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## The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage

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# THE SCHEMES OF ADVENTURESSES:<sup>1</sup> THE ABOLITION AND REVIVAL OF COMMON-LAW MARRIAGE

CHARLOTTE K. GOLDBERG\*

## ABSTRACT

Common-law marriage is about to go the way of the buggy whip. In 2005, Pennsylvania abolished common-law marriage and other state legislatures are considering following Pennsylvania's lead. Even if common-law marriage is abolished in all states, the problem of unmarried cohabitants seeking property rights arising from their relationships will still challenge the courts. In particular, because most claimants are women, the perception of them as either an "adventuress" or a "virtuous wife" will often determine whether they will attain shared property rights.

This article uses the California experience as an illustration of the evolution of the law from the abolition of common-law marriage in 1895 to the re-evaluation of cohabitant rights in the landmark case of *Marvin v. Marvin* in 1976. Post-Marvin litigation in both California and Washington state provide a paradigm for dealing with cohabitant property claims in the twenty-first century. In essence, courts have revived common-law marriage in another form today. The emergence of the concept of a "committed intimate relationship" for determining whether a cohabitant can attain shared property rights is instructive. A committed intimate relationship is one that resembles common-law marriage with the additional requirement of intertwined financial affairs. An analysis of common-law marriage cases in the nineteenth century and present-day cohabitant cases shows that the main determinant is still whether the cohabitant is cast in the role of "adventuress" (or adventurer) or has fulfilled the role of "virtuous wife."

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1. "Adventuress" is an old-fashioned word for what today would be called a "gold digger." Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1029-30 (1995). Common-law marriage was originally thought to protect women from men who would take advantage of their innocence by convincing them that a formal ceremony was unnecessary. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 964 (2000). As women began to view the doctrine as a means to gain the monetary benefits of marriage, they became branded as "adventuresses," "conniving and gold digging women preying on the goodwill of innocent men . . ." *Id.*

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- Myth:** In California, if a man and a woman live together for seven years, they have a common-law marriage.<sup>2</sup>
- Fact:** Common-law marriage was abolished in California in 1895.<sup>3</sup>
- Reality:** Today, a relationship resembling common-law marriage will result in a successful claim to share property accumulated during the relationship.<sup>4</sup>

## INTRODUCTION

Many cohabiting couples in California may believe that common-law marriage is legal.<sup>5</sup> When their relationship ends, they find out they were mistaken and their relationship was not a marriage at

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2. Where this myth originated is unclear. An informal survey of incoming law students confirmed that even though the California legislature abolished common-law marriage in 1895, many Californians think they have a common-law marriage after living together for seven years. Survey conducted by Charlotte Goldberg, Professor of Law, Loyola Law School, in L.A., Cal. (1997) (on file with author). The "seven years" portion of the myth possibly originated from the Supreme Court case addressing the issue of common law marriage, *Meister v. Moore*, 96 U.S. 76 (1877), where the parties, William and Mary, lived together for seven years.

3. OTTO E. KOEGEL, *COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES* 94 (1922).

4. See *infra* Part II.A.

5. William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1682 (1984).

all.<sup>6</sup> The courts view them as unmarried cohabitants.<sup>7</sup> Any rights accruing from their relationship depend on being able to state a “*Marvin*” claim,<sup>8</sup> based on the doctrine enunciated in the 1976 landmark case of *Marvin v. Marvin*.<sup>9</sup> The *Marvin* doctrine is based in part on the rationale that treating unmarried cohabitants as married would revive common-law marriage that was abolished in California in 1895.<sup>10</sup>

The purpose of this article is to examine why common-law marriage was abolished in California in 1895<sup>11</sup> and consider whether it has been revived in another form today.<sup>12</sup> Although there was a general movement in the United States in the late 1800’s to abolish common-law marriage,<sup>13</sup> several questions arise about abolition in California. First, what were the events that led the California legislature to consider the question of common-law marriage? Second, why did the legislature abolish common-law marriage and why then? And finally, when dealing with the property claims of unmarried cohabitants,<sup>14</sup> has common-law marriage been revived in a different form today?

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6. *Id.* at 1682-88.

7. KOEGEL, *supra* note 3, at 94.

8. Reppy, *supra* note 5, at 1689.

9. 557 P.2d 106, 110 (Cal. 1976).

10. *See infra* Part I.C. The bills abolishing common-law marriage were passed unanimously in 1895. KOEGEL, *supra* note 3, at 94. Today, marriage is defined as “a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization. . . .” CAL. FAM. CODE § 300 (West 2006). California does recognize common-law marriages from other jurisdictions if “valid by the laws of the jurisdiction in which the marriage was contracted.” CAL. FAM. CODE § 308 (West 2006).

11. KOEGEL, *supra* note 3, at 94.

12. Some argue that “many of the jurisdictions that claim to have abolished common-law marriage have, in fact, resurrected the doctrine under another name.” Hon. John B. Crawley, *Is the Honeymoon Over for Common-law Marriage: A Consideration of the Continued Viability of the Common-law Marriage Doctrine*, 29 CUMB. L. REV. 399, 400 (1998).

13. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS 126 (1988).

14. This article deals solely with the claims for shared property rights arising from a non-marital relationship between a man and a woman. The claims for support rights arising from the relationship are beyond the scope of this article. For more information on support claims see Charlotte K. Goldberg, *Virtual Marriage: Examining Support Claims by Ex-Cohabitants*, L.A. DAILY JOURNAL, Oct. 14, 1997, at 7. This article also does not deal extensively with claims of same-sex couples. California law does allow same-sex couples, who are not domestic partners, to take advantage of the *Marvin* doctrine. *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988). Also beyond the scope of this article are unmarried cohabitants’ claims against third parties, such as wrongful death claims, and claims for governmental benefits, such as social security. *See Grace Ganz Blumberg, Cohabitation Without Marriage: A Different Perspective*, 28 U.C.L.A. L. REV. 1125, 1126 (1981).

The short answer is that common-law marriage was abolished in California after a spate of lawsuits involving prominent and wealthy California men who had relationships with younger women.<sup>15</sup> In each case, the woman claimed to be married and the man denied a marriage existed.<sup>16</sup> One particularly notorious case, *Sharon v. Sharon*, was in the public spotlight for over seven years.<sup>17</sup> In that case, Sarah Althea Sharon's attorney stated in one sentence the major issue in all of these common-law marriage cases: "[s]he goes from this courtroom either vindicated as an honest and virtuous wife or branded as an adventuress, a blackmailer, a perjurer and a harlot."<sup>18</sup> Even though the women, including Sarah Althea, were generally unsuccessful in proving that they were married,<sup>19</sup> "[s]o many fraudulent cases were brought throughout the State, and such fierce litigation arose that it became a stench in the nostrils of the people."<sup>20</sup> The legislative decision to abolish common-law marriage in 1895 was intended "to close the door to fraud and to forever and effectually [sic] put an end to this class of litigation."<sup>21</sup>

At the heart of the common-law marriage cases was an effort by the women to gain the benefits of marriage.<sup>22</sup> Under California's community property system, a wife was entitled to one-half of the community property at death.<sup>23</sup> At divorce, she was also entitled to alimony.<sup>24</sup> Therefore, as a wife, she could claim she had a right to share in the community property; as a mistress, she may have had no recourse. Some of the women in the reported cases had embarked on the relationship to seek the support of the wealthy man.<sup>25</sup> When he ended the relationship or died, she turned to the courts relying on California's version of common-law marriage.<sup>26</sup> She usually did not succeed.<sup>27</sup>

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15. *Hinckley v. Ayres*, 38 P. 735 (Cal. 1895); *People v. Beevers*, 33 P. 844 (Cal. 1893); *Kilburn v. Kilburn*, 26 P. 636 (Cal. 1891); *White v. White*, 23 P. 276 (Cal. 1890); *Sharon v. Sharon*, 7 P. 456 (Cal. 1885).

16. *See supra* note 15.

17. MILTON S. GOULD, *A CAST OF HAWKS* 178 (1985), ROBERT H. KRONINGER, *SARAH AND THE SENATOR* 12 (1964).

18. GOULD, *supra* note 17, at 253.

19. *See supra* note 15.

20. Respondent's Reply Brief at 15, *Norman v. Norman*, 54 P. 143 (Dec. 4, 1897) (No. 469).

21. *Id.* at 16.

22. Walter O. Weyrauch, *Informal and Formal Marriage: An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 98 (1960).

23. GRAHAM DOUTHWAITE, *UNMARRIED COUPLES AND THE LAW* 297-99 (1979).

24. *Id.* at 294.

25. *See White v. White*, 23 P. 276 (Cal. 1890); OSCAR LEWIS & CARROLL D. HALL, *BONANZA INN* 121-26 (1939).

26. *Hinckley v. Ayres*, 38 P. 735 (Cal. 1895); *People v. Beevers*, 33 P. 844 (Cal. 1893); *Kilburn v. Kilburn*, 26 P. 636 (Cal. 1891); *White v. White*, 23 P. 276 (Cal. 1890); *Sharon v. Sharon*, 7 P. 456 (Cal. 1885).

27. *See supra* note 26.

Between 1889 and 1895, the California Supreme Court decided five cases dealing with common-law marriage.<sup>28</sup> In only one was the plaintiff successful in sustaining her claim that she was married.<sup>29</sup> The final common-law marriage case, *Hinckley v. Ayres*, was decided January 2, 1895.<sup>30</sup> That case was also highly publicized, and again the conclusion was that the woman was not married to the prominent Thomas H. Blythe.<sup>31</sup> Legislators had introduced bills in earlier sessions of the legislature, but finally, on March 26, 1895, the Senate and Assembly amended the law to abolish common-law marriage.<sup>32</sup>

The main impetus for abolishing common-law marriage was to prevent fraud by women perceived as adventureses — women who were attempting to convert an illicit relationship into a marriage to gain monetary benefits.<sup>33</sup> Another motivation reflected a completely opposite perception of women: women needed protection from unscrupulous men who would take advantage of their youth and naïveté.<sup>34</sup> For instance, an older man might convince a young woman to enter into a sexual relationship with the assurance that they were married at common law.<sup>35</sup> If later the man would abandon this woman and deny that they were married, a woman who thought she was an “honest and virtuous” wife could be left without support and the possibility of having a child stigmatized as illegitimate. If, however, common-law marriage was no longer an option, these women would be protected by knowing that cohabitation would not result in a legal marriage. Both these contrary perceptions of women — one who fraudulently sought the benefits of marriage<sup>36</sup> and the other one who needed protection from fraud<sup>37</sup> — led to the demise of common-law marriage.<sup>38</sup>

After the abolition of common-law marriage, unmarried cohabitants’ rights to shared property were extremely limited until the 1960s and 1970s when traditional concepts of marriage were called into question.<sup>39</sup> As divorce became more common and informal relationships between men and women increased, California courts re-evaluated the issue of whether property rights could arise based on a

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28. *See supra* note 26.

29. *White v. White*, 23 P. 276, 284 (Cal. 1890).

30. 39 P. 735 (Cal. 1895).

31. *Id.*; *see infra* notes 144-72.

32. KOEGEL, *supra* note 3, at 94.

33. Ariela Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1001 (2000).

34. *Id.* at 1002.

35. *Id.*

36. *Id.* at 1001.

37. *Id.* at 1002.

38. *Id.*

39. STEPHANIE COONTZ, *MARRIAGE, A HISTORY* 247-63 (2005).

relationship between unmarried cohabitants.<sup>40</sup> Although one California Court of Appeal case seemed to revive common-law marriage in the guise of an "actual family relationship,"<sup>41</sup> the California Supreme Court rejected that approach in the 1976 case *Marvin v. Marvin*.<sup>42</sup> The Supreme Court opted for contract theory to provide unmarried cohabitants the possibility of gaining property rights.<sup>43</sup> Examination of the post-*Marvin* cases demonstrates that many of the same characteristics that would define a common-law marriage would also result in a successful *Marvin* claim.<sup>44</sup>

After *Marvin*, the major determinative issue is usually whether the cohabitants have an implied-in-fact agreement to share property.<sup>45</sup> To establish an implied agreement to share property, the courts must examine the couple's conduct.<sup>46</sup> Those couples whose relationship is most like a traditional marriage are likeliest to exhibit an implied agreement to share property.<sup>47</sup> Ordinarily that means that the couple has lived together for a number of years, has held themselves out as husband and wife, have intertwined financial dealings, and may have had children together.<sup>48</sup> When the couple has a relationship that looks more like lover-mistress with no sharing of finances, the court will likely find no implied agreement to share property.<sup>49</sup> Despite abolition of the common-law marriage doctrine, the reality is that those couples whose relationships most resemble a traditional marriage would also be able to meet the *Marvin* requirement of an implied agreement to share property.<sup>50</sup>

The number of states recognizing common-law marriage is clearly decreasing.<sup>51</sup> Pennsylvania abolished common-law marriage

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40. *Marvin v. Marvin*, 557 P. 2d 106 (Cal. 1976).

41. *Cary v. Cary*, 109 Cal. Rptr. 862 (Cal. Ct. App. 1973).

42. *Marvin*, 557 P. 2d at 106.

43. *Id.* at 113.

44. *See infra* Part II.

45. *Marvin*, 557 P. 2d at 113.

46. *Id.* at 117.

47. *See infra* Part II.A.

48. *See infra* Part II.A.

49. *See infra* Part II.A.

50. *See infra* Part II.A.

51. Only nine states, Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and the District of Columbia still recognize common-law marriage. COLO. REV. STAT. § 14-2-104 (West 2006); *Creel v. Creel*, 763 So. 2d 943, 946 (Ala. 2000); KAN. STAT. ANN. § 23-101 (2005); S.C. CODE ANN. § 20-1-100 (West 2006); TEX. FAM. CODE ANN. § 2.401 (Vernon 2005); *In re Marriage of Martin*, 681 N.W.2d 612, 617 (Iowa 2004); *Demelo v. Zompa*, 844 A.2d 174, 177-78 (R.I. 2004); *In re Estate of Ober*, 62 P. 3d 1114, 1115 (Mont. 2003); *Stinchcomb v. Stinchcomb*, 674 P.2d 26, 28-29 (Okla. 1983); *Johnson v. Young*, 372 A.2d 992, 994 (D.C. 1977). New Hampshire recognizes common-law marriage only at death. N.H. REV. STAT. ANN. § 457:39 (2006). Utah recognized common-law marriage by statute in 1987 in an effort to combat welfare fraud. UTAH CODE ANN. § 30-1-4.5 (2006); *see also* Ryan D. Tenney, *Tom Green, Common-law*

prospectively as of January 1, 2005<sup>52</sup> and other states are considering following Pennsylvania.<sup>53</sup> The move to abolish common-law marriage is driven partially by the desire to formalize all informal relationships, both same-sex and opposite-sex.<sup>54</sup> In the case of opposite-sex couples, because it is so easy to formalize their relationship,<sup>55</sup> states see no reason to continue to recognize informal relationships as common-law marriage. Just as California abolished common-law marriage because of the specter of fraud and misuse of the courts,<sup>56</sup> so too do today's supporters of abolition use that rationale.<sup>57</sup> Despite

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*marriage, and the Illegality of Putative Polygamy*, 17 B.Y.U. J. PUBL. L 141, 148-50 (2006).

52. 23 PA. CONS. STAT. ANN. § 1103 (West 2006). The Pennsylvania Supreme Court called the common-law marriage doctrine into question in *Staudenmayer v. Staudenmayer*, 714 A.2d 1016 (Pa. 1998). A later case interpreted *Staudenmayer* as foreshadowing the eventual abolition of the doctrine. *PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos)*, 831 A.2d 1269 (Pa. Commw. Ct. 2003). See Ryan P. Newell, "To Be Sure He is My Husband Good Enough," *Or is He? An Analysis of Common-law marriage in Pennsylvania*, 109 PENN ST. L. REV. 337 (2004). The legislature clarified the court decisions and acted in 2004 to abolish common-law marriage prospectively. 23 PA. CONS. STAT. ANN. § 1103 (West 2006).

53. Colorado considered limiting or abolishing common-law marriage after a thirty-four-year-old man, accused of sexually assaulting a fourteen-year-old girl claimed that they had a common-law marriage. Katie McCrinmon, *At 12, Birthday Cake, Not Wedding Cake; Legislators Plan to Cut Loophole from Common-Law Marriage*, ROCKY MTN. NEWS, June 17, 2006, at 4A; Howard Pankratz, *Quick Fix on Child Brides*, DENVER POST, June 22, 2006 at A-1. In New Hampshire, a bill was introduced to abolish New Hampshire's limited common-law marriage law. H.R. 427, 2005 Leg., 159th Sess. (N.H. 2005). In Oklahoma, a bill was introduced in 2005 to prohibit recognition of common-law marriage. H.R. 1455, 2005 Leg., 50th Sess. (Okla. 2005). In South Carolina, the Legislature in 2000 established the minimum age of sixteen for entering into a common-law marriage, S.C. Code Ann. § 20-1-100 (2006), and considered abolishing common-law marriage in the 2005 and 2006 sessions. See H.R. 3588, 2005 Leg., 116th Sess. (S.C. 2005); S. 1106, 2006 Leg., 116th Sess. (S.C. 2006).

54. In California, domestic partnership legislation is a prime example. Couples, both same-sex and opposite-sex, must register their domestic partnership with the Secretary of State. CAL. FAM. CODE § 297 (West 2006). California law defines domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." CAL. FAM. CODE § 297(a) (West 2006). The requirements for establishing a domestic relationship resemble marriage in several respects, such as age of consent and consanguinity. CAL. FAM. CODE § 297(b)(4) (West 2006). Opposite-sex couples must be eligible for Social Security benefits, and one or both must be over the age of sixty-two. CAL. FAM. CODE § 297(b)(6)(B) (West 2006).

55. Even couples who have lived together as husband and wife without marrying can enter into a "confidential marriage." CAL. FAM. CODE § 500 (West 2006). The marriage will be recorded but generally will not be open to the public. CAL. FAM. CODE § 511 (West 2006).

56. Cynthia Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 732-36 (1996).

57. When Georgia abolished common-law marriage in 1996 along with a ban on same-sex marriage, one legislator explained that "[c]ommon-law marriage is a frontier concept which evolved from a well-intentioned, family-created practice to one now fraught with fraud, disappointment, dishonesty and deception." *Senate Vote Bans Same-Sex Marriage Common-Law Unions Also Would Be Barred*, CHATTANOOGA TIMES, Mar. 15, 1996, at B6 (quoting Sen. Diana Harvey Johnson, D-Savannah). Professor Walter O. Weyrauch summarized the arguments favoring abolition or retention of common-law marriage in



this trend, the abolition of common-law marriage does not signal the end of claims of unmarried cohabitants who accumulate property during their relationship. Thus it is important to examine judicial approaches in the post-*Marvin* era. Both California and Washington, community property states, have developed jurisprudence that allows unmarried couples in certain relationships to have property rights similar to those of married couples.<sup>58</sup>

In essence, this article recognizes that the problem of sorting out the property rights of unmarried cohabitants remains today. Even if all states abolished common-law marriage, the issue of determining property rights of cohabitants will continue to challenge the courts. The experiences of California and Washington State provide some guidance to courts on how to determine whether a particular case is merely a "scheme of an adventuress" or a legitimate claim of a deserving cohabitant who has fulfilled the role of a "virtuous wife."<sup>59</sup>

Part I of this article chronicles the history of the abolition of common-law marriage and the development of the doctrine of cohabitants' property rights in California. Part II examines the current law of cohabitants' property rights in California and Washington State. Both states' laws illustrate how cohabitant relationships that most resemble traditional marriage are able to gain property rights similar to those of married couples. A streamlined version of the Washington doctrine is suggested as the best way to sort out who should attain shared property rights.

## PART I

### *A. History of Common-Law Marriage in California*

The acceptance of common-law marriage in the United States dates back to the 1809 New York decision of *Fenton v. Reed*.<sup>60</sup> By the

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*Informal and Formal Marriage: An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 97-104 (1960). Recently there has been a move to try to preserve common-law marriage, particularly to protect the rights of women disadvantaged by a long-term cohabitant relationship in which the men worked and accumulated property in their names. See generally, Henry Baskin, *Important Changes in the Law During the 20th Century: The Abolition of Common-law marriage*, 79 MICH. B.J. 176 (2000); Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common-law marriage*, 75 OR. L. REV. 709, 779 (1996); John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 410-15, 424-25 (1999); William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984).

58. CAL. FAM. CODE § 297.5 (West 2006); *Oliver v. Fowler*, 126 P.3d 69 (Wash. Ct. App. 2006).

59. See *infra* Part II.A.1-2.

60. 4 Johns. 52 (N.Y. Sup. Ct. 1809); see also MICHAEL GROSSBERG, GOVERNING THE

time the United States Supreme Court put its imprimatur on common-law marriage in 1877,<sup>61</sup> a majority of states recognized common-law marriage.<sup>62</sup> Yet a counter movement to abolish common-law marriage gained strength toward the end of the century and has continued to the present.<sup>63</sup> Common-law marriages were considered "thoroughly bad, involving social evils of the most dangerous character"<sup>64</sup> and couples who entered into such marriages "deliberately take up an illicit relation with each other and start a life of immorality and shame."<sup>65</sup> This moral disdain for illicit relationships led to legislative efforts to abolish common-law marriage and to restrain the courts' recognition of informal marriages.<sup>66</sup>

Soon after California was admitted to the Union in 1850,<sup>67</sup> the California Supreme Court recognized common-law marriage in

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HEARTH, LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 70 (1985); Ariella R. Dubler, *Governing through Contract: Common-law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1885-89 (1998).

61. *Meister v. Moore*, 96 U.S. 76 (1877).

62. Dubler, *supra* note 60, at 1890.

63. GROSSBERG, *supra* note 60, at 83-90. The following states abolished common-law marriage before the turn of the twentieth century: Kentucky (1866) (*Estill v. Rogers*, 64 Ky. 62 (Ky. 1866)), Arkansas (1875) (Bowman, *supra* note 57, at 732), North Dakota (1890) (GRAHAM DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 377 (1979)); Massachusetts (1892) (*Id.* at 410), Washington (1892) (*In re MacLaughlin's Estate*, 30 P. 651 (Wash. 1892)), and California (1895) (OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 94 (1922)). The following states abolished common-law marriage near the turn of the century: Illinois (1905) (Douthwaite, *supra* note 63, at 353), New Mexico (1905) (William Reppy, Property and Support Rights of Unmarried Cohabitants: *A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1706), and Arizona (1913) (Bowman, *supra* note 57, at 732). The following states abolished common-law marriage during World War I and the post-war era: Alaska (1917) (Bowman, *supra* note 57, at 733), Wisconsin (1917) (DOUTHWAITE, *supra* note 63, at 598), Hawaii (1920) (Vivian Hamilton, *Mistaking Marriage for Social Policy*, VA. J. SOC. POL'Y & L. 307, 328 (2004)), Missouri (1921) (*Id.* at 436), Nebraska (1923) (*Id.* at 448), Louisiana (1927) (Reppy, *supra* note 63, at 1706), New York (1933) (DOUTHWAITE, *supra* note 63, at 479), Virginia (1919) (VA. CODE ANN. § 20-14 (West 2006)), and New Jersey (1939) (DOUTHWAITE, *supra* note 63, at 462). The following states abolished common-law marriage during World War II: Minnesota (1941) (*Id.* at 425), Connecticut (1942) (*Id.* at 305), Nevada (1943) (*Id.* at 453), and Wyoming (1943) (*Id.* at 604-05). The following states abolished common-law marriage in the post-WWII/Baby-boomer era: Maryland (1952) (*Henderson v. Henderson*, 87 A.2d 403 (Md. 1952)), Tennessee (1955) (DOUTHWAITE, *supra* note 63, at 462), Mississippi (1956) (*Id.* at 431), Michigan (1957) (Hamilton, *supra* note 63, at 328), and South Dakota (1959) (DOUTHWAITE, *supra* note 63, at 548). The following states abolished common-law marriage during the counter-culture era (1960's and 70's): Delaware (1962) (*Id.* at 311-12), West Virginia (1968) (*Id.* at 594), Florida (1968) (*Id.* at 325), Maine (1969) (*Pierce v. Secretary of U.S. Dept. Of Health, Educ., and Welfare*, 254 A.2d 46 (Me. 1969)), North Carolina (1975) (DOUTHWAITE, *supra* note 63 at 490), Oregon (1976) (*Id.* at 518-19), and Vermont (1978) (*Id.* at 578).

64. GEORGE HOWARD, THE HISTORY OF MATRIMONIAL INSTITUTIONS 171 (1904); *see also* GROSSBERG, *supra* note 60, at 86-90.

65. W.C. RODGERS, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 67 (1899).

66. GROSSBERG, *supra* note 60, at 92.

67. THEODORE H. HITTELL, HISTORY OF CALIFORNIA 387 (1898).

*Graham v. Bennett*.<sup>68</sup> The court found that Tillatha Bennett and Isaac Graham were validly married, at least regarding the issue of the legitimacy of their children.<sup>69</sup> The court defined marriage as a "civil contract" that is valid and binding on "an assumption of the relative duties which it imposes on each other."<sup>70</sup> The contract in question was a written one that Isaac had presented to Tillatha.<sup>71</sup> It seems that this type of written contract derived from Mexican law was imported to Spanish North America.<sup>72</sup> Couples used written contracts when a clergyman was not available, allowing for the marriage to commence and the ceremony to occur later.<sup>73</sup> In some cases, even if the ceremony never occurred, the marriage could be considered valid.<sup>74</sup> A written contract was at the heart of the most notorious California common-law marriage case, *Sharon v. Sharon*.<sup>75</sup>

In 1872, the Legislature codified California law regarding common-law marriage.<sup>76</sup> Civil Code § 55 defined marriage as a "civil contract" by parties with capacity to consent.<sup>77</sup> Consent was necessary but not sufficient to constitute a marriage.<sup>78</sup> Consent had to be followed by either "a solemnization" or "by a mutual assumption of marital rights, duties, or obligations."<sup>79</sup> Thus, in California, common-law marriage took the form of a contract followed by the "mutual assumption of marital rights, duties, or obligations."<sup>80</sup>

68. 2 Cal. 503, 506-07 (Cal. 1852).

69. *Id.* at 506.

70. *Id.* Isaac and Tillatha's marriage was bigamous and thus illegal and void because Isaac was still married to a prior wife at the time he "married" Tillatha. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 87-90 (2000).

71. *Graham*, 2 Cal. at 506.

72. The contract in the *Graham* case was entered into in September 1845, prior to California statehood. *Id.* at 503; HITTELL, *supra* note 67, at 387. The court noted that the marriage was "according to the laws of the land, which were then the laws of Mexico." *Graham*, 2 Cal. at 503.

73. Hans W. Baade, *The Form of Marriage in Spanish North America*, 61 CORNELL L. REV. 1, 8 (1975).

74. This type of marriage was called "marriage by bond" in pre-statehood Texas and even dubious marriages were considered valid to prevent the "scandal of manifestly illegal cohabitation." *Id.* at 8-9. In the *Graham* case, Isaac had come from Texas to California and later admitted that he had a wife living in Texas. *Graham*, 2 Cal. at 504. Thus he possibly was well acquainted with the custom that a written contract could be sufficient to establish a marriage even without the presence of a clergyman. See Baade, *supra* note 73, at 8.

75. *Sharon v. Sharon*, 16 P. 345 (Cal. 1888).

76. CAL. CIV. CODE § 55 (1872).

77. CAL. CIV. CODE § 55 (1872).

78. *Id.*

79. *Coon v. Joseph*, 237 Cal. Rptr. 873, 873 (Cal. 1897).

80. *Id.*

### 1. *The Most Notorious Case*

The most notorious California common-law marriage case involved wealthy Senator William Sharon and Sarah Althea Hill.<sup>81</sup> The case began in 1883 and captivated the public until the legal skirmishing ended in 1890.<sup>82</sup> It involved some of the most prominent men of the time, including United States Supreme Court Justice Stephen J. Field.<sup>83</sup> The entire story has been the subject of two books,<sup>84</sup> and a history of San Francisco would be incomplete without reference to the case.<sup>85</sup>

William Sharon came to California in the Gold Rush in 1849.<sup>86</sup> He became extremely wealthy, primarily through investment in silver mining in Nevada.<sup>87</sup> His fortune was estimated between twenty and thirty million dollars.<sup>88</sup> When his partner William C. Ralston died, he ended up owning the Grand Hotel and the Palace Hotel as well.<sup>89</sup> By the year 1875, he was known as the "Bonanza King" and "King of the Comstock" and was elected to the post of United States Senator from Nevada.<sup>90</sup> Despite his senatorial responsibilities, he spent most of his time in San Francisco and was not reelected to a second term.<sup>91</sup>

Sharon's wife died in 1875 when he was fifty-four.<sup>92</sup> "Loath to give up the pleasures of feminine companionship, the Senator, by his own later account, began employing young women on a monthly salary, requiring only that they make themselves readily available and that they be discreet."<sup>93</sup> Even in a city where brothels were common,<sup>94</sup> Sharon's "penchant for harlots would poison his old age, and even after his death would make his name a local byword for the prurient."<sup>95</sup> Sarah Althea Hill was one of these young women.<sup>96</sup> The

81. *Sharon v. Sharon*, 16 P. 345 (Cal. 1888).

82. ROBERT H. KRONINGER, *SARAH AND THE SENATOR* 12 (1964).

83. See 3 *DICTIONARY OF AMERICAN BIOGRAPHY* 372-73 (Allen Johnson et al. eds., 1958); KRONINGER, *supra* note 82 at 127.

84. KRONINGER, *supra* note 82; GOULD, *supra* note 17.

85. JULIA ALTROCCHI, *THE SPECTACULAR SAN FRANCISCANS* 223-24 (1949); OSCAR LEWIS & CARROLL D. HALL, *BONANZA INN* 123-24 (1939); DORIS MUSCATINE, *OLD SAN FRANCISCO* 298-99 (1975).

86. GOULD, *supra* note 17, at 169.

87. KRONINGER, *supra* note 82, at 15-16.

88. *Id.* at 18.

89. KRONINGER, *supra* note 82, at 18.

90. GOULD, *supra* note 84, at 169-70.

91. KRONINGER, *supra* note 82, at 17.

92. KRONINGER, *supra* note 82, at 18.

93. KRONINGER, *supra* note 82, at 19.

94. STEPHEN LONGSTREET, *THE WILDER SHORE, A GALA SOCIAL HISTORY OF SAN FRANCISCO'S SINNERS AND SPENDERS, 1849-1906*, at 226-28 (1968).

95. GOULD, *supra* note 17, at 169.

96. MUSCATINE, *supra* note 85, at 298.

"Senator had set Sarah up in a lavish apartment in the Grand Hotel from which she could cross to his Palace Hotel apartment by the connecting bridge over Market Street."<sup>97</sup> Sarah also received five hundred dollars a month for "expenses."<sup>98</sup> Sarah, however, was not discreet.<sup>99</sup>

Their relationship ended in 1881,<sup>100</sup> and the legal skirmishing began when Sarah had Sharon arrested in 1883 on charges of adultery.<sup>101</sup> In response, Sharon filed a case in federal court against Sarah to declare that he had never been married to her.<sup>102</sup> The criminal charge was eventually dismissed, but Sarah's attorney instead pursued a civil suit against Sharon for divorce, seeking alimony and her share of community property.<sup>103</sup> The major issue was whether they were married.<sup>104</sup> Sarah's claim was based on a written marriage contract.<sup>105</sup> At the time, California Civil Code § 55 provided:

Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations.<sup>106</sup>

Much of the litigation concerned whether the marriage contract was genuine and whether they had a "mutual assumption of marital rights, duties, or obligations."<sup>107</sup>

The publicity around the case came fast and furious. Sarah was dubbed the "Rose of Sharon,"<sup>108</sup> but little was known about her. Some facts emerged immediately: "[a]ll agreed that she was vivacious, quick-witted, headstrong, and uncommonly pretty."<sup>109</sup> She came to San Francisco from Missouri in 1870.<sup>110</sup> She was an orphan whose

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97. *Id.* at 298. How the couple met and established their relationship was of prime interest in the trial of *Sharon v. Sharon*. See GOULD, *supra* note 17, at 221-22, 245-46; KRONINGER, *supra* note 82, at 53-55; LEWIS & HALL, *supra* note 85, at 123-24.

98. MUSCATINE, *supra* note 85, at 298.

99. GOULD, *supra* note 17, at 169.

100. KRONINGER, *supra* note 82, at 58-59.

101. *Id.* at 15-19.

102. *Id.* at 22.

103. *Id.* at 25-26; *Sharon v. Sharon*, 16 P. 345 (Cal. 1888).

104. MUSCATINE, *supra* note 85, at 298.

105. *Id.*

106. CAL. CIV. CODE §55 (1872).

107. *Id.*

108. This title is a Biblical reference: "I am the rose of Sharon, and the lily of the valleys. As the rose among the thorns, so is my love among the daughters." SONGS OF SOLOMON 2:1-2 (KING JAMES).

109. LEWIS & HALL, *supra* note 85, at 121.

110. *Id.* at 123.

parents had died when she was a child.<sup>111</sup> There were reports that her father had left his children a handsome estate,<sup>112</sup> but how much was left when she came to San Francisco with her brother is unclear.<sup>113</sup> She lived first with some relatives but later moved to a boardinghouse and then to a modest room at the Baldwin Hotel.<sup>114</sup> Exactly how old she was when she "married" Senator Sharon is unclear.<sup>115</sup> The press reported that she was twenty-seven,<sup>116</sup> but she was more likely between thirty and thirty-five.<sup>117</sup>

After a sensational trial in 1884,<sup>118</sup> the trial court accepted the written marriage contract as genuine and found Sarah to be Sharon's wife.<sup>119</sup> She was awarded alimony and a division of the community property.<sup>120</sup> The decision was immediately appealed.<sup>121</sup> The major result was that the California Supreme Court stayed the order for alimony until all the appeals were resolved.<sup>122</sup> In 1885, while the case was on appeal, Sharon died.<sup>123</sup> The litigation, however, had a life of its own. In 1888, the California Supreme Court concluded that the statutory requirements of "mutual assumption of marital rights and duties" were met even though the marriage was not made public and affirmed the judgment of the trial court.<sup>124</sup>

That was not the end of the case. The case filed in federal court came to the opposite conclusion concerning the Sharon "marriage."<sup>125</sup> The court found that the contract was "false, fabricated,

111. *Id.* at 122.

112. *Id.*

113. *Id.* at 121-22.

114. LEWIS & HALL, *supra* note 85, at 121-23. The boardinghouse was run by Mammy Pleasant, "the flamboyant queen of San Francisco's Negro community," who maintained a "boardinghouse-bordello." GOULD, *supra* note 17, at 186. Some have suggested that Mammy was the one behind the plan to claim that Sarah was Sharon's wife. *Id.* at 190-93. That Mammy was the one who financed Sarah's litigation against the Senator is clear. *Id.* at 272-73.

115. *Id.* at 186.

116. LEWIS & HALL, *supra* note 85, at 125.

117. *Id.* at 121; GOULD, *supra* note 17, at 186.

118. For details of the trial see GOULD, *supra* note 17, at 205-56; KRONINGER, *supra* note 82, at 125-76.

119. *Sharon v. Sharon*, 9 P. 187 (Cal. 1885).

120. The trial court awarded alimony in the amount of two thousand five hundred dollars per month and counsel fees totaling fifty-five thousand dollars. *Sharon v. Sharon*, 9 P. 187, 188 (Cal. 1885).

121. MUSCATINE, *supra* note 85, at 299.

122. *Sharon v. Sharon*, 7 P. 456, 465 (Cal. 1885). Wrangling over the appeal process continued until the marriage was affirmed in 1888. 7 P. 456 (Cal. 1885); 8 P. 614 (Cal. 1885); 9 P. 187 (Cal. 1885); 16 P. 345 (Cal. 1888).

123. MUSCATINE, *supra* note 85, at 299.

124. *Sharon*, 16 P. at 361.

125. *Id.*

forged, fraudulent, and utterly null and void."<sup>126</sup> Furthermore, the court enjoined Sarah from relying on that contract in any way.<sup>127</sup> The California Supreme Court therefore reversed itself and considered that the judgment in favor of Sarah would violate the federal court injunction.<sup>128</sup> Ultimately, Sarah Althea Hill failed in her attempt to be declared William Sharon's wife.<sup>129</sup> The aftermath of the case brought additional tragedy and notoriety. Sarah had married one of her attorneys, David Terry.<sup>130</sup> In dramatic circumstances, Terry was shot by the bodyguard of Supreme Court Justice Stephen Field.<sup>131</sup> Justice Field was one of the judges who upheld the federal trial court judgment and his involvement inflamed a feud between Terry and Field.<sup>132</sup> In 1892, Sarah was committed to the Stockton State Hospital for the Insane where she remained until she died in 1937.<sup>133</sup>

There is no question that the Sharon-Hill case garnered enormous attention from the public. The case gained additional notoriety from the involvement of so many prominent lawyers and jurists in its denouement. Unquestionably it was an impetus to reconsider the California law regarding common-law marriage. The court opinions also illuminate the then current concepts of how husbands and wives acted toward one another.<sup>134</sup> In considering the Sharon-Hill relationship, the California Supreme Court noted that the couple did not have a common home or place of abode.<sup>135</sup> Even more telling was the fact

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126. *Terry v. Sharon*, 131 U.S. 40, 41 (1889).

127. *Sharon v. Sharon*, 23 P. 1100, 1101 (1890).

128. *Terry v. Sharon*, 131 U.S. 40, 41 (1889).

129. MUSCATINE, *supra* note 85, at 300.

130. *Id.* at 299.

131. *Id.* at 300.

132. See *id.* at 299-301 for a synopsis of the aftermath. For a more extensive explanation, see GOULD, *supra* note 17, at 293-337; KRONINGER, *supra* note 82, at 196-246.

Field was embroiled in personal rivalries. The most famous of these involved Judge David Terry, who had sat on the state supreme court with Field in the late 1850s and early 1860s. Terry represented and then married Sarah Althea Hill, who claimed to be the widow of Senator William Sharon. When lawsuits to obtain control of Sharon's vast fortune reached the federal court, Field ruled against Terry and Hill. In the courtroom Terry and Hill became violent and threatened Field, and Terry was jailed for contempt of court. In the summer of 1889 federal officials appointed David Neagle as Field's bodyguard. When Field and Terry met by chance in a California railroad station, Neagle shot and killed Terry. There was considerable doubt whether Terry had been threatening Field in any way. Neagle was imprisoned, but released when federal officials, claiming he was a federal official carrying out his duty asked the federal circuit court for a writ of habeas corpus. The U.S. Supreme Court upheld the circuit court decision in *Cunningham v. Neagle* (1890).

7 AMERICAN NAT'L BIOGRAPHY 895-96 (1999).

133. GOULD, *supra* note 17, at 333-37; KRONINGER, *supra* note 82, at 239-46; MUSCATINE, *supra* note 85, at 300-01.

134. *Sharon v. Sharon*, 22 P. 26, 37-38 (Cal. 1889).

135. *Id.* at 37.

that they "held themselves out to their relatives, friends, acquaintances, and the world as unmarried."<sup>136</sup> In addition, Sarah "never at any time assumed the name of her alleged husband."<sup>137</sup> In their personal correspondence, there were "no words of affection or endearment, nothing that one might expect to find in communications between husband and wife."<sup>138</sup> In assessing the letters between the couple, Judge Deady in the federal court opinion, viewed them as "utterly void of affection, and altogether lacking in mention or even allusion to the numberless and nameless little incidents and affairs peculiar to every married couple, and which taken together, constitute the charm as well as the staple of married life. . . ."<sup>139</sup> He also found it significant that "it does not appear that she ever received a present, greeting, or other token or affection from [Sharon]."<sup>140</sup> In sum, conduct indicative of a common-law marriage includes (1) cohabitation in a "common home," (2) holding out to the "world" that the couple is married, (3) the wife taking her husband's name, and (4) the relation being one of affection between the couple.

## 2. *Spotlight on Two Cases — Blythe and White*

The plethora of common-law marriage cases continued with another highly publicized case concerning Thomas H. Blythe and Alice Edith.<sup>141</sup> The case bore remarkable similarity to the Sharon-Hill litigation. Thomas Blythe, an elderly and wealthy man,<sup>142</sup> was involved with a young woman,<sup>143</sup> Alice Edith Dickason. After he died in 1883, she claimed to be his widow based on the common-law marriage provisions of the California statute.<sup>144</sup> Just as in the *Sharon* case, the issue was whether Alice was his wife or his mistress.<sup>145</sup> Her right to take her share of the community property hinged on the resolution of that issue. The result was the same: Thomas and Alice Edith were not married because "she did cohabit with him as his mistress, and in no other character or capacity."<sup>146</sup>

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136. *Id.*

137. *Id.*

138. *Id.* at 37-38.

139. *Sharon v. Hill*, 26 F. 337, 373 (1885).

140. *Id.*

141. *Hinckley v. Ayres*, 38 P. 735 (Cal. 1895).

142. The San Francisco Chronicle reported Blythe's estate to be around four million dollars. *Blythe's Widows*, S.F. CHRON., Apr. 10, 1883, at 4.

143. According to her testimony, Edith Alice was twenty-three years old when she first met Blythe in May, 1878. *Mrs. Alice Edith*, S.F. CHRON., Jan. 23, 1890, at 8.

144. *Hinckley v. Ayres*, 38 P. 735, 736 (1895).

145. *Id.*

146. *Id.*



The *Sharon v. Hill* case differed in some respects from *Hinckley*.<sup>147</sup> *Hinckley* did not involve a written agreement as did the *Sharon* case.<sup>148</sup> The facts were more sympathetic to Alice Edith than to Sarah Althea.<sup>149</sup> For instance, Blythe and Alice Edith had lived together at Blythe's home from April of 1880 to his death in April of 1883, even though they had "meretricious intercourse" for about two years before she moved into his home.<sup>150</sup> The California Supreme Court, in noting the import of the marriage issue, viewed Alice Edith with some compassion for her situation:

For if she was not his wife, then notwithstanding the fact that she gave to him the best years of her life, and appears to have contributed more to his comfort and happiness than any other person mentioned in record, she will be left without a dollar of his vast estate.<sup>151</sup>

Although some facts favored Alice Edith, it was unmistakable that when she met Blythe she was a woman who needed financial support.<sup>152</sup> Alice Edith had been divorced, made several "unsuccessful attempts to earn a living by teaching art and music," and needed to seek "assistance from various relatives."<sup>153</sup> At the trial, she testified that she had left her husband partly because he was a poor man.<sup>154</sup> When challenged that she "wanted to take [Blythe] in because he was a rich bachelor," she replied, "I laid no wiles for Mr. Blythe."<sup>155</sup>

Despite the fact that Blythe was deceased and could not contradict Alice Edith's testimony, she was quite candid that their relationship was not a chaste courtship that ended at the altar.<sup>156</sup> Defense Counsel Foote<sup>157</sup> elicited answers about the initiation of their relationship with Alice Edith testifying about Blythe chasing her around the parlor and dining room of his home and catching her and kissing her.<sup>158</sup> Another incident involved another chase and tearing at her

147. *Id.*

148. *Id.* at 735; *Sharon*, 22 P. At 29.

149. *Hinckley v. Ayres*, 38 P. 735, 736 (Cal. 1895).

150. *Id.*

151. *Id.*

152. *Mrs. Alice Edith*, S.F. CHRON., Jan. 23, 1890, at 8.

153. *Id.*

154. *Burning Kisses*, S.F. CHRON., Feb. 5, 1890, at 8.

155. *Id.*

156. *Id.*

157. W.W. Foote "was known as the bulldog of the bar, being tenacious and even overbearing with witnesses in cross-examination. . . ." HISTORY OF THE BENCH AND BAR OF CALIFORNIA 189 (J.C. Bates ed., 1912). During the last ten or twelve years of his life, he amassed a fortune. *Id.* "His fee in the Blythe will case was in itself enough to make him independent." *Id.*

158. *Burning Kisses*, *supra* note 154, at 8.

bodice.<sup>159</sup> Foote intimated that Blythe proposed that she “should live with him, but not as his wife.”<sup>160</sup> Alice Edith admitted that Blythe had a key to her room.<sup>161</sup> She was challenged with the following:

“Didn’t you think it somewhat strange that he should have a key to your room before you regarded one another as husband and wife?” asked Mr. Foote, looking at Alice Edith as though he gravely doubted her to have been “chaste as the icicle that’s curdled by the frost from purest snow, and hangs on Dian’s temple.”<sup>162</sup>

Alice Edith described their wedding ceremony that occurred after she had resisted attempts by Blythe to caress and kiss her:

He told me to place my hand in his and asked me if I would renounce my hopes, give up all my friends, love, cherish and accept him as my husband, take care of him and be a faithful and devoted wife and live with him until death parted us. I told him I would. I asked him what he would do for me and he said that he would be a faithful and devoted husband and care for and protect me in sickness and in health as long as he lived. He said ‘Amen’ and I said the same.<sup>163</sup>

Blythe also insisted that she keep the marriage secret and live separately until he was able to settle some “trouble” he was having with his then mistress.<sup>164</sup> With only her testimony to support the marriage agreement the focus moved to whether from the time she moved to his home, they had mutually assumed the rights, duties, or obligations of marriage.<sup>165</sup>

Much of the testimony focused on how Alice Edith was addressed. Was she “Mrs. Blythe” or was she “Alice Dickason”?<sup>166</sup> Many of the witnesses for Alice Edith were tradespeople and servants who addressed her as Mrs. Blythe:

A long line of witnesses still comes daily trooping in to the hearing of the Blythe case, each bringing a little evidence that Alice Edith was known as Mrs. Blythe, had goods charged to Mrs. Blythe, and

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159. *Id.*

160. *A Tell-Tale Key*, S.F. CHRON., Feb. 7, 1890, at 5.

161. *Id.*

162. *Id.*

163. *Blythe’s Wedding*, S.F. CHRON., Jan. 24, 1890, at 5.

164. *Id.* The mistress was named Nellie Firman, who was also mentioned as a potential “widow” of Thomas Blythe. *Blythe’s Widows*, S.F. CHRON., Apr. 10, 1883, at 4.

165. *Id.*

166. *Blythe at Home*, S.F. CHRON., Feb. 7, 1890, at 5.

in and out of the cozy rooms which were her home for several years acted the part of a real wife.<sup>167</sup>

The more probative evidence came from those who knew Thomas Blythe.<sup>168</sup> All testified that Blythe referred to her as "Miss Dickason" or "my niece."<sup>169</sup> Thomas Blythe was quite open about his relationship with Alice Edith. For instance, he confided in one Frederick R. Reed, a surveyor who had been employed by Blythe and had accompanied him on a trip.<sup>170</sup> Blythe had freely discussed his experiences with women.<sup>171</sup> Reed had commented on Alice Edith's paintings and asked if she was his daughter.<sup>172</sup> "He replied, 'No . . . Allie,' he said, 'is Miss Alice Dickason, my mistress.'"<sup>173</sup> The most outstanding witness was General Andrade, who visited Blythe often and lived at his home for three months during 1882.<sup>174</sup> He testified that "he always knew her as Miss Dickason, and not as Mrs. Blythe; and that Blythe called her 'Alice,' or 'dear Alice,' or 'my child,' and that he heard him introduce her as 'Miss Dickason, my niece.'"<sup>175</sup>

What the Supreme Court found most striking about the evidence was "the wonderful dearth of lady visitors at the residence of the deceased [Blythe] and appellant [Alice Edith]."<sup>176</sup> The Court speculated that even a married woman living in humble surroundings would have "some friends and visitors of her own sex. Entire isolation from such visitors is exceptional in the highest degree."<sup>177</sup> Such isolation could only be understood if she were simply his mistress, for

167. *Blythe at Home*, S.F. CHRONICLE, Jan. 16, 1890, at 3, col. 5.

168. *Id.*

169. Blythe's factotum, Leobeus H. Varney, testified:

"By what names did you hear Blythe address the lady?" asked the cross-examiner.

"I heard him call her 'Alice,' 'Miss Dickason' and 'his niece.'"

"Did you ever hear him call her 'my dear?'"

"No, sir."

"Or 'my love?'"

"No, sir. I never heard any lallygagging of that kind," responded the old gentleman, biting his lip and moving uneasily in his chair.

*Blythe's Gout*, S.F. CHRONICLE, Feb. 28, 1890, at 5, col. 7.

170. *Blythe's Mistresses*, S.F. CHRONICLE, Mar. 19, 1890, at 5.

171. *Id.*

172. *Id.*

173. *Id.* Another of Blythe's friends, Milo Jeffers, testified that Alice Edith was referred to at lunch with another friend as Miss Dickason. *Witness Jeffers*, S.F. CHRON., Mar. 20, 1890, at 5. Jeffers later asked Blythe if he intended to marry Alice. *Id.* Blythe responded, "No, but I will make her my legal niece." *Id.* On cross examination, when questioned on why he asked Blythe about marriage, Jeffers answered, "Well, he seemed always to be polite and attentive to her." *Id.*

174. *Blythe's Mistresses*, *supra* note 170, at 5.

175. *Hinckley v. Ayres*, 38 P. 735, 737 (Cal. 1895). Several other witnesses testified similarly. *Id.*

176. *Id.*

177. *Id.*

if the relations between them had been reputed to be that of marriage, it is difficult to imagine why she did not have a number of respectable women among her associates and visitors. But, practically, she had none after she commenced to live openly with the deceased at his house.<sup>178</sup>

Two other aspects of the case were devastating to Alice Edith's claim.<sup>179</sup> The first were her letters to Blythe where she addressed him as "Uncle" and signed them as "Niece."<sup>180</sup> That evidence undermined her testimony that she was actually his wife. Her explanation that Blythe demanded secrecy was not plausible.<sup>181</sup> The second aspect was a finding that Blythe's heir was his illegitimate daughter Florence.<sup>182</sup> Thus the California Supreme Court affirmed the trial court's finding that "Thomas H. Blythe was never married to [Alice Edith] . . . but that for a certain period before his death she did cohabit with him as his mistress, and in no other character or capacity."<sup>183</sup> Again, this case portrays a young woman claiming to be the wife of a wealthy and prominent man but failing to prove that they had mutually assumed marital rights, duties, or obligations. They did not treat each other in the usual way of married people nor did they "conduct themselves as to have full repute among their intimate friends and associates to be husband and wife."<sup>184</sup>

Of all the common-law marriage cases prior to 1895, *White v. White*<sup>185</sup> stands out. It is the only California Supreme Court case upholding a divorce judgment based on a common-law marriage.<sup>186</sup> The husband Lorenzo denied that he was actually married to Jane. His argument was that "during the whole period of the cohabitation" they were "man and mistress."<sup>187</sup> Even though their cohabitation had begun with "illicit intercourse,"<sup>188</sup> the facts found by the trial court clearly

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178. *Id.*

179. *Id.* at 739; *Blythe v. Ayres* 31 P. 915, 915-16 (Cal. 1892).

180. *Hinckley*, 38 P. at 738.

181. *Id.* at 739.

182. Florence Blythe, born in 1873, was declared the child of Thomas Blythe and his lawful heir. *Blythe v. Ayres*, 31 P. 915, 915-16 (Cal. 1892). She was thus entitled to receive his estate. *Id.*

183. *Hinckley*, 38 P. at 736.

184. *Id.*

185. 29 P. 276 (Cal. 1890).

186. *Id.* Two other California Supreme Court cases favored women trying to establish a common-law marriage: *In re McCausland's Estate*, 52 Cal. 568, 1878 WL 1483 (Cal. 1878) (addressing claims of a widow seeking family allowance from her common-law husband's estate) and *In re Ruffino's Estate*, 48 P. 127 (Cal. 1897) (involving heirs contesting naming common-law wife as sole beneficiary of decedent's will).

187. *White*, 29 P. at 276.

188. *Id.*

avored Jane.<sup>189</sup> Jane was a young widow, only twenty or twenty-one, with an infant of tender age, when she arrived in California from Australia in May 1850.<sup>190</sup> She met Lorenzo, who was around her age, in July of 1850 in San Francisco.<sup>191</sup> He hired her as a housekeeper at Rancho San Geronimo in Marin County for one hundred dollars a month.<sup>192</sup> The ranch house was small, with only two rooms and their illicit intercourse commenced very quickly after Jane arrived at the ranch.<sup>193</sup>

Jane had a child the next year, followed by another child in 1853.<sup>194</sup> Two more children were born in 1856 and 1859.<sup>195</sup> They continued to live together until Lorenzo "quit living with" her in 1882.<sup>196</sup> The trial court found that Lorenzo and Jane mutually agreed to marry after the first child was born and after that time lived and cohabited as "husband and wife."<sup>197</sup> Their agreement, according to the trial court, could be inferred from "cohabitation and repute sufficient to establish a marriage."<sup>198</sup> The Supreme Court reviewed the evidence in detail and concluded that "[t]here is evidence here, at least since 1861, of cohabitation and repute which tends to show a marriage between the parties."<sup>199</sup>

What was that evidence? The evidence focused on the terms that Lorenzo used to refer to Jane such as "the madam."<sup>200</sup> Lorenzo's parents and sister testified that they "supposed" Jane was his wife when he introduced her as "the madam."<sup>201</sup> Once the couple moved to Albion in 1861, many witnesses testified that they were known as Mr. and Mrs. White.<sup>202</sup> One said that they "acted towards each other as husband and wife."<sup>203</sup> Another said that "they behaved towards each other as any other man and wife behaved."<sup>204</sup> Another "judged from

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189. *Id.*

190. Damaging to her claim was the fact that she began having sexual relations with Lorenzo soon after being hired as a housekeeper. *Id.* at 276. She possibly was desperate to support herself and her child in San Francisco and was willing to move in with Lorenzo. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 90 (2000).

191. *White v. White*, 29 P. 276, 276, 280 (Cal. 1890).

192. *Id.*

193. *Id.* at 280.

194. *Id.*

195. *Id.* at 277.

196. *Id.* at 280.

197. *White*, 29 P. at 276.

198. *Id.* at 277.

199. *Id.* at 282.

200. *Id.*

201. *Id.*

202. *Id.* at 281.

203. *White*, 29 P. at 281.

204. *Id.* at 280-81.

their conversation that they were man and wife.”<sup>205</sup> Their relationship clearly met the criteria articulated in the *Sharon*<sup>206</sup> case. Not only did Jane and Lorenzo cohabit in a common home from 1850 to 1882, they held themselves out to relatives, friends, and visitors as husband and wife.<sup>207</sup> Although not mentioned specifically by the California Supreme Court, the length of their relationship and the presence of their four children were undoubtedly indicia of the “affection” and “the numberless little incidents and affairs peculiar to every married couple.”<sup>208</sup>

Even such a sympathetic case provoked a dissent.<sup>209</sup> Judge Works viewed their relationship as “not only . . . illicit in the beginning, but that it continued to be so up to the time of their separation.”<sup>210</sup> Without a promise or an agreement to marry or to live together as husband and wife, Judge Works was unwilling to recognize their marriage.<sup>211</sup> For him, cohabitation and repute were insufficient.<sup>212</sup>

### 3. Common-Law Marriage, Bigamy, and Adultery

The attitude toward common-law marriage in California and its abolition was also influenced by cases involving bigamy and adultery.<sup>213</sup> In these cases, young people began to live together without the benefit of a license or solemnization.<sup>214</sup> Often a pregnancy led to the “marriage.”<sup>215</sup> When the husband was later accused of bigamy or adultery, the “marriage” was called into question.<sup>216</sup> As Civil Code § 55 validated marriages where there was “a mutual assumption of marital rights, duties or obligations,” the issue was whether there was a “first” marriage or a marriage at all.<sup>217</sup> If there was no first marriage, the criminal charge of bigamy would be dismissed. If there was no marriage at all, there could be no adultery.

In August 1893, the California Supreme Court faced an appeal of a bigamy conviction against John Beevers.<sup>218</sup> When Beevers

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205. *Id.* at 281.

206. *Sharon v. Hill*, 26 F. 337 (Cal. 1885).

207. *See supra* notes 191-202 and accompanying text.

208. *Sharon*, 26 F. at 373.

209. *White v. White*, 29 P. 276, 284 (Cal. 1890) (Works, J., dissenting).

210. *Id.* at 284.

211. *Id.*

212. *Id.*

213. *See, e.g., People v. Beevers*, 33 P. 844 (Cal. 1893).

214. *Id.*

215. *See, e.g., Sonya Gorza, Common Law Marriage: A Proposal for the Reviving of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 551 (2006).

216. *See, e.g., Beevers*, 33 P. at 844.

217. LAW OF 1872, CAL. CIV. CODE § 55 (1872) (repealed 1969).

218. *People v. Beevers*, 33 P. 844 (Cal. 1893).

married Clara Bates, he was prosecuted for bigamy.<sup>219</sup> According to the prosecution, he was still married to a young woman named Lou.<sup>220</sup> The trial court accepted the facts that when John was twenty years old and Lou only fourteen years old, they eloped, "with a view to escape the difficulties to marriage presented by the girl's tender years."<sup>221</sup> In accordance with the requirements of common-law marriage, they agreed to be married and returned home and lived together as husband and wife, were reputed to be married people, and conducted themselves as such.<sup>222</sup> They lived together for almost four years and had a child together.<sup>223</sup> Soon after they separated, John married Clara.<sup>224</sup> The trial court had admitted evidence of Lou and John's divorce as evidence of their marriage.<sup>225</sup>

The court faced a difficult dilemma. It likely did not want to declare the first marriage to be invalid, thus ruining Lou's reputation in addition to rendering the child illegitimate, but if the marriage was valid, then John's bigamy conviction would stand. The court chose to solve the problem based on an error in evidence.<sup>226</sup> It declared that the evidence of John and Lou's divorce was erroneously admitted in the bigamy trial and prejudiced the jury.<sup>227</sup> The court noted that applying the principle of estoppel in a criminal case was a "wholesome rule" protecting "the interests of the wronged spouse, the unfortunate offspring, and good morals. . . ."<sup>228</sup> In this way, the court could consider both the first and second marriages valid, and John Beevers would probably be acquitted in a new trial.

On the issue of common-law marriage, the court reluctantly recognized that a marriage did exist between John and Lou.<sup>229</sup> Even though the Court stated that common-law marriage "is not for the court to support or condemn," the Court speculated

It is known to all that it is becoming a common practice with the people, entirely too common, but if bigamy, adultery, and kindred crimes cannot be founded upon such marriages, inducements are offered to the lawless which cannot fail to be seized upon, and which will undoubtedly end in most pernicious results.<sup>230</sup>

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219. *Id.* at 844.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *People v. Beevers*, 33 P. 844 (Cal. 1893).

225. *Id.* at 846.

226. *Id.*

227. *Id.*

228. *Id.* at 845-46.

229. *Id.* at 845.

230. *Id.* at 845-46.

In direct language, the court condemned informal marriage where older men could take advantage of young women with impunity by leaving a relationship without the specter of being held to the responsibilities of marriage. The legislature was soon to take a cue from the California Supreme Court and not only condemn but abolish common-law marriage.

### *B. The Legislature Moves to Abolish Common-Law Marriage*

Legislation to abolish California's version of common-law marriage was introduced in 1891 but not enacted until 1895.<sup>231</sup> The bill introduced in the 1891 legislative session was described as a "very good bill" and if passed "the recent contract system [would] be at an end in California."<sup>232</sup> That very good bill received little attention as the legislature worked on other bills giving rights to women. Two bills passed: one authorizing the appointment of women as notaries public<sup>233</sup> and another giving married women the right to consent to their husband's gifts of community property.<sup>234</sup>

Soon after the Legislature adjourned that year, the Supreme Court rendered another decision regarding a claim of common-law marriage. In that case, *Kilburn v. Kilburn*,<sup>235</sup> Minnie sued Cleon for divorce based on adultery after he had married Nellie Rowe in a ceremonial marriage.<sup>236</sup> A jury found that Minnie and Cleon had met the requirements for a contract marriage and had mutually assumed marital rights, duties, and obligations.<sup>237</sup> The contract was actually a secret one, entered into soon after Minnie gave birth to a child about nine months after their "acquaintance ripened into an act of illicit intercourse, followed by similar acts at opportune times . . ."<sup>238</sup> Despite the contract, the marriage failed on the "mutual assumption" requirement.<sup>239</sup> The major problems were that the couple never lived

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231. At that time, the California Legislature met every other year from January until the end of March. E. DOTSON WILSON & BRIAN EBBERT, CALIFORNIA'S LEGISLATURE 73 (2006), [http://www.leginfo.ca.gov/pdf/Ch\\_06\\_CaLegi06.pdf](http://www.leginfo.ca.gov/pdf/Ch_06_CaLegi06.pdf). Therefore, the legislation was introduced in 1891 and 1893, then passed in the 1895 legislative session. *Id.*

232. *Bills and Bills*, THE SACRAMENTO BEE, Jan. 15, 1891, at 1 (discussing Assem. 169, 29th Sess. (Ca. 1891)).

233. Assem. 52, 29th Sess. (Ca. 1891).

234. S. 120, 29th Sess. (Ca. 1891); see also Charlotte K. Goldberg, *A Cauldron of Anger: the Spreckels Family and Reform of California Community Property Law*, 12 W. LEGAL HIST. 241, 242-45 (1999).

235. *Kilburn v. Kilburn*, 26 P. 636 (Cal. 1891); *Marriage Contracts*, S.F. CHRON., May 8, 1891, at 5.

236. *Kilburn*, 26 P. at 636, 638.

237. *Id.* at 637.

238. *Id.*

239. *Id.* at 638.



together in the same house, they never were reputed to be husband and wife in their respective communities, and Cleon had contributed only about seventy dollars to support Minnie and her child.<sup>240</sup> The Court considered cohabitation, "to live or dwell together; to have the same habitation, so that where one lives and dwells there does the other live and dwell also," as the threshold requirement for "mutual assumption" accompanying a contract marriage.<sup>241</sup> Thus, Minnie's divorce action failed because there was no marriage at all. It is unclear whether Minnie's motive in the divorce was to assure that her child was legitimate or was a vengeful act because Cleon had married Nellie Rowe in a ceremonial marriage.<sup>242</sup> The *San Francisco Chronicle*, however, viewed it as a case where "[t]he Supreme Court has destroyed the validity of another alleged marriage contract, and another wealthy citizen of the State has secured a stronger hold upon much of his money."<sup>243</sup> Thus, Minnie Kilburn was viewed by the press as an adventuress, pursuing a wealthy man for his money, basing her claim on California's version of common-law marriage.<sup>244</sup> The abolition issue awaited the next legislative session which began in January, 1893.

In the 1893 legislative session, another bill to abolish common-law marriage was introduced.<sup>245</sup> It garnered more attention and debate than in the prior session but the bill ultimately failed.<sup>246</sup> An editorial published in the *Los Angeles Daily Journal* advocated passage of the bill, noting that the days had passed "when ranchers were two and three days' journey from a magistrate or a minister" and young people could "take each other for husband and wife by the simple formality of mutual consent."<sup>247</sup> The editorial continued that "the recognition of consent marriage at the present day merely opens a door for the schemes of adventuresses."<sup>248</sup> Of course, the editorial primarily alluded to the adventuress Sarah Althea, so well known from the well-publicized Sharon case.<sup>249</sup> Also the more recent *Kilburn*<sup>250</sup> case brought more publicity to the issue of women seeking monetary reward from an informal relationship.

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240. *Id.* at 637.

241. *Id.*

242. *Id.* at 638.

243. *Marriage Contracts*, S.F. CHRON., May 8, 1891, at 5.

244. *Id.*

245. S. 284, 1893 Leg., 30th Sess. (Cal. 1893).

246. *Id.*

247. *On Marriage*, L.A. DAILY J., Jan. 28, 1893, at 1.

248. *Id.*

249. "The ghost of the Sharon case flitted through the Assembly this afternoon when the Senate bill [regarding abolition of common-law marriage] was called up for third reading." *Work at the Capitol*, S.F. CHRON., Mar. 8, 1893, at 4.

250. *Kilburn v. Kilburn*, 26 P. 636 (Cal. 1891).

The editorial also opined that society should be involved in the serious matter of marriage.<sup>251</sup> For a man, marriage "converts him from a waif and estray into a responsible member of the community."<sup>252</sup> For a woman, "her whole life's happiness depends on her entering into the marriage state under proper conditions."<sup>253</sup> Therefore, "[p]ublic interest requires that a young couple seeking to become man and wife should be made to feel how grave a business they are undertaking by being confronted with a magistrate."<sup>254</sup> Here, the editorial was possibly alluding to "mock marriage ceremonies" that "placed people in very annoying predicaments on more than one occasion."<sup>255</sup> One such predicament was reported to have occurred because of some young people's summer amusement at a farm in Los Gatos.<sup>256</sup> One summer evening young people paired off to have the amusement of mock marriages.<sup>257</sup> Among the couples was Samuel Beggs and Miss Ethel Knowlton.<sup>258</sup> The couples were to "marry," but no "minister" was available to perform the ceremony.<sup>259</sup> Instead it was suggested that they all "marry by contract."<sup>260</sup> Pen and paper were produced and an agreement to love, honor, and obey was signed and witnessed by the couples.<sup>261</sup> After the mock wedding, it was treated as a "royally good joke," but it seems that the Beggs-Knowlton written agreement was not torn up or burned.<sup>262</sup> Miss Knowlton kept the contract, and Mr. Beggs had to resort to the courts to nullify it.<sup>263</sup> With the abolition of contract marriages, that "piece of youthful folly" could not happen again.<sup>264</sup>

The debate on the Senate Bill was heated: "[a]ll the speakers used the Sharon case as a horrible example to illustrate both sides of the discussion."<sup>265</sup> Those in favor of the bill saw that abolishing common-law marriage "would prevent the evil at its source."<sup>266</sup> Those against the bill thought that "it would work a hardship on poor, deluded women."<sup>267</sup> Protection of poor, deluded women carried the day,

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251. *On Marriage*, *supra* note 243, at 1.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Marriage as a Joke*, S.F. CHRON., Apr. 3, 1895, at 8.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Editorial*, S.F. CHRON., Apr. 4, 1895, at 6.

265. *Work at the Capitol*, S.F. CHRON., Mar. 8, 1893, at 4.

266. *A Marriage Bill*, DAILY BEE, Mar. 8, 1893, at 4.

267. *Id.*

and the bill was defeated twenty-five in favor and forty against.<sup>268</sup> Abolition of common-law marriage would again have to await the next legislative session.

The scheme of another so-called adventuress, Alice Edith, was in the limelight at the start of the legislative session in January of 1895.<sup>269</sup> On January 2, the Blythe case was finally decided by the California Supreme Court.<sup>270</sup> The entire trial concerning Thomas Blythe's marriage to Alice Edith Dickason had grabbed the attention of the public from January to April of 1890, and again when the California Supreme Court rendered its decision on January 2, 1895 that "ALICE EDITH LOSES. She Was Never Married to Blythe."<sup>271</sup> Soon after that decision, bills were introduced in the Senate and the Assembly.<sup>272</sup> After the positive recommendation by the Assembly Judiciary Committee, the bills passed unanimously in both houses.<sup>273</sup> Why the bill abolishing common-law marriage passed with such ease when it had been defeated in the past session is unclear. Perhaps protection of "poor, deluded women" now favored abolition. Alice Edith's case was certainly a more sympathetic one than Sarah Althea's.<sup>274</sup> In the choice of protecting Thomas Blythe's young illegitimate child or Alice Edith who had taken care of him at the end of his life, the California Supreme Court favored the child and Alice Edith was denied the benefits of being his widow.<sup>275</sup> The press noted that "[m]any girls . . . will have to be taught the new law in order to prevent them

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268. *Id.*

269. *Hinckley v. Ayres*, 38 P. 735 (Cal. 1895).

270. *Id.*

271. *ALICE EDITH LOSES. She Was Never Married to Blythe*, S.F. CHRON., Jan. 3, 1895, at 7. The San Francisco Chronicle reported the opening statement of the Alice Edith's case on January 7, 1890. *Alice Edith's Case*, S.F. CHRON., Jan. 7, 1890, at 5. Alice Edith began her testimony on January 22, 1890. *Mrs. Alice Edith*, S.F. CHRON. Jan. 23, 1890, at 8. Her testimony continued through January, and even the details of her pets became part of the court record. *Alice Edith's Pets*, S.F. CHRON., Jan. 30, 1890, at 8. February brought additional details of their relationship and their home life. *Alice's Kisses*, S.F. CHRON., Feb. 8, 1890, at 5; *Burning Kisses*, *supra* note 156, at 8. Alice Edith finished her testimony on February 13, 1890. *Alice Steps Down*, S.F. CHRON., Feb. 13, 1890, at 5. Alice Edith's case continued until April 8, 1890. *Mrs. Blythe, My Wife*, S.F. CHRON., Apr. 9, 1890, at 5. The case continued concerning Blythe's illegitimate child, Florence. *Foot's Scorcher*, S.F. CHRON., Apr. 15, 1890, at 8. Thomas Blythe died in 1883 and the final appeal regarding his estate was decided in 1895. *Alice Edith Loses*, S.F. CHRON., Jan. 3, 1895, at 7.

272. S. 91, 31st Sess. (Ca. 1895); Assem. 567, 31st Sess. (Ca. 1895).

273. Report of Standing Committees, Journal of the Assembly, 31st Session 1895, at 226. The Senate Bill passed by a vote of 33-0 on February 12, 1895. Journal of the Senate, 31st Session 1895 at 470. The Assembly Bill passed on February 20 by a vote of 57-0. Journal of the Assembly, 31st Session 1895 at 523. The Senate passed the Assembly bill on March 13, 1895 on a vote of 27-0. Journal of the Senate, 31st Session 1895 at 1103.

274. *Hinckley v. Ayres*, 38 P. 735 (Cal. 1895).

275. *Id.*

from being lured into marriages that will be legally worthless."<sup>276</sup> Also, after passage of the bill, "[n]o more can young people under age run away from home and return to their respective homes a week later with the announcement that they have married by contract."<sup>277</sup> Thus, common-law marriage, which led to several notorious cases and the issue of questionable marriages, was abolished in California in 1895.

### C. Post-Abolition Cases

#### 1. *The First Test* — Norman v. Norman

The first test of the new legislation arose when a father tried to thwart the marriage of his young daughter to an older man.<sup>278</sup> The father was A.C. Thomson, "one of the wealthiest orange growers in Southern California"<sup>279</sup> and "the original cultivator of the famous Thompson [sic] navel orange."<sup>280</sup> His daughter Janette was the youngest of six daughters<sup>281</sup> and was almost sixteen years old.<sup>282</sup> Homer Norman, who was almost twenty-five years old, was employed by the Duarte-Monrovia Fruit Exchange and had known Janette for nearly a year.<sup>283</sup> Janette's parents did not disguise their disapproval of Homer's attention to Janette, particularly because of her "tender age."<sup>284</sup>

On the evening of August 1, 1897, the couple eloped.<sup>285</sup> About 8:30 that evening, Janette disappeared from home and left behind a note stating that she had decided "to put in the remainder of her

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276. *Unmarried Women Should Beware*, S.F. CALL, Mar. 21, 1895, at 4. This article stated:

Every girl and every girl's mother in California should read Assembly bill 567. It abolishes all common-law marriages and young girls and middle-aged women who have been married by contract, and who have not recorded the document, should do so at once, otherwise the instrument is not worth the paper it is written on.

*Id.*

277. *Id.*

278. *Norman v. Norman*, 54 P. 143 (Cal. 1898).

279. *Are Sea Marriages Legal?*, S.F. CALL, Aug. 4, 1897, at 5.

280. *Married at Sea*, L.A. DAILY TIMES, Aug. 3, 1897, at 12. According to the court papers, Janette's father was A.C. Thomson, not Thompson. *Norman*, 54 P. at 143.

281. *Id.*

282. *Marriages at Sea*, L.A. DAILY TIMES, Aug. 16, 1897, at 12.

283. In the court opinion, Homer's age is stated as twenty-one years and ten months. *Norman*, 54 P. at 143. However, Homer's complaint states that he is twenty-four years and ten months. Appellant's Points and Authorities at 4, *Norman v. Norman*, 54 P. 143 (Cal. 1897) (No. 469). The first newspaper report also states "Homer Norman is nine years his bride's senior." *Married at Sea*, *supra* note 276, at 12.

284. *Married at Sea*, *supra* note 280, at 12.

285. *Id.*

life with Homer."<sup>286</sup> Soon after finding the note, the local police were notified and an attempt was made to intercept the couple.<sup>287</sup> The couple eluded their pursuers by taking a carriage to Long Beach.<sup>288</sup> There they met Captain Pierson, the captain of the yacht J. Willey.<sup>289</sup> The Captain, the couple, and witnesses sailed to the High Seas, around nine miles from the coast.<sup>290</sup> There the Captain "pronounced the words that made the young lovers man and wife."<sup>291</sup> Thomson was reported to "be very angry over the course taken by . . . his youngest daughter," and her mother was "very ill, having been prostrated when informed of her daughter's elopement."<sup>292</sup>

The very next day, August 3, Thomson filed a writ of habeas corpus in Superior Court in Los Angeles for the return of his daughter.<sup>293</sup> The validity of the marriage was the main issue at the trial on August 5.<sup>294</sup> The L.A. Daily Times reported that Janette was no longer with Homer and instead was under the care of Sheriff Burr in San Fernando.<sup>295</sup> There she was to remain until the decision regarding the marriage was resolved.<sup>296</sup> On August 14, Judge M.T. Allen rendered his opinion that the marriage was never legally contracted and, as a minor, her father was entitled to her custody and control.<sup>297</sup>

The press reported that this decision was a matter of "general importance" because of the "the large number of sea marriages that have occurred recently on this coast."<sup>298</sup> One can infer that young people who wished to marry despite parental disapproval would try to evade the requirements of the 1895 law by going offshore to wed. Judge Allen noted that:

As a result families have been disgraced, tragedies have been enacted and estates have been wasted in bitter controversies

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286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* In the Second Amended Complaint filed by Homer Norman, the vessel was described as a "fishing and pleasure schooner." Appellant's Points and Authorities at 6, *Norman v. Norman*, 54 P. 143 (Cal. 1897) (No. 469).

290. *Married at Sea*, *supra* note 280, at 12.

291. *Id.*

292. *Id.*

293. *Marriages at Sea*, *supra* note 282, at 12.

294. *Norman*, 54 P. at 143; see *Marriages at Sea*, L.A. DAILY TIMES, Aug. 15, 1897, at 12.

295. *Marriages at Sea*, *supra* note 282, at 12.

296. *Id.*

297. *Sea Marriages Are Not Legal*, S.F. CALL, Aug. 15, 1897, at 7.

298. *Id.* In the appeal of the *Norman* case, the defendant argued that "hundreds and probably thousands of couples in California . . . have been married at sea. Since and while this case was pending, many marriages have taken place off Redondo. So universal has grown the practice that it may be said to have grown into a custom." Appellant's Points and Authorities at 21, *Norman v. Norman*, 54 P. 143 (Cal. Nov. 13, 1897) (No. 469).

ensuing. The Legislature, in amending the marriage law in 1895, evidently had in view all of these difficulties and sought by one stroke to define a course of conduct, and no other, which would result in marriage.<sup>299</sup>

Clearly the plethora of notorious cases had not been forgotten, and the *Norman* case was to join their annals.

Although Thomson thought that his daughter was secure from Homer, it soon became evident that Homer was not ready to accept Judge Allen's decision in the habeas corpus proceedings. On August 16, 1897, his lawyer hastily filed a Complaint requesting that "said marriage be declared valid."<sup>300</sup> The complaint was amended twice, adding factual details, and alleged that after the ceremony at sea, Homer and Janette "began to cohabit and live together as such husband and wife and continued so to do until the 10th day of August, 1897."<sup>301</sup> The answer filed by Thomson as guardian *ad litem* for Janette admitted all the allegations of Homer's Complaint.<sup>302</sup> Thomson's defense was that the couple married "with the intent and the purpose of evading the statutes of the state of California prescribing the manner in which marriages shall be contracted, solemnized and entered into."<sup>303</sup> Therefore, Thomson argued, the "pretended marriage" should be "declared illegal, null and void, and [Homer] be forever precluded and estopped from setting up, asserting or claiming to be the husband of this defendant."<sup>304</sup> The trial was held the next day, and, unsurprisingly, Judge Allen ruled in favor of Thomson; thus, Homer and Janette were "not husband and wife."<sup>305</sup> Homer appealed to the California Supreme Court.<sup>306</sup>

Two major points were argued on appeal: (1) the marriage at sea was valid and should be recognized by the State of California and (2) the 1895 amendment did not expressly declare marriages at sea to be void.<sup>307</sup> Arguing the second point, that despite the 1895 amendment, common-law marriages would still be valid, was extremely difficult. The major argument was that the 1895 amendment could not take away the "common law right" unless the legislature

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299. *Sea Marriages Are Not Legal*, *supra* note 297, at 7.

300. Complaint at 4, *Norman v. Norman*, 54 P. 143 (Cal. Aug. 16, 1897) (No. 469).

301. Second Amended Complaint, *Norman v. Norman*, 54 P. 143 (Cal. Sept. 27, 1897) (No. 469).

302. Answer at 7, *Norman v. Norman*, 54 P. 143 (Cal. Sept. 28, 1897) (No. 469).

303. *Id.*

304. *Id.*

305. *Norman v. Norman*, 54 P. 143, 144 (Cal. 1898).

306. *Id.*

307. *Id.*

had plainly expressed that intention.<sup>308</sup> The argument focused on the "very serious . . . consequences" that could result from voiding the Norman marriage and others like it.<sup>309</sup> First, many couples, "hundreds and probably thousands," were married at sea.<sup>310</sup> Thus that type of marriage was so accepted that the practice had ripened into a custom.<sup>311</sup> Unless the legislature explicitly prohibited those marriages, the courts should consider them valid.<sup>312</sup> Second, voiding the marriage could affect "the married woman's "reputation in the future" and the legitimacy of any children that "may possibly result from this union."<sup>313</sup> Admittedly, those arguments were the best arguments that could be made considering the clarity of the 1895 law and the legislative history leading up to its enactment.

Thomson argued vigorously that the legislature clearly intended to abolish common-law marriage.<sup>314</sup> The major points were that "the necessity for the old common-law marriage had passed away" and that past litigation "opened the eyes of our legislators to the danger of longer recognizing or tolerating these loosely formed matrimonial unions."<sup>315</sup> The mandatory nature of the statute was found in both the original statute and its amendment.<sup>316</sup> Emphasis was placed on the word *must*.<sup>317</sup> Although marriage was a contract to which they parties consented, marriage *must* be followed by a solemnization according to the 1895 amendment.<sup>318</sup>

The argument continued with a "parade of horrors," citing the notorious cases of the early 1890s with particular attention to the *Sharon* and *Blythe* cases.<sup>319</sup> The prior law "left a door open to fraud, and furnished a temptation to adventurous women and designing and unscrupulous persons to assent and establish mythical marriages with a view to defrauding citizens of wealth or their estates and rightful heirs."<sup>320</sup> The conclusion was that the legislature intended "to close

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308. Appellant's Points and Authorities at 16-17, *Norman v. Norman*, 54 P. 143 (Cal. Nov. 13, 1897) (No. 469).

309. *Id.* at 21.

310. *Id.*

311. *Id.*

312. *Id.*

313. Appellant's Points and Authorities at 22, *Norman v. Norman*, 54 P. 143 (Cal. Nov. 13, 1897) (No. 469).

314. Respondent's Reply Brief at 6, *Norman v. Norman*, 54 P. 143 (Cal. Dec. 4, 1897) (No. 469).

315. *Id.*

316. *Id.* at 15.

317. *Id.* at 6.

318. The prior version of the Civil Code had the additional words "or by mutual assumption of marital rights, duties or obligations." *Id.* at 15.

319. *Id.*

320. Respondent's Reply Brief at 15, *Norman v. Norman*, 54 P. 143 (Cal. Dec. 4, 1897)

this door to fraud and to forever and effectually [sic] put an end to this class of litigation."<sup>321</sup> Thus, Thomson urged the supreme court to "construe and declare its provisions to be mandatory and prohibitory."<sup>322</sup> Finally, "[t]o construe the section otherwise would be to defeat the will and intent of the legislature, and reinstate the old common-law doctrine with attending litigation and consequent evils."<sup>323</sup>

The evils to be combated were twofold. First, the abolition of common-law marriage was intended to protect a proper wife and children from "an unscrupulous adventuress who chooses to assert in our courts an irregular marriage contracted upon the high seas in the presence of a scalawag captain of a ten-foot fishing dory, or for that matter, without the presence of any one except the fraudulent claimant and the dead man."<sup>324</sup> Second, if common-law marriage were still permitted, "[a]nother great evil that would surely result, would be irregular marriages contracted with girls of tender years by unscrupulous men."<sup>325</sup>

The California Supreme Court accepted these arguments.<sup>326</sup> Thus, the Norman marriage was invalid because there was no solemnization as required by the 1895 amendment.<sup>327</sup> The court did not adopt all the hyperbole of the briefs but did state: "[t]o recognize such a marriage, we think, would grossly violate the spirit and letter of our statute, and be a blot upon the civilization we profess."<sup>328</sup> The case ended any attempt to continue the practice of common-law marriage in California.<sup>329</sup>

(No. 469).

321. *Id.* at 16.

322. *Id.* Norman's reply was to challenge the Respondent's reliance on cases that "are not applicable and do not support respondent's position." Brief of Appellant in Reply to Respondent's Reply Brief at 3-4, *Norman v. Norman*, 54 P. 143 (Cal. Dec. 22, 1897) (No. 469).

323. Respondent's Reply Brief at 3-4, *Norman v. Norman*, 54 P. 143 (Cal. Dec. 4, 1897) (No. 469).

324. *Id.* at 31.

325. *Id.* at 32.

326. *Norman v. Norman*, 54 P. 143, 146 (Cal. 1898).

327. *Id.* On the issue of marriages on the high seas, the Court determined that the law of parties' domicile controlled, especially where there was an attempt to evade those laws. *Id.* at 144. The Court referred to the case of *Holmes v. Holmes*, 12 F. Cas. 405, 412 (Or. 1870) (No. 6638), in which Judge Deady emphasized that "[s]uch an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them." *Norman v. Norman*, 54 P. 143, 144-45 (Cal. 1898); see Annotation, *Validity of Marriage Celebrated or Contracted on Board a Vessel*, 61 A.L.R. 1528 (1929).

328. *Id.* at 146.

329. Some cases still arose, such as estate claims raised by the alleged widow or child of pre-1895 informal marriages. *In re Baldwin's Estate*, 123 P. 267, 269 (Cal. 1912). These claims were disfavored, as one court said, "[w]herefore we indulge the not unreasonable



## 2. *The Narrowing of Cohabitants' Rights*

Despite the abolition of common-law marriage in California in 1895, couples still lived together and disputes still arose concerning property accumulated during their relationship. Cohabitants' theories for relief, however, were extremely limited. The most influential case of the early twentieth century regarding cohabitants' rights was *Trutalli v. Meraviglia*, decided in 1932.<sup>330</sup> If common-law marriage had still been permitted in California, Charles Trutalli and Rita Meraviglia would have been considered married. The trial court found that they "agreed to become and live together and assume the marital relation between themselves and the world, as husband and wife."<sup>331</sup> In addition, they had held themselves out as married to their friends and to the public in general, had two children together, and continued their relationship for eleven years.<sup>332</sup> Charles filed suit to quiet title to real property located in San Francisco, and Rita cross-claimed for one-half of that property and other real property in Santa Clara County.<sup>333</sup> The trial court found that they had an agreement that Rita would perform household services, that any money she earned Charles would invest for both of them, and each of them would have an undivided one-half interest of the property held by Charles.<sup>334</sup>

Charles challenged the trial court's finding because the contract was based on "immoral consideration."<sup>335</sup> The California Supreme Court said that their agreement to cohabit could be separated from their agreement concerning the property, "so long as such immoral relation was not made a consideration [for] their agreement."<sup>336</sup> More importantly, the court upheld the agreement based on Rita's monetary contribution to the property because "the couple agreed to invest their earnings in property to be held jointly by them."<sup>337</sup> Later courts interpreted these statements narrowly to mean that an implied agreement to share property required a cohabitant to contribute funds to acquisition of the property.<sup>338</sup> The only other way to prove an agreement to share property was to have an express agreement to do so.<sup>339</sup>

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hope that this case will prove the last of a most malodorous brood." *Id.*

330. 12 P.2d 430 (Cal. 1932).

331. *Id.* at 431 (quoting trial court findings).

332. *Id.*

333. *Id.* at 430.

334. *Id.* at 431.

335. *Id.*

336. *Trutalli*, 12 P.2d at 431.

337. *Id.*

338. *Vallera v. Vallera*, 134 P.2d 761, 763 (Cal. 1943).

339. *Id.*

That interpretation greatly limited the ability of a cohabitant to succeed in a claim to share property. When the California Supreme Court considered the case of *Vallera v. Vallera*<sup>340</sup> in 1943, that interpretation had become entrenched. The *Vallera*<sup>341</sup> facts were less favorable to Maria Vallera than the facts of *Trutalli*<sup>342</sup> to Rita Meraviglia. Maria claimed property acquired during the one and one-half-year period they lived together between Concezio's other marriages.<sup>343</sup> The trial court held that all property acquired during that time period was held by them as tenants-in-common, each having a one-half share.<sup>344</sup>

Concezio appealed, arguing that there was "no evidence of any agreement between the parties as to their property rights, and no evidence concerning the accumulations of property or contributions by the parties thereto."<sup>345</sup> Clearly his understanding of the *Trutalli* case was that sharing of property required either an express agreement or evidence of contribution of funds.<sup>346</sup> The California Supreme Court agreed.<sup>347</sup> The relationship alone was insufficient to gain rights to property:

The controversy is thus reduced to the question whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship. It has already been answered in the negative.<sup>348</sup>

The court reasoned that if a man and a woman who live together as husband and wife have an agreement to share earnings and accumulations, it will be upheld, but "*even in the absence of an express agreement to that effect*, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed to its acquisition."<sup>349</sup> Thus, the court in *Vallera* continued the understanding regarding unmarried cohabitants that the only

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340. *Id.* at 761.

341. *Id.*

342. *Trutalli v. Meraviglia*, 12 P.2d 430 (Cal. 1932).

343. *Vallera*, 134 P.2d at 761. In 1933, Maria and Concezio began to live together. *Id.* at 762. At that time, he was still married to wife Ethel. *Id.* That marriage was dissolved in 1938. *Id.* One and one-half years later, he married Lido. *Id.*

344. *Id.* at 762.

345. *Id.*

346. *Id.* at 763.

347. *Id.*

348. *Id.* at 762-63 (citing *Flanagan v. Capital Natl Bank*, 3 P.2d 307, 308 (Cal. 1931) (stating "the essential basis of recovery is a bona fide belief on the part of the 'wife' on the existence of a valid marriage")).

349. *Vallera*, 134 P.2d at 763 (emphasis added).

way to prove an implied sharing agreement was through contributions of funds.

The court in *Vallera* was split four to three, with a vigorous dissent by Justice Curtis.<sup>350</sup> Justice Curtis railed against the narrow interpretation of an implied agreement:

Unless it can be argued that a woman's services as cook, housekeeper, and homemaker are valueless, it would seem logical that if, when she contributes money to the purchase of property, her interest will be protected, then when she contributes her services in the home, her interest in property accumulated should be protected.<sup>351</sup>

This view represents both a traditional and a modern view of women's contributions as homemaker. On the one hand, society traditionally thinks of a "wife" as being the housekeeper, cook, and homemaker. The home is her domain and where she belongs. On the other hand, the modern view is that "wifely" services have value even though wives are not actually paid wages. The latter idea is clearly the view reflected in the California Community Property regime that applies to married people — that each spouse has a "present, existing, and equal interest" in community property, regardless of their contributions.<sup>352</sup> In *Vallera*, however, the majority's limited view of implied contract persisted and proved an unfruitful avenue for recovery unless funds were contributed to property.<sup>353</sup>

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350. *Id.* at 763-64 (Curtis, J., dissenting).

351. *Id.* at 764. The majority opinion was written by Justice Traynor and joined by Justices Gibson, Shenk, and Edmonds. *Id.* at 761-63. The dissent included Justice Curtis, Carter and Peters, pro tem. *Id.* at 763-64. A contrary view was reflected in the states following "the common law rule that gave a husband property rights in his wife's labor." Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2130 (1994). Even though reform movements gave wives the rights to their earnings, those reforms "often explicitly excluded work a wife performed for her family. . . ." Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1084 (1994). The majority opinion in *Vallera* reflected this common-law view of a woman's contribution to the home. *Vallera*, 134 P.2d at 764.

352. CAL. FAM. CODE § 751 (West 2006).

353. A particularly egregious instance of this narrow reading of contributions to property is in the case of *Keene v. Keene*, 371 P.2d 329 (Cal. 1962). In *Keene*, while the couple cohabited, Ora Mae had contributed considerable services to Clarence's property and businesses:

farm labor, including raising of turkeys, chickens, sheep, cattle, the clearing of land, the sowing, raising and harvesting of grain crops and the growing and harvesting of nut crops . . . operation of his real estate brokerage business, furniture business and the buying and selling of real estate, timber and timber lands.

*Id.* at 332 n.3. The Court rejected that *funds* means anything other than "its intended

### 3. Attitudes Toward Cohabitation Change

Attitudes toward unmarried relationships and toward women's roles changed dramatically during the 1960s and 1970s.<sup>354</sup> Much of society no longer categorized women by their marital status.<sup>355</sup> The stigma of the "spinster" or "divorcee" started to disappear.<sup>356</sup> Women could enter into a sexual relationship without the fear of pregnancy, either because of the availability of birth control or abortion.<sup>357</sup> The immorality of living together became a thing of the past.<sup>358</sup> It was no longer as widely viewed as "living in sin."<sup>359</sup> More and more couples lived together openly without the thought of marriage.<sup>360</sup> The relevance of marriage to the legitimacy of children also underwent change. Children born of unmarried couples were no longer as widely stigmatized as "bastards" or "illegitimate" children.<sup>361</sup> Even more significantly, marriage was no longer the only way to create a legal

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commonsense meaning" and could not be extended to "services not included in the usual services of a housekeeper, cook and homemaker." *Id.* at 333. Equitable remedies also seemed precluded by the court's statement in *Vallera* that "[e]quitable considerations [where there is no genuine belief that she is legally married] are not present in such a case." *Id.* at 763. That view was adopted by the courts of appeal in later cases. *Oakley v. Oakley*, 185 P.2d 848, 850 (Cal. Ct. App. 1947) (holding that there could be no equitable relief unless there was belief in validity of marriage); *Lazzarevich v. Lazzarevich*, 200 P.2d 49, 55-56 (Cal. Ct. App. 1948) (finding no existence of a belief in validity of marriage and therefore awarding no equitable relief).

354. COONTZ, *supra* note 39, at 263-69; STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 203-10 (1988); see also Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States in the Twentieth Century*, 88 CALIF. L. REV. 2017, 2048 (2000); Walter Weyrauch, *Informal and Formal Marriage — An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 97 (1960).

355. MINTZ & KELLOGG, *supra* note 354, at 205-10.

356. *Id.* at 205-06.

357. *Id.* at 209.

358. *Id.*

359. *Id.*

360. Over the past fifteen years the number of opposite sex couples cohabiting has increased. The 2000 Census reported 5.5 million cohabitants (4.9 million of which are of the opposite sex) compared to 3.2 million in Census 1990. U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORT, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 (2003). In addition, according to the Current Population Survey (CPS), the number of cohabitants in 1996 was approximately 2.86 million compared to approximately 4.88 million cohabitants in 2005, nearly a sixty percent increase in just under ten years. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARCH AND ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS (2006). Although the surveys are different, they both come to the same conclusion that cohabitation is on the rise. *Id.*

361. The change is reflected in the legal digests, where designations changed from "bastards" to "illegitimate children" to "out-of-wedlock." 4A NEW CAL. DIGEST MCKINNEY 364 (1964) (referring to "Bastards" and "Illegitimacy"); CAL. DIGEST OF OFFICIAL REPORTS 3D MCKINNEY, 4th Series 108 (1996) (referring to "Illegitimacy" and "Parent and Child"); 10 WEST'S CAL. DIGEST 189 (1973) (referring to "Bastards"); 6 WEST CAL. DIGEST 2d 494 (2005) (referring to "Children Out-of-Wedlock").

parent-child relationship.<sup>362</sup> In California, the turning point regarding the law of unmarried cohabitants came with the enactment of no-fault divorce in 1969.<sup>363</sup>

In *Marriage of Cary*,<sup>364</sup> the court of appeal used the enactment of no-fault divorce to revive common-law marriage implicitly under the guise of an "actual family relationship."<sup>365</sup> Although this revival was short-lived, the law regarding property rights of unmarried cohabitants underwent re-evaluation. Paul and Janet Cary had what would have been considered a common-law marriage, having lived together for eight years and held themselves out as husband and wife to friends, family, and the community.<sup>366</sup> Janet took Paul's surname.<sup>367</sup> They had four children together.<sup>368</sup> They intertwined their financial affairs, buying property together, borrowing money, obtaining credit together, and "otherwise conducted all business as husband and wife."<sup>369</sup> Paul worked outside the home, and Janet stayed home and took care of the children and house.<sup>370</sup> They acquired property using Paul's earnings.<sup>371</sup> If they had been married that property would have been community property and divided equally.<sup>372</sup> The trial court determined that the property should be divided equally because of their "actual family relationship," and Paul appealed.<sup>373</sup>

The court of appeal was willing to extend the Family Law Act to Paul and Janet's relationship, based on the objective of the Act to do away with "fault": "[b]y the Family Law Act the Legislature has announced it to be the public policy of this state that concepts of 'guilt' (and punishment therefor) and 'innocence' (and reward therefor) are no longer relevant in the determination of family property rights, *whether there be a legal marriage or not*. . . ."<sup>374</sup> Paul and Janet's relationship was deemed to be a "family," so it came under the Family Law Act, giving Janet rights as if she were a legal wife.<sup>375</sup> Clearly,

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362. CAL. FAM. CODE § 7611(d) (West 2006).

363. The Family Law Act of 1969 adopted no-fault divorce. CAL. CIV. CODE § 4506 (West 1970). Thus, the only grounds for divorce are "irreconcilable differences, which have caused the irremediable breakdown of the marriage" or "incurable insanity." CAL. FAM. CODE § 2310(a)(b) (West 2006). The grounds must be "pleaded generally." *Id.*

364. 109 Cal. Rptr. 862 (Cal. Ct. App. 1973).

365. *Id.* at 862.

366. *Id.* at 863.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Cary*, 109 Cal. Rptr. at 863.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 866 (emphasis added).

375. *Id.* at 867.

adherence to that doctrine would have revived common-law marriage.<sup>376</sup> The *Cary* “actual family relationship” doctrine was short-lived, and in 1976 the California Supreme Court overturned it in *Marvin v. Marvin*.<sup>377</sup> The court in *Marvin* criticized the reasoning of *Cary* and substituted the express and implied contract doctrine to assess unmarried cohabitants’ rights to property accumulated during their relationship.<sup>378</sup> The court was mindful that a contract doctrine could be considered a resurrection of common-law marriage but denied that its decision was an attempt to do so.<sup>379</sup>

The landmark case of *Marvin v. Marvin*<sup>380</sup> overturned the *Cary* doctrine of “actual family relationship” yet liberalized the prior law regarding unmarried cohabitants’ property rights.<sup>381</sup> The case scenario in *Marvin* resembled an updated version of “a scheme of an adventuress,”<sup>382</sup> with Michelle Triola Marvin attempting to gain rights to the fortune of movie star Lee Marvin.<sup>383</sup> The California Supreme Court used the opportunity to expand the rights of unmarried cohabitants.<sup>384</sup> The court concluded:

- (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision.
- (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.

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376. See Patrick Nielson, Note, *In Re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226, 1246-47 (1974); Laurel Olson, Comment, *In Re Marriage of Carey [sic]: The End of the Putative-Meretricious Spouse Distinction in California*, 12 SAN DIEGO L. REV. 436, 447 (1975). The *Cary* doctrine was criticized as imposing “upon men and women who choose to live together in nonmarital cohabitation a lifestyle characterized by the restrictions formerly associated with traditional marriage.” Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937, 953 (1977).

377. 557 P.2d 106 (Cal. 1976).

378. *Id.* at 120-22. The court noted that the Family Law Act does not explicitly address property rights of unmarried cohabitants, nor did the legislative history suggest that the legislature considered that subject. *Id.* at 120 n.19.

379. “We do not seek to resurrect the doctrine of common-law marriage, which was abolished in California by statute in 1895.” *Id.* at 122 n.24.

380. 557 P.2d 106 (Cal. 1976).

381. *Id.* at 120-22.

382. See *supra* note 33 and accompanying text.

383. During their relationship, Lee Marvin was the star of several films: *Cat Ballou* in 1965 (for which he won an Oscar), *The Dirty Dozen* in 1967, *Hell in the Pacific* in 1968, and *Paint Your Wagon* in 1969. See Ann Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381-82 (2001). Michelle’s claim was for \$1.8 million or half his earnings during their relationship. *Id.*

384. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

- (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.<sup>385</sup>

The first conclusion overturned the *Cary* doctrine, and the third conclusion recognized the unfairness of the prior rule that "a nonmarital partner who rendered services in the absence of express contract could assert no right to property acquired during the relationship."<sup>386</sup> The court held that the legislature in enacting no-fault divorce did not intend to change the law dealing with nonmarital partners which "had been fixed entirely by judicial decision."<sup>387</sup> The court then went on to "fix" prior judicial decisions.<sup>388</sup> The unfairness of the prior rule was that it did not "permit a nonmarital partner to assert rights based on accepted principles of implied contract or equity."<sup>389</sup> The third conclusion granting a cohabitant the right to claim an implied-in-fact contract and the possibility of equitable relief marked a significant change from prior law that had limited implied contracts to the contribution of funds and had precluded equitable remedies.<sup>390</sup>

The unfairness of the prior law was evident when applied to the *Cary* facts. All property acquired during their relationship was traceable to Paul's earnings.<sup>391</sup> Had they been married, the property would have been community property.<sup>392</sup> Because they were not married, Janet would have had to prove an express agreement to share the property,<sup>393</sup> which Paul probably would deny. Janet would not have been able to prove an implied agreement because she could provide no evidence that she had contributed funds to the acquisition of the property.<sup>394</sup> That result would be unfair to Janet because it would allow Paul "to retain a disproportionate amount of the property."<sup>395</sup> The court recognized that courts should "fairly apportion property

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385. *Id.*

386. *Id.* at 119.

387. *Id.* at 120.

388. *Id.* at 121.

389. *Id.*

390. *Id.* at 122-23.

391. *Cary v. Cary*, 109 Cal. Rptr. 862, 863 (Cal. Ct. App. 1973).

392. *Id.* at 863.

393. *Id.* at 864.

394. *Id.* at 863.

395. *Marvin v. Marvin*, 557 P.2d 106, 121 (Cal. 1976).

accumulated through mutual effort.”<sup>396</sup> The “mutual effort” was Paul working outside the home and Janet caring for the home and the children.<sup>397</sup> Thus, through the mechanism of implied contract, the Court recognized that a traditional marital-like relationship in which a woman provided homemaking services could be the basis for an agreement to share property.

The court’s second conclusion regarding express contracts recognized that cohabitants will “voluntarily live together and engage in sexual relations” and that such factors will not preclude them from contracting regarding their property.<sup>398</sup> Yet the Court stated that “a contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services.”<sup>399</sup> The prohibition against “meretricious sexual services” means that cohabitants “cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason.”<sup>400</sup> Thus many relationships that would formerly have been considered immoral because a couple lived together would not be considered illegal consideration for a contract to share property. The court even noted many reasons couples live together without marrying: to “avoid the strictures of the community property system,” to avoid the commitment marriage implies, to avoid the loss of benefits, to avoid the “difficulty and expense of dissolving a prior marriage,” to try out living together as a “prelude to marriage,” or to live together under the mistaken belief that they have a common-law marriage.<sup>401</sup> The determination of what the couple intends regarding the property accumulated during the relationship “can only be ascertained by a more searching inquiry into the nature of their relationship.”<sup>402</sup> Thus an inquiry into the facts of their relationship becomes relevant in determining whether they have an enforceable agreement to share property.

In *Marvin*, Michelle’s complaint alleged a marital-like relationship even though Lee was still married to Betty Marvin at the time Michelle and Lee started living together in 1964.<sup>403</sup> Their relationship lasted until 1970, when Lee compelled her to leave his household.<sup>404</sup> Michelle alleged that she and Lee had orally agreed that “they would

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396. *Id.*

397. *Cary*, 109 Cal. Rptr. at 863.

398. *Marvin*, 557 P.2d at 116.

399. *Id.* at 114.

400. *Id.* at 116.

401. *Id.* at 117 n.11.

402. *Id.*

403. *Marvin*, 557 P.2d at 110-11.

404. *Id.*



combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individually or combined.”<sup>405</sup> In addition, she claimed that they had agreed that she would “give up her lucrative career as an entertainer” to devote her time to being Lee’s “companion, homemaker, housekeeper and cook” and that Lee would provide for her “financial support and needs for the rest of her life.”<sup>406</sup> The trial court granted Lee a judgment on the pleadings, and Michelle appealed.<sup>407</sup> Despite the extensive revision of the law by the court in *Marvin*, all Michelle gained was a chance to prove her case.<sup>408</sup>

Michelle failed.<sup>409</sup> Even though they had lived together for five years, the court found that their initial agreement was that they would live together “as unmarried persons so long as they both enjoyed their mutual companionship and affection.”<sup>410</sup> This case was clearly a he-said, she-said battle, and the court believed his assertion they never had an agreement of the sort that Michelle had alleged.<sup>411</sup> Most striking was the finding that the “plaintiff [Michelle] actually benefitted economically and socially from the cohabitation of the parties,” including living expenses and substantial gifts.<sup>412</sup> Although the trial court felt that Michelle deserved something and fashioned a one hundred four thousand dollar rehabilitative award, that award was reversed on appeal.<sup>413</sup> The court of appeal ruled that the award was not technically part of the pleadings, but even so, an equitable remedy was not appropriate as Michelle was not wronged and had actually benefitted from the relationship.<sup>414</sup> Thus Michelle was the classic example of the adventuress who enjoyed the relationship of a wealthy man and then tried to gain economic benefit from that relationship. Again, unmarried cohabitation was in the spotlight. The major result for Michelle was an unsuccessful lawsuit, but for unmarried cohabitants with a marital-like relationship, the *Marvin* decision represented recognition that their sexual relationship was not an impediment to proving implied-in-fact agreements to share property.<sup>415</sup>

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405. *Id.*

406. *Id.* at 110.

407. *Id.* at 111.

408. *Id.* at 123.

409. *Marvin v. Marvin*, 176 Cal. Rptr. 555, 556 (Cal. Ct. App. 1981).

410. *Id.*

411. *Id.* at 558-59.

412. *Id.* at 557.

413. *Id.* at 559.

414. *Id.* at 558.

415. *Marvin v. Marvin*, 557 P.2d 106, 113 (Cal. 1976).

## PART II

A. *Unmarried Cohabitants' Rights after Marvin*1. *The California Experience*

The relevance of the unmarried cohabitants' relationship was ostensibly reduced to a bare minimum in *Marvin v. Marvin*.<sup>416</sup> The California Supreme Court established that a cohabitant's right to share property depends on either an express or implied contract.<sup>417</sup> The only caveat was that a contract between cohabitants will not be enforced if it is "explicitly founded on the consideration of meretricious sexual services."<sup>418</sup> One could therefore expect that inquiry into an unmarried couple's relationship would only be to determine if the contract was based on meretricious sexual services, a euphemism for prostitution. For instance, if the couple lived together only sporadically, a court could interpret it to be a mere sexual relationship and that would not even rise to the level of cohabitation.<sup>419</sup>

In examining whether meretricious sexual services were the basis for the contract and in determining whether an implied contract existed based on conduct of the parties, it was almost inevitable that the cohabitants' relationship would assume more relevance. The same question arose about the woman in the cohabitant relationship: was she an adventuress or did she have the role of virtuous wife? Attorneys soon realized that the most sympathetic *Marvin* claims were brought by women who had long-term relationships in which the man worked outside of the home acquiring property in his name and the woman stayed home and took care of their children.<sup>420</sup> Thus, a woman in that position deserved the protection of an implied contract.<sup>421</sup> One such case was *Alderson v. Alderson*.<sup>422</sup>

The *Alderson* relationship started as a typical traditional relationship that ordinarily would have led to marriage.<sup>423</sup> Steve Alderson

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416. *Id.* at 122.

417. *Id.*

418. *Id.* at 110.

419. *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 78 (Cal. Ct. App. 1993) (holding an agreement for financial support was unenforceable because the parties did not cohabit); *Taylor v. Fields*, 224 Cal. Rptr. 186, 188, 194 (Cal. Ct. App. 1986) (holding that the couple's forty-two-year intimate relationship was insufficient for *Marvin* agreement when parties did not live together).

420. *See, e.g., Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

421. *Id.*

422. *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Cal. Ct. App. 1986).

423. *Id.* at 611.

met Jonne Koenig in December, 1966, in Reno, Nevada.<sup>424</sup> Jonne lived at home with her parents and worked in a local bank.<sup>425</sup> They fell in love and spoke about marriage.<sup>426</sup> In September, 1967, Jonne followed Steve to Portland, Oregon where they planned to marry.<sup>427</sup> For some reason, they never formally married, but their cohabitation lasted for twelve years.<sup>428</sup> Both worked initially, Steve as a civil engineer, Jonne as a receptionist.<sup>429</sup> They rented a house in Portland.<sup>430</sup> They deposited their earnings in a joint bank account and filed joint federal income tax returns for 1967 as a married couple.<sup>431</sup>

The following year they moved to Eugene, Oregon because of Steve's job, and there they purchased their first home.<sup>432</sup> The purchase was a joint decision and their first endeavor in investing in real property.<sup>433</sup> Even though the title was in Steve's name, the down payment came from their joint savings account.<sup>434</sup> Jonne understood that that they owned the property together.<sup>435</sup> Jonne continued working and in December, 1969, gave birth to their first child.<sup>436</sup> Over the course of their relationship, they had three children.<sup>437</sup>

Between 1968 and 1979, they acquired fourteen properties, eleven in California where they eventually settled.<sup>438</sup> Most were purely for investment.<sup>439</sup> They jointly made the decisions to purchase the property and the down payments came from their joint savings accounts or loans from Jonne's parents.<sup>440</sup> Seven of the titles stated that Steve and Jonne were husband and wife or were married persons.<sup>441</sup> Other titles did not designate their marital status.<sup>442</sup> Jonne was involved with management of the properties.<sup>443</sup> She collected rents, paid bills, and kept the books for the rental properties.<sup>444</sup> She helped to repair

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424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Alderson*, 225 Cal. Rptr. at 611.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Alderson*, 225 Cal. Rptr. at 611.

435. *Id.* at 611-12.

436. *Id.* at 612.

437. *Id.*

438. *Id.*

439. *Id.*

440. *Alderson*, 225 Cal. Rptr. at 612.

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

and fix up the properties.<sup>445</sup> She viewed the properties as “our houses” that would be investments for the future of their children.<sup>446</sup>

During their entire twelve-year relationship, they held themselves out as husband and wife to everyone including family and friends.<sup>447</sup> Jonne used Steve’s surname as did their children.<sup>448</sup> They maintained joint bank accounts and filed joint federal income tax returns.<sup>449</sup> In December, 1979, they separated.<sup>450</sup> Jonne moved out.<sup>451</sup> She signed quitclaim deeds in Steve’s favor for all the houses but testified that she did so under duress.<sup>452</sup> In 1980, Jonne filed a complaint against Steve, including a cause of action to set aside the quitclaim deeds and equally divide the eleven California properties.<sup>453</sup> Jonne also sued Steve for assault and battery because he broke her arm after she first filed suit against him.<sup>454</sup> Steve was convicted of battery and the court considered that issue established.<sup>455</sup>

In 1982, the trial court rendered judgment for Jonne, concluding that the quitclaim deeds should be set aside and that Jonne was entitled to an undivided one-half of the properties.<sup>456</sup> The court ordered that the properties be equally divided.<sup>457</sup> Steve appealed on the basis that their agreement was illegal and thus unenforceable, but he lost.<sup>458</sup> The court of appeal found that substantial evidence supported the trial court’s findings: the parties had “an implied contract to share equally any and all the property acquired during the course of their relationship” and that the contract was legal and enforceable and did not rest on “consideration of meretricious sexual services.”<sup>459</sup>

The court in *Alderson* catalogued the evidence that supported the implied agreement, much of which would also have supported a common-law marriage: they held themselves out as husband and wife, Jonne and the children took Steve’s surname, and they pooled their financial resources and used them to purchase property.<sup>460</sup> The way they treated the property certainly added to their “sharing”

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445. *Id.*

446. *Alderson*, 225 Cal. Rptr. at 612.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Alderson*, 225 Cal. Rptr. at 612.

453. *Id.*

454. *Id.*

455. *Id.* at 612-13.

456. *Id.* at 613.

457. *Id.*

458. *Alderson*, 225 Cal. Rptr. at 615.

459. *Id.*

460. *Id.*

relationship: Jonne participated in the management of their property and almost all of the titles were taken jointly and seven were taken as husband and wife.<sup>461</sup>

On the issue of whether their relationship was meretricious, Steve and Jonne's relationship clearly would have been a common-law marriage if such a marriage were permitted in California.<sup>462</sup> Jonne's testimony was most damaging to Steve's claim of a meretricious relationship.<sup>463</sup> In cross-examination by Steve's attorney, it became crystal clear that Jonne viewed herself as Steve's wife: "I was his wife, I mean, whatever a wife does," and "we just were living together as we were married. We did anything that any other married couple did and we pooled together resources, we saved money, we didn't buy things so we had money to buy houses."<sup>464</sup> The cross-examination did not help Steve's cause, as the court of appeal found that "there is no evidence that the agreement between Jonne and Steve, or any part thereof, explicitly rests upon such a consideration."<sup>465</sup> The *Alderson* case demonstrates that a marital-like relationship in which additional facts show sharing of property will yield a successful *Marvin* claim.<sup>466</sup> A "virtual" wife will yield shared property rights.<sup>467</sup>

The *Alderson* case was almost identical to the *Cary* case. The only difference was the doctrine that applied.<sup>468</sup> To gain property rights, both Janet Cary and Jonne Alderson could have succeeded under *Marvin*. Instead of showing an actual family relationship as required under *Cary*, Janet could have<sup>469</sup> and Jonne actually did<sup>470</sup> demonstrate under *Marvin*,<sup>471</sup> an implied-in-fact contract that was not based on meretricious sexual services. Under both doctrines, the marital-like relationship was highly relevant, if not determinative of whether the couple shared property.<sup>472</sup> In both, having a relationship that resembled common-law marriage was a major component of success.<sup>473</sup>

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461. *Id.*

462. *See* *People v. Beevers*, 33 P. 844 (Cal. 1893).

463. *Alderson v. Alderson*, 225 Cal. Rptr. 610, 615-16 (Cal. Ct. App. 1986).

464. *Id.* at 616 n.1.

465. *Id.* at 617.

466. *Id.* at 620.

467. *Id.*

468. *Compare* *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Cal. Ct. App. 1986) *with* *Cary v. Cary*, 109 Cal. Rptr. 862 (Cal. Ct. App. 1973).

469. *Cary*, 109 Cal. Rptr. at 862-67.

470. *Alderson*, 225 Cal. Rptr. at 610.

471. *Marvin v. Marvin*, 557 P.2d 106, 106 (Cal. 1976).

472. *Alderson*, 225 Cal. Rptr. at 610-20; *Cary*, 109 Cal. Rptr. at 862-64.

473. *Alderson*, 225 Cal. Rptr. at 610-20; *Cary*, 109 Cal. Rptr. at 862-64.

Even in a case reflecting an updated version of marriage, the marital-like relationship of the cohabitants was relevant.<sup>474</sup> In *Maglica v. Maglica*, one issue concerned whether the Maglicas had an implied contract to share property accumulated during their relationship.<sup>475</sup> On the one hand, the Maglicas' relationship resembled a traditional marriage.<sup>476</sup> Claire and Anthony Maglica met soon after Anthony divorced his previous wife.<sup>477</sup> They began living together and held themselves out as husband and wife, and Claire began using Anthony's last name even though they never married.<sup>478</sup> What differed from a traditional marriage was that Claire worked side by side in Anthony's business, and was paid an equal salary, and the business prospered in part due to Claire's "great ideas and hard work."<sup>479</sup> Their relationship began in 1971 and ended in 1992 when Claire discovered that Anthony was trying to transfer stock in his company to his children but not to her.<sup>480</sup> In June 1993 she sued and the court awarded her eighty-four million dollars for breach of fiduciary duty and quantum meruit.<sup>481</sup> The appeal was based on faulty jury instructions regarding quantum meruit and implied-in-fact contracts.<sup>482</sup>

On the issue of implied-in-fact contracts, the court of appeal objected that the jury instructions implied the facts of their relationship had to be ignored: their living together, their holding themselves as husband and wife, and Claire providing services as a constant companion and confidant.<sup>483</sup> That omission was misleading according to the Court: "[t]rue, none of these facts *by themselves and alone* necessarily compels the conclusion that there was an implied contract. But that does not mean that these facts cannot, in conjunction with all the facts and circumstances of the case, establish an implied contract. In point of fact, they can."<sup>484</sup>

The court pointed to *Alderson* to support its conclusion that a marital-like relationship is indeed among the facts that would allow

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474. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Cal. Ct. App. 1998).

475. *Id.* at 110.

476. *Id.* at 103.

477. *Id.*

478. *Id.*

479. *Id.*

480. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Cal. Ct. App. 1998).

481. *Id.*

482. *Id.* at 105. The main issue on appeal was the definition of *benefit* under the doctrine of quantum meruit. *Id.* The Court of Appeal explained that "[i]t is one thing to require that the defendant be benefited by services, it is quite another to *measure* the reasonable value of those *services* by the value by which the defendant was 'benefited' as a *result* of them." *Id.* Thus, the jury instruction was in error, and the case was remanded for a new trial. *Id.* at 110. See Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 52-54 (1978).

483. *Maglica*, 78 Cal. Rptr. 2d at 108.

484. *Id.*

a court to find an implied-in-fact contract to share property.<sup>485</sup> Thus the court ordered a new trial with jury instructions which directed that those facts, if "taken together and in conjunction with other facts bearing more directly on the alleged arrangement to share property, can show an implied agreement to share property."<sup>486</sup> Not surprisingly, on remand, the case settled in favor of Claire.<sup>487</sup> Because of Claire's activities in Anthony's business and the marital-like relationship, she would have had an excellent chance of proving an implied-in-fact agreement to share in Anthony's business.<sup>488</sup>

A couple's marital-like relationship is thus a strong factor in showing that a couple agreed to share property. The same factors that were relevant to finding a common-law marriage in the nineteenth century are still relevant today when a court inquires whether there is an implied-in-fact agreement to share property.<sup>489</sup> In the 1890 *White* case, finding a common-law marriage was dependent on whether a marital-like relationship existed.<sup>490</sup> In *White*, the probative facts were the length of the relationship, holding themselves out as husband and wife, and the woman taking the man's name.<sup>491</sup> In conjunction with those facts was the additional fact of "sharing" a life together by having four children together.<sup>492</sup> In nineteenth-century California, showing a common-law marriage without a marital-like relationship was difficult.<sup>493</sup> Similarly in today's California, showing an implied-in-fact agreement to share property without a traditional marital-like relationship is difficult.<sup>494</sup>

## 2. The Washington State Experience

Although Washington formally abolished common-law marriage in 1892,<sup>495</sup> the Washington Supreme Court has informally revived

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485. *Id.* at 109 (citing *Alderson v. Alderson*, Cal. Rptr. 610 (Cal. Ct. App. 1986)).

486. *Id.* at 109-10.

487. Richard Marosi, *Maglicas Reach a Palimony Settlement*, L.A. TIMES, Mar. 14, 2000, at B1.

488. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 109-10 (Cal. Ct. App. 1998).

489. Compare *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Cal. Ct. App. 1981) with *White v. White*, 23 P. 276 (Cal. 1890).

490. *White*, 23 P. at 276-83.

491. *Id.* at 280-81.

492. *Id.* at 280.

493. See *supra* Part I.

494. See *supra* notes 418-21 and accompanying text.

495. WASH. REV. CODE ANN. § 26.04.070 (West 2006); *In re McLaughlin's Estate*, 30 P. 651, 658 (Wash. 1892) (holding "[i]t is clear that . . . the legislature was of the opinion that all attempts to establish the [marriage] relationship, other than in accordance with the ways provided by the statute would be void, and would be so held"); *In re Smith's Estate*, 4 Wash. 702, 703 (1892) (reasoning "[w]e have lately decided, however . . . that there could be no common-law marriage in this state. . . ."); see Burton Wheelon, Note,

common-law marriage in the guise of “meretricious relationships” that are “stable cohabiting relationships.”<sup>496</sup> A meretricious relationship in Washington has a completely opposite meaning from the California definition of *meretricious*.<sup>497</sup> Instead of relating to “prostitution,”<sup>498</sup> the Washington Supreme Court characterized a meretricious relationship as “a stable marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.”<sup>499</sup> The Court insisted that “marital-like” is “a mere analogy because defining meretricious relations as related to marriage would create a de facto common-law marriage, *which this court has refused to do*.”<sup>500</sup>

Despite the Court’s protestation, if a court finds that a couple had a meretricious relationship, the court will treat the property accumulated during the relationship as if the couple were married.<sup>501</sup> Also the factors the court specified for determining whether a couple’s relationship is meretricious seem suspiciously like a common-law marriage: “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”<sup>502</sup> In the two cases that established these factors, *Marriage of Lindsey* and *Connell v. Francisco*, a meretricious relationship was conceded and the only issue was how to divide the property accumulated during the relationship.<sup>503</sup> The court

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*Common-Law Marriage*, 1 WASH. L. REV. 277 (1926).

496. *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995). In a recent case, the court of appeals opted for a different phrase to describe the relationship that would determine cohabitants’ rights: “committed intimate relationship.” *Olver v. Fowler*, 126 P.3d 69, 72 (Wash. Ct. App. 2006). The court explained that “[w]e share earlier courts’ distaste for the antiquated term with its negative connotations. . . .” *Id.* at 72 n.9; *Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984).

497. Compare *Lindsey*, 678 P.2d at 331 and *Connell*, 898 P.2d at 834 with *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976).

498. *Marvin*, 557 P.2d at 116.

499. *Connell*, 898 P.2d at 834; *Lindsey*, 678 P.2d at 331.

500. *Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000) (emphasis added). See *Connell*, 898 P. 2d at 835 (explaining that “a meretricious relationship is not the same as marriage”). Rights that flow from a meretricious relationship differ from those arising from a marriage. For instance, property rights are not as extensive. *Connell*, 898 P. 2d at 835-36. Under Washington law, a court is instructed to distribute the community and separate property of a married couple as “shall appear just and equitable.” WASH. REV. CODE § 26.09.080 (Wash. 2005). If, however, a meretricious relationship is established the court will divide only the “property that would have been characterized as community property had the parties been married.” *Connell*, 127 898 P.2d at 836. Other benefits of marriage are not extended to meretricious relationships: unemployment compensation, attorney fees in a dissolution action, and insurance benefits. *Id.* at 835.

501. *Connell*, 127 898 P.2d at 836.

502. *Pennington*, 14 P.3d at 770.

503. *Connell*, 898 P.2d at 834 (explaining “The Superior Court found *Connell* and *Francisco* were parties to a meretricious relationship. This finding is not contested”);



in *Lindsey* overturned prior law as “unpredictable and at times onerous;”<sup>504</sup> the court in *Connell* established that only property acquired during the relationship should be divided “so that one party is not unjustly enriched at the end of such a relationship.”<sup>505</sup>

The more recent case of *Marriage of Pennington* discussed whether two couples’ relationships would qualify as a meretricious relationship.<sup>506</sup> In both cases, the Washington Supreme Court reversed a trial court finding of a meretricious relationship.<sup>507</sup> The Court was unwilling to give an expansive reading of the determinative factors.<sup>508</sup> The first couple, Clark Pennington and Evelyn Van Pevenage, had a twelve-year relationship although they separated and reconciled several times before the relationship ended.<sup>509</sup> Van Pevenage claimed that property acquired during their relationship should be treated as community property.<sup>510</sup> The trial court awarded her over two hundred thousand dollars.<sup>511</sup> Pennington appealed.<sup>512</sup> According to the supreme court, the factors of a meretricious relationship were not supported by the evidence.<sup>513</sup> The factor of duration was met, but Van Pevenage failed to show continuous cohabitation.<sup>514</sup> According to the court, because Van Pevenage intended a long-term relationship with the expectation of marriage but Pennington refused to marry her, their relationship failed to demonstrate the requisite intent to establish a “stable, longterm,[sic] cohabiting relationship.”<sup>515</sup> Her absences from the home and her relationship with another man were also detrimental to meeting the factor of “mutual intent to form a meretricious relationship.”<sup>516</sup> The court found the relationship purpose requirements were met because the relationship included

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*Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (explaining “[t]he existence of a meretricious relationship was not contested by either appellant or respondent and was not an issue”).

504. *Lindsey*, 678 P.2d at 331. The court explained the prior law and its shortcomings and concluded that this case presented an appropriate circumstance to overrule the prior law. *Id.* at 330-31. See Gavin M. Parr, *What is a “Meretricious Relationship”? An Analysis of Cohabitant Property Rights under Connell v. Francisco*, 74 WASH. L. REV. 1243, 1245-48 (1999); John E. Wallace, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem*, 29 SEATTLE U.L. REV. 243, 246-55 (2005).

505. *Connell*, 898 P.2d at 836.

506. *In re Marriage of Pennington*, 14 P.3d 764 (Wash. 2000).

507. *Id.* at 773.

508. *Id.*

509. *Id.* at 766-67.

510. *Id.* at 767-68.

511. *Id.* at 768.

512. *In re Marriage of Pennington*, 14 P.3d 764, 768 (Wash. 2000).

513. *Id.* at 771.

514. *Id.*

515. *Id.*

516. *Id.*

companionship, friendship, love, sex, mutual support, and caring.<sup>517</sup> The court found that the relationship failed to meet the pooling of resources requirement, even though the couple shared some living expenses, because pooling of resources requires that “the parties jointly invested their time, effort, or financial resources in any specific asset to justify the equitable division of the parties’ property acquired during the course of the relationship.”<sup>518</sup> This couple’s relationship was not “marital-like” in that it did not reflect the stability of a marriage, where the couple shares a name, shares assets, and holds themselves out as husband and wife. Instead, the relationship appeared simply to be a long-term, tempestuous sexual relationship. Although many marriages could also be long-term and tempestuous with separations, reconciliations, and infidelities, the meretricious relationship according to the court in *Pennington* seemed to envision a very traditional model of marriage.<sup>519</sup>

The second couple, James Nash and Diana Chesterfield, separated after a relationship that spanned from 1986 to 1995, but they only lived together in Chesterfield’s home from 1989 to 1993.<sup>520</sup> The trial court equitably distributed the property acquired during their relationship which resulted in a judgment of over seventy-five thousand dollars in Chesterfield’s favor.<sup>521</sup> The court of appeals affirmed, concluding that their relationship was “functioning as one would expect a married couple to function with regard to work.”<sup>522</sup> The court of appeals did not find it dispositive that Nash and Chesterfield did not hold title together, hold themselves out as married, or commingle their resources other than for living expenses.<sup>523</sup> The Washington Supreme Court thought otherwise.<sup>524</sup>

Viewed as a “modern” marriage, Nash and Chesterfield’s relationship could be considered typical. They met while Chesterfield was still married but separated from her husband.<sup>525</sup> Nash dated other women until he moved into Chesterfield’s home.<sup>526</sup> They had an exclusive relationship for approximately four and one-half years.<sup>527</sup> During that time they kept their own names but had a joint checking

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517. *Id.* at 772.

518. *In re Marriage of Pennington*, 14 P.3d 764, 771-72 (Wash. 2000).

519. *Id.* at 764-72.

520. *Id.* at 768.

521. *Chesterfield v. Nash*, 978 P.2d 551, 553 (Wash. Ct. App. 1999).

522. *Id.* at 554.

523. *Id.*

524. *In re Marriage of Pennington*, 14 P.3d 764, 773 (Wash. 1999).

525. *Id.* at 768.

526. *Id.*

527. *Id.*

account for living expenses to which both contributed.<sup>528</sup> They also had separate checking accounts and separate investment accounts.<sup>529</sup> Both were working, Nash as a dentist and Chesterfield as a salesperson at Nordstrom's.<sup>530</sup> They assisted each other in their work: Nash helped Chesterfield with her work-related travel logs; Chesterfield assisted Nash in his dental practice.<sup>531</sup> They shared mortgage payments even though the home was in Chesterfield's name.<sup>532</sup> After they separated, they reconciled briefly and discussed marriage but permanently ended their relationship.<sup>533</sup> Many married couples today would arrange their affairs exactly in this way, but the Washington Supreme Court applied stricter requirements for establishing a meretricious relationship.<sup>534</sup>

According to the court, the duration of the relationship was long enough to support a meretricious relationship.<sup>535</sup> It was not continuous, however, especially since Chesterfield was still married when she began dating Nash and Nash and Chesterfield separated and then reconciled at the end of their relationship.<sup>536</sup> The evidence was also insufficient to satisfy the mutual intent and pooling of resources factors.<sup>537</sup> Again Chesterfield's marriage to another man was viewed as detrimental to forming mutual intent.<sup>538</sup> Their "sharing" behavior was insufficient to establish that they jointly pooled their "time, effort, or financial resources."<sup>539</sup> The Court found it significant that they purchased no property together and had separate bank accounts and careers.<sup>540</sup> Overall Chesterfield's case was much stronger than Van Pevengage's in that Chesterfield's case involved more sharing behavior, but still the court was unwilling to find a meretricious relationship.<sup>541</sup> Absent the indicia of a common-law marriage such as holding themselves out as husband and wife and sharing extensive time and totally joint finances, a meretricious relationship is very difficult to prove in Washington.<sup>542</sup> Both Van Pevengage and Chesterfield could

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528. *Id.*

529. *Pennington*, 14 P.3d at 768.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.* at 771-73.

535. *Pennington*, 14 P.3d at 772.

536. *Id.*

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.* at 772-73.

541. *Pennington*, 14 P.3d at 769-73.

542. *Id.*

be viewed as adventuresses who were trying to take advantage of the men with whom they cohabited and not as virtuous wives.

Several cases following *Pennington*, all of them unpublished and almost all of them finding that a meretricious relationship existed, illustrate that the closer a relationship is to a traditional marriage the greater possibility of success.<sup>543</sup> The court found in only one of the appellate cases following *Pennington*, that a meretricious relationship did not exist, *Hobbs v. Bates*.<sup>544</sup> That case presented the unusual scenario in which the male cohabitant, Mark Hobbs, was seeking division of the female cohabitant's substantial Microsoft retirement plan and stock options.<sup>545</sup> Even though the couple had two children together during their seven-year relationship, the court of appeals affirmed the trial court conclusion that no meretricious relationship existed.<sup>546</sup> The primary dispute revolved around three of the *Pennington* factors: continuous cohabitation, purpose of their relationship, and financial contributions to the relationship/joint ventures.<sup>547</sup> Although their tumultuous relationship spanned seven years, continuous cohabitation lasted only two years.<sup>548</sup> The co-parenting of their children supported a finding of purpose, but the maintenance of separate finances throughout their entire relationship outweighed the co-parenting.<sup>549</sup> Mark Hobbs and Linda Bates therefore "did not function as an economic unit."<sup>550</sup> The court of appeals commented that pooling of economic resources and functioning as an economic unit is "an important factor" since the claim of a meretricious relationship "operates primarily as a property claim."<sup>551</sup> Despite their co-parenting, the trial court found no meretricious relationship existed and therefore no equitable division of property was necessary.<sup>552</sup> In this case, Mark Hobbs was cast in the role of adventurer, taking advantage of the woman with whom he cohabited.

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543. *Marriage of Bostain*, 2005 WL 1177586 (Wash. App. Div. 2 2005); *Hobbs v. Bates*, 2004 WL 1465949 (Wash. App. Div. 1 2004); *Gower v. Shinstrom*, 2003 WL 352880 (Wash. App. Div. 1 2003); *Vo v. Tran*, 2003 WL 22847074 (Wash. App. Div. 2 2003); *Rota v. Vandver*, 2001 WL 1521996 (Wash. App. Div. 2 2001).

544. *Hobbs v. Bates*, 2004 WL 1465949 (Wash. App. Div. 1).

545. *Id.* at 1.

546. *Id.* at 1-2. The court of appeals also rejected Hobbs's argument that the court should adopt the 2002 American Law Institute's Principles of Law of Family Dissolution, § 6.03 (2002). *Id.* at 8-9. Under those Principles, persons may be considered domestic partners if they maintain a common household with a common child for a continuous cohabitation period, suggesting that two years of cohabitation would be sufficient. *Id.*

547. *Id.* at 10.

548. *Id.* at 10-11.

549. *Id.* at 11-12.

550. *Hobbs v. Bates*, 2004 WL 1465949, at 10-12 (Wash. App. Div. 1 2004). An added factor was that that Hobbs wanted to marry, but Bates did not. *Id.* at 11.

551. *Id.* at 11.

552. *Id.* at 7.

In contrast to *Hobbs*, in *Vo v. Tran*, the female cohabitant, Nghia Tran, challenged the trial court's finding that her nineteen-year cohabitation with Viet Vo was a meretricious relationship in attempting to resist his property claims.<sup>553</sup> Their nineteen-year cohabitation preceded a seven-year marriage.<sup>554</sup> Tran's arguments were that the relationship was solely for economic convenience and to help each other adjust to living in the United States.<sup>555</sup> Those arguments were futile.<sup>556</sup> The length of their relationship and their pooling of resources, both in buying a house together and maintaining joint accounts for living and household expenses, supported the trial court's finding of a meretricious relationship.<sup>557</sup> In this case, the relationship resembled a very long-term marriage with pooling of economic resources and thus was a meretricious one.<sup>558</sup> The significance of these cases is that the gender roles were reversed: in *Hobbs*, the male cohabitant was seeking benefits of the relationship, and in *Vo*, the woman was resisting the male cohabitant's claims to the benefits of the relationship.<sup>559</sup> Thus men can be cast in the role of "adventurer."

In other cases involving disputes over property accumulated during the relationship, courts have found meretricious relationships. These cases were more typical, as it was the woman who was seeking the benefits of the relationship. In *Rota v. Vandver* and *Gower v. Shinstrom*, the relationships were long-term, twelve years and twenty-two years respectively.<sup>560</sup> Although neither of the couples ever married and there was some break in their cohabitation, pooling of resources and services in both cases were significant enough to support a finding of a meretricious relationship.<sup>561</sup>

### 3. Reality of Committed Intimate Relationship

In the wake of the increase in unmarried cohabitation, courts have struggled to delineate which relationships are deserving of some

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553. *Id.*

554. *Id.* at 2.

555. *Id.*

556. *Id.*

557. *Id.* at 2-3.

558. *Id.* at 2-3. Similarly, in *Marriage of Bostain*, 2005 WL 1177586 (Wash. App. Div. 2 2005), the court of appeals affirmed a finding of a meretricious relationship in which the couple cohabited for approximately seven years before they married. *Id.* at 5-6. Their marriage lasted for three years. *Id.* Although the relationship was not as long as the relationship in *Vo*, other factors were strong such as pooling resources and the fact that they married. *Id.*

559. *Hobbs v. Bates*, 2004 WL 1465949, at 10-12 (Wash. App. Div. 1 2004); *Vo v. Tran*, 2003 WL 22847074, at 2 (Wash. App. Div. 1).

560. *Gower v. Shinstrom*, 2003 WL 352880 (Wash. App. Div. 1 2001); *Rota v. Vandver*, 2001 WL 1521996 (Wash. App. Div. 2 2001).

561. *Gower*, 2003 WL 352880 at 1-2; *Rota*, 2001 WL 1521996 at 1-2.

of the rights gained through ceremonial marriage.<sup>562</sup> The license and solemnization requirements of marriage automatically and instantly provide those rights. To distinguish ceremonial marriage from cohabitant relationships, the courts have required that cohabitants meet a much higher standard for attaining shared property rights.<sup>563</sup> In other words, unmarried cohabitants have to be more “married” than those who obtain a license and have a ceremony.<sup>564</sup>

Stephanie Coontz suggested that in Europe and North America, four stages are necessary before cohabitation and marriage reach almost equal status.<sup>565</sup> The first stage is when most people marry without living together.<sup>566</sup> The second stage marks a time when people from many walks of life live together but eventually marry especially if they become parents.<sup>567</sup> The third stage emerges when cohabitation becomes accepted as an alternative to marriage.<sup>568</sup> In the fourth and final stage, cohabitation and marriage become virtually indistinguishable legally and socially.<sup>569</sup> Legally, that final stage has not been reached in the courts of California and Washington.

Legislative efforts to formalize non-traditional relationships, like domestic partnership legislation, foreshadow the beginning of equating cohabitation with marriage.<sup>570</sup> For instance, California’s most recent domestic partnership legislation, effective January 1, 2005, gives community property rights to “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”<sup>571</sup> The rights bestowed on same-sex domestic partners,

562. In this struggle, other models have been suggested to categorize these relationships. See Am. Law Institute, § 6.03 (2002) (setting forth guidelines for determining domestic partners); David L. Chambers, *For the Best of Friends and For Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1352-54 (2001) (recommending a “designated friends” status); Ellen Kandoian, *Cohabitation, Common-law marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1870-71 (1987) (recommending a “de facto partnership” status).

563. See *supra* Part II.A.1-2.

564. See *supra* Part II.A.1-2. Professor Herma Hill Kay has suggested that “[p]erhaps a more realistic analogy for marriage in the twenty-first century is the joint venture. . . . A joint venture presupposes persons capable of contributing assets to the enterprise and sharing in the risks, thus, fitting the model of spouses who are self-sufficient at the outset of the undertaking.” Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2089 (2000).

565. COONTZ, *supra* note 39, at 2701-71.

566. *Id.* at 272.

567. *Id.*

568. *Id.*

569. *Id.*; see also Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1439-42 (2001) (arguing that cohabitation should not be treated similarly).

570. CAL. FAM. CODE § 297(a) (2006).

571. *Id.*

as well as opposite-sex partners where at least one is over the age of sixty-two, are identical to married people in California.<sup>572</sup>

For those couples who are able to marry but choose not to do so, the courts require a relationship that is "marital-like" to succeed in gaining shared property rights. What does "marital-like" mean? One Washington court has recently chosen the phrase "committed intimate relationship" to describe the type of relationship necessary to establish property rights of unmarried cohabitants.<sup>573</sup>

The concept of an "intimate and committed relationship" in the case of domestic partnership or a "committed intimate relationship" in the case of unmarried cohabitants will surely be tested in the days to come. Inevitably, the criteria for common-law marriage will emerge as one of the major determinants of whether rights will be attained. Rather than looking for an implied contract as in California,<sup>574</sup> states should use a streamlined version of the Washington criteria<sup>575</sup> for determining whether that committed intimate relationship exists:

(1) Intimate Relationship: The length and type of relationship

(2) Committed Relationship: The intertwining of financial affairs.

An examination of two cases, *Maglica* from California and *Pennington* from Washington, demonstrates how these criteria would be applied.

In *Maglica*, the length and type of relationship was like a common-law marriage.<sup>576</sup> The couple in *Maglica* lived together for twenty-one years, they held themselves out as husband and wife, and Claire used Anthony Maglica's last name.<sup>577</sup> Therefore, the length and type of relationship would qualify the relationship as "intimate." That criterion would be essentially identical to establishing common-law marriage. The requirement of commitment through intertwining financial affairs is to replace the license and ceremony of the marriage statutes and show that there is a right to property accumulated during their relationship. In *Maglica*, Claire could show the commitment to the relationship with evidence of her working in the business side-by-side with Anthony.<sup>578</sup> The fact that they did not take property together would not be detrimental to a claim by a person like Claire.

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572. *Id.* The rights extend only to California law, because federal law under the Defense of Marriage Act extend federal rights only to marriages between a man and a woman. Defense of Marriage Act, 1 U.S.C. § 7 (2006).

573. *Olver v. Fowler*, 126 P.3d 69, 72 (Wash. Ct. App. 2006).

574. Some have argued that "contract is a poor model for intimate relations." Ira Mark Ellman, "Contract Thinking" was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1367 (2001). "Contract law offers little promise of guidance" in the definition of private relationships. Kandoian, *supra* note 575, at 1868.

575. *In re Marriage of Pennington*, 14 P.3d 764 (Wash. 2000).

576. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Cal. Ct. App. 1998).

577. *Id.*

578. *Id.*

The very reason she was suing for property rights was that the property was in Anthony's name.<sup>579</sup> Thus, if both requirements can be met, a claim for shared property rights would succeed.

In *Pennington*, where the court found the relationship of Nash and Chesterfield insufficient, the intimate requirement would have been harder to meet. Their relationship spanned nine years, but they only lived together and dated exclusively for four years.<sup>580</sup> Chesterfield provided no evidence that she took Nash's name, and they did not hold themselves out as married.<sup>581</sup> As far as the commitment requirement is concerned, they had a joint checking account for living expenses and shared mortgage payments on Chesterfield's home but otherwise kept their investments separate.<sup>582</sup> They also assisted each other in their work.<sup>583</sup> However, the combination of a short relationship unlike common-law marriage and only some intertwining of financial affairs would be insufficient to meet the "committed intimate relationship" standard.

The revival of common-law marriage will likely take the form of determining which "relationships" are enough like traditional marriage to warrant extension of shared property rights. Even if all states declare that common-law marriage no longer exists, the rise of "committed intimate relationships" will take its place.

## CONCLUSION

Common-law marriage in America is going the way of the buggy whip, with the number of states recognizing common-law marriage rapidly diminishing.<sup>584</sup> Yet the problem of sorting out the property rights of unmarried cohabitants still remains for the courts. The experiences of California and Washington courts provide guidance to the judiciary in these disputes over property.<sup>585</sup> Those couples who have a "committed intimate relationship" of long duration in which they have intertwined financial affairs clearly have the best chance to claim property rights. Whatever the doctrine used, whether implied-in-fact contract in California or meretricious relationship in Washington, the heart of the problem is whether the relationship in question is enough like marriage to provide rights similar to those of married people.

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579. *Id.*

580. *Id.* at 768.

581. *Id.* at 764-773; *Chesterfield v. Nash*, 978 P.2d 551, 554 (Wash. Ct. App.).

582. *In re Marriage of Pennington*, 14 P.3d 764, 768 (Wash. 2000).

583. *Id.*

584. *See supra* notes 51-52.

585. *See supra* Part II.A.1.-2.



The courts seem to use a very traditional model for marriage for determining whether a cohabitant relationship is enough like marriage to provide shared property rights. That model, a long-term relationship with intertwined financial affairs, differs significantly from many marriages today. Marriages today are very often short-term with separate finances.

At the heart of the rationale for abolishing common-law marriage is the notion that informal relationships will not be treated as marriage. To receive the benefits of marriage, couples must marry and not just cohabit. If they choose to cohabit without being married, receiving the main benefit of marriage, rights to shared property, is much more difficult. The higher burden of proving a marital-like relationship is aimed at preventing the fraud of adventuresses (or adventurers) who try to convert a mere informal relationship into a formal one. These strict standards will unfortunately fail to provide some honest and virtuous people with property rights based on their relationship.