CHAPTER 1

Disputes Between Unmarried People

Chapter Contents

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§ 1.01 Introduction

When people marry, their rights relating to their relationship stem from the marital property rules of the jurisdiction. In contrast, there is no established system to regulate other types of intimate relationships. In recent times, unmarried cohabitants and people involved in dating relationships have sometimes sought judicial resolution of a dispute relating to the relationship. Such suits have been grounded upon theories of express or implied contract, partnership, resulting or constructive trust, and even various tort theories.

§ 1.02 Disputes Between Cohabitants

[1]—The Traditional View

The doctrine of illegality pervades older cases involving claims between unmarried cohabitants.[1] Pursuant to this view, claims relating to the cohabitation were considered tainted by the parties' fornication. Such claims were considered immoral and barred by the doctrine of illegality.[2] Even an express written contract between cohabitants regarding their property rights arising from the cohabitation was unenforceable. This rule of illegality evolved because such relationships were considered highly offensive. In addition, some hoped that this harsh rule would encourage cohabitants to marry.

A 1980 Tennessee case is representative. In that case, the court held:

> "[a claim based upon a contract between cohabitants] is founded upon illegal consideration. . . . A contract for an immoral purpose [cohabitating without the benefit of marriage] is . . . invalid consideration, . . . contrary to public policy and will not be enforced."[3]

It is unclear whether, under this view, *all* claims relating to the cohabitation are barred, including claims based upon equitable theories such as resulting trust, constructive trust, or partnership. At least one case has held that all such claims are barred.[4] Most courts treat the illegality doctrine as a bar only to contract claims; rights based upon theories of trust or partnership can exist.[5]

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[1] See generally: Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 Fam. L. Q. 101 (1976); Folberg and Buren, "Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families," 12 Willamette L. J. 453 (1976).

"Unmarried Cohabitation" is used herein to refer to two people, not married to each other, who live together and have a sexual relationship.

[2] See, e.g.:

New York: Vincent v. Moriarity, 31 A.D. 484, 52 N.Y.S. 519 (1898).

Washington: Creasman v. Boyle, 31 Wash.2d 345, 196 P.2d 835 (1948).

Wyoming: Willis v. Willis, 48 Wyo. 403, 49 P.2d 670 (1935).

A few cases have adhered to this view. See, e.g.:

Georgia: Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977).

Illinois: Hewitt v. Hewitt, 77 Ill.2d 49, 31 Ill. Dec. 827, 394 N.E.2d 1204 (1979).

Tennessee: Roach v. Buttons, 6 Fam. L. Rep. (BNA) 2355 (Tenn. Ch. 1980).

See generally, Bruch, N. 1 *supra*, 10 Fam. L.Q. at 106-109.

[3] Roach v. Buttons, 6 Fam. L. Rep. (BNA) 2355 (Tenn. Ch. 1980).

[4] See Jones v. Daly, 122 Cal. App.3d 500, 176 Cal. Rptr. 130 (1981). See also, Rehak v. Mathis, 239 Ga. 541, 238 S.W.2d 81 (1977). See generally: Bruch, N. 1 *supra*; Folberg and Buren, N. 1 *supra*.

[5] See, e.g., Cluck v. Sheets, 141 Tex. 219, 171 S.W.2d 860 (1943). See also, Mason v. Rostad, 476 A.2d 662 (D.C. App. 1984).

[2]—Severability

The doctrine of illegality does not bar people who participate in an illegal act from filing *any* claim in the courts. Such people are only barred from filing a claim relating to the illegal act. In the context of unmarried cohabitation, those states that accept the illegality rule only bar cohabitants from asserting claims relating to the cohabitation.[6]

It therefore is necessary, under this system, to determine what kinds of claims are sufficiently unrelated to the cohabitation to be considered "severable" from the illegal cohabitation. One claim which clearly is severable is one relating to a separate business or investment activity of the couple.[7]

It is no secret that cohabitation has become much more acceptable.[8] Because of this trend, and because the illegality rule can have quite harsh results, many courts not willing to expressly reject the illegality rule have greatly limited it by a creative interpretation of the severability exception. Such courts have considered "severable" almost any claim relating to the cohabitation, so long as sexual relations are not expressly mentioned as consideration.[9]

[3]—Selective Illegality

Some courts have restricted the types of relationships to which the illegality rule will apply. For example, in a few cases, courts have allowed claims relating to property accumulated during the relation-

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[6] See Starr v. Estate of Nottolini, 13 Fam. L. Rep. (BNA) 1333 (Ill. Cir. 1987). See generally: 6A *Corbin on Contracts*, § 1476 (1962); Williston, *Contracts*, § 1745 (3d. ed. 1960).

[7] See, e.g.:

New York: McCall v. Frampton, 81 A.D.2d 607, 438 N.Y.S.2d 11 (N.Y. App. Div. 1981).

North Carolina: Suggs v. Norris, 88 N.C. App. 539, 364 S.E.2d 159, *cert. denied* 322 N.C. 486 (1988).

Tennessee: Bass v. Bass, 814 S.W.2d 38 (Tenn. 1991).

Texas: Small v. Harper, 638 S.W.2d 24 (Tex. Civ. App. 1982).

[8] See generally: Blumberg, "Cohabitation Without Marriage: A Different Perspective," 28 UCLA L. Rev. 1125 (1981); Caudill, "Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common Law Marriage," 19 Tenn. L. Rev. 537 (1982); Oldham and Caudill, "A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants," 18 Fam. L.Q. 93 (1984).

[9] See, e.g.:

Maryland: Donovan v. Scuderi, 51 Md. App. 217, 443 A.2d 121 (1982).

Michigan: Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).

New York: Donnell v. Stogel, 161 A.D.2d 93, 560 N.Y.S.2d 200 (N.Y. App. Div. 1990).

Wyoming: Kinnison v. Kinnison, 627 P.2d 594 (Wyo. 1981).

ship.[10] These cases emphasized, however, that the relationships involved were sufficiently conventional so that community standards were not offended. It was stated, however, that some cohabitation relationships could still be offensive and illegal, thereby rendering any cohabitation agreements unenforceable.[11] The characteristics of such offensive relationships remain unclear. The relationships involved in these cases were long, stable, heterosexual and monogamous, and neither party was married to another.[12] If a relationship deviates from such a "conventional" cohabitation situation, the doctrine of illegality might still be strictly applied by these courts.

The illegality of cohabitation under the forum's criminal laws does not seem to affect this analysis. For example, lewd and lascivious cohabitation violated the criminal laws of Michigan and Wisconsin when two cohabitation claims arose.[12.1] Yet the claims between the cohabitants were allowed by both the Michigan[13] and Wisconsin[14] courts.

In many cohabitation situations, at least one cohabitant is married to a third party. Courts have not considered this situation sufficiently unconventional so that the rule of illegality applies.[15] Indeed, even when the cohabitant continued to "date" the spouse, it has not caused the courts to consider the cohabitation immoral and illegal.[16] The effect of such a cohabitation award upon the property rights of the spouse not cohabiting has not been considered.[17]

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[10] See, e.g.:

Indiana: Glasgo v. Glasgo, 410 N.E.2d 1325 (Ind. App. 1980).

Michigan: Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).

[11] *Id.*

[12] Other courts permitting cohabitation actions have emphasized the length and stability of the relationship involved. See, e.g., Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979). See also, Artiss v. Artiss, 8 Fam. L. Rep. (BNA) 2313 (Hawaii App. 1982).

[12.1] See Mich. Comp. L. § 750.335.

[13] See Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).

[14] See In re Estate of Steffes, 95 Wis.2d 490, 290 N.W.2d 697 (1980).

[15] See:

North Carolina: Collins v. Davis, 68 N.C. App. 588, 315 S.E.2d 759, *aff'd per curiam* 312 N.C. 324, 321 S.E.2d 892 (1984).

Minnesota: In re Estate of Eriksen, 337 N.W. 2d 671 (Minn. 1983).

Cf., Goode v. Goode, 183 W.Va. 468, 396 S.E.2d 430 (1990).

If one of the parties in the relationship is still *living* with the lawful spouse and merely *dating* the other person, a court might apply another analysis. See Taylor v. Fields, 178 Cal. App.3d 653, 224 Cal. Rptr. 186 (1986).

[16] See, e.g.:

Michigan: Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).

Washington: In re Estate of Thornton, 81 Wash.2d 72, 499 P.2d 864 (1972), *on remand* 14 Wash. App. 397, 541 P.2d 1243 (1975).

[17] See, e.g.:

Florida: Poe v. Estate of Levy, 411 So.2d 253 (Fla. App. 1982).

Pennsylvania: Baldassari v. Baldassari, 278 Pa. Super. 312, 420 A.2d 556 (1980).

"Unconventional" heterosexual relationships that have been involved in cohabitation cases include a man who cohabited with two women and still dated his wife,[18] and a "communal marriage" comprised of two men and one woman.[19] The illegality rule was not applied in either case.

Claims relating to same-sex cohabitants have also reached appellate courts. These courts generally have applied the rules governing heterosexual cohabitation to such claims.[20] However, one court seemed to apply these rules in a less than even-handed manner to invalidate an agreement between homosexuals.[21]

A Colorado court held that a claim arising out of a cohabitation relationship should not be barred for illegality if the sexual relationship was secondary to any agreement and not the sole consideration.[22] A California court has suggested that only claims arising from prostitution should be barred due to illegality.[23] As the above discussion suggests, the vitality of the illegality rule is in flux, and will vary from state to state.[24]

[4]—The Rejection of the Illegality Rule

Marvin v. Marvin[25] is the most celebrated of the cases that generally reject the application of the illegality rule to cohabitation claims.[26] However, *Marvin* and its progeny have not driven a stake through the heart of the illegality rule by any means. *Marvin* states:

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[18] Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

[19] In re Bauder, 44 Ore. App. 443, 605 P.2d 1374 (1980).

[20] *Arkansas:* Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980).

California: Whorton v. Dillingham, 202 Cal. App.3d 447, 248 Cal. Rptr. 405 (1988).

Oregon: Ireland v. Flanagan, 51 Ore. App. 837, 627 P.3d 496 (1981).

Texas: Small v. Harper, 638 S.W.2d 24 (Tex. Civ. App. 1982).

But see Vasquez v. Hawthorne, 99 Wash. App. 363, 994 P.2d 240 (2000).

[21] See Jones v. Daly, 122 Cal. App.3d 500, 176 Cal. Rptr. 130 (1981). See also, "Suit Settled," Time Magazine, at 66 (Jan. 12, 1987).

[22] Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000).

[23] Della Zoppa v. Della Zoppa, 86 Cal. App.4th 1144, 103 Cal. Rptr.2d 901 (2001).

[24] For example, some states have generally rejected the applicability of the illegality rule in cohabitation situations. See, e.g., Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).

[25] Marvin v. Marvin 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

[26] For other cases, see, e.g.:

New Jersey: Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).

New York: Morone v. Morone, 50 N.Y.2d. 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980).

Oregon: Latham v. Latham, 274 Ore. 421, 547 P.2d 144 (1976).

> "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. Of course, they cannot lawfully contract to pay for the performance of sexual services. . . . So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their affairs as they choose. . . ."[27]

The standard set forth in *Marvin* is less than precise. An agreement "[resting] upon illicit meretricious consideration" is unenforceable. It is unclear how this can be a workable rule, since all cohabitation in this context involves sexual relationships. Those who agree to share accumulated property presumably do so because they are living together and sharing a sexual relationship. Under California law, the agreement apparently is void only if the parties allude to the sexual relationship in the agreement.[28] It is unclear how other states that have adopted *Marvin* will construe this unlawful meretricious consideration limit.[29]

[5]—Theories of Recovery in Cohabitants' Disputes

If a cohabitation claim is not barred by illegality, a number of theories of recovery are possible.[30]

[a]—Express Contract

The most generally accepted theory of recovery is express contract. An oral or written cohabitation agreement is enforceable in those

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[27] *Marvin v. Marvin*, N. 25 *supra*, 557 P.2d at 116.

[28] See Jones v. Daly, 122 Cal. App.3d 500, 176 Cal. Rptr. 130 (1981). See also, Donovan v. Scuderi, 51 Md. App. 217, 443 A.2d 121 (1982). *Cf.*, Whorton v. Dillingham, 202 Cal. App.3d 447, 248 Cal. Rptr. 405 (1988).

[29] In *Whorton v. Dillingham, id.*, the court emphasized that the plaintiff alleged that, in addition to agreeing to being the lover of the defendant, he agreed to render services not normally expected in a domestic relationship, such as being a chauffeur, bodyguard, secretary and investment counselor. This persuaded the court that the consideration was independent of the sexual aspect of the relationship. A contract between a same-sex couple was also enforced in Estate of Reaves v. Owen, 744 So.2d 799 (Miss. App. 1999), despite a public policy challenge.

[30] For a detailed discussion of these claims, see: Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 Fam. L.Q. 101 (1976); Casad, "Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?" 77 Mich. L. Rev. 47 (1978); Folberg and Buren, "Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families," 12 Willamette L.J. 453 (1976); Day and Amyx, "*Marvin v. Marvin:* Preserving the Options," 65 Calif. L. Rev. 937 (1977); Comment, 61 Neb L. Rev. 138 (1982).

states that do not apply the illegality rule to all cohabitation claims,[31] unless the Statute of Frauds applies,[32] or unless unlawful meretricious

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[31] See, e.g.:

Alaska: Levar v. Elkins, 604 P.2d 602 (Alaska 1980).

Arizona: Cook v. Cook, 142 Ariz. 573, 691 P.2d 664 (1984).

California: Marvin v. Marvin 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

Colorado: Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000).

Connecticut: Boland v. Catalano, 202 Conn. 333, 521 A.2d 142 (1987).

Florida: Poe v. Estate of Levy, 411 So.2d 253 (Fla. 1982); Posik v. Layton, 695 So.2d 759, 23 Fam. L. Rep. (BNA) 1296 (Fla. App. 1997).

Georgia: Crooke v. Gilden, 262 Ga. 122, 414 S.E.2d 645 (1992).

Hawaii: Artiss v. Artiss, 8 Fam. L. Rep. (BNA) 1085 (Hawaii 1982).

Idaho: Curtis v. Curtis, 14 Fam. L. Rep. (BNA) 1322 (Idaho Dist. 1988).

Indiana: Bright v. Kuehl, 650 N.E.2d 311 (Ind. App. 1995); Glasgo v. Glasgo, 410 N.E.2d 1325 (Ind. App. 1980).

Iowa: Marriage of Martin, 684 N.W.2d 612 (Iowa 2004).

Maryland: Donovan v. Scuderi, 51 Md. App. 217, 443 A.2d 121 (1982).

Massachusetts: Wilcox v. Trautz, 427 Mass. 326, 693 N.E.2d 141 (1998); Green v. Richmond, 369 Mass. 47, 337 N.E.2d 691 (1975).

Michigan: Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).

Minnesota: Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977).

Mississippi: In re Estate of Alexander, 445 So.2d 836 (Miss. 1984).

Missouri: Hudson v. Delonjay, 732 S.W.2d 922 (Mo. App. 1987); Johnston, v. Estate of Phillips, 706 S.W.2d 554 (Mo. App. 1986).

Nebraska: Kinkenan v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981).

Nevada: Hay v. Hay, 100 Nev. 196, 678 P.2d 672 (1984).

New Hampshire: Joan S. v. John S., 121 N.H. 96, 427 A.2d 498 (1981).

New Jersey: In re Estate of Roccamonte v. Slackman, 174 N.J. 381, 808 A.2d 838 (2002); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d (1979).

New Mexico: Dominguez v. Cruz, 95 N.M. 1, 617 P.2d 1322 (1980).

New York: Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980); McCall v. Frampton, 81 A.D.2d 607, 438 N.Y.S.2d 11 (N.Y. App. Div. 1981).

North Carolina: Suggs v. Norris, 88 N.C. App. 537, 364 E.2d 159 (1988).

Oregon: Beal v. Beal, 282 Ore. 115, 577 P.2d 507 (1978).

Pennsylvania: Mullen v. Suchko, 279 Pa. Super. 499, 421 A.2d 310 (1980).

Tennessee: Smith v. Riley, 2002 WL 122917 (Tenn. App. 2002).

Utah: Edgar v. Wagner, 572 P.2d 405 (Utah 1977).

Washington: In re Estate of Thornton, 81 Wash.2d, 72, 499 P.2d 864 (1972).

West Virginia: Goode v. Goode, 183 W.Va. 468, 396 S.E.2d 430 (1990).

Wisconsin: Watts v. Watts, 137 Wis.2d 506, 405 N.W.2d 303 (1987). See also, Muir v. Stotler, 20 Fam. L. Rep. (BNA) 1094 (Wis. App. 1994).

Wyoming: Kinnison v. Kinnison, 627 P.2d 594 (Wyo. 1981).

See also: Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 Fam. L.Q. 101 (1976); Folberg and Buren, "Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families," 12 Williamette L.J. 453 (1976); Weyrauch, "Metamorphoses of Marriage," 13 Fam. L.Q. 415, 428-431 (1980).

But see:

Georgia: Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977).

Illinois: Hewitt v. Hewit, 77 Ill.2d 49, 394 N.E.2d 1204 (1979).

consideration was given.[33] (Note that Texas, New Jersey, and Minnesota require cohabitant contracts to be written.)[34]

Normal contract rules apply to the express contract theory.[35] For example, the parties must have agreed regarding all material terms of the agreement,[36] any claim for a breach of the contract must be brought within the applicable limitations period, and consideration is required.[37]

In a Florida case, the court applied conventional contract analysis to uphold a liquidated damages provision requiring one party to pay the other monthly payments of $2,500 for the rest of her life.[38]

A Massachusetts court considered an alleged cohabitation contract to be against public policy when the contract was made to induce the woman to leave her husband.[39]

A New York court has enforced a "separation agreement" signed by a lesbian couple when their relationship ended.[40]

North Dakota courts equitably divide a couple's property accumulated during a cohabitation if it finds written evidence of such an intention to share. Relevant evidence includes how the parties took title to property and whether they have separate or joint bank accounts.[40.1]

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[32] See, e.g.:

New York: Williams v. Lynch, 245 A.D.2d 715, 666 N.Y.S.2d 749 (N.Y. App. Div. 1997); Wilke v. Oldenburg, 6 Fam. L. Rep. (BNA) 2086 (N.Y. Sup. 1980).

[33] See, e.g., Jones v. Daly, 122 Cal. App.3d 500, 176 Cal. Rptr. 130 (1981).

[34] See:

Minnesota: Minn. Stat. Ann. § 513.075; Estate of Palmen, 588 N.W.2d 493 (Minn. 1999) (allowing a claim for unjust enrichment).

New Jersey: N.J. Stat. Ann. § 25: 1-5.

Texas: Tex. Fam. Code § 1.108.

[35] See Trimmer v. Van Bomel, 107 Misc.2d 201, 434 N.Y.S.2d 82 (N.Y. Sup. 1980).

[36] See:

First Circuit: Norton v. McOsker, 407 F.3d 501 (1st Cir. 2005).

State Courts:

California: Whorton v. Dillingham, 202 Cal. App.3d 447, 248 Cal. Rptr. 405 (1988); In re Estate of Fincher, 119 Cal. App.3d 343, 174 Cal. Rptr. 18 (1981).

New York: Soderholm v. Kosty, 177 Misc.2d 403, 676 N.Y.S.2d 850 (N.Y. Just. 1998).

[37] See Rose v. Elias, 177 A.D.2d 415, 576 N.Y.S.2d 257 (N.Y. App. Div. 1991).

[38] Posik v. Layton, 695 So.2d 759 (Fla. App. 1997).

[39] *First Circuit:* de Castelbajac v. Kock, 1998 U.S. Dist. LEXIS 2187, 24 Fam. L. Rep. (BNA) 1213 (D. Mass. 1998).

[40] Silver v. Starrett, 76 Misc.2d 511, 674 N.Y.S.2d 915 (N.Y. Sup. 1998).

[40.1] *Compare* McKechnie v. Berg, 667 N.W.2d (N.D. 2003), *with* Kohler v. Flynn, 493 N.W.2d 647 (N.D. 1992).

In an Ohio case, in connection with moving in together, a couple signed a written agreement stating that they were "equal partners" in the house they were to live in (that was owned by the man). The man was to pay all expenses relating to the property. If the house was sold, they were to share the proceeds. If the relationship ended while the parties still owned the house, the man could retain the house if he paid the woman for her 50% share. The Ohio Supreme Court concluded that this agreement was not enforceable, due to a lack of consideration.[40.2]

Enforceable contracts must set forth all material terms. In a New York case, the court held that a man's promise to "always take care of [the other]" and that "we will enjoy together [all our accumulations during the relationship]" was not an enforceable contract.[40.3] The court also stated that an agreement between cohabitants to create the same rights as married people if they ended their relationship was contrary to public policy and should not be enforced.

In those states that enforce oral express agreements, differences have arisen regarding how specific the terms of any such contract must be. A promise "to take care of [another] after my death" was considered too vague by a New York court.[41] A California court reached this same conclusion regarding a promise to "always support" another.[42] In contrast, a New Jersey court enforced a promise "to take care of another for the rest of her life."[43]

[b]—Implied Contract

There is less agreement whether implied agreement claims should be permitted. For example, the New York Court of Appeals has limited cohabitation claims to those relating to an express agreement.[44]

[40.2] Williams v Ormsby, 131 Ohio St. 3d 427, 966 N.E.2d 255 (2012).

[40.3] Fass, "Promises to Support Unmarried Partners Ruled Not Binding," New York Law Journal, at p. 6 (March 31, 2010) (discussing Ericson v. Baron # 350065/09 (N.Y. Sup. March 26, 2010)).

[41] Estate of Lasek, 545 N.Y.S.2d 668 (N.Y. Surr. 1989).

[42] Friedman v. Friedman, 20 Cal. App.4th 876, 24 Cal. Rptr.2d 892 (1993).

[43] Sopke v. Estate of Roccamonte, 787 A.2d 198 (N.J. Super. 2001).

[44] See Morone v. Morone, 50 N.Y.2d. 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980). This limit was not applied to a dispute involving people who dated but did not live together. See Moors v. Hall, 143 A.D.2d 336, 532 N.Y.S.2d 412 (N.Y. App. Div. 1988). See also:

Alaska: Wood v. Collins, 812 P.2d 951 (Alaska 1991).

Mississippi: Davis v Davis, 643 So.2d 931 (Miss. 1994); In re Estate of Alexander, 445 So.2d 836 (Miss. 1984); Cates v. Swain, 2012 WL 129639 (Miss. App. April 17, 2012).

New Mexico: Dominguez v. Cruz, 95 N.M. 1, 617 P.2d 1322 (1980) (court enforced oral express contract).

In contrast, a number of courts have upheld recoveries based upon implied agreements.[45] It is easier to base a claim upon an implied in fact agreement than on one implied in law, since implied in fact claims rest upon inferences from the behavior of the parties. For example, if the parties took title jointly when a purchase was made, or pooled certain resources, this may show an implied agreement to share accumulated property.[46]

A North Dakota court permitted one partner to sue for partition of the property accumulated during the relationship, when the parties pooled their funds.[46.1]

There is less of a consensus among courts regarding the ability of a cohabitant to bring an implied in law contract claim. California has authorized this type of recovery.[47] Other courts have concluded that a

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North Carolina: Collins v. Davis, 68 N.C. App. 588, 315 S.E.2d 759, *aff'd per curiam* 312 N.C. 324, 321 S.E.2d 892 (1984).

Those states that have adopted a statute of frauds approach would not permit an implied contract claim. See Roatch v. Puera, 534 N.W.2d 560 (Minn. App. 1995).

[45] See, e.g.:

Alaska: Wood v. Collins, 812 P.2d 951 (Alaska 1991).

Arizona: Carroll v. Lee, 148 Ariz. 10, 712 P.2d 923 (1986).

California: Marvin v. Marvin, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

Connecticut: Boland v. Catalano, 202 Conn. 333, 521 A.2d 142 (1987); Dosek v. Dosek, 4 Fam. L. Rep. (BNA) 2828 (Conn. 1978).

Hawaii: Artiss v. Artiss, 8 Fam. L. Rep. (BNA) 2313 (Haw. App. 1982).

Idaho: Curtis v. Curtis, 14 Fam. L. Rep. (BNA) 1322 (Idaho Dist. 1988).

Indiana: Bright v. Kuehl, 650 N.E.2d 311 (Ind. App. 1995).

Michigan: Roznowski v. Bozyck, 73 Mich. App. 405, 251 N.W.2d 606 (1977).

Minnesota: Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977).

Missouri: Hudson v. Delonjay, 732 S.W.2d 922 (Mo. App. 1987); Johnston v. Estate of Phillips, 706 S.W.2d 249 (Minn. 1977).

Nevada: Western States Construction v. Michoff, 108 Nev. 931, 840 P.2d 1220 (1992).

New Jersey: Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).

North Carolina: Suggs. v. Norris, 88 N.C. App. 539, 364 S.E.2d 159 (1988).

Oregon: Beal v. Beal, 282 Ore. 115, 577 P.2d 507 (1978); In re Pinto and Smalz, 955 P.2d 770, 24 Fam. L. Rep. (BNA) 1238 (Ore. App. 1998); Wilbur v. DeLapp, 850 P.2d 1151 (Ore. App. 1993); Shuraleff v. Donnelly, 817 P.2d 764 (Ore. App. 1991).

West Virginia: Goode v. Goode, 183 W.Va. 468, 396 S.E.2d 430 (1990) (apparently limiting this rule to those unmarried cohabitants who held themselves out as husband and wife).

Wisconsin: Watts v. Watts, 137 Wis.2d 506, 405 N.W.2d 303 (1987); In re Estate of Steffes, 95 Wis.2d 490, 290 N.W.2d. 697 (1980).

[46] See, e.g., Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977). See also, Carroll v. Lee, 148 Ariz. 10, 712 P.2d 923 (1986).

[46.1] McKechnie v. Berg, 667 N.W.2d 628 (N.D. 2003).

[47] Marvin v. Marvin, 18 Cal.3d 660, 1324 Cal. Rptr. 815, 557 P.2d 106 (1976). See also:

cohabitant renders services to the other with no expectation of compensation, so at least a *quantum meruit* claim regarding domestic services should not be permitted,[48] although some courts have allowed recovery of *quantum meruit* claims.[49] Even if such a recovery is permitted, any support received should be offset against the value of the services rendered.[50]

[c]—Resulting Trust

A resulting trust can be created when a party contributes funds or services toward the acquisition of property, and title is taken in another's name.[51] A Georgia court imposed an "implied trust" as a remedy, which seemed a close cousin of a resulting trust.[51.1]

District of Columbia: Mason v. Rostad, 476 A.2d 662 (D.C. 1984).

Wisconsin: Watts v. Watts, 137 Wis.2d 506, 405 N.W.2d 303 (1987).

Cf., Carnes v. Sheldon, 109 Mich. App. 204, 311 N.W.2d 747 (1981).

[48] See, e.g., Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980). See also, Featherston v. Steinhoff, 226 Mich. App. 584, 575 N.W.2d 6 (1997). See generally: Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 Fam. L.Q. 101 (1976); Caudill, "Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common Law Marriages," 19 Tenn. L. Rev. 537 (1982).

[49] See, e.g.:

California: Maglica v. Maglica, 66 Cal. App.4th 442, 78 Cal. Rptr.2d 101 (1998).

Colorado: Nini v. Sullivan, 23 Fam. L. Rep. (BNA) 1127 (Colo. Dist. 1996).

Connecticut: Boland v. Catalano, 202 Conn. 333, 521 A.2d 142 (1987).

District of Columbia: Mason v. Rostad, 476 A.2d 662 (D.C. App. 1984).

Indiana: Turner v. Freed, 792 N.E.2d 947 (Ind. App. 2003).

Maine: Gilbert v. Cliche, 398 A.2d 387 (Me. 1979).

Massachusetts: Green v. Richmond, 69 Mass. 47, 337 N.E.2d 691 (1975).

New Hampshire: Humiston v. Bushnell, 118 N.H. 759, 394 A.2d 844 (1978).

New York: Moors v. Hall, 143 A.D.2d 336, 532 N.Y.S.2d 412 (N.Y. App. Div. 1988).

North Carolina: Suggs. v. Norris, 88 N.C. App. 539, 364 S.E.2d 159, *cert. denied* 322 N.C. 486 (1988).

Wisconsin: Watts v. Watts, 137 Wis.2d 506, 521, 405 N.W.2d 305 (1987).

Wyoming: Shaw v. Smith, 964 P.2d 428 (Wyo. 1998) (distinguishing between household services and commercial services).

[50] See Purser v. Kerr, 21 Ark. App. 233, 730 S.W.2d 917 (1987). See also, Nini v. Sullivan, 23 Fam. L. Rep. (BNA) 1127 (Colo. Dist. 1996). See also, Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. 1999).

[51] For examples of cases sanctioning this theory of recovery, see:

Alaska: Sugg. v. Morris, 392 P.2d 313 (Alaska 1964).

Arizona: Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953).

California: Keene v. Keene, 57 Cal.2d 657, 21 Cal. Rptr. 593, 371 P.2d 329 (1962).

Iowa: Marriage of Martin, 681 N.W.2d 612 (Iowa 2004).

North Carolina: Collins v. Davis, 68 N.C. App. 588, 315 S.E.2d 759 (1984).

Texas: Hayworth v. Williams, 116 S.W. 43 (Tex. 1909); Faglie v. Williams, 569 S.W.2d 557 (Tex. Civ. App. 1978).

[d]—Constructive Trust

A constructive trust is a remedy, applied for purposes of restitution, to prevent unjust enrichment. It is an equitable doctrine established as a remedial device by which the holder of legal title is held to be trustee for the benefit of another who in good conscience is entitled to the beneficial interest. It is normally applied to remedy a situation where the holder of legal title has been unjustly enriched at the expense of another.[52] No intent to create a trust is required.

[e]—Express Trust

A cohabitant claim can also be based upon an express trust.[53]

[f]—Implied or Express Partnership

The Uniform Partnership Act defines "partnership" as "an association of two or more persons to carry on as co-owners a business for profit."[54] Since a normal domestic relationship is not a "business,"

In order to establish a resulting trust, the contribution normally must be made at the time the property was acquired. See generally, Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 Fam. L.Q. 101 (1976).

[51.1] Weekes v. Gay, 243 Ga. 784, 256 S.E.2d 901 (1979).

[52] See generally: Slocum v. Hammond, 346 N.W.2d 485 (Iowa 1984); Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 Fam. L.Q. 101 (1976).

For cases that support this remedy in disputes between cohabitants, see:

Arkansas: Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980).

California: Marvin v. Marvin, 18 Cal.3d 660, 134 Rptr. 815, 557 P.2d 106 (1976).

Colorado: Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000).

Connecticut: Boland v. Catalano, 202 Conn. 333, 521 A.2d 142 (1987).

Florida: Saporta v. Saporta, 766 So.2d 379 (Fla. App. 2000); Evans v. Wall, 542 So.2d 1055 (Fla. App. 1989).

Indiana: Bright v. Kuehl, 650 N.E.2d 311 (Ind. App. 1995).

Iowa: Marriage of Martin, 681 N.W.2d 612 (Iowa 2004).

Massachusetts: Sullivan v. Rooney, 404 Mass. 160, 533 N.E.2d 1372 (1989).

Minnesota: Estate of Palmen, 588 N.W.2d 493 (Minn. 1999); In re Estate of Eriksen, 337 N.W.2d 671 (Minn. 1983).

New York: Williams v. Lynch, 245 A.D.2d 715, 666 N.Y.S.2d 749 (N.Y. App. Div. 1997); Minieri v. Knittel, 188 Misc.2d 298, 727 N.Y.S.2d 872 (N.Y. Sup. 2001).

North Carolina: Suggs v. Norris, 88 N.C. App. 539, 364 S.E.2d 159 (1988).

Rhode Island: Nani v. Vanasse, 32 Fam. L. Rep. (BNA) 1220 (R.I. Super. 2006).

Washington: Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974).

West Virginia: Goode v. Goode, 183 W.Va. 468, 396 S.E.2d 430 (1990).

Wisconsin: Pederson v. Anibas, 247 Wis.2d 990, 635 N.W.2d 27 (Wis. App. 2001); Ward v. Jahnke, 220 Wis.2d 539, 583 N.W.2d 656 (Wis. App. 1998).

See generally, Annotation, 3 A.L.R.4th 14. But see, Jordan v. Mitchell, 705 So.2d 453 (Ala. App. 1997).

[53] See, e.g., Cluck v. Sheets, 171 S.W.2d 860 (Tex. 1943).

[54] See Unif. Part. Act § 6(1).

partnership principles do not apply. However, if the parties are involved in a separate business, or even if they merely invest money together,[55] partnership principles may be applicable.[56]

[g]—Equitable Lien

A cohabitation claim based upon an equitable lien has been permitted.[57]

[h]—Loan

Funds advanced as a loan to the other cohabitant could be recovered.[58]

[i]—Unjust Enrichment

In a Wisconsin case, the female partner proved that, while she and her partner were living together, she paid for the family's living expenses, but her partner saved money to make a down payment on a house. The court held that the male partner was unjustly enriched by the woman's payment of their living expenses.[58.1]

[j]—Intentional Interference with Expectation of Inheritance

If the parties are living together when one partner dies, and the other partner can establish that a family member of the decedent fraudulently prevented the survivor from obtaining an inheritance or

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[55] See, e.g., Small v. Harper, 638 S.W.2d 24 (Tex. Civ. App. 1982). See also:
Mississippi: Jernigan v. Jernigan, 625 So.2d 782 (Miss. 1993).
Oregon: Rissberger v. Gorton, 41 Ore. App. 65, 597 P.2d 366 (1979).

[56] See, e.g.:
New York: Williams v. Lynch, 245 A.D.2d 715, 666 N.Y.S.2d 749 (N.Y. App. Div. 1997); Lee v. Slovak, 440 N.Y.S.2d 358 (N.Y. App. Div. 1981); McCall v. Frampton, 81 A.D.2d 607, 438 N.Y.S.2d 11 (1981).
Tennessee: Martin v. Coleman, 19 S.W.3d 757 (Tenn. 2000); Bass v. Bass, 814 S.W.2d 38 (Tenn. 1991); Story v. Lanier, 166 S.W.3d 167, 2004 WL 2609185 (Tenn. App. 2004).
Texas: Small v. Harper, 638 S.W.2d 24 (Tex. Civ. App. 1982).
Washington: In re Estate of Thornton, 81 Wash.2d 72, 499 P.2d 864 (1972).
See generally, Folberg and Buren, "Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families," 12 Willamette L.J. 453 (1976).

[57] See Evans v. Wall, 542 So.2d 1055 (Fla. App. 1989).

[58] See Shold v. Goro, 449 N.W.2d 372 (Iowa 1989).

[58.1] See:
Indiana: Turner v. Freed, 792 N.E.2d 947 (Ind. App. 2001) (affirming an award for unjust enrichment).
Wisconsin: Ward v. Jahnke, 220 Wis.2d 539, 583 N.W.2d 656 (Wis. App. 1998).

gift from the decedent, a number of states have accepted the cause of action for intentional interference with expectation of enheritance.[58.2]

[k]—Summary

A number of possible theories of recovery for cohabitants have evolved. However, almost all courts will not grant a cohabitant any recovery unless there is *some* applicable theory established.[59] In other words, few courts now claim the general power to make an equitable division of property accumulated by a cohabitant; also, few appellate courts claim the right to award quasi-alimony at the end of a cohabitation.[60]

For example, when the case of *Marvin v. Marvin*[61] was retried after the celebrated California Supreme Court opinion, the trial judge found against the plaintiff on *all* theories advanced, but awarded her $104,000. The appellate court reversed this award, stating that it would only be justified if she had established an approved theory of recovery.[62]

[6]—*De Facto* Marriage

The Washington Supreme Court has announced that property accumulated by cohabitants may be divided, even absent any agreement or available equitable remedy.[63] It is unclear whether this opinion applies to all cohabitation relationships. A later Washington case applied this rule where the parties cohabited for ten years, held each other out as husband and wife, and had children.[64] The Washington

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[58.2] See Beckwith v. Dahl, 205 Cal. App.4th 1039, 141 Cal. Rptr.3d 142 (2012). See generally Klein, "Tortious Interference with Expectation of Inheritance," 13 Lewis & Clark L. Rev. 209 (2009).

[59] See Wajda v. Wajda, 239 N.J. Super. 248, 570 A.2d 1308 (1990).

[60] *Cf.*, Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982). In Marvin v. Marvin, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), the court did suggest that it might be receptive to such a claim. *Id.*, 557 P.2d at 123 n. 26. A few courts approved an award of quasi-alimony, when the duration of the relationship was long and the parties closely resembled a traditional family. See: In re Reckno, 138 Cal. App.3d 539 (1982); Flores v. Flores, 15 Fam. L. Rep. (BNA) 1053 (Cal. App. 1988).

[61] Marvin v. Marvin, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

[62] Marvin v. Marvin, 122 Cal. App.3d 871, 176 Cal. Rptr. 555 (1981).

[63] See Lindsey v. Lindsey, 101 Wash.2d 299, 678 P.2d 328 (1984). A Kansas court has held that it has the power to divide cohabitants' property, even absent a contract or equitable claim. See Eaton v. Johnson, 9 Kan. App.2d 63, 10 Fam. L. Rep. (BNA) 1094 (1983). See also: Connell v. Francisco, 74 Wash. App. 306, 872 P.2d 1150 (1994); Warden v. Warden. 10 Fam. L. Rep. (BNA) 1259 (Wash. App. 1984).

The concept of "*de facto* marriage" was rejected in Wajda v. Wajda, 239 N.J. Super. 248, 570 A.2d 1308 (1990).

[64] Foster v. Thilges, 61 Wash. App. 880, 812 P.2d 523 (1991). The court rejected the argument that the property accumulated while the parties lived together should be divided based upon their respective financial contributions. A very similar case is Lindemann v. Lindemann, 92 Wash. App. 64, 960 P.2d 966 (1998).

Supreme Court clarified the scope of these cases by announcing that, where the cohabitants have a stable, marriage-like relationship, at the end of the relationship the court should divide all property that would have been community property.[65] These relationships are called "meretricious" in Washington.[65.1] One court concluded that a relationship that lasted a little longer than four years was meretricious,[66] whereas the Washington Supreme Court held in a later case that there wasn't sufficiently continuous cohabitation to be meretricious when the parties cohabited for five years while one of them was married to a third party, separated shortly after that person obtained a divorce, then lived together again twice, once for a period a little longer than one year and once for one year.[67] A same-sex couple may establish a meretricious relationship in Washington.[68] The principle has been extended to relationships that end in death.[68.1] One court has held that such a committed intimate unmarried relationship is ended when one party expresses an unequivocal intent to end it.[68.2] This court also held that parties can change the rules applicable to such a relationship by oral agreement. Another case held that a claim must be brought within three years of the end of the relationship or the claim will be barred.[68.3]

An Oregon appellate court has approved an equitable distribution of cohabitants' assets where the relationship lasted fifteen years and the parties ran a business together.[69]

In Mississippi, the chief appellate court has permitted an equitable division of property accumulated during a cohabitation when the relationship was a "partnership."[70] Other Mississippi appellate courts have granted an equitable remedy at the end of a long-term cohabitation relationship.[70.1] These remedies have normally been limited to instances where the complaint had been based on a good faith belief that the complainant was married. But in *Cotton v. Cotton*, whereas

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[65] Connell v. Francisco, 127 Wash.2d 339, 898 P.2d 831 (1995). See also, Koher v. Morgan, 93 Wash. App. 398, 968 P.2d 920 (1998).

[65.1] A later case has substituted the term "committed intimate relationship." See *Oliver v. Fowler*, N. 68.1 *infra*.

[66] Chesterfield v. Nash, 96 Wash. App. 103, 978 P.2d 551 (1999).

[67] Marriage of Pennington, 142 Wash.2d 592, 14 P.3d 764 (2000).

[68] Vasquez v. Hawthorne, 145 Wash.2d 103, 33 P.3d 735 (2001).

[68.1] Oliver v. Fowler, 161 Wash.2d 655, 168 P.3d 348 (2007).

[68.2] In re G.W.F. (Finch and Wieder), 258 P.3d 208, 38 Fam. L. Rep. (BNA) 1552 (Wash. App. 2012).

[68.3] In re Kelly and Moesslang, 287 P.3d 12, 38 Fam. L. Rep. (BNA) 1550 (Wash. App. 2012).

[69] Shuraleff v. Donnelly, 108 Ore. App. 707, 817 P.2d 764 (1991).

[70] Pickens v. Pickens, 490 So.2d 872 (Miss. 1986).

[70.1] See Cotton v. Cotton, 44 So.3d 371 (Miss. App. 2010) (thirty-seven-year relationship).

the claimant had married her partner, she knew she had been previously married and had not dissolved her prior marriage.[70.2]

Of course, these cases are the exception rather than the rule. Most courts have decided that a cohabitant shouldn't be granted a remedy based on that status; the cohabitant must establish a cause of action under one of the theories discussed above before a remedy may be granted.[71] So, for example, a California court refused to uphold an award of spousal support to a cohabitant.[72]

[7]—Property Accumulated During Premarital Cohabitation

Some courts have considered, in a later divorce action, property accumulated during premarital cohabitation.[73] Property accumulated during the cohabitation sometimes has been considered property accumulated during marriage, and it has been divided accordingly. Alternatively, a cohabitation claim could be asserted in the divorce action.[73.1] However, statute of limitation problems could be encountered.

[8]—Non-Property Cohabitation Contract Provisions

The previous discussion generally pertains to the enforceability of cohabitation contracts regarding the parties' respective rights in accumulated property. Other types of provisions present more complex issues.

For example, sample cohabitation contracts purport to address what will occur if one party has an affair, the parties' respective rights and responsibilities if the woman becomes pregnant, and who will be responsible for birth control and various household chores.[74]

[70.2] *Id.*

[71] Collins v. Guggenheim, 417 Mass. 615, 631 N.E.2d 1016 (1994).

[72] Friedman v. Friedman, 20 Cal. App.4th 876, 24 Cal. Rptr.2d 892 (1993).

[73] See generally:

Connecticut: Vine v. Vine, 7 Fam. L. Rep. (BNA) 2765 (Conn. Super. 1981).

Hawaii: Malek v. Malek, 7 Haw. App. 377, 768 P.2d 243 (1989).

Illinois: In re Marriage of Goldstein, 97 Ill. App.3d 1023, 53 Ill. Dec. 397, 423 N.E.2d 1201 (1981).

Indiana: Chestnut v. Chestnut, 499 N.E.2d 783 (Ind. App. 1986).

Kentucky: Sousky v. Sousky, 6 Fam. L. Rep. (BNA) 2278 (Ky. App. 1980).

Maine: Grishman v. Grishman, 407 A.2d 9 (Me. 1979).

New Jersey: Magone v. Magone, 495 A.2d 469 (N.J. Super. 1985).

Oregon: Marriage of Troffo, 151 Ore. App 741, 951 P.2d 197 (1997).

South Carolina: Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977).

Washington: In re Marriage of DeHollander, 53 Wash. App. 695, 770 P.2d 638 (1989).

[73.1] This subject is discussed in § 5.03[4] *infra*.

[74] See generally: Hirsch, *Living Together: A Guide to the Law for Unmarried Couples*, at 97-111 (1976); Ihara and Wainer, *The Living Together Kit*, at 47-62 (1978); Burger, *The Love Contract*, at 71-77 (1973); Weitzman, *The Marriage Contract* (1981).

Although the couple may benefit from considering these matters, it is doubtful that such provisions would be enforceable. Enforcing such provisions would present thorny constitutional and policy issues.[75]

[9]—Cohabitants Treated as Spouses in Certain Instances

Cohabitants generally have not been treated as spouses.[76] However, in at least one state a cohabitant may claim wrongful death benefits if the other party dies.[77] Other states permit a cohabitant to obtain workers' compensation death benefits.[78] A minority of courts have permitted a cohabitant to sue for loss of consortium.[79]

If unmarried cohabitants believe in good faith that they are married, some states treat them as putative spouses. Putative spouses are, in many ways, given the rights of spouses.[80]

[10]—Cohabitants Who Purchase Property Jointly

If cohabitants purchase realty together, the form of title can be important. A California court has held that if title is taken as tenants in common, one cohabitant should be reimbursed by the other for unequal contributions.[81]

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[75] See generally, Oldham and Caudill, "A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants," 18 Fam. L.Q. 93, 136-137 (1984).

[76] See generally: Rhine and Staubus, "Workers' Compensation and the Meretricious Spouse: Sixty-Two Years of Irreconcilable Differences," 15 Cal. W.L. Rev. 1 (1979); Note, "Extending Consortium Rights to Unmarried Couples," 129 U. Pa. L. Rev. 911 (1981)

[77] See, e.g., West v. Barton-Malow Co., 394 Mich. 334, 230 N.W.2d 545 (1975). Most would not permit such a claim. See Clark Sand Co. v. Kelley, ___ So.2d ___, 36 Fam. L. Rep. (BNA) 1223 (Miss. 2010).

[78] See, e.g., Ore. Rev. Stat. § 656.226. See also, D.I.R. v. Workers' Compensation Appeals Board, 94 Cal. App.3d 72 (1979). The contrary majority rule is set forth, for example, in Stone v. Goulet, 522 A.2d 216 (R.I. 1987).

[79] See, e.g.:

Third Circuit: Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980).

Ninth Circuit: Norman v. General Motors Corp., 628 F. Supp. 702 (D. Nev. 1986).

But see:

California: Elden v. Sheldon, 46 Cal.3d 267, 250 Cal. Rptr. 254, 758 P.2d 582 (1988); Ledger v. Tippitt, 164 Cal. App.3d 625, 210 Cal. Rptr. 814 (1985).

Massachusetts: Feliciano v. Rosemar Silver Co., 401 Mass. 141, 514 N.E.2d 1095 (1987).

New Jersey: Sykes v. Zook Enterprises, 215 N.J. Super. 461, 521 A.2d 1380 (1987).

Washington: Roe v. Ludtke Trucking, Inc., 6 Wash. App. 816, 732 P.2d 1021 (1987).

[80] See § 2.03[4] *infra*.

[81] Milian v. De Leon, 181 Cal. App.3d 1185, 226 Cal. Rptr. 831 (1986). *Cf.*: Casey v. Casey, 736 S.W.2d 69 (Mo. App. 1987); Brooks v. Brooks, 637 S.W.2d 135 (Mo. App. 1982). If title is in the name of one party, the other party has the burden

The Nevada Supreme Court also has considered what should occur if cohabitants own a home as tenants in common. The court decided that, absent evidence of an intent to make a gift, the ownership interests should be calculated based on the parties' respective contributions.[82]

Other courts have provided some sort of equitable remedy when parties take title jointly and one party provides all the consideration.[82.1]

[11]—Other Public Policy Issues

It has been suggested that the applicability of the illegality rule to cohabitants depends on the moral offensiveness of the relationship.[83] Nevertheless, a cohabitation contract may be illegal and unenforceable even if sex is not a consideration for the contract. A Massachusetts court, for example, invalidated a cohabitation contract which was signed to induce one party to obtain a divorce from a third party.[84]

[12]—Choice of Law

Cohabitation disputes, like divorce actions, arise when the relationship has ended. It is quite possible that, when a cohabitation relationship ends, one party will move to another state and then file suit. For this reason, cohabitation disputes sometimes are litigated in a

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of proving that he or she has a claim to it; however, if cohabitants hold property as tenants in common, in some states there is a presumption of equal contribution. See Estate of Wilson, 740 S.W.2d 694 (Mo. App. 1987).

Other courts have not required reimbursement for unequal contributions, if the parties had agreed that no such reimbursement would be required. See:

Alaska: Wood v. Collins, 812 P.2d 951 (Alaska 1991).

Mississippi: Jones v. Graphia, 95 So.2d 751, 38 Fam. L. Rep. (BNA) 1481 (Miss. App. 2012) (boyfriend should receive all of the property because he paid for it and maintained it).

Washington: Foster v. Thilges, 61 Wash. App. 880, 812 P.2d 523 (1991).

[82] Sack v. Tomlin, 871 P.2d 298 (Nev. 1994).

See also:

New York: C.Y. v. H.C., No. 102658/06, New York Law Journal (N.Y. Sup. Ct. N.Y. Cy. June 12, 2007) (division of sale proceeds of townhouse owned by same-sex couple who had registered as domestic partners in New York City and entered into a religious marriage was akin to partition in spite of ownership as tenants in common; the court awarded each party reimbursement for her costs of down payment, repairs, renovations, mortgage, taxes, and insurance plus 50% of the balance of the value of the property).

[82.1] See:

Georgia: Weekes v. Gay, 256 S.E.2d 901 (Ga. 1979)

Massachusetts: Sutton v. Valois, 66 Mass. App. Ct. 258, 846 N.E.2d 1171 (2006).

[83] See §§ 1.02[3] and 1.02[4] *supra*.

[84] Capazzoti v. Holzwasser, 397 Mass. 158, 490 N.E.2d 420 (1986).

forum other than the state where the parties cohabited. In such a situation a California court, applying the *Second Restatement*'s "most significant relationship" analysis, decided that the rights of the parties should be determined by the law of the state where the parties cohabited.[85]

A Hawaii court has applied its law to determine the rights of partners who cohabited in China.[86]

[13]—Other Matters

In a Montana case, one cohabitant sued the other for $1000 in telephone calls made. The court rejected the claim, noting that the plaintiff had not communicated to the other that her telephone privileges were cut off.[87]

In a California case, the parties had a joint bank account into which they both deposited a substantial amount of money. When the relationship ended one party withdrew $350,000. When the other party sued, the court concluded that the bank account agreement gave the first party the right to withdraw funds, and that she had no obligation to reimburse the other party for any funds withdrawn.[88]

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[85] Henderson v. Superior Court, 142 Cal. Rptr. 478 (Cal. App. 1978). See also, Knauer v. Knauer, 470 A.2d 553 (Pa. Super. 1983) (applying the *Second Restatement* test). For an extensive discussion of these issues, see Reppy, "Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile," 55 S.M.U. L. Rev. 273 (2002).

[86] Chen v. Hoeflinger, 127 Haw. 346, 279 P.3d 11 (Haw. App. 2011).

[87] Albinger v. Harris, 310 Mont. 27, 48 P.3d 711 (2002).

[88] Lee v. Yang, 111 Cal. App.4th 481, 3 Cal. Rptr.3d 819 (2003).

§ 1.03 Dating Claims

[1]—In General

It is unclear whether people who are not living together, but merely dating, may assert the same property claims as cohabitants. Courts may be more willing to apply the illegality limit to dating situations. For instance, in some cohabitation cases courts have emphasized that the doctrine of illegality should not be applied because the relationships involved were quite conventional.[1] The relationships were stable and monogamous, and the parties generally held themselves out as husband and wife.

In a dating case, the relationship involved is less frequently conventional. For example, a Washington case involved a dispute arising from a four-year affair between a married man and a single woman.[2] Although the parties sometimes spent an evening or a weekend together, the man lived with his wife during the course of the relationship. During the relationship, the man transferred amounts aggregating $30,000 to the woman. After the relationship ended, he sued to recover these funds, among other things. He alleged that a trust should be imposed upon these funds, since the parties planned to marry and this was to be their "nest egg." The court ruled that the man was not entitled to equitable relief. The court expressly distinguished the cohabitation cases, which generally involved stable, long-term relationships in which the parties held themselves out as husband and wife. In contrast, the case at bar involved a surreptitious and unstable situation where the parties did not live together.[3] It is clear that the court was offended by the relationship and therefore would not grant the plaintiff equitable relief.

In an almost identical case, the Nebraska Supreme Court reached the opposite result.[4] In this case, Phyllis, a married woman, had an affair with Robert, a single man. She apparently lived with her hus-

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[1] See, e.g.:
Indiana: Glasgo v. Glasgo, 410 N.E.2d 1325 (Ind. App. 1980).
Michigan: Tyranski v. Piggins, 44 Mich, App. 570, 205 N.W.2d 595 (1973).
[2] Adams v. Jensen-Thomas, 18 Wash. App. 757, 571 P.2d 958 (1977).
[3] *Id.*, 571 P.2d at 961, 963. See also:
California: Taylor v. Fields, 178 Cal. App.3d 653, 224 Cal. Rptr. 186 (1986).
Massachusetts: Capazzoli v. Holzwasser, 397 Mass. 158, 490 N.E.2d 420 (1986).
Other courts have not been as concerned when a married person cohabits with a third party and continues to "date" the spouse. See, e.g.:
Iowa: Shold v. Goro, 49 N.W.2d 372 (Iowa 1989).
Utah: Edgar v. Wagner, 572 P.2d 405 (Utah 1977).
[4] Taylor v. Frost, 202 Neb. 652, 276 N.W.2d 656 (1979).

band throughout the affair, which lasted approximately five years. After the affair had begun, Phyllis filed for divorce. At about that time, Robert and Phyllis apparently agreed to marry. Robert advanced money to Phyllis, so that she could buy a house. Title was taken in Phyllis' name alone, although both parties planned to live there after they were married. Robert and Phyllis subsequently became formally engaged, but Phyllis terminated the engagement. Robert sued to recover the funds he advanced to Phyllis for the house purchase. The court concluded that Robert could recover pursuant to either a resulting trust or a constructive trust, even though Robert in some sense induced Phyllis to divorce. The court considered Phyllis equally guilty and did not want her to keep her "illegal gains."

A similar case was presented by the celebrated dispute between the Bloomingdales and the late Vicki Morgan. This case involved alleged contracts between the late Alfred Bloomingdale and Vicki Morgan. One contract allegedly provided that Bloomingdale and Morgan were to be partners in a business venture; another provided that he would pay her a certain amount of monthly support for a certain period.[5] A severability argument presumably could be made regarding the former claim, unless Morgan's partnership contribution was sexual services. The latter claim more directly presents the illegality issue.

To the extent it is considered important whether the partners were "living together," it can sometimes be unclear whether this occurred. For example, a California case involved a couple who had conceived a child and had a long relationship. They only sporadically shared the same bed. The court concluded that this satisfied any requirement California had adopted requiring a stable and significant relationship.[6]

The New Jersey Supreme Court has considered whether unmarried partners must cohabit to be able to bring a claim when the relationship ends. The court held that the parties must have a "marital-type relationship," and whether the parties cohabitated is a factor but not an absolute requirement.[6] Other relevant factors include how much time was spent together, whether the couple commingled finances, and whether they held themselves out as a married couple.

The cohabitation cases upholding the enforceability of cohabitation contracts frequently state that prostitution contracts remain unen-

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[5] See, e.g., Norwind, "Betsy Bloomingdale Also Named in Palimony Suit," L.A. Herald Examiner, p. A-1, col. 1 (July 29, 1982). The estate of Vicki Morgan then sued the estate of Alfred Bloomingdale. See "Lawsuit Proceeds," Houston Post, p. B-1, col. 5 (Oct. 6, 1983).

[6] Cochran v. Cochran, 89 Cal. App.4th 283, 106 Cal. Rptr.2d 899 (2001).

[6] Devaney v. L'Esperance, 195 N.J. 247, 949 A.2d 743 (2008).

forceable.[7] It may be inferred from these cases that the courts believe that cohabitants exchange many different services, and that sex is not the sole or primary consideration offered by either party. Dating situations present a scenario somewhere between prostitution and cohabitation. The parties share something more than a sexual relationship, but the relationship generally would not be as rich and meaningful as cohabitation. It is unclear whether the illegality rule will be applied to dating relationships. The result may depend upon the duration of the relationship, whether either party is married to another, and whether the married party was separated or living with the lawful spouse during the dating relationship.

An increasing number of courts have concluded that *Marvin* remedies should not be extended to couples who "date" but do not cohabit.[8]

[2]—Claims Regarding Child Support

Some appellate cases have involved agreements between unmarried persons to sire a child. These cases present very complex public policy issues.

For example, in a New Jersey case a married man (who was living with his wife) allegedly promised an unmarried woman that, if she would bear his child, he would totally support the child, and adequately provide for the child in his will.[9] The woman bore his child, and the man supported the child until the man's death, when the child was eleven. The man made no provision for the child in his will. The mother filed a claim against the estate. The court concluded that this was a contract for sex and was therefore illegal and unenforceable. The adulterous nature of the situation particularly troubled the court.[10]

A female's biological clock has caused other interesting contract problems. Women nearing the end of their childbearing years have

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[7] See, e.g.:

California: Marvin v. Marvin, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

Kentucky: Cougler v. Fackler, 510 S.W.2d 16 (Ky. App. 1974).

[8] See:

California: Bergen v. Wood, 14 Cal. App.4th 854, 18 Cal. Rptr.2d 75 (1993).

New Jersey: Levine v. Konvitz, 383 N.J. Super. 1, 890 A.2d 354, *cert. denied* 186 N.J. 607 (2006).

Washington: Adams v. Jensen-Thomas, 18 Wash.App. 757, 571 P.2d 958 (1977).

[9] Naimo v. La Flanza, 369 A.2d 987 (N.J. Ch. 1976).

[10] *Id.*, 369 A.2d at 992. Such a promise was considered against public policy when neither party was married. See Jennings v. Hurt, 160 A.D.2d 576, 554 N.Y.S.2d 220 (N.Y. App. Div. 1990). The female in this case alleged that the male promised to support her if she would give up her career and have his child.

made agreements with "friends" that, if the friend would impregnate them, the friend would have no support obligation.[11] Some women have had a change of heart and have later sued for child support; the friend has resisted.

In reported cases to date, the Good Samaritan has not been rewarded. When this issue was first presented, the court merely concluded that sexual services were integral to the contract, so the contract was illegal and unenforceable.[12] This non-analysis is not particularly useful. A later New York case explored in more depth the issues presented.[13] The court balanced the unfairness of imposing a child support obligation against the problems which would result if there was inadequate support for the child. The court concluded that policy concerns dictated that a support action should be permitted.

A related issue can arise regarding negligence or misrepresentations pertaining to birth control. In a California case, an unmarried woman had been impregnated by an unmarried man and gave birth to a baby girl. The man resisted a claim for child support on the ground that the woman falsely represented she was taking birth control pills and he sued for fraudulently inducing him to have sexual relations with her. The court concluded that if the man's action was sanctioned, it would involve an "unwarranted governmental intrusion into matters affecting the individual's right to privacy,"[14] so the man's complaint was dismissed. The court was concerned about supervising "the promises made between two consenting adults as to the circumstances of their private sexual conduct."[15]

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[11] See, e.g.:
California: Fournier v. Lopez, 5 Fam. L. Rep. (BNA) 2582 (Cal. App. 1979).
New York: L. Pamela P. v. Frank S., 88 A.D.2d 865, 451 N.Y.S.2d 766 (N.Y. App. Div. 1982), *aff'd* 59 N.Y.2d 1, 462 N.Y.S.2d 819, 449 N.E.2d 713 (1983).

[12] Fournier v. Lopez, 5 Fam. L. Rep. (BNA) 2582 (Cal. App. 1979).

[13] *L. Pamela P. v. Frank S.,* N. 11 *supra.*

[14] Stephen K. v. Roni L., 105 Cal. App.3d 640, 164 Cal. Rptr. 618, 620 (1980).
See also:
Pennsylvania: Hughes v. Hutt, 500 Pa. 209, 455 A.2d 623 (1983).
Washington: Linda D. v. Fritz C., 38 Wash. App. 288, 687 P.2d 223 (1984).

[15] *Stephen K. v. Roni L., id.*, 164 Cal. Rptr. at 620. See also:
Michigan: Faske v. Bonanno, 137 Mich. App. 202, 357 N.W.2d 860 (1984).
New Hampshire: Welzenbach v. Powers, 139 N.H. 688, 660 A.2d 1133 (1995).
New Mexico: Wallis v. Smith, 130 N.M. 214, 22 P.3d 682 (N.M. App. 2001).
New York: Douglas R. v. Suzanne M., 487 N.Y.S.2d 244 (N.Y. Sup. 1984).
Pennsylvania: Hughes v. Hutt, 500 Pa. 209, 455 A.2d 623 (1983).
Tennessee: Henson v. Sorrell, 1999 WL 5630, 25 Fam. L. Rep (BNA) 1175 (Tenn. App. 1999).
Washington: Linda D. v. Fritz. C., 38 Wash. App. 288, 687 P.2d 223 (1984).

In a New York case, the court reached the opposite conclusion when considering a female's request for damages as a result of a male's misrepresentation that he was sterile. In reliance on this statement, the female did not take any birth control precautions, became pregnant, and aborted the pregnancy. The court granted the female a judgment for the cost of the abortion, lost wages, and pain and suffering.[16]

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[16] Alice D. v. William M., 450 N.Y.S.2d 350 (N.Y. Sm. Cl. 1982). See also, Barbara A. v. John G., 145 Cal. App.3d 369, 193 Cal. Rptr. 422 (1983).

§ 1.04 Tort Actions Between the Parties

In addition to claims by cohabitants and dating partners based on contract and equitable principles, tort claims may also be possible. Although there do not appear to be any older cases on point, it may be that the parties would have been embarrassed to bring such an action and that the courts were not disposed to grant relief to couples engaged in what was considered immoral behavior. As the vitality of the illegality doctrine as applied to cohabitation and dating disputes has ebbed, there has been an increased judicial willingness to hear tort claims between cohabitants and between dating parties.

In New York there is a conflict of authority with one court permitting an action by a cohabitant against her partner for intentional infliction of emotional distress,[1] while another New York court refused to permit an action on the ground that spouses may not bring such a claim.[2] A California court has permitted an action between former cohabitants based on negligent infliction of emotional distress.[3]

A cohabitant would also be permitted to bring a battery claim against her partner.[4] A New Jersey court has recognized a cause for action for "battered woman's syndrome" if the relationship was a marriage-like intimate relationship.[5]

Some "dating tort" cases have arisen relating to complications stemming from sexual relations. In California, a man sued a woman for fraudulently misrepresenting to him that she was taking birth control pills when she was not.[6] She became pregnant, bore a child, and sued him for child support. The court dismissed his complaint, emphasizing privacy concerns.[7]

Later California cases have distinguished this situation. In one case, the man had told the woman he was dating that he was sterile when in fact he was not and she became pregnant, suffered an ectopic pregnancy and was forced to undergo surgery which saved her life but rendered her sterile.[8] She brought an action against the man based

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[1] Murphy v. Murphy, 11 Fam. L. Rep. (BNA) 1259 (N.Y. App. Div. 1985). See also, Avildsen v. Avildsen, 19 Fam. L. Rep. (BNA) 1204 (N.Y. Sup. 1993).

[2] Baron v. Jeffer, 469 N.Y.S.2d 815 (N.Y. App. Div. 1983).

[3] Ledger v. Tippitt, 164 Cal. App.3d 625, 210 Cal. Rptr, 814 (1985). See also, Christian v. Estate of Hudson, 15 Fam. L. Rep. (BNA) 1280 (Cal. Super. 1989).

[4] Albinger v. Harris, 310 Mont. 27, 48 P.3d 711 (2002).

[5] Cusseaux v. Pickett, 279 N.J. Super. 335, 652 A.2d 789 (1994).

[6] Stephen K. v. Roni L., 105 Cal. App.3d 640, 164 Cal. Rptr. 618 (1980). See § 1.03[2] *supra*.

[7] See also, C.A.M. v. R.A.W., 237 N.J. Super. 532, 568 A.2d 556 (N.J. App. Div. 1990).

[8] Barbara A. v. John G., 145 Cal. App.3d 369, 193 Cal. Rptr. 422 (1983).

upon his false representation of sterility. The court permitted the action. The earlier decision was distinguished on the basis that a child support obligation was essentially involved in that case. In the present case, no child was involved.[9]

A Massachusetts case involved a claim by a man who had suffered a "penile fracture" while engaged in sexual intercourse with the defendant. The man sued, based on a claim of negligence. The court concluded that because there are no commonly accepted customs or values that determine parameters for the intensely private and widely diverse forms of sexual contact, that there was no duty of reasonable care owed by the woman to the man. The court did conclude that parties should be required not to engage in reckless conduct toward each other during sexual interactions; the court found there was no evidence the plaintiff could have made such a showing.[10]

Another Massachusetts case involved a situation where a man allegedly misrepresented his willingness to have a child with a woman, and did not disclose his prior vasectomy. The court rejected the woman's claims of negligent infliction of emotional distress, fraud, intentional infliction of emotional distress, and battery.[11]

A more common problem was involved in a case in which the parties had engaged in sexual relations voluntarily, but the woman was not aware that her partner was afflicted with genital herpes. When she contracted herpes, she sued him alleging, among other things, that he represented that he was free from all venereal disease.[12] The court permitted the claim.[13]

The earlier California case was again distinguished based upon the existence of a child and the effect of the action on the child's support.

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[9] *Id. Accord*, In re Alice D., New York Law Journal, p. 12 (May 25, 1982), (N.Y. Sup. 1982) (emphasizing the length of the parties' relationship, thereby rendering the reliance reasonable).

[10] Doe v. Moe, 63 Mass. App. Ct. 516, 827 N.E.2d 240 (2005).

[11] Conley v. Rameri, 60 Mass. App. Ct. 799, 806 N.E.2d 933 (2004).

[12] Kathleen K. v. Robert B., 150 Cal. App.3d 992, 198 Cal. Rptr. 273 (1984).

[13] *Id.*, 198 Cal. Rptr. at 227. See Also:

Alabama: Berner v. Caldwell, 543 So. 2d 686 (Ala. 1989).

Georgia: Long v. Adams, 175 Ga. App. 538, 333 S.E.2d 852 (1985).

Maryland: B.N. v. K.K., 312 Md. 135, 538 A.2d 1175 (1988).

Minnesota: R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. App. 1988).

Ohio: Reinke v. Lenchitz, 537 N.E.2d 709 (Ohio App. 1988).

Texas: De Vall v. Strunk, 96 S.W.2d 245 (Tex. Civ. App. 1936).

See generally: Comment, 18 Baltimore L. Rev. 613 (1989); Comment, 1986 Ill. L. Rev. 779; 91 Dickinson L. Rev. 529 (1986); Comment, "Tort Liability for Genital Herpes," 2 Cooley L. Rev. 379 (1984); Comment, 70 Cornell L. Rev. 101 (1984). It does not appear to matter whether the conduct in question violated the state's criminal law. Long v. Adams, 175 Ga. App. 538, 333 S.E.2d 852 (1985). But see, Zysk v. Zysk, 239 Va. 32, 387 S.E.2d 466 (1990).

Consent to the intercourse was vitiated by fraudulent concealment of the disease. The court emphasized that some degree of trust and confidence exists in *any* sexual relationship, so the plaintiff's reliance upon defendant's representation was justified.[14] The length of the relationship apparently was not important.

The New York and California cases suggest that courts in urban, "sophisticated" areas will allow tort claims between cohabitants or dating couples, even if the claim relates to the sexual relationship of the parties. It is unclear whether this will be true in other areas that are less urban and "progressive." The doctrine of illegality still seems to have some vitality in these other areas.

For example, in a Wyoming case, an unmarried woman brought suit against a date, claiming that he had infected her with gonorrhea, and that she had been damaged thereby.[15] Although the trial court permitted the claim and the jury awarded $1.3 million in damages, the Wyoming Supreme Court, by a creative application of statute of limitations principles, ruled that her claim was barred by the statute. The opinion clearly shows that the court was less than anxious to provide relief for this "offensive" plaintiff.

The cases mentioned above involved claims relating to an alleged negligent or intentionally wrongful act by the defendant. If the defendant had no idea he or she was infected, the claim will be denied.[16]

These previously discussed cases generally involve claims between people who have shared a sexual relationship. It would be possible, however, for a spouse who contracted herpes to sue a third party who infected the other spouse.[17]

The Virginia Supreme Court has resolved a claim relating to herpes transmission in a way which differs markedly from the previously described cases.[18] In this case, the parties had sexual intercourse before marriage and the herpes virus was transmitted from the male to the female. Heterosexual fornication is a crime in Virginia. The Supreme Court decided that "one who participates in an immoral or illegal act cannot recover damages from other participants for the consequences of the act." The plaintiff's claim therefore was barred.[19]

AIDS cases also have been brought on similar theories. For example, parents have been permitted to bring a wrongful death action

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[14] *Kathleen K. v. Robert B*, N. 12 *supra*, 198 Cal. Rptr. at 276.
[15] Duke v. Housen, 589 P.2d 334 (Wyo. 1979).
[16] C.A.U. v. R.L., 438 N.W.2d 441 (Minn. App. 1989) (AIDS case). See also: *Sixth Circuit:* Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993).
[17] See Mussivand v. David, 544 N.E.2d 265 (Ohio 1989).
[18] See Zysk v. Zysk, 239 Va. 32, 387 S.E.2d 466 (1990).
[19] See Doe v. Roe, 20 Fam. L. Rep. (BNA) 1128 (D.C. D.C. 1994).

against their deceased son's lover.[20] Sexual intercourse without disclosing HIV-positive status has been the foundation of claims for aggravated assault,[21] fraud, breach of fiduciary duty and infliction of emotional distress.[22]

The herpes cases, and some of the AIDS cases, have been brought by people who contracted the disease via sexual contact with the defendants. Others have brought "AIDS phobia" claims against HIV-positive defendants when the defendant had engaged in sex with the plaintiff without disclosing the defendant's HIV-positive status. The claim has been for mental anguish of not knowing whether the plaintiff had thereby contracted AIDS. Some courts have permitted such a claim.[23] Others have dismissed such a claim, but granted the plaintiff the right to initiate an action if he or she becomes infected.[24]

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[20] Blanco v. Sullivan, 19 Fam. L. Rep. (BNA) 1083 (N.Y. Sup. 1992).

[21] United States v. Joseph, 1993 WL 345611 (D. Mass. 1993).

[22] Mason v. Calhoun, 20 Fam. L. Rep. (BNA) 1356 (N.Y. Sup. 1994).

[23] See, e.g.:

California: Kerins v. Hartley, 17 Cal. App.4th 713, 21 Cal. Rptr.2d 621 (1993).

Maryland: Faya v. Almarez, 329 Md. 435, 620 A.2d 327 (Md. App. 1993).

New York: Tischler v. Dimenna, 20 Fam. L. Rep. (BNA) 1260 (N.Y. Sup. 1994).

Virginia: Howard v. Alexandria Hospital, 245 Va. 346, 429 S.E.2d 22 (1993).

West Virginia: Johnson v. West Virginia University Hospitals, 413 S.E.3d 889 (W.Va. 1991).

Wisconsin: Kaehne v. Schmidt, 472 N.W.2d 247 (Wis. App. 1991).

Other courts have rejected AIDS phobia claims. See:

Third Circuit: Buck v. Sage Products, 747 F. Supp. 285 (E.D. Pa. 1990).

Seventh Circuit: Poole v. Alpha Therapeutic Corp. 698 F. Supp. 1367 (N.D. Ill. 1988).

State Courts:

West Virginia: Gregory v. Bluefield Hospital, 413 S.E.2d 79 (W.Va. 1991).

[24] See Lubowitz v. Albert Einstein Medical Center, 424 Pa. Super. 468, 623 A.2d 3 (1993).

§ 1.05 Actions Between Persons Who Were Engaged to Be Married

[1]—Breach of Promise of Marriage

An action for a breach of promise of marriage has existed for at least two centuries.[1] One commentator has theorized that the cause of action was accepted because of the substantial commercial aspects of marriage during that period.[2] Marriage, however, has evolved, at least for most, into an attachment based upon sentiment, rather than on mercenary concerns. In addition, the period of engagement is now considered a trial period, one during which the parties are encouraged to question the belief that the intended will be an appropriate spouse. Further, the appropriate age for marriage has become much less rigid, so if a marriage is called off neither party thereby misses a "window of opportunity" to be married. It is therefore not surprising that many states have abolished the breach of promise of marriage action.[3]

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[1] See generally: Clark, *Law of Domestic Relations*, § 1.1 (1968); 2 Howard, *History of Matrimonial Institutions*, at 200-209 (1904). See also, Comment, 83 Mich. L. Rev. 1770 (1985).

[2] Clark, *id.*, § 1.1.

[3] See generally, Clark, *id.*, § 1.05. See also, 12 Am. Jur.2d, "Breach of Promise," § 18. For statutes, see:

Alabama: Ala. Code § 6-5-330.

Alaska: Harris v. Dragseth, 1994 WL 16459435 (Alaska Oct. 5, 1994).

California: Cal. Civ. Code § 43.5.

Colorado: Colo. Rev. Stat. §§ 13-20-202, 13-20-203.

Connecticut: Conn. Gen. Stat. Ann. § 52-572b.

Delaware: 10 Del. Code Ann. § 3924.

District of Columbia: D.C. Code § 16-923.*Florida:* Fla. Stat. Ann. §§ 771.01, 771.04.

Indiana: Ind. Code § 34-4-4-1.

Kentucky: Gilbert v. Barkes, 987 S.W.2d 772 (Ky. 1999) (not abolishing breach of contract claims).

Maine: 19 Maine Rev. Stat. Ann. § 854.

Maryland: Md. Code Ann., Family Law, § 3-102.

Massachusetts: Mass. Gen. L. Ann., Ch. 207 § 47A.

Michigan: Mich. Comp. L. §§ 551.301, 600.2901.

Minnesota: Minn. Stat. Ann. § 553.03.

Montana: Mont. Rev. Code Ann.§ 27-1-602.

Nevada: Nev. Rev. Code § 41.380.

New Hampshire: N.H. Rev. Stat. Ann. § 508:11.

New Jersey: N.J. Stat. Ann. § 2A:23-1.

New York: N.Y. Civ. Rights L. § 80-a.

North Dakota: N.D. Cent. Code § 14-02-06.

Ohio: Ohio Rev. Code Ann. § 2035.29.

Pennsylvania: 48 Pa. Stat § 171.

Utah: Jackson v. Brown, 904 P.2d 685 (Utah 1995).

Vermont: 15 Vt. Stat. Ann. § 1001.

Virginia: Va. Code Ann. § 8.01-220.

Nevertheless, the action is still permitted in a number of states.[4] In order to establish such an action, the couple must agree to be married.[5] No corroborating testimony of third parties is generally required. However, there must be some evidence that the parties behaved as if they were engaged.[6] An unaccepted offer to marry obviously would not create such an agreement. If the engagement is terminated by one party, the "wronged" party may sue.

Certain defenses exist to a breach of promise of marriage action. For example, if a party misrepresented a material fact, such as the existence of an illegitimate child[7] or the true circumstances surrounding an earlier divorce,[8] the other party is permitted to terminate the engagement. If one party is already married to another, the promise to marry is unenforceable, even if both parties were aware of the marriage at the time of the engagement.[9] If a promise to marry is made in exchange for sexual relations, the contract is illegal and unenforceable.[10] Some states require the party suing to send a detailed notice of an intention to sue before suit is initiated.[11]

Damages for a breach of promise action can be quite large. A breach of promise action seems to oscillate conceptually between contract and tort theories.[12] In order to determine whether there is a valid agreement to marry, contract theory applies. In contrast, dam-

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West Virginia: W.Va. Code Ann. § 56-3-2a.

Wisconsin: Wis. Stat. Ann. § 768.01.

Wyoming: Wyo. Stat. Ann. § 1-23-101.

For applicable cases, see:

Kentucky: Gilbert v. Barkes, 987 S.W.2d 772 (Ky. 1999) (retaining the possibility of a breach of contract claim).

South Dakota: Fanning v. Iverson, 535 N.W.2d 770 (S.D. 1995).

Utah: Jackson v. Brown, 904 P.2d 685 (Utah 1995).

[4] See, e.g., S.D. Comp. L. § 25-1-3. For cases upholding this action see:

Seventh Circuit: Wildey v. Springs, 840 F. Supp. 1259 (N.D. Ill. 1994).

State Courts:

Georgia: Phillips v. Blankenship, 251 Ga. App. 235, 554 S.E.2d 231 (2001) (allowing an unjust enrichment claim as well).

Nebraska: Menhusen v. Drake, 214 Neb. 450, 334 N.W.2d 435 (1983).

North Carolina: Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780, *vacated* 313 N.C. 324, 327 S.E.2d 888 (1984).

South Carolina: Bradley v. Somers, 283 S.C. 365, 322 S.E.2d 665 (1984); Campbell v. Robinson, 398 S.C. 12, 726 S.E.2d 221 (S.C. App. 2012).

Washington: Stanard v. Bolin, 88 Wash.2d 614, 65 P.2d 94 (1977).

[5] See Clark, *Law of Domestic Relations*, § 1.2 (1968).

[6] Id. This normally would not be a problem, since engagements generally are immediately made public.

[7] Bell v. Eaton, 28 Ind. 468, 92 Amer. Dec. 329 (1867).

[8] Van Houten v. Morse, 162 Mass. 414, 38 N.E. 705 (1894).

[9] See, e.g., Adams v. Jensen-Thomas, 18 Wash. App. 757, 571 P.2d 958 (1977).

[10] See Clark, N. 5 *supra*, § 1.3.

[11] See, e.g., Wildey v. Springs, 47 F.3d 1475 (7th Cir. 1995).

[12] See Clark, *Law of Domestic Relations*, § 1.4 (1968).

ages apparently are calculated based upon tort principles. For example, a plaintiff can recover for injury to feelings, health and reputation.[13] The plaintiff's damages can reflect a loss of status and wealth, if the "jiltor" is wealthier than the "jiltee."[14] Seduction may be proved as an element in aggravation of damages.[15]

Under traditional choice of law rules, the governing law would be the place where the engagement occurred. However, under the modern interest analysis or most significant relationship tests, the law of the parties' domicile might well govern.[16]

In an era that accepts no-fault divorce, this cause of action is obviously a disaster and should be put out of its misery. For example, a spouse can file for divorce one day after the marriage, and no breach of promise damages are possible. Until the breach of promise action is abolished, however, lawyers must advise clients that an engagement cannot be undertaken lightly in jurisdictions where this cause of action still exists. Even in these states, there is no action for inducing a breach of a marriage contract.[17]

An action for humiliation and loss of position stemming from a terminated engagement should be distinguished from an action for out-of-pocket losses. For example, a bride's family may have bought a wedding dress and paid other deposits that will be lost if the wedding does not occur. Similarly, one party may have quit a job and moved to join the prospective spouse, incurring expenses and losing income. Such out of pocket losses are clearly recoverable in a breach of promise action.[18] Indeed, they may be recoverable on some general equitable ground even in those states that have abolished the breach of promise action.[19]

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[13] See, e.g.:
Seventh Circuit: Wildey v. Springs, 840 F. Supp. 1259 (N.D. Ill. 1994).
State Courts:
South Carolina: Bradley v. Sommers, 283 S.C. 365, 322 S.E.2d 665 (1984).
Texas: Funderburgh v. Skinner, 209 S.W. 452 (Tex. Civ. App. 1919).
See Clark, *Law of Domestic Relations*, § 1.4 (1968). See generally: Annotation, 73 A.L.R.2d 553 (1960); Brown, "Breach of Promise Suits," 77 U. Pa. L. Rev. 474 (1929).

[14] See Clark, *id.*, § 1.4. See also, annotation, 73 A.L.R.2d 553. Some courts have limited the types of recoverable damages. See, e.g., Stanard v. Bolin, 88 Wash.2d 614, 565 P.2d 94 (1977).

[15] See, e.g., Daggett v. Wallace, 75 Tex. 352, 13 S.W. 49 (1889).

[16] See, e.g., Wildey v. Springs, 47 F.3d 1475 (7th Cir. 1995).

[17] See Brown v. Glickstein, 347 Ill. App. 486,107 N.E.2d 267 (1952). See also, Clark, N. 13 *supra*, § 1.6.

[18] See Clark, *id.*, § 1.4.

[19] Such damages were not permitted in Ferraro v. Singh, 343 Pa. Super. 576, 495 A.2d 946 (1985). See also:
Kentucky: Gilbert v. Barkes, 987 S.W.2d 772 (Ky. 1999).

Some types of other claims may be possible even in states that reject this cause of action. In an Ohio case, a woman transferred property to a man while they were engaged. After the engagement was terminated (it is unclear who decided to terminate it), the woman sued the man to recover the property, claiming unjust enrichment. The court granted her claim, even though Ohio has abolished the breach of promise action.[20]

[2]—Return of Engagement Gifts

Persons engaged to be married frequently exchange gifts. A question then arises whether the gifts must be returned if the engagement is terminated.

The first issue presented is whether there was a gift at all. A "gift" requires a present intent to make a gift and delivery and acceptance of the gift.[21] If there was no present intent to make a gift, or if there was no delivery or acceptance, there was no gift.

A New York court has concluded that if one engaged person pays off all the other's outstanding debts, this can constitute a conditional gift.[22]

Most courts agree that a couple must be engaged before the conditional gift theory can be utilized. So, if people are planning to marry after one party divorces, but the party does not in fact divorce, the conditional gift theory is generally not applied, because the still-married person does not have the capacity to be engaged to another.[23] A New York Court has applied this rule to a gift made while the donor was divorcing his wife, but the divorce had not been finalized at the time of the gift.[24]

If there was a gift, does it have to be returned? Courts first try to determine whether the gift involved was a final, completed gift or a

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New Jersey: Aronow v. Silver, 223 N.J. Super. 344, 538 A.2d 851 (1987) (refusing to allow the prospective bride's parents to recover monies expended in preparation for wedding, where apparently both parties canceled the engagement).

New York: Greenberg v, Cohen, 17 Fam. L. Rep. (BNA) 1082 (N.Y. Sup. 1990) (the court ordered both parties to share the costs of the wedding preparations).

Utah: Jackson v. Brown, 904 P.2d 685 (Utah 1995) (the court stated that out-of-pocket damages could be recovered as damages for a breach of contract); Hess v. Johnston, 163 P.3d 747 (Utah App. 2007).

[20] Jury v. Ridenour, 1999 Ohio App. LEXIS 3145, 25 Fam. L. Rep. (BNA) 1937 (1999).

[21] See, e.g., Grimsley v. Grimsley, 632 S.W.2d 174 (Tex. Civ. App. 1982).

[22] Volodarsky v. Malamud, 23 Fam. L. Rep. (BNA) 1022 (N.Y. Civ. 1996).

[23] See Adams v. Jensen-Thomas, 18 Wash. App. 757, 571 P.2d 958 (1977).

But see, Witkowski v. Blaskiewicz, 162 Misc.2d 66, 615 N.Y.S.2d 640 (N.Y. Civ. Ct. 1994).

[24] Callahan v. Parker, 12 Misc.3d 1193(A), 32 Fam. L. Rep. (BNA) 1429 (N.Y. Sup. 2006).

conditional gift. Namely, was it merely a completed gift not conditioned upon the planned marriage, such as a Christmas gift or a birthday gift, or was it a gift in contemplation of marriage? This determination could be made based upon the value of the gift and the date of delivery. The rule of thumb is that all gifts after the engagement, including the ring, are conditional gifts.[25] Gifts before the engagement are generally not considered conditional.[26]

Conditional gifts are not recoverable by the donor in all situations, however, if the engagement is broken. Under the traditional rule, if the donee breaks the engagement, or if the engagement is broken by mutual consent, the gifts must be returned.[27] If the donee fraudulently said he or she would marry, when there was no intention to marry, gifts must be returned.[28]

In contrast, if the donor breaks the engagement, in most states the donor generally has no right to the gifts.[29] This is done apparently to punish the donor. Such a result is inconsistent with the idea that the engagement period is a trial period to determine whether marriage is appropriate. Indeed, in view of the social costs of divorce, parties should be encouraged not to marry if they are unsure. This "donor fault" rule has the opposite effect and should be changed. An increasing number of states accept this argument and permit an engagement gift to be recovered regardless of who terminated the engagement.[30]

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[25] See Clark, *Law of Domestic Relations*, § 1.4 (1968). See, e.g., Brown v. Thomas, 127 Wis.2d 318, 379 N.W.2d 868 (1986). But see, Albinger v. Harris, 310 Mont. 27, 48 P.3d 711 (2002) (treating engagement ring as a completed gift).

[26] Id.

[27] Id. See Annotation, 46 A.L.R.3d 578. See, e.g.:

Colorado: In re Marriage of Heinzman, 596 P.2d 61 (Colo. 1979).

Connecticut: Piccininni v. Hajus, 180 Conn. 369, 429 A.2d 886 (1980).

Delaware: Byam v. Jackson 2011 WL 3035273, 37 Fam. L. Rep. (BNA) 1482 (Del. Com. Pl. 2011) (mutual breakup); Machurek v. Wilson, 2007 WL 2318637 (Del. Com. Pl. 2007) (same).

Illinois: Vann v. Vehrs, 260 Ill. App.3d 648, 198 Ill. Dec. 640, 633 N.E.2d 102 (1994) (mutual decision).

Louisiana: Busse v. Lambert, 773 So.2d 182 (La. App. 2000).

South Dakota: Fanning v. Iverson, 535 N.W.2d 770 (S.D. 1995)

[28] See Clark, N. 25 *supra*, § 1.6.

[29] See, e.g., Coconis v. Christakis, 70 Ohio Misc. 29, 435 N.E.2d 100 (Ohio County Ct. 1981). See Clark, *id.*, § 1.6.

[30] See:

Indiana: Fowler v. Perry, 830 N.E.2d 97 (Ind. App. 2005).

Iowa: Fierro v. Hoel, 465 N.W.2d 669 (Iowa App. 1990).

Kansas: Heiman v. Parrish, 262 Kan. 926, 942 P.2d 631 (1997).

Michigan: In re Estate of Lowe, 146 Mich. App 325, 379 N.W.2d 485 (1985).

Minnesota: Benassi v. Back & Neck Pain Clinic, Inc., 629 N.W.2d 475 (Minn. App. 2001) (the defendant was a party to an engagement).

In those states that accept this majority rule, it sometimes could be difficult determining who "broke" the engagement. For example, assume one partner has an affair or is violent toward the other partner, and the second partner chooses to end the engagement. It would seem very unfair to conclude that, for purposes of this rule, the innocent partner broke the engagement.

The "conditional gift" rule only applies when the parties are engaged. In a New York case, a woman returned an engagement ring to her fiancé when she terminated the engagement, as the majority rule required. The man then gave her the ring again, when they were no longer engaged. His suit to recover the ring was dismissed.[31]

Most courts have concluded that conditional gifts are not recoverable if either party dies before the marriage.[32] The application of this rule upon the death of the donee seems inconsistent with the rule that gifts should be returned if the engagement is broken by the donee. If the donee dies, the donor is not in any way at fault. There is no reason, sentimental or otherwise, to let the donee's heirs keep or sell the ring and other gifts. The rule does seem fair when the donor dies, however.[33] The donee probably would have a strong attachment to the ring, and allowing her to keep the ring is probably consistent with the parties' intentions.

Many states have abolished breach of promise of marriage actions. Cases decided in these states after the abolition have concluded that actions for the return of conditional gifts were not intended to be banned.[34]

New Jersey: Aronow v. Silver, 223 N.J. Super. 344, 538 A.2d 851 (1987).

New Mexico: Virgil v. Haber, 888 P.2d 455 (N.M. 1995).

New York: Friedman v. Geller, 82 Misc.2d 291, 368 N.Y.S.2d 980 (N.Y. Civ. Ct. 1975). *Cf.*, Greenberg v. Cohen, 17 Fam. L. Rep. (BNA) 1082 (N.Y. Sup. 1990) (ordering both parties to return rings when one party broke the engagement).

Michigan: In re Estate of Lowe, 146 Mich. App 325, 379 N.W.2d 485 (1985).

Pennsylvania: Lindh v. Surman, 560 Pa. 1, 742 A.2d 643 (1999).

South Carolina: Campbell v. Robinson, 398 S.C. 12, 726 S.E.2d 221 (S.C. App. 2012).

[31] Shultz v. Suss, 17 Fam. L. Rep. (BNA) 1494 (N.Y. Just. 1993).

[32] See, e.g.:

Eighth Circuit: Hahn v. United States, 535 F. Supp. 132 (D.S.D. 1982).

State Courts:

Michigan: In re Estate of Lowe, 146 Mich. App 325, 379 N.W.2d 485 (1985).

See also, 46 A.L.R.3d 578, 606-607.

[33] See, e.g., Cohen v. Bayside Federal Savings & Loan Ass'n, 309 N.Y.S.2d 980 (N.Y. App. Div. 1970).

[34] See, e.g.:

Ohio: Jury v. Ridenour, 25 Fam. L. Rep. (BNA) 1397 (Ohio App. 1999).

South Dakota: Fanning v. Iverson, 535 N.W.2d 770 (S.D. 1995).

West Virginia: Bryan v. Lincoln, 168 W.Va. 556, 285 S.E.2d 152 (1981).

Wisconsin: Brown v. Thomas, 127 Wis.2d 318, 379 N.W.2d 868 (Wis. App. 1986).

See Annotation, 46 A.L.R.3d 568, 588-595.

The conditional gift prerequisite is satisfied if the parties marry. The gift is complete, even if the parties divorce shortly thereafter.[35] There is no clear rule regarding whether gifts by a parent of one engaged person to the other engaged person are conditional. Some courts have concluded that they are conditional[36]; others have reached the opposite conclusion.[37] It would seem reasonable to conclude that any substantial gift by a parent during the engagement period would be conditional. Wedding gifts received by parties who do not marry are recoverable.[38]

If the parties have an agreement, however, the result might be different from that summarized above. For example, in a New York case the parties agreed to marry. The intended bride agreed to pay all wedding expenses if the groom would convey to her a 50% interest in his condominium. Before the marriage, the groom conveyed the 50% interest to the bride. The parties did not marry, but the woman had spent $16,000 toward wedding expenses. They sued each other based on various theories. The court held that, based on the parties' agreement, the man should reimburse the woman the $16,000 spent, and, after such reimbursement, the man should regain a 100% interest in his condominium.[39]

This case does reveal a problem in current laws regarding engagement disputes. Although there is a movement toward a "no-fault" approach to engagement gifts, no rule has evolved that deals with who must pay for wedding expenditures when an engagement is broken. It appears the current state of the law is that, absent a contract, whoever made the expenditures must bear them.[40]

A house purchase before marriage can present complicated engagement gift issues. For example, assume both prospective spouses are named grantees in the deed. If one spouse provides the down payment, what should occur if the engagement is broken? A New Jersey court reached the sensible conclusion that this was a conditional gift. The person not providing the down payment was ordered to convey her interest to the other party.[41]

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[35] See Smith v. Smith, 17 Fam. L. Rep. (BNA) 1048 (Mo. App. 1990).

[36] See, e.g.:

Louisiana: McCormick v. Monette, 1 La. App. 186 (1924).

Maryland: Grossman v. Greenstein, 161 Md. 71, 155 Atl. 190 (1931).

[37] See, e.g., Semonian v. Donoian, 96 Cal. App.2d 259, 215 P.2d 119 (1950).

[38] See Clark, *Law of Domestic Relations*, § 1.6 (1968). See Greenberg v. Cohen, 17 Fam. L. Rep. (BNA) 1082 (N.Y. Sup. 1990).

[39] DeFina v. Scott, 195 Misc.2d 75. 755 N.Y.S.2d 587 (N.Y. Sup. 2003).

[40] See Tushnet, "Rules of Engagement," 107 Yale L. J. 2583 (1998).

[41] Aronow v. Silber, 223 N.J. Super. 344, 538 A.2d 851 (1987). Both parties had signed the promissory note. The court ordered the owner of the house to refinance the note or in some other way make the other person no longer liable under the note. See also, Fanning v. Iverson, 535 N.W.2d 770 (S.D. 1995).

Things get more complicated if both parties contributed to the down payment. In one case, one party moved into the house and continued to make all house payments after the engagement was ended. The New Jersey court granted each party a *pro rata* interest in the house, based upon the respective down payment contributions.[42]

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[42] See Asante v. Abban, 237 N.J. Super. 495, 568 A.2d 146 (1989).