulated as a result of their efforts whether individual or combined."[115]

The court's decision came during a time when cohabitation had moved from the fringes to the center of society.[116] As such, the *Marvin* majority relied on the newfound social acceptability of cohabitation and urged that "the prevalence of nonmarital relationships in modern society and the social acceptance of them" required courts to decline applying traditional legal standards that were "based on alleged moral considerations that [had] apparently been so widely abandoned by so many."[117] In doing so, the *Marvin* court not only approved the enforcement of explicit relational contracts between cohabitants, but also authorized trial courts to

112. *In re* Marriage of Lindsey, 678 P.2d 328, 331 (Wash. 1984) (adopting the rule that courts must examine the meretricious relationship and the property accumulations and make a just and equitable disposition of the property).

113. 557 P.2d 106 (Cal. 1976).

114. *Id.* at 110.

115. *Id.*

116. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008).

117. *Marvin*, 557 P.2d at 122 ("[W]e believe that the prevalence of non-marital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship . . . .").

"inquire into the conduct of the parties to determine whether that conduct demonstrate[d] an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties."[118] The court also approved of equitable remedies—quantum meruit, constructive trust, resulting trust—which had served as relief to cohabitants prior to its decision, and left open the possibility of "additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate."[119] Thus, California became the first state to judicially recognize and "dramatically expand the range of rights and remedies available to cohabiting couples."[120]

After California's holding in *Marvin*, many other states followed suit and held that cohabitants could assert property rights under express contract, implied contract or equity.[121] Despite it being the dominant approach to cohabitation claims in the United States, this approach to regulating rights between cohabitants has two substantial pitfalls.

First, it may be very difficult to prove an implied agreement or assert equitable rights, as exemplified by the aftermath of the California Supreme Court's ruling in *Marvin*. Michele Triola spent three months on remand attempting to assert her property rights under any of the three options the Supreme Court expressly approved of. However, the trial court found that "no express contract was negotiated between the parties" and that "the conduct of the parties . . . does not reveal any implementation of any contract nor . . . give rise to an implied contract."[122] The court went on to conclude that there was no "mutual effort" that might support a recovery and

118. *Id.*

119. *Id.* at 123 n.25.

120. Garrison, *supra* note 116, at 315.

121. States that recognize express and implied contracts as well as equitable rights include: Arizona, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin. *See* Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 249 (1999) ("[C]ourts in these states have demonstrated a willingness to use various theories to grant relief to the aggrieved party upon termination of a period of unmarried cohabitation.") *See also, e.g.*, Carroll v. Lee, 712 P.2d 923 (Ariz. 1986); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Boland v. Catalano, 521 A.2d 142 (Conn. 1987); Poe v. Levy, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); Maria v. Freitas, 832 P.2d 259 (Haw. 1992); Bright v. Kuehl, 650 N.E.2d 311 (Ind. Ct. App. 1995); Kerkove v. Thompson, 487 N.W.2d 693 (Iowa Ct. App. 1992); Ellis v. Berry, 867 P.2d 1063 (Kan. Ct. App. 1993); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987); Hay v. Hay, 678 P.2d 672 (Nev. 1984); Crowe v. DeGioia, 495 A.2d 889 (N.J. Super. Ct. App. Div. 1985); Suggs v. Norris, 364 S.E.2d 159 (N.C. Ct. App. 1988); Knauer v. Knauer, 470 A.2d 553 (Pa. Super. Ct. 1983); Harmon v. Rogers, 510 A.2d 161 (Vt. 1986); Connel v. Francisco, 898 P.2d 831(Wash. 1995); Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

122. HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 235 (6th ed. 2007) (quoting Marvin v. Marvin, 5 Fam. L. Rep. (BNA) 3077 (Cal. Ct. App. 1979)).

that, "in good conscience," no equitable remedies were applicable.[123] In the court's view, Lee Marvin never had any obligation to support Michelle and therefore had not been unjustly enriched, and that Michelle had in fact benefited from the parties' cohabitation.[124] Despite these findings, the court nonetheless awarded the plaintiff $104,000 in alimony,

> so that she may have the economic means to reeducate herself and to learn new, employable skills or to refurbish those utilized, for example, during her most recent employment and so that she may return from her status as companion of a motion picture star to a separate, independent but perhaps more prosaic existence.[125]

However, this award was promptly stuck down on appeal as it had not been sanctioned by the contract approach outlined in *Marvin*.[126] Thus, Michele Triola walked away from her landmark victory in the California Supreme Court with nothing.

Second, this approach gives the cohabitant seeking to assert contractual rights more leverage over the partner with the property. The non-property-owning-partner can easily allege an implied contract in *Marvin* jurisdictions. The threat of a lengthy court battle then gives this partner greater leverage in any agreement to equitably divide property when a cohabitating relationship ends. This also gives the property-owning partner a greater incentive to reach an agreement with their ex-cohabitants outside of court given the multiple judicial tools available to cohabitants to establish property rights. Thus, even cohabitants who had no intention of creating property/finance-sharing rights might be able to put themselves in a position to obtain such rights by threatening a lawsuit.

### *B.* Beal v. Beal*: Express or Implied Agreements Recognized*

Another approach, taken by Oregon, is to only enforce express and implied agreements between unmarried cohabitants.[127] As stated by the

123. *Id.*

124. Cordelia S. Munroe, Comment, Marvin v. Marvin*: Five Years Later*, 65 MARQ. L. REV. 389, 420 (1982).

125. Krause, *supra* note 122; *see also* Garrison, *supra* note 116.

126. *See* Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (Cal. Ct. App. 1981).

127. Alaska takes a similar approach. *See* Wood v. Collins, 812 P.2d 951, 955–57 (Alaska 1991) (implementing the rule that property accumulated during cohabitation should be divided by determining the express or implied intent of the parties and refusing to extend equitable remedies to unmarried cohabitants). Maryland, Nebraska and Wyoming will also enforce express and implied agreements between unmarried cohabitants, but unlike Oregon and Alaska, have not expressly denied equitable remedies to such couples. See Attorney Grievance Comm'n v. Flisher, 572 A.2d 501, 509 (Md. 1990); Kinkenon v. Hue, 301 N.W.2d 77, 80 (Neb. 1981); Kinnison v. Kinnison, 627 P.2d 594, 595 (Wyo. 1981).

Oregon Supreme Court in *Beal v. Beal*, when dividing property accumulated during a non-marital cohabitating relationship, Oregon takes the approach of first inquiring into the intent of the parties.[128] Where intent can be found, such as in an express written agreement, it should control the property division; and, even where a written agreement does not exist, "courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon."[129]

Unlike the California Supreme Court in *Marvin*, the Oregon Supreme Court illustrated various guidelines courts could use to determine the implied intent of the cohabitants:

> [I]nferences can be drawn from factual settings in which the parties lived. Cohabitation itself can be relevant evidence of an agreement to share incomes during continued cohabitation. Additionally, joint acts of a financial nature can give rise to an inference that the parties intended to share equally. Such acts might include a joint checking account, a joint savings account, or joint purchases.[130]

The couple in *Beal*, one month after obtaining a divorce, purchased a house where the defendant, Barbara Beal, contributed the majority of the down payment and made the first monthly payment, and the plaintiff, Raymond Beal made all subsequent monthly payments.[131] The parties lived together in the house and had a joint savings account, but maintained separate checking accounts. Barbara paid some of the costs for home improvements, and her income was used for family expenses.[132]

Applying the aforementioned guidelines, the Oregon Supreme Court held that the record supported the position that the parties intended to pool their resources for their common benefit during the time they lived together.[133] This conclusion, the court said, was evidenced by the living arrangement itself, as well as Barbara's testimony that she contributed her entire income to the maintenance of the household and that she gave plaintiff money on one occasion for the monthly house payment. Further, "[n]either party made any effort to keep separate accounts or to total their respective contributions for reimbursement purposes, and, although they had separate checking accounts, they had a joint savings account."[134] Thus, the court concluded the parties would be considered equal co-tenants, except that

128. 577 P.2d 507, 510 (Or. 1978) (en banc).
129. *Id.*
130. *Id.*
131. *Id.* at 507–08.
132. *Id.* at 508.
133. *Id.* at 510.
134. *Id.*

Barbara would be entitled to an offset representing the amount she paid over and above one-half of the down payment.[135]

In adopting this intent-based rule, the *Beal* court attempted to cure problems with the previous "unannounced but inherent" judicial approach to assessing property rights of unmarried cohabitants.[136] The old, hands-off approach—which was simply that the party with title, or, in some instances, possession, would receive ownership rights in the property concerned—"often operate[d] to the great advantage of the cunning and the shrewd."[137] Furthermore the courts, in claiming that they would have no involvement in such matters, actually established "'an effective and binding rule of law which tend[ed] to operate purely by accident or perhaps by reason of the cunning, anticipatory designs of just one of the parties.'"[138] The *Beal* court also rejected the "mechanistic application" of co-tenancy rules since they did not "consider the nature of the relationship of the parties," and would "not often accurately reflect the expectations of the parties."[139]

Thus, *Beal*'s intent-based approach has the benefit of ensuring that whichever party has title does not obtain imbalanced leverage over the other. It also gives cohabiting couples the assurance that their intended agreements, whether expressed in a written agreement or implied in their actions, will be enforceable by the court. However, similar to *Marvin* jurisdictions, this approach may grant one partner inappropriate leverage upon the parties' separation if he or she can point to any facts which indicate the couple entered an implied agreement to share property. Unlike *Marvin* jurisdictions, the intent-based approach gives courts more specific guidelines regarding what facts they can consider when finding such an intent. For that reason, the leverage of the parties remains more balanced in an intent-based jurisdiction since the court is limited to either enforcing express agreements, or enforcing implied agreements but only when certain facts can be shown regarding the couple's living and financial arrangements during their relationship.

135. *Id.*

136. *Id.* at 509.

137. *Id.* (quoting West v. Knowles, 311 P.2d 689, 693 (Wash. 1957) (Finley, J., concurring specially)).

138. *Id.*

139. *Id.* at 510.

### *C.* Wilcox v. Trautz*: Only Express Agreements Recognized*

A final approach taken by states is to enforce only express written agreements between unmarried cohabitants. Courts in Kentucky[140], Massachusetts[141], Michigan[142], Minnesota[143], Mississippi[144], New Hampshire[145], New Mexico[146], New York[147], North Dakota[148], Ohio[149] and Texas[150] will enforce express agreements concerning property and financial rights be-

140. Kentucky courts, along with those in New Mexico and New York, have refused to recognize implied agreements between unmarried cohabitants as contrary to the abolition of common law marriage, but have not expressly refused recognizing equitable rights. *See* Murphy v. Bowen, 756 S.W.2d 149 (Ky. Ct. App. 1988); Merrill v. Davis, 673 P.2d 1285 (N.M. 1983); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980).

141. Wilcox v. Trautz, 693 N.E.2d 141, 144 (Mass. 1998) (stating that unmarried cohabitants may lawfully contract concerning property, financial and other matters relevant to their relationship, and, such a contract is subject to rules of contract law and is valid even if expressly made in contemplation of a common living arrangement, except to the extent that sexual services constitute the only—or dominant—consideration for the agreement, or that enforcement should be denied on some other public policy ground).

142. The Michigan Court of Appeals has recognized that contracts entered into during the course of a "meretricious relationship" may be enforceable where there is "an express agreement to accumulate or transfer property following a relationship of some permanence and an additional consideration in the form of either money or of services." Tyranski v. Piggins, 205 N.W.2d 595, 596 (Mich. Ct. App. 1973); *see also* Carnes v. Sheldon, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981) ("While the judicial branch is not without power to fashion remedies in this area, we are unwilling to extend equitable principles to the extent plaintiff would have us do so, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature." (citations omitted)).

143. MINN. STAT. § 513.075 (2008) provides that a contract which deals with the property and financial relationship of an unmarried, cohabiting man and woman will be enforced only if it is written and if the parties seek to enforce it after the relationship ends. MINN. STAT. § 513.076 provides that a trial court cannot hear claims by parties where there is no written contract if the consideration for the oral contract was the intimate relationship of the couple.

144. Mississippi does not authorize ordering division of property between cohabitants when the claim is "based upon a relationship." Cates v. Swain, 215 So.3d 492, 495 (Miss. 2013). However, the Mississippi Supreme Court recently held that a cohabitant could recover the amounts she contributed toward the purchase and improvement of a joint residence based on a theory of unjust enrichment since the claim for recovery was based upon something other than the relationship itself. *Id.*

145. Tapley v. Tapley, 449 A.2d 1218, 1220 (N.H. 1982) (refusing to recognize implied contracts, or grant remedies under the theory of quantum meruit, between unmarried cohabitants without guidance from the legislature).

146. *See supra* note 140.

147. *See supra* note 140.

148. Kohler v. Flynn, 493 N.W.2d 647, 649 (N.D. 1992) (holding that cohabitants generally may bring an action for partition of property if their intention was clear to own property jointly, but mere cohabitation is not enough to support the right to partition in the absence of actual joint ownership).

149. Tarry v. Stewart, 649 N.E.2d 1, 6 (Ohio 1994) (refusing to allow property division between unmarried cohabitants because of the lack of precedent).

150. Section 26.01(b)(3) of Texas's statute of frauds requires that promises made on consideration of nonmarital conjugal cohabitation be in writing to be enforceable. TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (West 2017). *See also* Zaremba v. Cliburn, 949 S.W.2d 822, 829 (Tex. App. 1997) (barring claims arising from a purported oral or implied partnership agreement as violative of the statute of frauds).

tween unmarried cohabitants so long as the consideration is not based primarily on sexual services.

The Supreme Judicial Court of Massachusetts nicely laid out this approach in *Wilcox v. Trautz*.[151] There, the court expressly recognized, for the first time, "that unmarried cohabitants may lawfully contract concerning property, financial, and other matters relevant to their relationship," and such contracts are "subject to the rules of contract law and [are] valid even if expressly made in contemplation of a common living arrangement, except to the extent that sexual services constitute the only, or dominant, consideration for the agreement, or that enforcement should be denied on some other public policy ground."[152] In that case, a woman who had cohabited with a man as an unmarried couple for approximately twenty-five years[153] brought an action seeking declaration that the written property agreement they had entered was invalid and unenforceable.[154] "The agreement basically establishe[d] that, whether acquired before or during the relationship, 'what's mine is mine and what's yours is yours.'"[155]

In holding that the agreement should be enforced, the court recognized the dramatic changes in social mores regarding cohabitation between unmarried parties; such living arrangements were becoming relatively common and accepted.[156] Because "a considerable number of persons live together without benefit of the rules of law that govern property, financial, and other matters in a marital relationship," the court reasoned that it would "do well to recognize the benefits to be gained by encouraging unmarried cohabitants to enter into written agreements, as the consequences for each

151. 693 N.E.2d 141 (Mass. 1998).

152. *Id.* at 146. Cases to the contrary in Massachusetts were expressly overruled. *Id.*

153. The parties lived together in a house purchased by defendant, with title in his name only. Between 1973 and 1992, the plaintiff contributed $25 a week toward general household expenses, and throughout the course of the relationship, the plaintiff performed various household duties. She also contributed some of her income toward the maintenance and improvement of the parties' home. *Id.* at 143.

154. *Id.*

155. *Id.* at 144 n.1. The court continued:

> Specifically the agreement provide[d] that each party's earnings and property is his or hers alone, and the other party shall have no interest in the property of the other; any services rendered by either party are voluntary and without expectation of compensation; the parties shall maintain separate accounts; any debts or obligations are the responsibility of the party who acquired them; if one party contributes to the mortgage payment of a premises owned by the other party, the contribution is to be deemed rent only and shall not create in the contributor any interest in the property; and any money transferred from one party to the other, with the exception of mortgage or rent payments, shall be deemed a loan.

*Id.*

156. *Id.* at 144.

partner may be considerable on termination of the relationship or, in particular, the death of one of the partners."[157]

The court concluded that it would "ma[ke] no sense" to uphold certain financial and property arrangements between unmarried cohabitants—such as agreements to hold real property jointly or in common, agreements to create joint bank and other accounts, agreements to create joint investments, and testamentary disposition—that stem from a relationship involving sexual cohabitation, but "withhold enforcement of written agreements between the same parties when they attempt to settle the financial and other consequences if they should separate."[158] In either case, the parties are motivated by "an intention to hold, or dispose of, property in a mutually acceptable way in order to manage day-to-day matters and to avoid litigation when the relationship ends."[159]

Thus, the court held that the instant property division agreement was valid and enforceable, as both parties had capacity to contract and understood each other's financial worth prior to execution of the agreement.[160] However, the court also stressed that its decision left intact prior decisions affording preference for marriage, and should not "be taken as a suggestion or intimation that [the court is] retreating from [its] prior expressions regarding the importance of the institution of marriage and the strong public interest in ensuring that its integrity is not threatened."[161]

This approach grants unmarried cohabitants a great deal of certainty concerning their financial and property rights. Cohabiting couples can rest assured that as long as their contract abides by the rules of contract law—i.e. there was not fraud, overreaching, unconscionability, etc.—the court will enforce it unless the primary consideration is sexual services. Cohabitants can easily avoid drafting an agreement based solely on sexual services or fidelity by excluding those topics and, more generally, the mention of domestic services, and instead framing the consideration in terms of "the common welfare of both parties, combined with an effort to further their financial partnership."[162]

The problem with this approach is that, if the couple draft an unfair agreement, it will likely be enforced (unless it is found unconscionable) since courts will examine cohabitation agreements not under a "fair and

157. *Id.* at 145.
158. *Id.* at 146.
159. *Id.*
160. *Id.* at 147–48.
161. *Id.* at 146.
162. Andrea D. Heinbach & Pierce J. Reed, Wilcox v. Trautz*: The Recognition of Relationship Contracts in Massachusetts*, 43 BOS. B.J. 6, 20 (1999).

reasonable" standard, but rather, under a pure contract paradigm.[163] Another obvious problem with this approach is that many couples will fail to enter into such a contract, either because they are not aware of cohabitation agreements, or because they feel such an agreement is unnecessary. In these jurisdictions, such couples will be left with little legal recourse since the court in *Wilcox* explicitly rejected those portions of *Marvin* and other cases which grant property rights to a nonmarital partner in the absence of an express contract.[164]

### *D. The Legislature Should Enact a Statute Making Express Agreements and Certain Implied Agreements Between Unmarried Cohabitants Enforceable*

As evidenced by these jurisdictions' various approaches, the Illinois legislature will have many options available to it in deciding which relationships—and which rights associated with them—will be recognized. However, given the Illinois Supreme Court's desire that the courts avoid litigation of disputes between unmarried cohabitants, along with the need to provide unmarried cohabitants with greater certainty and fairness, the best option is to enforce express agreements (where the consideration is not primarily sex) and implied agreements, but only where the party seeking relief meets specific statutory requirements.

## III. AN ILLINOIS COHABITATION STATUTE

As discussed in Part I above, there is a problem in Illinois right now when it comes to cohabitation agreements. A forty-year old precedent is being followed, but its underlying goal of keeping property claims brought by unmarried cohabitants out of court is not being accomplished. Moreover, the public policy on which it relies—favoring marriage over private arrangements—is being served by withholding basic common-law rights from nonmarital couples, despite the unfair consequences that result from that approach. Unfortunately, given the chance to reconsider and modernize a decades-old approach, the Illinois Supreme Court has remained dedicated to the position that this "delicate area of marriage-like relationships, which

163. *Id.* at 19.

164. *Wilcox*, 693 N.E.2d at 145 n.3. However, more recently, the Massachusetts Appellate Court, after acknowledging that other states have permitted equitable claims that are not predicated on sexual relations or the cohabiting relationship itself, has allowed unmarried cohabitants to bring claims based on a recognized equitable remedy. *See* Sutton v. Valois, 846 N.E.2d 1171, 1175–76 (Mass. 2006) (citing Salzman v. Bachrach, 996 P.2d 1263, 1267–69 (Colo. 2000); Spafford v. Coats, 455 N.E.2d 241, 245 (Ill. 1983)).

involves evaluation of sociological data and alternatives . . . [is] best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field."[165] Thus, in the absence of judicial action, the legislature must answer the call of the Illinois Supreme Court and update Illinois public policy to reflect our changing society, and, at the very least, grant unmarried cohabitants the same rights as those not in a cohabitating, sexual relationship.

Given the options available for enforcement of cohabitation agreements, and considering the underlying goal of the Illinois Supreme Court in *Hewitt*, the best approach for Illinois is to enforce express, and certain implied, cohabitation agreements between unmarried cohabitants, but refuse to hear equitable claims.

### *A. Enforce Express Agreements*

First, the legislature should enact a statute codifying what courts in jurisdictions that recognize only express agreements[166] have held, i.e., a written contract concerning property and financial matters between unmarried cohabitants, even if made in contemplation of cohabitation, is enforceable except to the extent that sexual services constitute the dominant consideration for the agreement.[167] The legislature should indicate that the contract is only enforceable upon termination of the relationship,[168] and will become invalid if the parties eventually marry.[169] Finally, the statute should indicate that such contract will not be enforced to the extent that it fails to conform with Illinois law or public policy.

Enabling unmarried cohabitants to contract with each other will give them greater certainty with respect to their property and financial rights. Furthermore, it would put an end to the unfortunate situation in Illinois in which unmarried cohabitants have lesser rights to contract than single individuals. Allowing cohabitants to enter into contract will also reduce litigation, since parties are less likely to seek judicial intervention when they have established contractual rights to rely on.

165. Blumenthal v. Brewer, 2016 IL 118781, ¶ 58, 69 N.E.3d 834, 851 (citing Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979)). However, as indicated in Part II, the economic rights of cohabitants in nearly all states, with Minnesota and Texas being the only exceptions, have come about through judicial opinions rather than legislative enactments.

166. *See supra* Part II.C.

167. Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998).

168. MINN. STAT. § 513.075 (2008).

169. *Wilcox*, 693 N.E.2d at 146 n.4.

### *B. Allow Certain Implied Contract Claims*

Since not every cohabitating couple will have the means or the foresight to enter into a cohabitation agreement, the Illinois legislature should also create statutory guidelines that indicate what relationships are worthy of recognition in the absence of a written agreement. As evidenced by the newly-enacted maintenance statute[170], the Illinois legislature is capable of setting threshold requirements and detailing what exactly courts should consider when litigating an issue.[171] Thus, in writing a statute that sets a requirement for cohabitating couples seeking to enforce property and financial rights, the legislature can set a threshold requirement that will ensure that only meritorious claims are heard.

For example, the legislature might require that the cohabitating relationship last at least five years before a party can assert rights arising from an implied agreement. Or, the legislature could follow Oregon's intent-based approach, and require that the courts consider evidence which tends to show the parties' implied intent to enter a cohabitation agreement, including shared incomes and joint financial acts—such as joint checking accounts, savings accounts or purchases. The legislature might also simply state that litigants need only prove an indication that the couple was substantially committed to each other and leave it to the courts to determine, based on the facts of the case, whether or not relief is appropriate. However, the clearer the guidelines the legislature provides, the less litigation will result.

Whatever requirements the legislature deems appropriate, having an option for unmarried cohabitants to assert rights based on implied contract will ensure that meritorious claims are not turned away simply because the couple did not enter a written agreement. Furthermore, such a statute would serve as an incentive for litigants to settle out of court, knowing that they either can or cannot establish the necessary elements to bring an implied contract claim.

### *C. Refuse Equitable Claims*

The legislature should also announce a policy stating that unmarried cohabitants are not permitted to bring claims based on equitable rights. It has long been recognized that equitable adjudication is a potentially dan-

170. 750 ILL. COMP. STAT. 5/504 (2017).

171. Under Illinois's maintenance statute, the court must first consider fourteen relevant factors and decide whether or not a maintenance award is appropriate. *Id.* 5/504(a)–(b).

gerous source of arbitrary discretion by courts.[172] As has been shown in cases following *Hewitt*, the standards the courts apply in deciding equitable claims related to cohabitating relationships vary substantially depending on what is asserted in a complaint or what relief is sought. Additionally, such claims often require the court to delve into the couple's relationship and it is often difficult for litigants to prove equitable rights arising independently from the cohabitating relationship, which can drain judicial time and resources. Recognizing equitable rights of cohabitants undermines the underlying policy goal of the Illinois Supreme Court, expressed in *Hewitt*: to avoid substantial litigation that involves details of a couple's living arrangement.

As such, the legislature should make a clear indication that any claim brought by unmarried cohabitants seeking property or financial rights must either be in writing, or conform to the statutory requirements allowing implied claims.

## CONCLUSION

This suggested approach will give courts and litigants something concrete to rely on when planning and evaluating cohabitation agreements. Furthermore, it will ensure that compelling claims—which, as shown in Part I.B above, manifest themselves either way—are not only allowed, but are grounded in law. Such a statute will save litigants, lawyers, and courts time and resources because only meritorious claims will be heard, and courts will be able to avoid hearing equitable claims related to marriage-type rights. Finally, this approach will allow the legislature to determine what types of relationship we want to recognize in order to ensure meritorious claims are treated fairly, while keeping in line with Illinois public policy favoring marriage.

172. GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 5 (1982) ("Throughout the entire history of procedural innovations in equitable adjudication it was understood that equity is a potentially dangerous source of arbitrary discretion.").