Golden Gate University Law Review

Volume 14
Issue 3 *Women's Law Forum - Symposium Issue: National Association of Women Judges*
Article 14

January 1984

Taylor v. Polackwich: Property Rights of Unmarried Cohabitants - From Marvin to Equity

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NOTES

TAYLOR V. POLACKWICH: PROPERTY RIGHTS OF UNMARRIED COHABITANTS— FROM MARVIN TO EQUITY

> The legal order can exist only to the extent that social conduct is oriented to it. Law that is too divergent from social reality undermines the respect for and the rule of law.[1]

I. INTRODUCTION

In *Taylor v. Polackwich,*[2] the trial court achieved an equitable and just result regarding the division of property acquired during cohabitation.[3] The appellate court reversed on the grounds that the remedy was not grounded in law or equity.[4] In reaching such a result, the appellate court diverged from and was not responsive to the social realities of modern times.

Cohabitation has become a significant minority lifestyle in

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1. Norman v. Unemployment Insurance Board, 131 Cal. App. 3d 946, 958, 182 Cal. Rptr. 708, 715 (1982) (Feinberg, J., concurring), *rev'd* 34 Cal.3d 1, 633 P.2d 904, 192 Cal. Rptr. 134 (1983). In *Norman v. Unemployment Insurance Board,* the supreme court was faced with a situation where the appellate court ruled that an engaged cohabitant was entitled to receive unemployment compensation. The relevant statute provided that compensation was payable when a worker voluntarily left his or her job if there was a showing of good cause. Leaving a job in order to be with a spouse was presumed to be good cause, and the appellate court agreed that leaving a job in order to be with a fiancé was also good cause. However the California Supreme Court reversed. Norman v. Unemployment Insurance Board, 34 Cal. 3d at 3, 663 P.2d at 905, 192 Cal. Rptr. at 135. The court held that public policy dictated a judgment declaring that leaving a job in order to be with a fiancé or cohabitant was not good cause. *Id.* at 6, 663 P.2d at 907, 192 Cal. Rptr. at 137. The dissent argued that good cause should not be presumed, as it is with marriage, but may be proven, depending upon the facts of the individual case. *Id.* at 14, 663 P.2d at 913, 192 Cal. Rptr. at 143. *See also Survey; Women and California Law,* 14 GOLDEN GATE U.L. REV. 785, 833 (1984).

2. 145 Cal. App. 3d 1014, 194 Cal. Rptr. 8 (1983).

3. For the purpose of this paper, cohabitation will refer to unmarried couples living together in an intimate relationship. This paper will focus on relationships in which both parties know they are not legally married.

4. *Taylor,* 145 Cal. App. 3d at 1020, 194 Cal. Rptr. at 12.

the United States, with relationships strongly resembling husband and wife commitments.[5] In 1970 and 1980, there was a 200% increase in the number of unmarried couples sharing households.[6] This trend is likely to continue,[7] as there has been an increase in the recognition of rights of unmarried couples[8] and public attitudes regarding cohabitation have changed. Formerly, cohabiting couples were labelled "meretricious,"[9] which connotes wrongdoing. More recently courts have taken judicial notice of cohabitation, preferring such terms as "nonmarital partners" or "nonmarital relationship."[10]

Taylor represents a typical cohabitation situation in three different respects: the man was the primary earner while the woman worked part time and was the homemaker, at her partner's request;[11] the parties neither completely combined nor kept separate their money; and at trial the parties offered conflicting testimony regarding their expectations and intentions.

This note examines the rights of unmarried partners upon separation in regard to the division of property acquired during cohabitation. It will be argued that adherence to the governing law does not achieve equitable results. This note proposes that a more equitable division of property acquired during cohabitation may be realized through application of community property principles.[12]

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5. Comment, *Consortium Rights of the Unmarried: A Time for A Reappraisal*, 15 FAM. L.Q. 223, 251 (1981) [hereinafter cited as Comment, *Consortium Rights*].

6. BUREAU OF CENSUS. U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS SERVICES PUB. NO. 365, *Marital Status and Living Arrangements:* March, 1980, at 4 (1981).

7. Comment, *Consortium Rights, supra* note 5, at 223-24. "Demographers at the Massachusetts Institute of Technology and Harvard University estimate that by 1990 only slightly more than a quarter of all households in the nation will consist of married couples with children. New York Times, May 23, 1980, at 18. The study based its prediction on the continuation of present trends, including cohabitation." *Id.* at 224 n.7.

8. *Id.* at 231-35.

9. The dictionary defines meretricious as "of, pertaining to, characteristic of, or being a prostitute." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1539 (2d ed., 1948).

10. *See* Marvin v. Marvin, 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976).

11. *Taylor*, 145 Cal. App. 3d at 1020, 194 Cal. Rptr. at 11.

12. *See infra* notes 73-94 and accompanying text. While the California Supreme

II. BACKGROUND

A. THE FACTS OF TAYLOR

The parties lived together for eight years without marrying. After they separated, Janina Taylor sued Joseph Polackwich to establish a one-half interest in property they acquired while living together.

Early in their relationship, Polackwich moved into Taylor's apartment. When he became impatient with the landlord, he told Taylor to look for a house to buy in which he, Taylor, and her seven minor children would live. Taylor found a house and Polackwich decided to buy it. The purchase price was $27,950. Polackwich paid a down payment of $6,000 and took title in his name. A monthly payment of $184 was automatically deducted from his wages. The parties agreed that each month Taylor would deposit $205 into Polackwich's checking account. This was the same amount that Taylor had been paying in rent before she moved into the house. For a year and a half, Polackwich gave Taylor rent receipts, which she used to prove to AFDC that she was paying rent. At the time of trial, Taylor had paid more than $14,000 toward the purchase of the house—more than twice as much as Polackwich.

Polackwich paid the taxes and the insurance and purchased furniture for the house. He also spent $600 to $700 per month for food for the entire household. In 1974, he executed a will leaving all his property to Taylor and her children and made Taylor the beneficiary of his life insurance policy, employee savings plan, and profit-sharing plans.

Taylor worked outside the home, yet did not earn nearly as much as Polackwich.[13] However, she used the bulk of her salary

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Court has stated that the Family Law Act does not address the property rights of nonmarital partners, and therefore community property laws do not apply to unmarried people, the court has also noted that the delineation of the rights of nonmarried partners is a judicial matter. *Marvin*, 18 Cal.3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829. This note suggests that in cohabitation situations, equity is not achieved under the current state of the law; and in order for the court to respond to prevailing trends, the rights of nonmarried partners must be reexamined.

13. At the time of the trial, Polackwich was earning $19,625 per year, with an annual pension of $4,852 from the Navy. Taylor was earning $9,000 per year. *Taylor*, 145

to make house payments and meet household expenses.

At trial, the parties gave conflicting testimony as to whether they had agreed to share earnings, property, and expenses. Taylor testified that she and Polackwich agreed that he would make the down payment and that she would make the monthly payments. She also testified that it was their understanding that the house had been purchased for "all of us."[14] Taylor stated that she was not concerned that title to the house was in Polackwich's name because Polackwich had told her that he would take care of her and the children. That was good enough for her. She claimed that while the parties lived together they agreed to treat all of their property and earnings as joint property. Since Taylor trusted Polackwich, she relied on him to fulfill that agreement.

On the other hand, Polackwich testified that they did not agree to pool their earnings or share expenses.[15] He claimed that he had told Taylor that he took title to the house in his name because it was his and he wanted to control it as long as he lived.[16] He testified that he wished to maintain a landlord-tenant relationship with her, and that as long as they remained in a committed relationship, she and her children could live in the house. Polackwich claimed he had told Taylor that if the relationship terminated, he would "withdraw" all the rights he had given her.[17]

B. THE TAYLOR DECISION

At trial, Taylor sought a one-half interest in the house, in the furniture, and in other accumulated property on two theo-

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Cal. App. 3d at 1019, 194 Cal. Rptr. at 11.

14. *Id.* at 1018, 194 Cal. Rptr. at 10.

15. *Id.* at 1018, 194 Cal. Rptr. at 11.

However, it is hard to reconcile Polackwich's claim with the fact that he had given Taylor a power of attorney to withdraw funds from both his savings and checking accounts. Polackwich also conceded that Taylor "spent all the money she wanted without a question asked" and that he "footed the bill." *Id.*

16. *Id.* Polackwich stated that after he died, Taylor could have the house.

17. *Id.*

ries: contract and constructive trust.[18] The trial court found that the evidence did not establish either an express or an implied contract or that the acquired property was joint property.[19] The court also rejected Taylor's claim of an interest in the property under the constructive trust theory.[20] However, the trial court did render an equitable solution:

> [E]quity requires some further assistance to plaintiff from defendant in order that plaintiff can rehabilitate herself . . . . [Therefore] judgment [is] entered granting plaintiff the exclusive right to reside with her children in the house until July 1, 1984, provided that plaintiff pay defendant rent of $236 per month from July 1, 1980 to June 30, 1984 and pay as additional rent any increase in real property taxes or insurance on the house; granting defendant the right to sell or refinance the house subject to plaintiff's right to reside therein; awarding to plaintiff "as her sole and separate property" all of the furniture, furnishings and appliances in the house; and ordering defendant to pay to plaintiff $1,000 as moving costs upon her vacation of the premises.[21]

Polackwich successfully appealed the rehabilitative award and Taylor cross-appealed the decision not to award her an interest in the house. The appellate court determined that the rehabilitative award could not stand because it was without a legal[22] or equitable basis.[23]

The appellate court conceded that Taylor needed Polackwich's assistance after the separation in order to maintain the lifestyle she and her children had enjoyed while living with Polackwich,[24] but nonetheless stated that "[r]emedies may be fashioned only

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18. *Id.* at 1019, 194 Cal. Rptr. at 11.

19. *Id.*

20. *Id.* at 1019, 194 Cal. Rptr. at 12.

21. *Id.* at 1019-20, 194 Cal. Rptr. at 12.

22. *Id.* at 1020, 194 Cal. Rptr. at 12. The court noted that the trial court found there was no contract between the parties to treat property acquired while they lived together as joint property. The court also affirmed the decision not to award Taylor an interest in the house under the theory of constructive trust.

23. *Id.* at 1022-23, 194 Cal. Rptr. at 14. The court also found that the jury believed the evidence did not show that Polackwich agreed to provide Taylor with financial support in the event that the parties ceased living together.

24. *Taylor,* 145 Cal. App. 3d at 1021, 194 Cal. Rptr. at 13.

to enforce rights, not to meet the needs of one party or to achieve what the court perceives to be 'equity' in a given situation."[25] The court concluded that the rehabilitative award granted by the trial court could not stand because there was no "legal or equitable obligation on Polackwich's part to provide Taylor and her children with a place to live, or to furnish them with support in any form."[26]

C. California Law Regarding Property Rights of Separating Unmarried Cohabitants

In a narrow decision the California Supreme Court in *Marvin v. Marvin*[27] declared the governing law in California for the separation of cohabiting couples. The *Marvin* court acknowledged that unmarried cohabitants should not be barred because of their relationship from asserting the contractual rights and remedies available to other persons.[28] The court enunciated the following policy considerations for applying equitable relief in cohabitation situations:

> [Non-married] parties may well expect that prop-

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25. *Id.*

26. *Id.*

27. *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32. In *Marvin*, a woman brought an action against a man with whom she had lived for six years. She alleged that they had entered into an oral agreement to combine efforts and earnings and to share equally the property accumulated through individual or combined efforts. At the time of the *Marvin* suit, the general rule in California was that absent an agreement to pool incomes or assets, and absent a finding that both parties contributed monetary funds to the purchase of the property in question, the property belonged to the party in whose name the legal title stood. *See* Vallera v. Vallera, 21 Cal. 2d 681, 684-85, 134 P.2d 761, 762-63 (1943).

The Washington Supreme Court recently ruled on this point. In *In re* Marriage of Lindsey, ___ Wash. 2d ___, 678 P.2d 328 (1984), the court overruled the presumption that parties intended to dispose of their property exactly as they did dispose of it, and that absent a trust relation, property belongs to the party who retains legal title. Instead, the Lindsey court adopted the rule that trial courts must examine the property accumulations during a nonmarital relationship and make a just and equitable disposition of the property.

This differs from the narrow *Marvin* holding because under *Lindsey*, recovery is not limited to traditional legal and equitable theories. *See infra* notes 38-67 and accompanying text. *Lindsey* may signify a trend in the courts toward a more progressive evaluation of the rights of cohabitants as this note suggests.

28. *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

> erty may be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort. We need not treat non-marital partners as putatively married partners in order to . . . extend equitable remedies; we need to treat them only as we do any other unmarried persons . . . . [I]n any event the better approach is to presume . . . "that the parties intend to deal fairly with each other."[29]

Furthermore, the court held that express contracts between unmarried cohabitants should be enforced unless the contract was explicitly founded on the consideration of sexual services.[30] The court stated that where there is no express agreement, "the courts may look to [the following] variety of other remedies in order to protect the parties' lawful expectations:"[31] implied contract or implied agreement of partnership or joint venture; constructive trust; resulting trust; quantum meruit; or some other tacit understanding between the parties.[32] In a footnote, the court noted that its opinion "does not preclude the evolution of additional remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise."[33]

On remand, the trial court fashioned an additional remedy, pursuant to the supreme court's direction. Although the trial court held that none of the theories articulated by the supreme court applied, it stated that the footnote in the supreme court opinion authorized rehabilitative awards and awarded plaintiff Michelle Marvin $104,000.[34] The trial court based the award on the harm to Marvin's career as an entertainer caused by the years during which she stayed at home to serve as homemaker and companion to the defendant. The court concluded that the

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29. *Marvin*, 18 Cal. 3d at 682-83, 557 P.2d at 121, 134 Cal. Rptr. at 830.
30. *Id.*
31. *Id.*
32. *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.
33. *Id.* at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.
34. *See* Marvin v. Marvin, 5 FAM. L. REP. 3077 (1979).

purpose of the award was to give Marvin the economic means to pursue an education and to learn new, employable skills.

The rehabilitative award in *Marvin* was similar to that rendered by the trial court in *Taylor*. Both decisions were reversed on appeal.[35] When the *Marvin* rehabilitative award was appealed to the California Supreme Court, it denied hearing. In reversing the trial court, the appellate court in *Marvin* stated that since there was no obligation to provide a reasonable sum for support and maintenance, and since there was no damage, unjust enrichment, or wrongful act, there was no basis in law or equity for a rehabilitative award.[36] According to the appellate court, the trial court's findings:

> merely established plaintiff's need therefore and defendant's ability to respond to that need. This is not enough. The award . . . must be supported by some recognized underlying obligation in law or equity. A court of equity admittedly has broad powers, but it may not create totally new substantive rights under the guise of doing equity.[37]

The appellate decision deleting the rehabilitative award in *Taylor* was therefore correct, at least in its reliance on precedent. Yet these decisions are disturbing, particularly because the trial courts in both *Marvin* and *Taylor,* after hearing the parties' testimony, rendered rehabilitative awards in attempts to reach equitable results as the California Supreme Court had suggested.

The next section explores the theories suggested by the *Marvin* court and the problems that arise when trying to apply them to a typical cohabitation situation like *Taylor*. The analysis concludes that such theories do not work in cohabitation situations because the *Marvin* theories are commercial and contractual in nature and are inappropriate in domestic situations,[38]

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35. Marvin v. Marvin, 122 Cal. App. 3d 871, 877, 176 Cal. Rptr. 555, 559 (1981) *hearing denied* (Oct. 7, 1981).

36. *Id.* at 876-77, 176 Cal. Rptr. at 559.

37. *Id.* at 876, 176 Cal. Rptr. at 559.

38. For example, the supreme court in *Marvin* cited *In re* Estate of Thornton, 81 Wash. 2d 72, 449 P.2d 864 (1972), as an example of an implied contract. *Marvin,* 18

and because courts seem unwilling to apply them in an equitable fashion.

III. FROM MARVIN TO EQUITY

A. Express Contracts

Contracts regarding property interests into which parties enter either before or while living together are now enforced by courts.[39] The contracts may be written or oral, and must be free from fraud, duress, and other defects. In *Marvin*, the supreme court held that cohabiting partners should be given the same judicial recognition as any two contracting parties.[40]

However, the contract theory provides little protection for cohabitors because it requires parties to contract during their relationship, regarding their separation. When parties are emotionally and intimately involved, signing a contract regarding property interests in the event of separation is rarely considered.[41] Oral contracts may be more likely but, as in *Taylor*, they are difficult to prove. Typically, when in court, separating parties give conflicting testimony. Under the contract theory, the court is forced to find for one party instead of fashioning an equitable remedy which benefits both and eliminates any unjust

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Cal.3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. In *Thornton*, the unmarried couple entered into the business of raising cattle, combining their experience, labor, and skills. Both parties participated in the decisions and day-to-day management of the business, and both contributed to the success of the business. The court held that the business belonged to both parties, not just the one who held title. While this implied partnership is quite appropriate in *Thornton*, it cannot be said that this theory accurately protects most cohabitation situations, since most couples do not go into business together. For excellent criticisms of *Marvin*, see Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 U.C.L.A. L. Rev. 1125 (1981); and Simitian, *Property Rights of Unmarried Homemakers: Marvin v. Marvin and the California Experience*, 5 Community Prop. J. 3 (1978).

39. *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

40. *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. The court stated that as long as an agreement does not rest upon the performance of sexual services, cohabiting partners "may order their economic affairs as they choose, and . . . no policy precludes the courts from enforcing such agreements." *Id.*

41. The protections afforded married couples affirms this point. The primary cohabitor relationship—marriage—does not require the parties to contemplate property settlements upon dissolution, as the law provides settlement laws for them. However, such a scheme is not afforded other cohabitors; they find no protection under the law. Therefore, they must contract regarding property settlement when no separation is contemplated.

enrichment. For instance, since Taylor's testimony was not enough to convince the court that a contract existed,[42] the trial court found that no express contract existed between the parties[43] and Taylor was ultimately left without a remedy. The facts of *Taylor* are not unique. Therefore, the contract theory will almost always prove to be inadequate to reach equitable results in comparable situations.

B. Implied-in-Fact Contracts

In an implied-in-fact contract, the court implies that the parties intended to contract. Intent can be shown not only by words, but by conduct and acts.[44] Recovery is usually based upon a showing that plaintiff rendered services or supplied a product with the expectation of monetary reimbursement.[45] The basis of recovery is quantum meruit—what is deserved.[46]

In *Taylor,* Taylor argued that while the parties lived together she cooked, washed, shopped, and generally took care of Polackwich. She cared for him when he was sick, entertained his co-workers, and helped him with a correspondence course which would advance his career. However, under the law of implied-in-fact contracts, Taylor could not recover for these household services unless she could prove that she expected to be reimbursed financially. Yet parties in intimate relationships do not expect monetary reimbursement for their work in the home. Taylor's expectations are more accurately reflected by her belief that her

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42. It is unlikely that a party in Taylor's position would have any witnesses to corroborate the existence of an oral agreement to consider all property as joint property.

43. *Taylor,* 145 Cal. App. 3d at 1019, 194 Cal. Rptr. at 11. The trial court could have found an express oral contract in light of the fact that Polackwich gave Taylor power of attorney over his bank accounts. The question remains whether judicial bias was at work here. The court seems to have found it more expedient to award property to the party who held title, rather than attempt to develop an equitable basis for shared ownership interests in the property.

44. Restatement (Second) of Contracts § 4, comment a (1979).

45. A "nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward." *Marvin,* 18 Cal. 3d at 684, 557 P.2d at 123, 134 Cal. Rptr. at 832.

46. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

reimbursement for performing household services was that she was a joint owner in all property acquired by the couple.[47] The implied-in-fact contract theory, by the *Marvin* definition, does not protect that expectation because it requires an expectation of monetary reimbursement.

C. Implied-in-Law Contracts (Quasi Contracts)

Implied-in-law contracts are created by law as a form of equitable relief to obtain justice and prevent unjust enrichment.[48] They are not based upon the apparent intentions of the parties or promises between the parties. Therefore, for Taylor to recover under this theory, she had to show that Polackwich was unjustly enriched. However, recovery is not allowed if sufficient consideration by the party allegedly unjustly enriched is shown, since consideration defeats the claim of unjust enrichment.

Taylor claimed Polackwich was unjustly enriched because he was awarded the house despite the fact that he only paid the $6,000 down payment, insurance, and taxes.[49] In contrast, Taylor provided household services, paid $14,000 of the mortgage, and used the bulk of her salary to meet household expenses. Nevertheless, the court felt that the support Polackwich provided for Taylor and her children was sufficient consideration, thereby precluding Taylor's recovery under this theory. The court stated:

> [D]efendant contributed to the support of plaintiff and the children, enabling them to enjoy a standard of living superior to that which they had experienced before residing with defendant in the house; such contributions by defendant were

47. Respondent's Answering Brief at 4, *Taylor*, 145 Cal. App. 3d at 1014, 194 Cal. Rptr. at 8. For a discussion of Taylor's reasonable expectations see *supra* note 14 and accompanying text.

It is possible that Taylor would not even have agreed to live with Polackwich and pay the $205 per month if she had known that she would not acquire any interest in the property. It is also possible that she would not have left an affordable apartment if she had known that upon breaking up with Polackwich she would have no place to live. This may be why the trial court awarded equitable relief. Yet the appellate court struck down the award because it found no implied contract.

48. Restatement (Second) of Contracts § 4, comment b (1959).

49. Cross-Appellant's Opening Brief at 23, *Taylor*, 145 Cal. App. 3d at 1014, 194 Cal. Rptr. at 8.

> equal to, if not greater than, the contributions to the household made by plaintiff in the form of services and money.[50]

The court further found that Taylor's payments constituted rent which she paid to her landlord, Polackwich, and rejected her claim of unjust enrichment.[51] This questionable result appears to be based entirely on Polackwich's testimony which directly contradicted Taylor's testimony on this issue. The court ignored the fact that parties in intimate relationships do not usually relate as landlord and tenant, and overlooked the facts that a lease was not drawn up, that there were no terms of the tenancy, and that the "rent" was never increased over an eight-year period. Given the housing shortage in California, especially for families with many children,[52] these factors make the court's conclusion even more questionable.

The conclusion in *Taylor* is also difficult to accept because it means that while Taylor was part of a committed relationship with Polackwich,[53] she was also subject, as a "tenant," to his whims with regard to whether or not she could live in the house that she had found and in which they made their home. Had the court found that Taylor acquired an interest in the property because of an implied-in-law contract by virtue of the more than $14,000 she paid, a more equitable result would have been reached. Quite possibly, Polackwich could not have afforded the house without her payments. Therefore, a finding of an implied-in-law contract would have prevented Polackwich's unjust enrichment.

The finding of a landlord-tenant relationship in a case like this is indicative of the lengths to which a court will go in order to find that a defendant was not unjustly enriched. Therefore,

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50. *Taylor*, 145 Cal. App. 3d at 1022-23, 194 Cal. Rptr. at 14.

51. *Id.* at 1022, 194 Cal. Rptr. at 14.

52. *See* Note, Marina Point, Ltd. v. Wolfson: *A Victory for Children in Rental Housing—Implications for Further Expansion of the Unruh Civil Right Act*, 13 GOLDEN GATE U.L. REV. 697 (1983).

53. Polackwich had told Taylor that he would probably marry her when he was ready, but that time never came. *Taylor*, 145 Cal. App. 3d at 1018, 194 Cal. Rptr. at 11.

this theory will likely prove inadequate in most cohabitation cases.

D. Resulting Trusts

A resulting trust is similar to an implied-in-fact contract in that the intent of the parties to create a trust is implied by the court from the facts of the case.[54] When a person purchases or furnishes money for the purchase of real property and allows title to be placed in the name of a third person,[55] the law presumes that the purchaser intended the third person to hold it in trust for the benefit of the purchaser.[56] This theory was not argued in *Taylor*. It appears to be inapplicable because Taylor did not provide the money for the purchase of the house.

However, Taylor did make the monthly payments for six years. It is well-settled in California that each party is entitled to share in property jointly accumulated in the proportion that his or her funds contributed toward its acquisition.[57] It is arguable that Polackwich would not have been able to afford the house had he not been able to rely on Taylor making the monthly payments. In this sense Taylor did provide some of the money, indeed, a larger proportion than Polackwich, for the purchase of the house. In practice, this theory will prove to have the same inherent problems as the implied-in-fact contract theory, and to date has not been successful when applied to cohabitation situations.

E. Constructive Trusts

When a person holding title to property would be unjustly enriched if she or he were permitted to retain it, a constructive trust arises. The titleholder then has an equitable duty to convey all or part of it to another in order to avoid unjust enrichment.[58] Justice Cardozo has characterized the constructive trust

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54. Restatement (Second) of Trusts § 404 (1957).

55. Recall that Taylor was not concerned that title to the house was taken in Polackwich's name. She believed that the parties had agreed that the house belonged to both of them. *Taylor*, 145 Cal. App. 3d at 1018, 194 Cal. Rptr. at 10.

56. Restatement (Second) of Trusts § 440 (1957).

57. *Vallera*, 21 Cal. 2d at 684-85, 134 P.2d at 762-63.

58. Restatement (Second) of Restitution § 160 (1936).

as "the formula through which the conscience of equity finds expression."[59] In *Omer v. Omer*,[60] cited in *Marvin* as a basis for applying the constructive trust theory in cohabitation cases, the court held that a finding of fraud or misrepresentation is not necessary in order to find a constructive trust.[61] *Omer* further held that clear evidence of inherent unconscionability will justify application of the doctrine.[62]

Taylor's claim that the court should impose a constructive trust and award her an interest in the house is based upon her actual monetary contribution to the acquisition and maintenance of the property. The residence was purchased at a total price of $27,950. The down payment was just under $6,000, which Polackwich paid. Thereafter, Taylor paid $205 per month from September 1973 until July 1979. Thus, Taylor's monetary contribution, in excess of $14,000, was more than double that of Polackwich's contribution.[63]

At the time of trial, both parties conceded that the value of the house was between $80,000 and $90,000. A conservative calculation of the value of the property results in an equity of approximately $55,000. Taylor, as well as Polackwich, contributed to the acquisition of that equity.[64]

The *Taylor* court explained that a "constructive trust may be imposed in practically any case where there is a wrongful acquisition of property to which another is entitled."[65] However, it held that there was no wrongful acquisition and no unjust enrichment since Taylor's payments constituted rent.[66] Elements

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59. Beatty v. Guggenheim Exploration Co., 225 NY 380, 386, 122 NE 378, 380 (1919). Justice Cardozo explained that when property is acquired in circumstances such that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *Id.*

60. 11 Wash. App. 386, 523 P.2d 957 (1974).

61. 11 Wash. App. at 390, 523 P.2d at 961.

62. *Id.*

63. Cross-Appellant's Opening Brief at 23, *Taylor*, 145 Cal. App. 3d at 1014, 194 Cal. Rptr. at 8 (1983).

64. *Id.* at 23.

65. *Taylor*, 145 Cal. App. 3d at 1022, 194 Cal. Rptr. at 13.

66. *Id.* at 1022, 194 Cal. Rptr. at 14.

which may compel the imposition of a constructive trust were present in *Taylor*: the parties had a confidential[67] relationship; Taylor contributed money to property held in Polackwich's name; and Polackwich was unjustly enriched at Taylor's expense when he was allowed to keep the property. Nevertheless the court failed to impose a constructive trust.

Constructive trust is an equitable doctrine, which is used to remedy unjust enrichment. However, whether or not a party has been unjustly enriched is left to the court's discretion. If *Taylor* is indicative of how reluctant the courts are to apply the doctrine, it is doubtful that the theory will help other cohabitants in positions similar to Taylor's.

IV. CRITIQUE

A. Confidential Relationships

Courts are required to carefully scrutinize the contracts, property transfers, and other business dealings of married people, because their relationship is presumed to be confidential.[68] However, no such presumption is made for unmarried couples.[69] Instead, unmarried couples are presumed to be dealing with each other at arm's length.[70]

Parties in intimate relationships, however, do not deal with each other at arm's length. Indeed, the *Marvin* court recognized that business dealings between unmarried cohabitants may be tainted due to their personal relationships. The court noted that

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67. *See infra* notes 69-71 and accompanying text.

68. *See, e.g., In re* Marriage of Coffin, 63 Cal. App. 3d 139, 150-51, 133 Cal. Rptr. 583, 588-89 (1976), where the court held that a husband's nondisclosure of a community property asset was a breach of his fiduciary duty and a basis for setting aside the property agreement between the parties. *See also* Cal. Civ. Code § 5103 (West 1983).

69. *See, e.g., In re* Marriage of Dawley, 17 Cal. 3d 342, 355, 551 P.2d 323, 331, 131 Cal. Rptr. 3, 11 (1976). The court questioned whether or not an antenuptial agreement had been tainted due to the exertion of undue influence. "Parties who are not yet married are not presumed to share a confidential relationship." *Id.*, citing Handley v. Handley, 113 Cal. App. 2d 280, 285, 248 P.2d 59; Thorpe v. Thorpe, 75 Cal. App. 2d 605, 611, 171 P.2d 126 (1946).

70. *See, e.g.,* Fernandez v. Fernandez, 194 Cal. App. 2d 782, 791, 15 Cal. Rptr. 374, 379 (1961), where the court refused to impose a burden upon the husband to show that an antenuptial agreement was fair, just, and fully understood by his wife since the parties were not yet married when they entered into the contract.

a confidential relationship may be found between cohabitants if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.[71] It seems clear that once it is determined that a confidential relationship exists between unmarried cohabitants, the court in a property division suit must scrutinize the property transactions in question. Any evidence of unfairness would, as in a marital relationship, justify a court's intervention in an attempt to reach an equitable result.

In *Taylor,* the court should have carefully examined the alleged rental agreement. Had the court done this, it would have realized that due to their personal relationship, it was inconceivable that a strict landlord-tenant relationship existed between Taylor and Polackwich. Having made this determination, the court would have been justified in fashioning an equitable remedy.

As demonstrated above, the theories offered by the California Supreme Court in *Marvin* are, for the most part, inadequate in fashioning remedies for cohabitation situations. Usually, recovery is awarded only upon a determination that the parties intended to contract or form a trust, but actually failed to do so.[72] The problem with implying intentions in cohabitation situations is that, as in *Taylor,* upon separation parties will claim opposite intentions. Thus, more appropriate solutions need to be developed.

B. Application of Community Property Principles

Traditional marriage is no longer regarded as it once was. A recent sociological study concluded that marriage as an institution is in danger of collapse.[73] Many people no longer see marriage as the "perfect vehicle for fulfilling aspirations for intimacy."[74] Indeed, it must be accepted that family relationships exist in our society in many forms other than traditional mar-

71. *Marvin,* 18 Cal. 3d at 682 n.22, 557 P.2d at 121 n.22, 134 Cal. Rptr. at 830 n.22.
72. *See supra* notes 44-67 and accompanying text.
73. P. Blumstein & P.Schwartz, American Couples, 318 (1983).
74. *Id.* at 11.

riage, and that many people have chosen viable alternatives to marriage.[75] Therefore, it is contended here that equity can only be accomplished when all families are given the same protection under our laws.[76]

The community property system stresses unity and places a strong emphasis on shared ownership. Its presumption that common ownership is highly desirable is based on the theory that both partners contribute to the acquisition of property, regardless of who earned the money and who is the titleholder.[77] There is no apparent reason why this approach should not be applied to unmarried cohabitants if their relationship is a partnership with the same elements as a traditional marriage.[78]

If the community property system were applied to all established family-like units, to all partnerships with identical elements (whether the parties were married or not), then the only issue to decide would be whether or not a cohabitation relationship constituted a family.[79] It is necessary, therefore, to look at

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75. In 1976, the Bureau of Vital Statistics for the State of California reported that there were 3,322 more petitions for marriage licenses than there had been in 1966. *See* Mitchelson and Glucksman, *Equal Protection for Unmarried Cohabitants: An Insider's Look at Marvin v. Marvin*, 5 PEPPERDINE L. REV. 283, 284 n.3 (1977). Such a small number of marriage licenses in comparison to the large number of divorce petitions in the same year (*See infra* note 80) illustrates that people who are getting divorced are not remarrying, and is indicative of the fact that people are choosing family alternatives to traditional marriage.

76. To acknowledge that family relationships exist outside of traditional marriage but to have different standards for determining property interests in non-traditional relationships encourages a primary earner partner to do exactly what Polackwich did. He took title to all property in his name, never married, and enjoyed all the benefits of an intimate relationship. When he tired of the relationship, he left the non-earner/non-titleholder with nothing, while he walked away with everything.

77. Community property is all real and personal property acquired by a couple during a valid marriage, with the exception of property received as a gift or as an inheritance. Upon dissolution, the court ascertains the nature and extent of community assets and obligations. There is a mandatory obligation upon trial courts to distribute community property equally. *See In re* Marriage of Knickerbocker, 43 Cal. App. 3d 1039, 1043-48, 118 Cal. Rptr. 232, 235-38 (1974); *In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 267-68, 105 Cal. Rptr. 483, 498-500 (1972); CAL. CIV. CODE §§ 4800(a), 4452 (West 1983 and West Supp. 1984).

78. *See* Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1 (1978), (author argues that sharing based principles are desirable and should be extended to unmarried cohabitants).

79. *See* Comment, *The Property Rights of Unmarried Cohabitants—A Proposal*, 14 CAL. L. REV. 485, 505-06 (1979), [hereinafter cited as Comment, *Property Rights*], (author suggests that unmarried cohabitants should be treated the same as married people

how the parties acted in order to determine whether their relationship constituted a family unit.

The first question, then, is how must unmarried cohabitants act before they are afforded the same protection married couples receive under the community property system?[80] To answer this question, it must be determined whether any factors operate in a marriage and not in cohabitation that justify protecting only married partners.[81] If the elements of each relationship are essentially the same then there should be equal treatment.[82]

Marriage has been described as follows:

> In marriage, most of us seek an alliance with another individual who will believe in us; who will be loyal to us; who will help us function in a demanding, often hostile world; and who will help make life satisfying. In exchange we will try to do the same. Those needs and the expectations they create shape the frame of mind with which deci-

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if a judgment states that there exists 1) an ostensible marital relationship, and 2) an actual family relationship).

80. The *Omer* court stated in dictum that "proof of the relationship itself, its purpose, duration, stability, and so forth, [should] determine the merits of [a] claim [by an unmarried cohabitant], and then, if warranted by the facts . . . . community property laws should be applied by analogy to determine the rights of the parties." *Omer*, 11 Wash. App. at 389, 523 P.2d at 960. The Washington Supreme Court, however, refused to adopt the theory that certain relationships of long and durable standing may give rise to community property rights similar to those enjoyed by married people. *See Thornton*, 81 Wash. 2d 72, 499 P.2d 864, 866-67.

81. *See* Mitchelson & Glucksman, *supra* note 75 at 291-93. The authors argue that discrimination against unmarried cohabitors, on the basis of their marital status, cannot be constitutionally tolerated, since the real government interest is in promoting and protecting the family unit, not only traditional marriage. They suggest that while these terms might have once been synonymous, there are now many alternatives to marriage.

However, the United States Supreme Court has never accepted this view and has limited their decisions strictly to promote marriage. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) for the Court's discussion of the fundamental right to marry.

82. *See* Comment, *Marvin v. Marvin: The Scope of Equity With Respect to Non-Marital Relationships*, 5 PEPPERDINE L. REV. 49, 74 (1978). The author suggests that absent an overt intention to keep property acquired during non-marital cohabitation as separate property and/or a conscious effort not to contribute services or funds to the community, there should be a rebuttable presumption that the parties assumed the rights and duties of legal spouses with regard to property acquired during the relationship. Then, if the presumption is not rebutted, equitable principles, such as quasi-marital property, should apply.

> sions are made during the marriage. The expectation of stability and continuity and the desire for a shared life suggest that married people are unlikely to make decisions on an individually oriented basis; rather the needs of each person tend to be taken into account. Thus, married people will often make different decisions from those they would make if there were no marriage or marriage-like relationship functioning.[83]

Many unmarried couples who cohabit have the same aspirations as married couples. These goals—love, sexual satisfaction, emotional intimacy, and trust—are the cornerstone of *any* successful relationship.[84]

Thus, an inquiry into whether or not a family relationship exists should focus on the following questions: Was the relationship stable and significant? That is, did the parties view the relationship as permanent? Did the parties plan for a shared life together?[85]

These questions can be answered by looking at the following

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83. Prager, *Perspective on Marital Property Law*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 117 (B. Thorne & M. Yalom ed. 1982).

84. The expectations created by the search for the fulfillment of these goals are the same for unmarried cohabitants as they are for married couples, with one possible exception. It might be said that when people marry they are making a lifelong commitment, while those who choose to live together may have more ambiguous motives. In order to determine what couples think about the notion of a permanent relationship, it is helpful to look at certain decisions they have made. For example, when decisions are made that involve one partner sacrificing a career or career advancement, it is safe to assume that such a decision was prompted by the assumption that the relationship was a permanent one.

It is not suggested that married couples and unmarried cohabitants always have the same expectations of permanence. Yet it must be noted that divorce has become quite common in our society. The Bureau of Vital Statistics for the State of California reported that in 1976 there were 64,218 more petitions for divorces than in 1966. *See* Mitchelson and Glucksman, *supra* note 75, at 284, n.3. It can be argued that the fear of divorce looms just as large for married couples as the fear of separation looms for unmarried cohabitants.

85. A recent fourth district case held that unmarried cohabitants may state a cause of action for loss of consortium by showing that the nonmarital relationship was stable and significant. Butcher v. Superior Court, 139 Cal. App. 3d 58, 71, 188 Cal. Rptr. 503, 512 (1983). The court stated that evidence of stability and significance can be shown by the duration of the relationship, mutual contracts, the degree of economic cooperation and entanglement, exclusivity of sexual relations, and a "family" relationship with children. *Id.* at 70, 188 Cal. Rptr. at 512.

factors. None of these factors are dispositive. Rather, courts must look at the totality of the circumstances and balance the respective rights of each party in an effort to protect the reasonable expectations of each party.

1) How did the couple hold themselves out to the community?[86] How did friends and family perceive the couple? How long did the parties live together?[87] Was there a mutual dedication to family life?[88]

2) Was there economic integration between the parties? Did they have joint bank accounts? Did they share purchases, expenses, and investments? Was one party dependent on the other for financial support? Was there a voluntary assumption of debts and of providing for each other?[89]

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86. *See* Blumberg, *Cohabitation Without Marriage: A Different Perspective,* 28 U.C.L.A. L. REV. 1125, 1134-35, 1167 (1981), (author maintains that it is fair to treat cohabitants as if they were married since most cohabitants feel that there is no difference between marriage and cohabitation).

87. *Id.* at 1166. The author also suggests that two years of cohabitation, or cohabitation of any period if a child was born to the couple during cohabitation, justifies treating the parties as if they were lawfully married for purposes of maintenance, property division, intestacy, and elective share statutes.

88. *See, In re* Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), which was one of the first California cases to award relief in a cohabitation situation. Paul Cary and Janet Forbes knew they were not married, yet together they purchased a home and other property, borrowed money, obtained credit, and filed joint income tax returns. They had four children. The children, as well as Forbes, used the last name Cary.

The parties accumulated some real and personal property purchased with Cary's earnings. Had the parties married, this property would have been community property. When the parties separated, the trial court determined that the property should be equally divided, and the appellate court affirmed. The court held that recovery in such situations required "that there be established not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage." *Id.* at 353, 109 Cal. Rptr. at 867.

Eventually, the California Supreme Court rejected the *Cary* reasoning as being a strained interpretation of the Family Law Act. *See supra* note 12. The court concluded that the legislature, in enacting the Family Law Act, never considered the property rights of nonmarital partners. *Marvin,* 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829. This may be true, but recovery need not be based upon the Family Law Act. Courts, as well as legislators, must recognize that it is logical to say that if parties lived and acted as a family, they should be treated as a family.

89. *See* Comment, *Property Rights, supra* note 79, at 507-08.

How partners handled their financial affairs is indicative of whether they perceived their relationship to be a stable and permanent one. If the parties acted as if they were planning a life together this must be recognized at separation in order to protect the parties' reasonable expectations.

3) Was there a voluntary division of labor and responsibility? Did one party make career sacrifices so that the other could advance?[90]

4) Did the parties share the responsibility of raising children?[91]

5) Was there a "tacit understanding" between the parties that whatever they acquired by mutual effort belonged to both of them?[92]

Taylor and Polackwich both perceived their relationship as stable and permanent. They shared their money and they planned on marrying. Polackwich supported Taylor's children and helped raise them. Taylor wanted to go back to school, but didn't, at Polackwich's request.[93] The parties had an actual family relationship, an intimate relationship, without traditional marriage. Their family relationship should have been afforded the respect it was due, and community property principles should have been applied. Had *Taylor* been reviewed under community property principles, Taylor would have been awarded an interest in the house.[94]

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90. *See* Prager, *supra* note 83, at 119.

91. *See* Comment, *Property Rights, supra* note 79, at 507-08. *See also In re* Marriage of Cary, 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 867 (for a discussion of *Cary, see supra* note 88).

92. *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. ("The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates. . .[a] tacit understanding between the parties.") *Id.*

See also Folberg and Buren, *Domestic Partnership: A Proposal For Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453, 489-90 (1976), where the authors conclude that absent an express contract to pool resources, there are currently no adequate remedies for dividing the property of an unmarried couple. They propose a new theory, entitled domestic partnership, where the central inquiry is whether there arose between the parties a legitimate expectation of a shared property interest in the accumulation of the union. Where this question is answered in the affirmative, the principles for dividing marital property apply.

93. *Taylor*, 145 Cal. App. 3d at 1019, 194 Cal. Rptr. at 11.

94. All property is presumed to be community property when parties are married.

V. CONCLUSION

The legal community must begin to recognize family relationships outside traditional marriage. If cohabiting partners act like their property is jointly owned, they should be treated as joint owners by the courts regardless of marital status. Parties should always have the option of keeping their property separate, but this would have to be a conscious choice evidenced by an agreement between the parties. Otherwise, it must be presumed that shared ownership principles are desirable whenever there is evidence that a relationship is stable and significant.

Only when non-traditional families are recognized as viable and legitimate family units can a division of property upon separation be truly equitable. Courts and legislators must recognize that traditional remedies are inapplicable in cohabitation situations. They must begin to respond to society's changing values.

When the law does not respond to social reality, it is difficult to respect the law. The decision in *Taylor* occurred because the court applied traditional theories to a non-traditional situation—cohabitation. Indeed, "if our trial courts were free of rigid doctrinal analysis, legal presumptions, [and] high standards of proof . . . and could make determinations on the basis of the

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CAL. CIV. CODE § 5110 (West 1983). Upon dissolution, if the court finds that some of the property was acquired with separate property funds, a formula is applied which apportions what is separate property and what is community property. *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979); *In re* Marriage of Lucas, 27 Cal. 3d 841, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

In *Taylor,* if the $6,000 Polackwich used for the down payment was earned before the parties began living together, he would be entitled to approximately 22% of the equity in the house as his separate property. Any payments made with funds earned while the parties lived together entitle the community to share equally in the equity those funds provide. Therefore, if the money Taylor used for the monthly payments was earned while the parties lived together, the community would own approximately 50% of the house, entitling Taylor to approximately 25% of what the house was worth at dissolution.

facts and equity of the particular case, a just result could be achieved more often than it is presently."[95]

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95. *Omer*, 11 Wash. App. at 389-90, 523 P.2d at 960-61.

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