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D. Judith Keith

Ronald L. Nelson

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COHABITATION: NEW VIEWS ON A NEW LIFESTYLE
D. JUDITH KEITH AND RONALD L. NELSON

I. INTRODUCTION

Nonmarital cohabitation is becoming a noticeably common lifestyle in America. Attractive to young adults as well as to numerous middle-aged and older people, nonmarital cohabitation increased in popularity by 700% from 1960 to 1970. Presently, it is believed to be the living arrangement of six to eight million Americans.

The nation’s courts as well are beginning to recognize unwedded cohabitation as a theoretically defensible lifestyle. A New York court recently stated that “[r]esidence together of an unmarried male and female without the benefit of a sermonized marriage is not per se evil nor one of immorality.” Similarly, a recent Minnesota opinion discussing unmarried, cohabiting adults asserted that it “does not believe it is necessary to either condemn or condone any relationship.”

Despite these recent signs of recognition, the general judicial response to unwedded cohabitations has been to label them “meretricious” or “illicit” relationships and to deal with them solely in the more familiar terms of traditional marriage. Cohabita-

1. Numerous young people favor cohabitation over marriage or any other type of relationship. See Macklin, Heterosexual Cohabitation Among Unmarried College Students, 21 Fam. Coordinator 463 (1972). Middle-aged and elderly people have avoided marriage so that pensions and social security benefits will not be reduced or terminated. Boston Evening Globe, Oct. 8, 1975, at 14, col. 7.


3. Boston Evening Globe, May 26, 1976, at 2, col. 1. It should be noted at the outset that figures regarding the number of cohabiting couples in this country can be misleading. The figures do not distinguish between those couples purposely choosing not to marry (conscientious objectors to marriage) and those who, because of a defect in formalities are in fact cohabitating but think they are legitimately married. While the number of “conscientious objectors” is no doubt growing, it is important to realize that total figures include many who are not “conscientious objectors” but believe that they are married and have the expectations of married couples.

4. S. v. J., 367 N.Y.S.2d 405, 410 (Sup. Ct. 1975). But the court also said that cohabitation is not a practice it commended. The decision in this post-divorce custody proceeding does, however, evidence a liberal judicial attitude toward cohabitation. Contrary to the father’s claims, the court found the mother fit to retain custody of her child despite her live-in arrangement with a boyfriend.


7. Glendon, Marriage and the State: The Withering Away of Marriage, 62 Va. L. Rev. 663, 692 (1976). Cohabitation cases have been dealt with as marriage cases and “disguised as cases involving presumptively legal marriages, estoppels, and implied agreements to pay for serv-
tion frequently has been characterized as "informal marriage" and often has been governed by the doctrines and laws of marriage, divorce, property, prostitution, and commercial contract. Although such laws were not formulated to apply to this emerging lifestyle, they have been called upon to resolve the legal problems which arise in cohabitation arrangements. Whether or not these doctrines suffice, particularly in the distribution of property upon dissolution of cohabitation relationships, is the subject of this note.

Initially, this note will discuss the incidence and legal consequences of cohabitation in Florida. Through the Florida cases, the common law principles developed in dealing with cohabitation relationships will be examined. Then a more detailed study of the doctrines of constructive and resulting trusts will be made through scrutiny of cases from various jurisdictions. Next, the note will analyze the important developments in decisional law brought about by two recent decisions, Marvin v. Marvin and Carlson v. Olson. The note will conclude with suggested changes in Florida law.

II. THE LEGAL STATUS OF COHABITATION IN FLORIDA

The number of Florida residents living together unmarried has not been revealed by any recent study. It is known, however, that 6.7% of the white births and 51.6% of the black births in Florida in 1974 were illegitimate. A recent Florida publication has stated that "at least a good portion" of these children were born to unmarried cohabiting parents. Whether the study's estimate distinguished between those parents purposely choosing not to marry and those who incorrectly thought themselves to be married is not known. The best assessment of the situation may be simply to recognize that Florida, as most states, is experiencing an increase in the number of young people deciding to live together unmarried rather than marry. Additionally, Florida, with its large elderly population, probably has a number of residents consciously choosing not to

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9. The cases are collected in Weyrauch, supra note 7, at 297.
12. 256 N.W.2d 249 (Minn. 1977).
13. Id.
14. Id. at 3.
marry in order to maximize government benefits.\(^{15}\)

Traditionally, Florida courts have been hesitant to devise a body of law for the equitable distribution of property upon termination of nonmarital relationships. Minimal and reluctant recognition has been accorded to the increased incidence and acceptance of nonmarital cohabitation in modern society.\(^{16}\) Caught between Scylla and Charybdis, Florida courts on the one hand have recognized their duty to provide equitable disposition of disputes. On the other hand, the courts have retained outmoded notions of morality and have refused to condone a practice considered morally offensive to much of society.\(^{17}\) The tension between these opposing societal needs was accurately reflected in 1976 in *Gammon v. Cobb*: “In society—like it or not (and the writer does not like it)—the fabric of our society related to the institution of marriage has been sorely rent and promiscuity has been the result.”\(^{18}\)

With few exceptions, unmarried couples in Florida have been denied access to rights and remedies which otherwise would have been available had the parties been single and living apart or married. Unsatisfactory and inequitable distributions of property have resulted from the courts’ reluctance to accord legal recognition to these relationships.\(^{19}\)

Couples agreeing to live together without the formalities of mar-

15. See note 1 supra.
17. The moral outrage of some judges was succinctly expressed by Justice Thornal of the Florida Supreme Court:

We are here confronted with a situation in which good morals would offer no brief in behalf of either party. In fact, if it were possible we would be inclined to dismiss them both with the Shakespearean denunciation “A plague o’[n] both your houses!” However, we are compelled by precedent to reverse the decree of the Chancellor. We do so reluctantly because the appellant Joe is lucky that he isn’t in jail for the crime of adultery and in our view the manner in which he concluded the affair is reprehensible. By the same token the appellee Julia Mae has little in the way of good morals to commend her to the conscience of equity.

Smith v. Smith, 108 So. 2d 761, 763 (Fla. 1959) (brackets in original).

To be fair, it should be added that moral considerations are not the only justification for the prevailing attitude which disapproves unwed cohabitation. The state has legitimate social and psychological reasons for wanting children to be born in wedlock and has health reasons for wanting sex to occur only in marriage. By denying cohabitants access to remedies available to spouses, the state encourages marriage as the exclusive mode of family formation.

18. 335 So. 2d 261, 265 (Fla. 1976) (emphasis in original).
19. Usually the woman is shortchanged when an unmarried couple separates and seeks judicial resolution of property disputes. In Maliska v. Dion, upon the man’s death, even where legal title to property was held in both names, the Florida Supreme Court awarded the woman only a half interest in the property. The decedent’s half interest was awarded to his ex-spouse. 62 So. 2d 4 (Fla. 1952). When legal title has been in the man’s name, the woman may not receive any interest in the property whatsoever. Duey v. Duey, 343 So. 2d 896 (Fla. 3d Dist. Ct. App. 1977).
riage rarely enter into express agreements that specify their economic expectations in detail. Yet over the period of their nonmarital union, such couples often accumulate personal and real property of substantial value. Upon termination of their relationships, the distribution of such property often becomes the subject of a legal dispute. Although reported cases concerning such disputes in Florida are scarce, those available indicate that such property distributions are frequently unsatisfactory and unequal. These unfair property distributions are usually the product of the Florida courts' following common law rules in the treatment of nonmarital cohabitation dissolutions.

While such standard doctrines as quantum meruit, express contract, or implied contract might be used to effect more equitable distributions, several obstacles have precluded application of these doctrines to nonmarital unions. First, cohabitation between the parties to an express or implied contract renders the agreement illegal to the extent that it is based on meretricious sexual services as consideration. It is difficult to establish that illicit sexual services were not the consideration for a nonmarital relationship because "where a sexual relationship is shown to have been meretricious in its inception it is presumed to continue." This presumption is rebuttable, however. Furthermore, Florida courts have recognized that sexual "intercourse between parties to a bargain previously or subsequently formed does not invalidate it."

The second obstacle is that Florida courts have used doctrines more readily applicable to arm's length business transactions than to interpersonal noncommercial ventures to determine the property rights of cohabiting couples. These doctrines include partnership, joint venture, constructive trust, and resulting trust.

Partnership is defined as "an association of two or more persons

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20. Couples probably enter into such a relationship either "in ignorance of the legal consequences of either marriage or nonmarriage . . . , under the assumption that some legal protections are available, or . . . with absolutely no thought given to the legal consequences of their relationship." Bruch, supra note 6, at 135.


22. In such distributions, the woman often has received no property whatsoever, especially when the man held legal title to all the property. See Duey v. Duey, 343 So. 2d 896 (Fla. 3d Dist. Ct. App. 1977).


25. McClish v. Rankin, 14 So. 2d 714, 717 (Fla. 1943).


27. See cases cited notes 18, 21-22, 24-25 supra.
to carry on as co-owners a business for profit." Joint venture exists 
"[w]here two or more persons combine to profit from a single busi-
ness enterprise [which is] limited in scope and duration and not 
intended to have the continuity of the usual general business part-
nership . . . ." With minor differences, the law of partnership is 
generally applied to joint ventures. The theories of partnership and 
joint venture have not proved to be successful avenues for equitable 
property distributions. In one case the Florida Third District Court 
of Appeal denied recovery under the partnership theory. The court 
inferrred from the allegations of the complaint that a meretricious 
relationship had been the consideration for the partnership and held 
that "[m]utual promises to live together in a meretricious or illegal 
relationship are not sufficient consideration to support an agree-
ment of partnership." In another case the Florida Supreme Court 
rejected the theory of joint venture as an avenue of recovery due to 
the lack of any suggestion of an agreement between the cohabitants 
to acquire property as joint adventurers.

Courts employ the doctrines of constructive trust and resulting 
trust to determine ownership when one party has provided all or 
part of the consideration for acquisition of real or personal property 
but title to the property is placed in the name of the other party. 
Constructive and resulting trusts are judicial fictions created to do 
justice to the parties. Florida courts have recognized the theories of 
constructive trust and resulting trust as means of dividing property 
upon dissolution of nonmarital relationships. Using these theories, 
a share of the property accumulated during cohabitation has been 
awarded to the woman even though legal title was held by the man 
or by another party.

The quantum of proof necessary to establish the existence of the 
constructive or resulting trust is extremely high. To recover under 
the doctrine of constructive trust, the woman must demonstrate 
beyond a reasonable doubt the "amount of money that went into 
the alleged trust corpus and then show the fraud or ill faith upon 
which equity can construct an interest in the property to the extent 
of the contribution made to the cost of acquisition." Florida courts

29. Id. at 8.
30. Id. at 9.
33. Property Rights Between Unmarried Cohabitants, supra note 9, at 396.
34. Smith v. Smith, 108 So. 2d 761 (Fla. 1954).
35. Id. at 763.
36. Id.
have allowed recovery under the principle of resulting trust only where there has been substantial evidence that both parties contributed to the acquisition of the property and that the parties intended that both have an interest in the property.\(^3\) Additionally, Florida courts have required the existence of a long-term cohabitation.\(^3\)

The resulting trust theory was used in 1947 in *Williams v. Bullington*.\(^3\) In that case the couple had lived together for several years and had held themselves out to the community as husband and wife. The woman had contributed money toward the arrearages on two lots on which a house had been built through joint efforts. The couple ultimately was listed as joint purchasers on the purchase contract for the lots. In his will, the man devised his total interest in the property to the woman. Further, a memorandum to his will stated that, upon full payment of the purchase price, the property was to be deeded to the parties jointly with the remainder to the survivor. Under these facts, the woman was awarded a half interest in the property even though the man subsequently had deeded the property to a third party.

Unavailability of alimony and suit money and difficulty in valuing homemaker services also present impediments. The courts in Florida have held consistently that neither companion can be liable to the other for alimony or suit money if a legitimate marital relationship does not exist.\(^4\) Florida courts also have refused to recognize the economic value of personal domestic services. The general rule has been that "[c]ompensation for services rendered by the [woman] during the existence of the meretricious relationship of course would not be recoverable."\(^4\) Therefore, though a woman had provided valuable housekeeping services (which the man would either have had to pay for or perform himself), the courts have disregarded this as a contribution toward the couple's acquisitions.

In addition to encountering difficulties in securing legal help to resolve disputes, cohabitants encounter direct legal sanctions. Florida statutes prohibit lewd and lascivious cohabitation,\(^4\) fornica-

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37. *Williams v. Bullington*, 32 So. 2d 273 (Fla. 1947). The *Williams* court rejected a contention that the trust should fail because of the couple's meretricious relationship. The court said, "If the land transaction had been in furtherance of or in consideration for the illicit relation, there might be substance to this contention . . . . The illicit relation was commenced years before the land contract was made, and had no connection with or dependence on it." Id. at 275.

38. Id.

39. 32 So. 2d 273 (Fla. 1947).


42. FLA. STAT. § 798.02 (1977): "Lewd and lascivious behavior.—If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together . . .
tion, and adultery. These offenses are second-degree misdemeanors punishable by a maximum of sixty days’ imprisonment or a $500 fine.

Although rarely enforced, these statutes still affect the lives of cohabitants. In 1974, a Coral Gables, Florida patrolman felt the brunt of section 789.02, Florida Statutes. He was suspended without pay for thirty days for refusal to comply with a police department order to “stop, cease, and desist” living with a woman. The reason given for the suspension was concern with “the good image of the . . . police force.” The young man was not reinstated to the police force until he stopped living with the woman. Back pay was awarded to the suspended patrolman, perhaps as a consolation prize. Such interference in private interpersonal relationships illustrates the potentially inequitable impact of these outmoded statutes.

In summary, a review of the Florida cases concerning dissolution of nonmarital relationships reveals that inequitable property distributions have been the product of several legal phenomena:

1. When the parties to an express or implied agreement, such as a property ownership or property distribution agreement, are living together unmarried, such cohabitation historically has rendered the agreement illegal and unenforceable;

2. Remedies appropriate to commercial ventures rather than to interpersonal relationships have been applied to accomplish prop-

they shall be guilty of a misdemeanor in the second degree, punishable as provided in s. 775.082 or s. 775.083.”

43. Id. § 798.03: “Fornication.—If any man commits fornication with a woman, each of them shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.” Because the statute penalizing the commission of fornication does not define the offense, the common law definition is considered controlling. “At common law, the term ‘fornication’ was used to describe illicit sexual intercourse between either a married or unmarried man and an unmarried woman, and was not punishable unless committed under such circumstances as to amount to a nuisance.” DeLaine v. State, 262 So. 2d 655, 657 (Fla. 1972).

44. FLA. STAT. § 798.01 (1977):

Living in open adultery.—Whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section.

45. Id. §§ 775.082(4)(b), .083(1)(e).

46. FLORIDA TASK FORCE, supra note 12, at 6.

47. (1977); Miami Herald, July 11, 1974, § B, at 1, col. 3.


50. Id., Oct. 11, 1974, § B, at 1, col. 2.

51. Id.

52. See section V infra for recommendations regarding the status of these statutes.
ertility distributions between unmarried couples;

(3) Wifely, motherly, and homemaking services have not been assigned economic value in nonmarital cohabitations;

(4) Nonmarital cohabitation has not been recognized as a legitimate lifestyle requiring recognition in the courts; and

(5) The imposition of statutory sanctions has illegitimized this lifestyle further.

III. RESULTING AND CONSTRUCTIVE TRUSTS

Courts in a number of cases have applied or recognized the rule that the courts will protect each party’s interest in property when the evidence establishes a joint venture, a partnership, or an agreement to pool earnings. Finding no such agreement, however, courts at times have employed the equitable remedies of resulting or constructive trusts.

When unmarried, cohabiting partners acquire property with title in the name of only one of the parties, the party whose name does not appear on the title documents occasionally has contended that he or she furnished a share of the consideration with which the property was purchased. In such instances, the complaining party has invoked the equitable principle that a resulting trust arises in favor of a person who furnished consideration for a conveyance of property to another.

The general rule regarding trusts is that when real property is purchased by one person with legal title in the name of another, the parties being strangers to each other, the person to whom the land is conveyed will hold it in trust for the one who furnished the purchase money. This rule was applied in *McDonald v. Carr*, in which the husband had a living, undivorced wife. Holding an attempted second marriage invalid, the Illinois Supreme Court ruled that the second “spouse” was a stranger to the man in the legal sense. The court concluded that the second “spouse” had conveyed property to him for her own benefit, such that a resulting trust arose in her favor.

The remedy of resulting trust, however, may be quite difficult to

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53. For a list and discussion of such cases, see Annot., 31 A.L.R.2d 1255, 1281 (1953).
56. Id. at 1287.
57. 37 N.E. 225 (Ill. 1894).
58. Id. at 226.
59. Id. at 227.
secure because of stringent proof requirements. In *Sugg v. Morris*, the plaintiff, living with the defendant, contributed part of her earnings to the purchase of a home.60 The deed, however, named only the defendant as grantee.61 The Alaska Supreme Court held that the plaintiff was not entitled to recover one-half of their joint equity in the property because of her failure to prove the precise amount of funds she had contributed.62 Distinguishing the equitable principles which govern the division of property of a couple living together in a bona fide, putative marriage63 and those which apply to a cohabiting couple who know they are not married, the court held that the only interest the woman possessed was that of a beneficiary pro tanto under a resulting trust.64 Consequently, the burden was on her to show the precise amount of her contribution.65

As noted earlier, the meretricious nature of the relationship probably bars recourse to contract remedies. The courts may presume that sexual services were consideration for the contract and invalidate the agreement. But the remedy of resulting trust may be available despite the illicit relationship. In *Williams v. Bullington*, legal title to a piece of land was taken in the man's name, although the woman advanced money to him with the understanding that she would be given a one-half interest in the property.66 The Florida Supreme Court said:

There is ample evidence to support the illicit relation but there is no showing that it had any relation to the land purchase contract. If the land transaction had been in furtherance of or in consideration for the illicit relation there might be substance to this contention. It might likewise be true if legal precepts were required to parallel moral precepts, but that is not the case. The illicit relation was commenced years before the land contract was made, and had no connection with or dependence on it.67

The court consequently decreed a resulting trust in favor of the woman.68

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60. 392 P.2d 313 (Alaska 1964).
61. *Id.* at 315.
62. *Id.* at 316.
63. A putative marriage exists when a couple has an erroneous, good faith belief that they are married. H. CLARK, LAW OF DOMESTIC RELATIONS 54 (1968).
64. 392 P.2d at 316. In appropriate circumstances "where A performs services in consideration of which land is transferred to B, B presumptively holds upon a resulting trust for A; and if the services are a part of the consideration, B holds upon a resulting trust pro tanto." 4 A. SCOTT, SCOTT ON TRUSTS 3080 (2d ed. 1965).
65. 392 P.2d at 316.
66. 32 So. 2d 263, 274 (Fla. 1947).
67. *Id.* at 275.
68. *Id.* at 276.
Nonmarital partners have occasionally sought the court’s imposition of a constructive trust. *Hayworth v. Williams* also involved parties living in a meretricious relationship. The woman sought an interest in property held in the name of the man. The Texas Supreme Court held that “[i]f [she] can show that the money with which the land was purchased was acquired in whole or in part by her labor in connection with [the man] before the time when the land was purchased, then she would be entitled to a share in the land in the proportion that her labor contributed in producing the purchase money.” In such a case, the man would be regarded as a trustee for her benefit.

The *Hayworth* court stated that it was not necessary for the woman to prove that her labor produced a part of the very money that was used in purchasing the land. Rather, if she and the decedent worked together for a common purpose, and the proceeds of labor performed by both became joint property, then she would own a portion of the property in proportion to the value that her labor contributed to its acquisition. The constructive trust, therefore, is basically a judicial invention designed to prevent unjust enrichment. Indeed, prior to the landmark *Marvin* decision, the constructive trust was one of the few effective devices for attaining a fair resolution of property disputes upon dissolution of a cohabitation arrangement.

IV. REVIEW OF *Marvin v. Marvin* AND *Carlson v. Olson*

The legal phenomena responsible for many of the unequal property distributions in Florida are representative of the norms which traditionally have governed cohabitation property disputes throughout the nation. In 1976 in *Marvin v. Marvin*, however, the California Supreme Court laid all such rules aside.

Plaintiff Michelle Triola Marvin claimed that in October, 1964, she and the defendant, the well-known movie star Lee Marvin, orally agreed that they would live together and represent themselves to the community as man and wife. Lee and Michelle agreed to consolidate their earnings and achievements and to share equally all property gained through individual or joint efforts. Plaintiff’s role was to “render her services as a companion, homemaker, house-

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69. 116 S.W. 43, 44 (Tex. 1909).
70. Id. at 45.
71. Id. at 46.
72. Id.
73. For a discussion of this topic, see Bruch, supra note 6, at 106.
74. 557 P.2d 106 (Cal. 1976).
keeper and cook." In order to devote her full time to these efforts, Michelle later agreed to forego her entertainment career, and Lee promised to provide for her needs throughout her life.

The relationship continued for six years, with Michelle fulfilling her duties under the agreement. Lee amassed a large amount of real and personal property during this time, mostly in his name. The property included movie rights worth more than one million dollars. Lee forced Michelle to leave his home in 1970 and cut off her support in late 1971.

When Michelle sued to enforce the contract, contending that she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for the defendant, thus leaving him with all the property accumulated by the couple during their relationship. After intermediate litigation, the plaintiff appealed to the California Supreme Court.

Four years before Marvin, a California district court of appeal, in In re Marriage of Cary, had raised the "status" of spouses of sufficiently familial cohabitations to that accorded to putative spouses. In Marvin, the California Supreme Court rejected this "status" approach and held that the formal doctrines which historically prevented fulfillment of the reasonable expectations of the partners should be rejected. Observing that contracts between unmarried partners traditionally have been deemed unenforceable as encompassing prostitution, the court said that the nonmarital cohabitation relationship in contemporary society cannot be identified legitimately as a form of prostitution and, thus, there is no longer any valid reason for failing to enforce such contracts. The court noted the prevalence and widespread acceptance of unwed cohabitation in today's society and stated that this is "a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case." The court held that nonmarital partners may order their economic affairs as

75. Id. at 110.
76. Id.
77. Id.
78. Id. at 111.
79. Id.
80. 109 Cal. Rptr. 862 (1st Dist. Ct. App. 1973). Common law marriage was abolished in California in the late nineteenth century, and a man and a woman in a familial relationship have been considered to come within one of three categories: formally married spouses, putative spouses, and meretricious spouses. Putative spouses are those with an erroneous, good faith belief that they are married. H. CLARK, supra note 63, at 54.
81. 557 P.2d at 122.
82. Id.
they choose and that a contract between them is enforceable unless the contract is explicitly and inseparably founded on sexual services.

The court in Marvin also held that, even in the absence of an express agreement, property acquired by an unmarried couple may be apportioned between them upon their separation. If the parties demonstrate appropriate intent, the concepts of implied contract, implied agreement of partnership, or joint venture might be used. In addition, the court sanctioned the use of constructive trust and quantum meruit theories.

Marvin may be summarized in the following principles:

1. The provisions of the divorce statute do not apply to the division of property acquired during a nonmarital relationship. Such a division is subject solely to judicial discretion.

2. The courts should enforce an express contract between nonmarital partners except to the extent that the contract is founded explicitly on the consideration of meretricious sexual services. Furthermore, when sexual services furnish part of the agreement's consideration, any severable portion of the contract supported by independent consideration will be enforced.

3. Given no express contract, the court should examine the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit agreement between the parties. The courts may also employ the doctrines of quantum meruit, constructive trust, or resulting trust. The courts should presume the parties intended to deal fairly with each other and should enforce what the evidence indicates were the intentions and reasonable expectations of the parties.

4. Domestic homemaking services constitute adequate consideration for an express or implied contract.

The four Marvin principles were adopted by the Minnesota Supreme Court in 1977 in Carlson v. Olson. Oral Olson and Laura

83. Id. at 116.
84. Id. at 114. It should be noted that the "explicitly founded on sexual services" exception to the Marvin rule is an important one for certain persons who have purposely decided not to marry. Not wanting the obligations of marriage and wishing to avoid the consequences of a Marvin-type property disposition, couples could state that their agreement was inseparably based on sex as consideration. More crudely, Don Juans not wanting to risk court intervention in their affairs could get a receipt for what they paid for in bed. What is sorely needed after Marvin is a clear delineation between cohabitation, which is subject to Marvin principles, and the type of relationship which traditionally triggered judicial reproach for its basis in sex.
85. Id. at 122.
86. 256 N.W.2d 249 (Minn. 1977).
Carlson began living together in 1955. Their relationship continued for twenty-one years, during which time they acquired a modest house and some personal property. The deed to the house listed them as husband and wife and as joint tenants. The couple was never legally married. However, they did hold themselves out to the public as husband and wife and they raised a son. Laura did not work outside the home at any time during the relationship. With the exception of $1,000 supplied by Laura’s mother for a remodeling project, Oral furnished all the money for acquisition and improvement of the real estate, the personal property located on it, and the personal effects of the parties. In 1974, the parties had a falling out, and Laura no longer desired to live with Oral. Once they separated, Laura brought an action to partition their real and personal property.  

The trial court allowed the partition suit and held that the commencement of the action severed the existing joint tenancy in the real estate and existing personal property. Each party was allotted half the property. Although Oral sought a credit for improvements on the property which he paid for, the trial court held that half the property constituted an irrevocable gift to Laura in consideration for her services as a wife and mother.  

When the case reached the Minnesota Supreme Court, Oral argued that the trial court had erred in applying more than the bare rules of real property. He asserted that the cohabitation of the parties was irrelevant and that the case should be resolved by the law of real property, without reference to the apparent marriage. Accordingly, he argued that each party’s interest should be determined by comparing the amount paid by each with the total consideration paid for the property.  

Laura responded that the case could not be resolved by the laws of real property alone, as if the parties were strangers. She contended that she should be able to recover the value of her services. To this end, she argued that real property law was insufficient to provide an equitable result and that the cohabitation should be recognized as affecting the ultimate division of property.  

In discussing the issue, the Minnesota Supreme Court observed that the consistent resolution of such disputes has been a difficult problem for the courts for many years and concluded that Minnesota law offered few concrete guidelines. The court then consulted

87. Id. at 250.  
88. Id. at 250-51.  
89. Id. at 251.  
90. Id.
the California Supreme Court's reasoning in Marvin. Following a lengthy discussion of the issues and the holding in Marvin, the court adopted the Marvin principles and recognized that the trial court was justified in enforcing the reasonable expectations of the parties. Under the facts, the partition statute provided an appropriate mechanism to effectuate the parties' expectations. The supreme court held that the trial court had correctly exercised its general equitable powers to effect the most advantageous plan permissible and that the partition statute did not restrain equity's ability to do justice.

In affirming the trial court's decision, the supreme court said the facts indicated that the parties intended their accumulations to be divided on an equal basis. Presumably, Oral made an irrevocable gift to Laura of the assets purchased solely with his earnings. Laura's contribution to remodeling the home was properly treated in like manner.

The principles enunciated in Marvin and Carlson are supported by reason, justice, and common sense. Many unmarried, cohabiting couples share their belongings and work together to accumulate property and enjoy an acceptable standard of living. A couple's failure to have participated in a valid marriage ceremony should not serve as a logical basis for the inference that the couple intended to keep their earnings and property separate and independent. Yet courts frequently make such unreasonable inferences and grant each party only the property to which he or she has legal title.

The Marvin and Carlson rules acknowledge that the parties' intentions can be ascertained only by a more searching inquiry into the nature of their relationship. The parties may well intend and expect that, should their relationship end, their property will be divided in accordance with their own tacit understanding and that in the absence of such an understanding the courts will fairly apportion property accumulated through mutual effort. Under the Marvin and Carlson principles, such reasonable expectations become governing factors in property distribution disputes.

91. Id. at 251-52.
92. Id. at 255.
93. Id.
94. See, e.g., Carson v. Oldfield, 127 So. 851 (Fla. 1930); Duey v. Duey, 343 So. 2d 896 (Fla. 3d Dist. Ct. App. 1977).
95. Marvin v. Marvin, 557 P.2d at 121. However, it should be noted that some couples enter into a cohabitation arrangement to avoid the "strings" of marriage. While doing equity in many situations, the Marvin principles could be a trap for the unwary. If couples truly expect to be able to walk away from such relationships without any legal complications, there may be a rude awakening when one of the parties, or the court, uses hindsight and decides that the couple must have intended a division under Marvin-type concepts.
When meretricious sexual services are not provided for expressly, there is no reason why those who cohabit should not enjoy the same rights to assert equitable interests in property and to enforce contracts as do any other unmarried individuals. That courts will enforce most informal contracts between individuals not acting in a business capacity but not enforce identical agreements between individuals who also happen to be living together simply makes no sense. Traditionally, such contracts have been held unenforceable because they have been perceived as encompassing prostitution. This outmoded conception of cohabitation is no longer tenable.

The Carlson court reasoned that it is just as logical to presume that a share of the property purchased with the wage earner’s income is contributed to the homemaker as a gift as it is to presume that homemaking services are contributed to the wage earner as a gift. Studies over the past forty-six years in France, Germany, and the United States have indicated that housewives devote from fifty-one to eighty-two hours per week to housework. Whether measured by the cost of hiring an outside party to perform such housework or by the income lost by the wage earner if he had to take the time to perform housework or by the income homemakers would earn if they chose to seek employment for which they were qualified, the economic value of these domestic services obviously is substantial. This fact finally received legal recognition in Marvin and Carlson.

The decision by the Marvin and Carlson courts to permit the application of quantum meruit or implied contract theories to the legal problems of unmarried, cohabiting couples was timely and appropriate. In recent years, innovative courts have become increasingly solicitous of contracting parties who do not fit the arm’s length business model and have developed quasi-contractual theories to provide equitable results and avoid the harsh preclusion of recovery otherwise imposed by commercial contract law. The California and Minnesota courts have merely extended this doctrinal diversity to the treatment of legal problems arising in the context of nonmarital cohabitation.

96. Id. at 122; Smith v. Smith, 38 N.W.2d 12 (Wis. 1949).
97. 256 N.W.2d at 250.
The Marvin and Carlson decisions acknowledge that traditional concepts frequently cannot be used to resolve fairly the property disputes precipitated by dissolution of nonmarital relationships. The California and Minnesota supreme courts have recognized nonmarital cohabitation as a unique relationship, distinguishable from marriage and every other lifestyle and worthy of its own set of rules. In sum, the Marvin and Carlson principles are really the rudimentary law in the emerging body of nonmarital cohabitation jurisprudence.

V. SUGGESTED CHANGES IN FLORIDA LAW

With the growing popularity of the nonmarital cohabitation lifestyle, Florida's courts very probably will be called upon with increasing frequency to settle property disputes involving the separation of cohabiting couples. In Florida, judicial resolution of such disputes traditionally has been marked by an unwillingness to develop a separate body of law for the partition of such property and by a tendency to borrow principles from marriage, divorce, property, prostitution, and commercial contract law. The courts and legislature of this state must now realize, as have the California and Minnesota supreme courts, that extremely inequitable property distributions result when the courts only apply inappropriate, traditional concepts to this contemporary social problem.

Sound policy and the demands of justice require that nonmarital cohabitation be recognized as a legitimate and unique lifestyle. Only then can unmarried cohabitations be governed by a body of equitable laws tailored to protect efficiently the rights and needs of partners to such arrangements. The principles set forth in Marvin and Carlson provide an excellent starting point.

The argument that granting remedies to the nonmarital partners would discourage marriage is of little merit. Granted there is a well-established public policy to foster and promote the institution of marriage. However, the perpetuation of judicial rules which result in unfair distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of fulfilling that policy. Moreover, when courts proclaim that they will have nothing

101. In one case, the court held that “no common law marriage existed” between the parties and, therefore, the courts could grant no relief. Carson v. Oldfield, 127 So. 851, 854 (Fla. 1930). In two other cases, the courts were willing to acknowledge the existence of a constructive or resulting trust over the property but granted the woman only a share of such property equal to her monetary contribution to its purchase, denying any credit for housekeeping services. Smith v. Smith, 108 So. 2d 761 (Fla. 1959); Williams v. Bullington, 32 So. 2d 273 (Fla. 1947).
to do with aiding the cohabitation because such couples are engaged in "immoral," "illicit," or "meretricious" behavior, they are in effect establishing a binding rule of law. Such rules of law are based wholly on concepts of guilt, and such precepts cannot justify an unequal division of property between two equally "guilty" parties. Public morality cannot be furthered by a policy which rewards one partner at the expense of the other.

It has been suggested that the solution to the problem lies in the reinstatement of common law marriage, which was abolished by statute in Florida as of January, 1968. In October, 1975, the Florida Conference on Marriage and the Family Unit, in discussing the unmarried, cohabitating couple, recommended that "[i]n order to protect the interests of spouses . . . with regard to property rights . . . common law marriages should be reinstated." As recently as 1976, the Florida Bar Committee on Family Law called for reinstatement of common law marriage.

Reinstatement of common law marriage in Florida, however, would do little to solve the problem with which this note is concerned. The primary reasons for entering into nonmarital cohabitation rather than legal marriage are (1) the inability to enter into legal marriage because of a previous, undissolved marriage; (2) the economic advantages, as among pensioners and elderly people receiving social security or other benefits terminable or reducible upon legal marriage; (3) an unwillingness to be subject to the legal effects of marriage; and (4) the desire for a "trial marriage."

With the exception of those unable to marry legally because of a prior,

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102. See note 17 supra.
103. "In terms of legal consequences, one party to a nonmarital cohabitation is likely to enjoy the best of both worlds. The wage-earning, property-acquiring party will often have title to the property acquired during the cohabitation while receiving domestic services from the other party, who acquires no interest in the property and no credit for the value of the services." See Property Rights Between Unmarried Cohabitants, supra note 9, at 398 n.47.
104. The statute abolishing common law marriages provides: "No common law marriage entered into after January 1, 1968, shall be valid, except that nothing contained in this section shall affect any marriage which, though otherwise defective, was entered into by the party asserting such marriage in good faith and in substantial compliance with this chapter." FLA. STAT. § 741.211 (1977).
105. FLORIDA TASK FORCE, supra note 12, at 35 (quoting Florida Conference on Marriage and the Family Unit, Conference Report 7 (Oct. 1975)).
106. Bruch, supra note 6, at 102 n.5.
107. In many cases the Social Security system inflicts financial penalties upon elderly citizens who remarry. Although individuals who receive old-age assistance by virtue of their own participation are entitled to their full benefits regardless of marital status, 42 U.S.C. § 402 (a) (1970), widows and widowers who participate only through the earnings of their deceased spouses ordinarily have their benefits cut in half by remarriage. Id. § 402(e)(4), (f)(5).
Glendon, supra note 7, at 687 n.99.
undivorced spouse, these groups are composed primarily of persons who are unmarried because they wish to be unmarried. Thus, reinstatement of common law marriage would not meet their needs.

Furthermore, imposition of a marital relationship in many of these cases would subvert the intentions of the parties. Moreover, even under the old statute\(^ {108}\) and many cases,\(^ {109} \) the present intention to become man and wife was a prerequisite to a valid common law marriage in Florida.\(^ {110} \) The status of cohabiting couples who do not "assent to become man and wife" and have no desire to be married would not change even if common law marriage were reinstated. Common law marriage requires present intent to be husband and wife. Hence, the rules of common law marriage would be inapplicable to many cohabiting couples.

A simple reality of contemporary society is that a growing number of couples, for a variety of reasons, desire to live together unmarried—right or wrong, moral or immoral. Florida's courts and the Florida Legislature should examine closely the laws of Florida which govern such relationships and proceed to set aside the unsuitable traditional concepts. New laws should be formulated to govern equitably the legal dimension of this lifestyle.

To achieve this goal, the legislature should repeal or amend archaic and often unenforced statutes, such as those prohibiting lewd and lascivious cohabitation, fornication, and adultery.\(^ {111} \) These statutes no longer serve the purposes for which they were instituted. This is amply illustrated by examining section 798.02, Florida Statutes.\(^ {112} \) The purpose of the statute prohibiting lewd and lascivious behavior is to prevent the scandal and disgrace resulting from unmarried couples of the opposite sex living together and to prevent the corruption of public morals by "such evil and indecent examples . . . ."\(^ {113} \) Clearly, neither this statute nor, by extension, the other statutes in this area, serve such a function today. For many Floridians, nonmarital cohabitation is an accepted lifestyle and is no longer viewed as scandalous, indecent, evil, or disgraceful. Serving no valid functions, these statutes should be repealed or amended.\(^ {114} \)

\(^{108}\) Act of June 4, 1953, ch. 28104, 1953 Fla. Laws 328 (current version at FLA. STAT. § 741.07 (1977)).


\(^{111}\) See notes 42-44 supra.

\(^{112}\) (1977).

\(^{113}\) Luster v. State, 2 So. 690, 692 (Fla. 1887).

\(^{114}\) The suggested change in § 798.02 applies to the portion of the statute pertinent to
The Florida Legislature should formulate and adopt a new set of rules for application to property disputes resulting from dissolution of nonmarital relationships. The authors propose the following law:

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section —, Florida Statutes, is created to read:

Short title.—This act may be cited as the “Nonmarital Cohabitants Property Distribution Act.”

Section 2. Legislative intent.—It is the finding of the legislature that cohabitation between unmarried persons of the opposite sex is a common lifestyle. This lifestyle is increasingly prevalent and increasingly accepted in modern society. It should be governed by appropriate legal and equitable remedies in the distribution of property upon dissolution of such a relationship. Concepts of guilt and sin as a bar to recovery have become anachronisms.

Inequitable property distributions have been the rule rather than the exception in the resolution of disputes between unmarried cohabitants. Accordingly, it has become necessary to fashion judicial remedies to meet the needs of these persons when they separate. Recent decisions in other states, such as Marvin v. Marvin and Carlson v. Olson, have recognized these trends. It is the intent of the legislature to fashion a new set of rules to be applied to cohabitants. The decisions in Marvin and Carlson may serve as guides in judicial interpretation of these new rules.

Section 3. Cohabitation agreements.—

(1) If there has been an actual or ostensible family relationship of a reasonable duration evidenced by cohabiting adults of the opposite sex who have acknowledged and accepted mutual rights, duties, and obligations toward one another, then, in the absence of any agreement to the contrary, the property of the cohabitation is subject to distribution in a manner analogous to the distribution of marital property. Proof of such a relationship can be demonstrated by evidence that others perceived or had reason to perceive the parties’ relationship as familial.

(2) Where there is an agreement between the parties, either express or implied, the courts shall enforce that agreement except to the extent that it is founded explicitly on the consideration of meretricious sexual services. Where sexual services are part of the contractual consideration, any severable portion of the agreement supported by independent consideration shall be enforced.

this note. No suggestion is made about the remaining language of the statute. After the recommended amendment, the statute would read: “[If any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree punishable as provided in s. 775.082 or s. 775.083.”

(3) The performance of domestic housekeeping services shall be accorded reasonable economic value and shall be considered compensable independently. These services also shall be deemed adequate consideration for an express or implied contract between the parties.

(4) The courts shall presume that the parties intended to deal fairly with one another and, in the absence of any contrary agreement, shall enforce the reasonable expectations of the parties.

(5) Doctrines which may be used by the courts to effectuate equitable distribution of property among the parties may include, but are not limited to, express and implied contract, agreement of partnership or joint venture, constructive or resulting trust, and equitable remedies such as quantum meruit.