CHAPTER 1

Disputes Between Unmarried People

Chapter Contents

§ 1.01 Introduction
§ 1.02 Disputes Between Cohabitants
[1] The Traditional View
[2] Severability
[3] Selective Illegality
[5] Theories of Recovery in Cohabitants’ Disputes
  [a] Express Contract
  [b] Implied Contract
  [c] Resulting Trust
  [d] Constructive Trust
  [e] Express Trust
  [f] Implied or Express Partnership
  [g] Equitable Lien
  [h] Loan
  [i] Unjust Enrichment
  [j] Intentional Interference with Expectation of Inheritance
[6] Summary
[7] De Facto Marriage
[8] Property Accumulated During Premarital Cohabitation
[10] Cohabitants Treated as Spouses in Certain Instances
[12] Choice of Law
[13] Other Matters
§ 1.01 DISTRIBUTION OF PROPERTY 1-2

§ 1.03 Dating Claims
[1] In General
§ 1.04 Tort Actions Between the Parties
§ 1.05 Actions Between Persons Who Were Engaged to Be Married
[1] Breach of Promise of Marriage

§ 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.\(^5\)

---


“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.:
   - A few cases have adhered to this view. See, e.g.:
   - See generally, Bruch, N. 1 supra, 10 Fam. L.Q. at 106-109.


§ 1.02[2] DISTRIBUTION OF PROPERTY

[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-

---


ship. 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. 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. 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. Yet the claims between the cohabitants were allowed by both the Michigan and Wisconsin 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. Indeed, even when the cohabitant continued to “date” the spouse, it has not caused the courts to consider the cohabitation immoral and illegal. The effect of such a cohabitation award upon the property rights of the spouse not cohabiting has not been considered.

---

11 Id.
12.1 See Mich. Comp. L. § 750.335.
14 See In re Estate of Steffes, 95 Wis.2d 490, 290 N.W.2d 697 (1980).
15 See:
  Minnesota: In re Estate of Eriksen, 337 N.W. 2d 671 (Minn. 1983).
  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).
“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:

---


\(^{19}\) In re Bauder, 44 Ore. App. 443, 605 P.2d 1374 (1980).


\(^{24}\) 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).


\(^{26}\) For other cases, see, e.g.: New Jersey: Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).


“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. . . .”

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

**[a]—Express Contract**


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. 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).
§ 1.02[5] DISTRIBUTION OF PROPERTY

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

consideration was given.\textsuperscript{33} (Note that Texas, New Jersey, and Minnesota require cohabitant contracts to be written.)\textsuperscript{34}

Normal contract rules apply to the express contract theory.\textsuperscript{35} For example, the parties must have agreed regarding all material terms of the agreement,\textsuperscript{36} any claim for a breach of the contract must be brought within the applicable limitations period, and consideration is required.\textsuperscript{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.\textsuperscript{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.\textsuperscript{39}

A New York court has enforced a “separation agreement” signed by a lesbian couple when their relationship ended.\textsuperscript{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.\textsuperscript{40.1}

\textsuperscript{32} See, e.g.:
\textsuperscript{33} See, e.g., Jones v. Daly, 122 Cal. App.3d 500, 176 Cal. Rptr. 130 (1981).
\textsuperscript{34} See:
\textit{Texas:} Tex. Fam. Code § 1.108.
\textsuperscript{36} See:
\textit{State Courts:}
\textsuperscript{38} Posik v. Layton, 695 So.2d 759 (Fla. App. 1997).
\textsuperscript{40} Silver v. Starrett, 76 Misc.2d 511, 674 N.Y.S.2d 915 (N.Y. Sup. 1998).
§ 1.02[5] DISTRIBUTION OF PROPERTY

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).


\(^{41}\) Estate of Lasek, 545 N.Y.S.2d 668 (N.Y. Surr. 1989).


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. 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.

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

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. Other courts have concluded that a
§ 1.02[5] DISTRIBUTION OF PROPERTY 1-12

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, although some courts have allowed recovery of quantum meruit claims. Even if such a recovery is permitted, any support received should be offset against the value of the services rendered.

[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. A Georgia court imposed an “implied trust” as a remedy, which seemed a close cousin of a resulting trust.
[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).


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).


**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).


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


**Wisconsin:** Pederson v. Anibus, 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).


\(^{53}\) See, e.g., Cluck v. Sheets, 171 S.W.2d 860 (Tex. 1943).

\(^{54}\) See Unif. Part. Act § 6(1).
§ 1.02[5] DISTRIBUTION OF PROPERTY

partnership principles do not apply. However, if the parties are involved in a separate business, or even if they merely invest money together, 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


\[58.1\] See:
DISPUTES BETWEEN UNMARRIED PEOPLE § 1.02[6]

gift from the decedent, a number of states have accepted the cause of action for intentional interference with expectation of inheritance.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. Marvin61 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

64 The concept of “de facto marriage” was rejected in Wajda v. Wajda, 239 N.J. Super. 248, 570 A.2d 1308 (1990).
§ 1.02[6] DISTRIBUTION OF PROPERTY

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.\textsuperscript{65} These relationships are called “meretricious” in Washington.\textsuperscript{65.1} One court concluded that a relationship that lasted a little longer than four years was meretricious,\textsuperscript{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.\textsuperscript{67} A same-sex couple may establish a meretricious relationship in Washington.\textsuperscript{68} The principle has been extended to relationships that end in death.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{69}

In Mississippi, the chief appellate court has permitted an equitable division of property accumulated during a cohabitation when the relationship was a “partnership.”\textsuperscript{70} Other Mississippi appellate courts have granted an equitable remedy at the end of a long-term cohabitation relationship.\textsuperscript{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 \textit{Cotton v. Cotton}, whereas

\begin{itemize}
\item [65.1] A later case has substituted the term “committed intimate relationship.” See \textit{Oliver v. Fowler}, N. 68.1 infra.
\item [67] Marriage of Pennington, 142 Wash.2d 592, 14 P.3d 764 (2000).
\item [68.1] Oliver v. Fowler, 161 Wash.2d 655, 168 P.3d 348 (2007).
\item [68.3] In re Kelly and Moesslang, 287 P.3d 12, 38 Fam. L. Rep. (BNA) 1550 (Wash. App. 2012).
\item [70] Pickens v. Pickens, 490 So.2d 872 (Miss. 1986).
\item [70.1] See Cotton v. Cotton, 44 So.3d 371 (Miss. App. 2010) (thirty-seven-year relationship).
\end{itemize}
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.

73.1 This subject is discussed in § 5.03[1] infra.
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.\textsuperscript{75}

[9]—Cohabitants Treated as Spouses in Certain Instances

Cohabitants generally have not been treated as spouses.\textsuperscript{76} However, in at least one state a cohabitant may claim wrongful death benefits if the other party dies.\textsuperscript{77} Other states permit a cohabitant to obtain workers’ compensation death benefits.\textsuperscript{78} A minority of courts have permitted a cohabitant to sue for loss of consortium.\textsuperscript{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.\textsuperscript{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.\textsuperscript{81}


\textsuperscript{80} See § 2.03[4] infra.

\textsuperscript{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

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:


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).


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).

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


§ 1.02[13] DISTRIBUTION OF PROPERTY

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.\footnote{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).}

A Hawaii court has applied its law to determine the rights of partners who cohabited in China.\footnote{Chen v. Hoeflinger, 127 Haw. 346, 279 P.3d 11 (Haw. App. 2011).}

[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.\footnote{Albinger v. Harris, 310 Mont. 27, 48 P.3d 711 (2002).}

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.\footnote{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. 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. 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. 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. In this case, Phyllis, a married woman, had an affair with Robert, a single man. She apparently lived with her hus-
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. 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.

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. 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-

---


forceable.\textsuperscript{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 \textit{Marvin} remedies should not be extended to couples who “date” but do not cohabit.\textsuperscript{8}

\textbf{[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.\textsuperscript{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.

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

\textsuperscript{7} See, e.g.: 
\textit{Kentucky}: Cougler v. Fackler, 510 S.W.2d 16 (Ky. App. 1974).
\textsuperscript{8} See: 
\textsuperscript{9} Naimo v. La Flanza, 369 A.2d 987 (N.J. Ch. 1976).
\textsuperscript{10} \textit{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.\textsuperscript{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.\textsuperscript{12} This non-analysis is not particularly useful. A later New York case explored in more depth the issues presented.\textsuperscript{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,”\textsuperscript{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.”\textsuperscript{15}
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.\footnote{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 DISTRIBUTION OF PROPERTY

§ 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, while another New York court refused to permit an action on the ground that spouses may not bring such a claim. A California court has permitted an action between former cohabitants based on negligent infliction of emotional distress.

A cohabitant would also be permitted to bring a battery claim against her partner. A New Jersey court has recognized a cause for action for “battered woman’s syndrome” if the relationship was a marriage-like intimate relationship.

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. She became pregnant, bore a child, and sued him for child support. The court dismissed his complaint, emphasizing privacy concerns.

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. She brought an action against the man based

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


\(^13\) Id., 198 Cal. Rptr. at 227. See Also:


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{17}

The Virginia Supreme Court has resolved a claim relating to herpes transmission in a way which differs markedly from the previously described cases.\textsuperscript{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.\textsuperscript{19}

AIDS cases also have been brought on similar theories. For example, parents have been permitted to bring a wrongful death action
against their deceased son’s lover. Sexual intercourse without disclosing HIV-positive status has been the foundation of claims for aggravated assault, fraud, breach of fiduciary duty and infliction of emotional distress.

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. Others have dismissed such a claim, but granted the plaintiff the right to initiate an action if he or she becomes infected.
§ 1.05[1] DISTRIBUTION OF PROPERTY

§ 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

---

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:
   - Indiana: Ind. Code § 34-4-4-1.
   - Massachusetts: Mass. Gen. L. Ann., Ch. 207 § 47A.
   - North Dakota: N.D. Cent. Code § 14-02-06.
Nevertheless, the action is still permitted in a number of states. In order to establish such an action, the couple must agree to be married. No corroborating testimony of third parties is generally required. However, there must be some evidence that the parties behaved as if they were engaged. 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 or the true circumstances surrounding an earlier divorce, 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. If a promise to marry is made in exchange for sexual relations, the contract is illegal and unenforceable. Some states require the party suing to send a detailed notice of an intention to sue before suit is initiated.

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. In order to determine whether there is a valid agreement to marry, contract theory applies. In contrast, dam-
ages apparently are calculated based upon tort principles. For example, a plaintiff can recover for injury to feelings, health and reputation.\textsuperscript{13} The plaintiff’s damages can reflect a loss of status and wealth, if the “jiltor” is wealthier than the “jiltee.”\textsuperscript{14} Seduction may be proved as an element in aggravation of damages.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} Indeed, they may be recoverable on some general equitable ground even in those states that have abolished the breach of promise action.\textsuperscript{19}

\textsuperscript{13} See, e.g.: 
\textbf{State Courts:}
\textsuperscript{14} See Clark, \textit{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).
\textsuperscript{15} See, e.g., Daggett v. Wallace, 75 Tex. 352, 13 S.W. 49 (1889).
\textsuperscript{16} See, e.g., Wildey v. Springs, 47 F.3d 1475 (7th Cir. 1995).
\textsuperscript{18} See Clark, \textit{id.}, § 1.4.
\textsuperscript{19} Such damages were not permitted in Ferraro v. Singh, 343 Pa. Super. 576, 495 A.2d 946 (1985). See also:
\textit{Kentucky}: Gilbert v. Barkes, 987 S.W.2d 772 (Ky. 1999).
DISPUTES BETWEEN UNMARRIED PEOPLE § 1.05[2]

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


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. Gifts before the engagement are generally not considered conditional.

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. If the donee fraudulently said he or she would marry, when there was no intention to marry, gifts must be returned.

In contrast, if the donor breaks the engagement, in most states the donor generally has no right to the gifts. 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.

---


26 Id.


28 See Clark, N. 25 supra, § 1.6.


30 See:


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.\textsuperscript{31}

Most courts have concluded that conditional gifts are not recoverable if either party dies before the marriage.\textsuperscript{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.\textsuperscript{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.\textsuperscript{34}

\begin{itemize}
\item New Mexico: Virgil v. Haber, 888 P.2d 455 (N.M. 1995).
\item See also, 46 A.L.R.3d 578, 606-607.
\item South Dakota: Fanning v. Iverson, 535 N.W.2d 770 (S.D. 1995).
\item Wisconsin: Brown v. Thomas, 127 Wis.2d 318, 379 N.W.2d 868 (Wis. App. 1986).
\item See Annotation, 46 A.L.R.3d 568, 588-595.
\end{itemize}
§ 1.05[2] DISTRIBUTION OF PROPERTY

The conditional gift prerequisite is satisfied if the parties marry. The gift is complete, even if the parties divorce shortly thereafter.\textsuperscript{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; others have reached the opposite conclusion.\textsuperscript{36} 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.\textsuperscript{37}

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.\textsuperscript{38}

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.\textsuperscript{39}

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.\textsuperscript{40}

\textsuperscript{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.\(^{42}\)