Standing in the Shadows: Honoring the Contractual Obligations of Cohabitants for Support

Tammy L. Lewis*

I. INTRODUCTION

Since the early 1970's, ever-increasing numbers of couples have rejected the commitment and long-term responsibilities of marriage. Rather, many couples are opting to live together outside the confines of a legal relationship.\(^1\) Recent demographic studies show that as many as 2.6 million couples in America are choosing the alternative of cohabitation.\(^2\) These cohabitants are raising novel legal questions about property and support rights following the termination of their relationships.

The variety of legal issues raised by cohabiting living arrangements is best illustrated by a typical hypothetical cohabitant's situation. Suppose a client, Ms. Jones, seeks legal assistance in order to protect her rights following the breakup of her ten year relationship with her live-in mate, Mr. Jones. The couple met in college, graduated, and decided to live together without the benefit of marriage; however, Ms. Jones assumed Mr. Jones' name. Mr. Jones indicated that he would

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\* B.A. 1987, Seattle Pacific University; J.D. Candidate 1992, University of Puget Sound School of Law. The Author would like to thank Professor Thomas J. Holdych for his generous advice and assistance.

1. In the past, such relationships were frequently referred to as meretricious relationships. The term meretricious is defined as "of the nature of unlawful sexual connection." Black's Law Dictionary 988 (6th ed. 1990). The use of the term meretricious implies that cohabitation is unlawful and immoral, consequently perpetuating a negative image of these relationships. This Author declines to use the term in light of society's current acceptance of cohabitation. But cf. Peffley-Warner v. Bowen, 113 Wash. 2d 243, 246 n.5, 778 P.2d 1022, 1023-24 n.5 (1989) (recognizing the negative connotations of the term meretricious but nevertheless continuing to apply it to cohabitants).

2. James R. Wetzel, American Families: 75 Years of Change, 113 MONTHLY LAB. REV. 3, 4 (1990). Cohabitants tend to be younger: over 60% are younger than thirty-five years of age. Cohabitating couples also are likely to end their relationships at the altar; according to a recent University of Wisconsin study, 37% marry within two years. Id. In 1989, the traditional model of marriage still accounted for 52.9 million households in the United States. Id. at 5.
take care of Ms. Jones if she would agree to stay home and assume responsibility for the domestic aspects of their life together. Consequently, Ms. Jones never pursued her career. She stayed home, bore two children, and ran the household. Mr. Jones became a successful architect, providing economic support for the household. The couple purchased a home and lived together in a marriage-like relationship for ten years. Mr. Jones eventually decided he was unhappy with the relationship and moved out. Apart from the property division issues, Ms. Jones' critical needs for support exceed what Mr. Jones is obligated to pay in child support. Ms. Jones has no job outside the home, no prospects for employment in the near future, and no stream of income with which to pay the expenses of day-to-day living. What relief is available to Ms. Jones under Washington State law? This area of post-cohabitation support has not yet been addressed by the Washington courts.

This Comment will explore the alternative legal theories on which Ms. Jones may proceed and the various approaches that courts have followed in an attempt to resolve post-cohabitation support issues. These theories range from status proposals to contract remedies. Initially, this Comment will examine traditional theories of marital support and their relation to post-cohabitant support. Next, this Comment will review express contract, implied-in-fact contract, and quasi-contract theories of support and how these different theories have been effectively applied by various state courts. A brief discussion follows concerning federal courts and the confusion surrounding the federal jurisdiction of cohabitation actions. Finally, the contract theories of relief will be contrasted against proposed legal status solutions. Ultimately, this Comment concludes that post-cohabitation support issues are best resolved through contract theories. Solutions based on legal status are extremely intrusive and impose unbargained-for terms upon unwilling parties. In contrast, contract analysis more accu-

3. In this Comment, the term "status" represents those privileges or obligations of an individual or class that are state-imposed. One common example of legal status is marriage. The individual has very little control over the legal responsibilities imposed by status; it does not respect the unique choices and understandings of the parties. For an interesting discussion of how state-imposed legal status impedes contractual freedoms in cohabitation, see Howard O. Hunter, An Essay on Contract and Status: Race, Marriage and the Meretricious Spouse, 64 VA. L. REV. 1039, 1076 (1978).
rately rewards the actual expectation and reliance interests of the parties.

In particular, this Comment will argue that support should be awarded to a dependent cohabitant only if an express contract existed. In the absence of an express contract, the dependent cohabitant should only be able to recover the value of his or her services in quasi-contract in order to prevent the unjust enrichment of the supporting party. These two remedies, based on express and quasi-contract, give the courts flexibility while preserving and honoring the intent and expectations of the parties to the greatest extent possible. Consequently, state-imposed legal obligations are avoided. Alternative approaches, such as implied-in-fact contract actions or status based remedies present troubling policy concerns. With these approaches, the state often takes a more intrusive role, imposing legal obligations on parties that are contrary to their intent.

II. THEORIES OF POST-MARITAL AND POST-COHABITATION SUPPORT

A. Traditional Post-Marital Support

Before analyzing support in the context of cohabitation, we will examine and distinguish traditional marital support obligations. Post-marital support is commonly referred to as alimony or, more recently, maintenance. Alimony is a state-imposed legal obligation of support. At common law, women lost their legal identity upon marriage; therefore, the husband had a legal obligation to support his wife. In the event of legal separation or divorce, the husband’s duty to support continued on the theory that the wife had a perpetual right of support as if the marriage had remained intact. This theory was based upon the fault of the husband for divorcing his innocent wife. Thus, under the fault system of divorce, many jurisdictions

4. Status remedies are contract obligations that are state-imposed. Under this view, the freedom of individualized relations is secondary to the state’s interest in creating and supervising standardized relations. The result is a decline in the role of individual bargaining to contract because the state supplies the terms of the agreement. E. ALLEN FARNSWORTH, CONTRACTS § 1.7, at 23 (1990).

5. Upon marriage, women forfeited their legal right to contract, purchase or sell land, bring legal actions, and make testamentary disposition of property. The husband retained all control over the marital assets, necessitating a legal duty to support. John Carbone & Margaret F. Brinig, Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 TUL. L. REV. 954, 965 n.47 (1991).
only allowed alimony claims by innocent wives divorcing guilty husbands.6

With the advent of no-fault divorce laws came variations of the common law permanent alimony award. Under modern state laws, courts now use their equitable powers to award alimony (now frequently referred to as maintenance) on the basis of need, rehabilitation, restitution, or a lump-sum award characterized as part of the property division. Indeed, the lines between alimony or maintenance and property division are becoming increasingly blurred.7 Often a court will take into account the amount of a property settlement when determining an equitable maintenance or alimony award. Parties may prefer to characterize money as alimony or maintenance to take advantage of favorable tax consequences.

In the state of Washington, marital spousal support, or maintenance, is calculated by considering the following factors: need for rehabilitation (i.e., job training), ability to pay, standard of living, length of marriage, and fitness or health.8 Some factors serve a rehabilitative function by assessing a spouse's ability to procure employment. For instance, a spouse's health, past education, and experience will limit his or her employment options. After these factors are evaluated, a court may


[T]he court may grant a maintenance order for either spouse. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
(c) The standard of living established during the marriage;
(d) The duration of the marriage;
(e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
(f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

award maintenance to assist the spouse in obtaining the training or education necessary for support in a lifestyle comparable to the standard enjoyed during marriage. Other factors, such as length of marriage and standard of living, serve a compensatory function. The contrasting views of alimony as rehabilitative or compensatory have resulted in some dissension among authorities. Some experts have argued that alimony should have a rehabilitative function,9 while others see it as compensatory in nature.10 The compensatory rationale is based on the fact that the wife has traditionally made a substantial investment of time and services during the marriage that deserves compensation. She is often left at a disadvantage because although her domestic services and child-raising functions have value to her husband, such skills have no real value on the open market.11

Under this compensatory theory, post-marital support serves an economic function by compensating spouses for lost opportunity costs and loss in expected gain from marriage.12 In short, even though maintenance is state-imposed on the basis of the parties' status as a married couple, compensatory maintenance also makes sense from a contractual standpoint because it strives to fulfill the parties' original expectations. Some of the same compensatory considerations inherent in the economic analysis of marital support are also relevant to the analysis of service and support contract actions among cohabitants.

B. Post Cohabitation Support

Turning to the issue of post-cohabitation support, some-
times inaccurately referred to as palimony, a great diversity of case precedent exists in American jurisdictions regarding the treatment of cohabitants' property and support rights. The landmark case dealing with cohabitation issues is Marvin v. Marvin. The California Supreme Court took an active judicial role and forged into the very heart of the cohabitation controversy. In an opinion by Justice Tobriner, the court announced that contracts between cohabitants were enforceable to the extent that they were not based on illicit sexual consideration. Justice Tobriner indicated that relief could be granted on express contract theory, implied contract theory, or in quantum meruit for the reasonable value of household services. In an enigmatic footnote, the court added that it did not intend to discourage additional remedies in equity that might evolve to protect the reasonable expectations of parties should the causes of action listed above prove inadequate.

After remand and a second appeal, however, the Marvin appellate court retreated somewhat from the sweeping pronouncements of the California Supreme Court. The trial court found that although the parties, Michelle and Lee, had no express agreement for Michelle's support, she deserved a $104,000 lump-sum award to finance her career rehabilitation. Thus, the trial court reasoned that Lee was responsible for Michelle's rehabilitation because he had terminated the relationship and left her with no means of support. The California Court of Appeals disagreed, noting that Michelle had not pleaded any legal theory on which to base such an award. The appellate court recognized that a support award may be appropriate in some cases provided it is based upon a legal cause of action. Because there was no contract or unjust enrichment, the court found no basis for a rehabilitative award. While need and ability to pay could justify mainte-

13. The term palimony connotes an award of post-cohabitation support analogous to alimony. Alimony is a state-imposed legal obligation in dissolution actions based on the need, length of marriage, and financial situation of the parties. Post-cohabitation support is not a state-imposed obligation but is based on an agreement between the parties.
15. Id. at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.
16. Id. at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.
18. Id. at 873, 176 Cal. Rptr. at 556.
19. Id. at 874, 176 Cal. Rptr. at 557.
20. Id. at 875, 176 Cal. Rptr. at 558.
21. Id. at 875, 176 Cal. Rptr. at 558.
nance awards in marital contexts, these factors were insufficient to award maintenance to cohabitants absent statutory authority.

In contrast to the active *Marvin* court, the Illinois Supreme Court in *Hewitt v. Hewitt*\(^{22}\) adopted a passive judicial role when dealing with cohabitation issues, maintaining that cohabitation was an issue better suited for legislative action. The court declined to grant any relief to a cohabiting spouse on the grounds that public policy gave the state a strong interest in protecting the sanctity of marriage.\(^{23}\)

Thus, *Hewitt* occupied the opposite end of the spectrum from *Marvin*, with harsh results for cohabitants. Noting that the *Marvin* case had received wide publicity prior to the Illinois legislature's enactment of the Illinois Marriage and Dissolution of Marriage Act, the *Hewitt* court concluded that the legislature did not intend to recognize *Marvin* or to extend property rights to unmarried cohabitants.\(^{24}\) The Illinois court left the matter to be resolved, if at all, by the state legislature.

Although no Washington cases directly address support awards among cohabitants, the Washington courts have also struggled with the legal problems presented by cohabitants. In a pivotal case, *In re Marriage of Lindsey*,\(^{25}\) the Washington Supreme Court applied a status remedy and recognized that cohabitants could have enforceable property rights.\(^{26}\) The court applied an analysis similar to that used in property distributions in marital dissolutions, holding that Washington courts have equitable power to examine a cohabiting relationship and award property on a just and equitable basis.\(^{27}\)

\(^{22}\) 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).
\(^{23}\) *Id.* at 65, 394 N.E.2d at 1210.
\(^{24}\) *Id.* at 64, 394 N.E.2d at 1210.
\(^{26}\) *Id.* at 307, 678 P.2d at 332.
\(^{27}\) *Id.* at 304, 678 P.2d at 331. The parties in the *Lindsey* case lived together for two years prior to marriage, and the wife claimed an interest in the insurance proceeds from the destruction of a barn and shop built during the parties' premarital cohabitation. The wife contended that she had helped build the barn and shop and should be awarded a share of the insurance proceeds. The case was remanded for a just and equitable determination of her premarital interest in the property, just as it would have been in a legal marriage under Washington's dissolution statute. *Id.* at 307, 678 P.2d at 332. *Lindsey* does not specifically provide any particular guidelines to determine precisely what sort of relationships would be subject to a just and equitable disposition. Other cases have considered the continuity and duration of relationship, pooling of resources, and services as relevant factors. *See* Latham v. Hennessey, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059 (1976).
The *Lindsey* case overruled a rule of law known as the Creasman presumption\(^{28}\) that advocated leaving the parties in a cohabiting relationship as they stood when they ceased living together. The rationale behind the presumption was that the parties had disposed of the property as they intended. This rule could produce harsh results if one party provided all the consideration for the property but the other party held legal title. The *Lindsey* court went to great lengths to eliminate the Creasman presumption; however, the *Lindsey* court may have also been influenced by the fact that the parties were indeed married and that the cohabitation had been a prelude to their marriage.

Immediately prior to *Lindsey*, Division One of the Washington State Court of Appeals held in *Warden v. Warden*\(^ {29} \) that the Washington divorce statute\(^ {30} \) for property distribution governs nonmarital relationships that are tantamount to a family-like relationship.\(^ {31} \) This application of a divorce statute to a cohabiting relationship was a radical departure from other jurisdictions; in fact, the *Warden* approach has been expressly rejected in other states.\(^ {32} \)

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28. In Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948), the court ruled that, in a cohabiting relationship, property would be awarded to the party who had legal title regardless of who had supplied the consideration for the property. The *Creasman* presumption stated: "[I]n the absence of any evidence to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it." *Id.* at 356, 196 P.2d at 841. The *Lindsey* court recognized the inequity of such an uncompromising rule: "The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it, in their names at the end of a so-called meretricious relationship." *Lindsey*, 101 Wash. 2d at 303, 678 P.2d at 330 (Finley, J., concurring) (quoting West v. Knowles, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957)).


32. The Wisconsin Supreme Court declined to recognize the *Warden* approach because "[a]lthough the *Warden* case provides support for the plaintiff's argument, most courts which have addressed the issue of whether marriage dissolution statutes provide relief to unmarried cohabitants have either rejected or avoided application of a marriage dissolution statute to unmarried cohabitants." Watts v. Watts, 137 Wis. 2d 506, 517, 405 N.W.2d 303, 308 (1989). The court declined to extend the application of the dissolution statute to unmarried cohabitants. *Id.* at 517-18, 405 N.W.2d at 309.

Conversely, the *Warden* court reasoned that because the Washington State Legislature had extended the divorce statute to invalid marriages, the statute should similarly be extended to any marriage-like cohabitation. *Warden*, 36 Wash. App. at 698, 676 P.2d at 1039. The court indicated that, among other factors, a court should look at the relationship's length and purpose, offspring of the relationship, the contributions of the parties, and future prospects of each. *Id.* at 698, 676 P.2d at 1039. In *Warden*, the parties had lived together for nine years, held themselves out as
Lindsey and Warden arguably allow the state to intervene in marriage-like cohabitations and impose marriage-like obligations on the parties, including support obligations. In other words, a court may consider the nature, length, and purpose of the relationship; if it resembles a marriage, the court may apply the Washington maintenance statute by analogy. However, Washington courts could turn to another, more desirable alternative to state-imposed support. Cohabits in Washington could seek relief based on contract theory. In order to weigh the advantages and disadvantages of each approach, one must examine the policy considerations underlying cohabitation contracts, the various theories on which they are based, and the application of these theories in other jurisdictions.

III. CONTRACT THEORIES OF RECOVERY

Several contract theories are available for recovery of support or services of cohabitants. The unique policy issues that arise when these legal remedies are applied to cohabitants shed light on the relative advantages of these theories in the context of cohabitation.

The initial inquiry regarding cohabitant contract claims is whether they are enforceable at all as a matter of public policy. Traditionally, public policy has prohibited the enforcement of contracts for sexual relations. Thus, one dilemma presented by a cohabitation agreement is how the agreement’s consideration can be separated from the sexual aspects of the parties’ relationship. One author has suggested that courts have been reluctant to enforce agreements between parties having a sexual relationship because judges were influenced by traditional notions that women were providers of sex, not partners in enjoyment. In other words, if sex were seen as being mutually satisfying to both parties, it could then be severed

husband and wife, filed joint tax returns, and raised two children. Id. at 694, 676 P.2d at 1037. Applying the above guidelines, the appellate court concluded that the trial court correctly treated the parties as a marital family. Id. at 698, 676 P.2d at 1039.


34. Harry G. Prince, Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?, 70 MINN. L. REV. 163, 191 (1985). The author notes that in the area of extramarital sexual relations, a great difference exists between a contract for prostitution or sexual services in exchange for money and a cohabitation relationship in which the sexual relations of the parties are only one aspect of the overall relationship.

from the rest of the contract. The Marvin court recognized that the sexual aspect of a cohabitation relationship is severable from the parties' agreement provided sufficient non-sexual consideration supports the contract.\textsuperscript{36}

Another policy consideration tending to discourage enforcement of cohabitation agreements is the policy encouraging marriage. Preserving the sanctity of marriage is the main policy justification of the Hewitt court.\textsuperscript{37} Nevertheless, enforcement of cohabitation agreements may not discourage marriage at all. If a potential cohabitant knows that he or she risks being held accountable for any agreements made pursuant to a cohabiting relationship, that individual may be discouraged from entering into such a relationship.\textsuperscript{38} Thus, marriage may become a more attractive alternative because it provides many legal benefits to its participants not usually available to cohabitants.\textsuperscript{39}

In some situations, however, a cohabitant's promise to support may conflict with other traditional support obligations. For instance, if Mr. Jones was under an obligation for child support from a previous relationship or marriage, the child support obligation should have priority as a matter of public policy over a promise to support a cohabitant. Similarly, if Mr. Jones is under a previous obligation to pay alimony or maintenance to a previous wife, the promise to support Ms. Jones should not be enforced to the detriment of the alimony obligation. In such cases, the public policy favoring child support and spousal support would override any secondary support agreements between cohabitants.

By recognizing cohabitants' right to recovery on traditional contract legal theories, courts can honor the parties' expectations and intentions without intruding on the sanctity of marriage. This result preserves the cohabitants' rights and abilities


\textsuperscript{37} "In thus potentially enhancing the attractiveness of a private arrangement over marriage, we believe that the appellate court decision in this case contravenes the [Illinois Marriage and Dissolution of Marriage] Act's policy of strengthening and preserving the integrity of marriage." Hewitt v. Hewitt, 77 Ill. 2d 49, 62, 394 N.E.2d 1204, 1209 (1979).


\textsuperscript{39} Common marital rights include insurance and Social Security benefits, rights to intestate succession, health insurance benefits, pension benefits, and so forth.
to contract and avoids penalizing parties merely because they have chosen an alternative lifestyle.\textsuperscript{40} Just as importantly, a contract analogy avoids the equation of cohabitation with marriage, and it also avoids imposing the doctrine of common law marriage on unsuspecting cohabitants.\textsuperscript{41}

In conclusion, a contract approach is a more equitable result because it will more closely give effect to the parties’ intentions. Of course, the particular contract theory utilized and the relief awarded will vary according to the unique facts of each case.\textsuperscript{42} Several legal theories may be utilized effectively in contract actions, and they are best analyzed individually.

\textbf{IV. EXPRESS CONTRACT}

The most universally accepted cause of action with respect to cohabitants is express contract. Ideally, the parties should have a written contract; unfortunately, this is rarely the case. The overwhelming majority of express contracts litigated between cohabitants are oral.\textsuperscript{43} In order for parties to enter into an oral agreement for support or services, they must manifest their assent to a mutual obligation by which the intent of the parties can be ascertained and honored.\textsuperscript{44} In the case of our hypothetical client, Mr. Jones could make an offer by promising Ms. Jones that he would care for her and provide lifetime economic security for her in exchange for her agreement to move in with him and assume domestic duties. If Ms. Jones either orally agrees or simply moves in, she has manifested her acceptance of Mr. Jones’s offer.\textsuperscript{45} Thus, the parties have expressed their assent to a bargained-for exchange, and the possible presumption of gratuitousness is overcome. The

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\textsuperscript{40} See supra note 28 and accompanying text.
\textsuperscript{41} Carol S. Bruch, \textit{Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers’ Services}, 10 Fam. L.Q. 101, 115 (1976). For a discussion of common law marriage, see infra text accompanying notes 82-87.
\textsuperscript{42} Bruch, supra note 41, at 115.
\textsuperscript{44} Subjective intent and manifestation of form have an inherent tension, however. Even in an express contract, questions of interpretation will compel the court to examine closely the circumstances of the parties’ understanding. Dalton, supra note 35, at 1100.
\textsuperscript{45} If Ms. Jones makes a return promise to Mr. Jones to move in and provide services, the contract is bilateral because both parties have made promises. If Ms. Jones manifests her assent by moving in and commencing performance, the contract is unilateral.
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continuity of the cohabitation further serves as evidence of the parties' intent to be bound. The amount of support will depend on the terms of the parties' agreement such as length of commitment and the standard of support promised.46

Once an arrangement has been identified, a court must next analyze whether the arrangement provides sufficient consideration to uphold an agreement for support of a specific duration. Domestic services, exclusive of sexual relations,47 have sufficient value to serve as consideration for a return promise for items such as property rights or financial support.48 Even if a couple has lived together for only a short period of time and the opportunities foregone are negligible, nonetheless, sufficient consideration may exist for a support agreement. The parties are in the best position to judge the value of their promises, and courts are reluctant to inquire intrusively into the sufficiency of consideration. If the parties have made a bargained-for-exchange, then both the promise and return promise have value in the parties' subjective view and should be analyzed as such.

Finally, the parties must be able to show that their oral contract does not violate the Statute of Frauds.49 Most cohabitants do not bother to execute written contracts; as a result, the overwhelming majority of cohabitation contracts are oral agreements. Although the Statute of Frauds prohibits enforcement of oral contracts not to be performed within one year, courts have interpreted this provision to exclude promises of support for life because the possibility of the dependent party's death within one year would preclude the Statute of Frauds.50

46. Although many sophisticated parties probably would not commit themselves to a lifelong obligation for support, many parties would agree to support for a limited period of time, such as while one is attending school. The issue of definiteness is very important to cohabitation contract analysis because definite contract terms define the scope of the obligations. Thus definite terms are necessary in order to determine whether a party has breached a contractual obligation. Definite terms also allow a court to provide the legal remedy. A promise "to support" may fail for indefiniteness unless the parties' subsequent course of performance fleshes out the terms of the promise. Farnsworth, supra note 4, § 3.28, at 210-28. See also infra note 92 and accompanying text.
47. See supra notes 34-36 and accompanying text.
48. Bruch, supra note 41, at 111.
50. Farnsworth, supra note 4, § 6.4 at 415; see also Thurston v. Nutter, 125 Me. 411, 134 A. 506 (1926); Fidelity Union Trust Co. v. Reeves, 96 N.J. Eq. 490, 125 A. 582 (Ch. 1924), aff'd mem., 98 N.J. Eq. 412, 129 A. 922 (1925). Even if the promise is merely to support without any language extending the promise for life, the promise is outside of the Statute of Frauds and enforceable because the limitation of life is
Thus, in our example, Ms. Jones is a party to an enforceable contract for lifetime support in exchange for her domestic services. If Mr. Jones breaches, he should be legally accountable for his actions.51

From an economic standpoint, the enforcement of these contracts will encourage efficient breaches.52 In other words, when the breaching party decides that ending the contract is more valuable than continuing performance, he or she will opt to do so and pay damages.53 Enforcement of this type of contract ensures that only efficient breaches will occur and that both parties' intentions will be honored.54 By enforcing contracts of this nature, the law imposes costs on breaching parties and discourages careless behavior in the contract process.55 The basic measure of damages should give the injured party the benefit of the bargain and compensate the injured party...

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51. If the dependent party, in this case Ms. Jones, is the breaching party, the supporting party would have a duty to mitigate damages until he or she procures a substitute for the services being provided by the dependent party. The dependent breaching party would not receive support if he or she is in breach. One problem these cohabitants present is the difficulty of ascertaining who actually breached first. This question would have to be resolved by the trier of fact in each case.

If the supporting party is the breaching party, the dependent party has an obligation when possible to mitigate damages by making substitute arrangements for support and thereby avoiding future loss. In cohabitation agreements, because the dependent cohabitant is the supplier of services, he or she is under a duty to dispose of services on the market if possible. See Farnsworth, supra note 4, § 12.12 at 862, 896-97. However, the dependent cohabitant should not be forced to seek out or accept employment of an inferior or substantially different nature. See Parker v. 20th Century Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970). Unfortunately, if the relationship has lasted for several years, the dependent party may not have any marketable skills and would be unable to mitigate damages by finding other employment.

52. Many factors may contribute to a party's decision to breach rather than continue performance. The efficiency of a breach is determined not only by financial factors, but also by emotional factors. In many cases, a party may have financial motivations to stay within the contract terms, but emotional considerations provide incentive to breach. Economic analysis of contract formation and breach takes into account both financial and emotional elements. Emotional satisfaction may have just as much value as financial satisfaction within the context of a cohabiting relationship.

53. "[I]t is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform." Kronman, supra note 38, at 106.

54. Farnsworth, supra note 4, § 12.3 at 846.

based on his or her expectation of the agreement. This result leaves the injured party in a position as favorable as if the contract had been fully performed.\textsuperscript{56} As a result, neither party is worse off, and the breaching party may be better off. Thus, the breach is efficient because resources are allocated to their highest and best use.\textsuperscript{57}

Moreover, contract enforcement may influence a wide range of life choices made during cohabitation. For instance, the decision whether to be a full-time homemaker, pursue a career, or have children, may be influenced by the degree of economic security promised by the supporting party.\textsuperscript{58} The other party's actions in reliance on that promise may result in substantial personal costs such as foregone career opportunities. If individuals are aware that they are legally accountable for promises to support, they will be less likely to make such offers carelessly. The end result may be twofold: first, cohabiting couples may have an incentive to plan their future more carefully, and second, cohabiting couples may strive to make their agreements work. Thus, when parties have expressly agreed to the terms of their agreement, less danger exists that one party will be subjected to unbargained for terms after the contract is efficiently breached.

A number of courts have applied an express contract analysis to actions for support by cohabitants. For example, the New Jersey courts have been extremely liberal in construing contract actions for support. Their approach is best illustrated by \textit{Crowe v. De Gioia}.\textsuperscript{59} In that case, Mrs. Crowe and Mr. De Gioia had lived together for twenty years. Mrs. Crowe alleged that Mr. De Gioia had made an oral promise to support her for the rest of her life. Consequently, Mrs. Crowe moved in with him, performed household services, remained his constant companion, and cared for his personal needs. In return, Mr. De Gioia provided her with financial support for twenty years until he moved out and terminated the relationship. As a result, Mrs. Crowe was left with no means of support. She

\textsuperscript{56} \textit{Farnsworth}, \textit{supra} note 4, § 12.8 at 871.

\textsuperscript{57} Landes, \textit{supra} note 10, at 46.

\textsuperscript{58} \textit{See} Baker, \textit{supra} note 7, at 229.

then brought suit against Mr. De Gioia for breach of his promise to support her for life.

The New Jersey courts resolved two issues in this case: (1) temporary support during the pending litigation and (2) the final support award. The initial appeal was interlocutory and sought temporary support in the form of a preliminary mandatory injunction for Mrs. Crowe until her trial date. The New Jersey Supreme Court ruled that a preliminary mandatory injunction was appropriate where necessary to prevent irreparable harm if (1) the claim had a settled legal basis, (2) granting of the injunction would not cause relative hardship, and (3) the moving party showed a reasonable chance of success on the merits. Applying this rule, the court held that temporary support *pendente lite* was appropriate because Mrs. Crowe had no other means of support, her claim for lifetime support was a valid cause of action in New Jersey, Mr. De Gioia would suffer relatively inconsequential expense, and Mrs. Crowe had a reasonable probability of ultimate success.

The court further determined that the contract action should properly be heard in the Chancery Division because other contract cases for personal support had likewise been brought in equity. The appellate court noted that cohabitant contract cases and matrimonial actions often have similar substantive and proof issues.

On remand, the Chancery court found that Mr. De Gioia had made an express promise both to take care of Mrs. Crowe for the rest of her life and to give her their residence. The court recognized that her twenty years of domestic services and companionship were sufficient consideration to support the promise; furthermore, Mrs. Crowe's performance took the contract out of the Statute of Frauds. The court acknowledged that although the parties also had a sexual relationship, it was not the basis of the promise. The trial court not only awarded Mrs. Crowe the family residence but also awarded her a lump sum as expectation damages for the breach of contract for support. The court multiplied an annual support figure of $14,300 by Mrs. Crowe's life expectancy and arrived at a final

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60. *Crowe*, 90 N.J. at 132-34, 447 A.2d at 176-77.
61. *Id.* at 136, 447 A.2d at 178.
62. *Id.* at 138, 447 A.2d at 179.
64. *Id.* at 33-34, 495 A.2d at 896.
65. *Id.* at 32, 495 A.2d at 895.
judgment of $155,642.63. The appellate court affirmed both awards.\textsuperscript{66}

Similarly, the Nebraska Supreme Court upheld an express personal services contract between cohabitants in \textit{Kinkenon v. Hue}.\textsuperscript{67} Ms. Kinkenon claimed that Mr. Hue invited her to move onto his farm, and in exchange for her personal and domestic services, he would take care of her for the rest of her life. The parties lived together for six years in an intimate relationship. During that time, they built a residence on one of Mr. Hue's farms. The trial court found the existence of an express oral agreement and established that Ms. Kinkenon provided services in exchange for lifetime support.\textsuperscript{68}

Worth noting is the court's reliance on \textit{Marvin} as authority to dispense with the presumption of gratuitousness for personal services rendered between cohabitants.\textsuperscript{69} The court also held that the agreement was taken out of the Statute of Frauds by Ms. Kinkenon's partial performance.\textsuperscript{70} Finally, the court held that Mr. Hue breached his promise to support when he threatened Mrs. Kinkenon and forced her to leave the residence. Rather than grant specific performance, however, the trial court required Mr. Hue to pay Ms. Kinkenon the value of a life estate in the home. The Nebraska Supreme Court upheld this award as a correct measure of damages for the breach of promise of lifetime support.\textsuperscript{71}

V. IMPLIED-IN-FACT CONTRACT

A more difficult case is presented when the parties have no express agreement. Normally, an implied-in-fact contract may be inferred from the acts of the parties with the same legal consequences as an express contract.\textsuperscript{72} The usual legal test is whether a reasonable person in the other party's position would infer a promise in return for a promise or performance.\textsuperscript{73} A problem arises, however, when this rule is applied to

\textsuperscript{66} \textit{Id.} at 35-36, 495 A.2d at 897.
\textsuperscript{67} 207 Neb. 698, 301 N.W.2d 77 (1981).
\textsuperscript{68} \textit{Id.} at 703, 301 N.W.2d at 80.
\textsuperscript{69} "[T]here is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift." \textit{Id.} (quoting Marvin v. Marvin, 18 Cal. 3d 660, 683, 557 P.2d 106, 121, 134 Cal. Rptr. 815, 830 (1976)).
\textsuperscript{70} \textit{Kinkenon}, 207 Neb. at 704, 301 N.W.2d at 81.
\textsuperscript{71} \textit{Id.} at 705, 301 N.W.2d at 81.
\textsuperscript{72} FARNSWORTH, supra note 4, at 135.
\textsuperscript{73} \textit{Id.}
cohabitants because of the intimate nature of their relationship. Even under a reasonable person standard, a court may have difficulty determining in a family-type relationship whether the party receiving the benefit understood that the services rendered were intended as compensation and were not merely gratuitous.\textsuperscript{74} Even if the party providing services can prove a mutual understanding of compensation, a court would likely find that the obligation was merely compensation for past services.\textsuperscript{75} The court would be reluctant to infer that the services were provided with the expectation of future support for life.

Nevertheless, some courts have disregarded the traditional presumption of gratuity in intimate cohabitant relationships and paved the way for complete recovery of damages from implied-in-fact contract actions.\textsuperscript{76} Other courts have taken a more cautious approach and declined to recognize a contract implied from giving and accepting services.\textsuperscript{77} The New York Supreme Court in \textit{Morone v. Morone}\textsuperscript{78} recognized the problems inherent in ascertaining the terms of an implied-in-fact contract:

As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a


\textsuperscript{75} In other words, a court may interpret the reciprocal obligation on the part of the supporting spouse as merely an obligation to compensate for services already received rather than a continuing obligation for support. Fernández, \textit{supra} note 9, at 385.

\textsuperscript{76} "There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event the better approach is to presume . . . that the parties intend to deal fairly with each other." Marvin v. Marvin, 18 Cal. 3d 660, 683, 557 P.2d 106, 121, 134 Cal. Rptr. 815, 830 (1976). See also Watts v. Watts, 137 Wis. 2d 506, 528 n.19, 405 N.W.2d 303, 312 n.19 (1987). On remand, however, the \textit{Marvin} trial court seemed unwilling to apply this presumption. The court refused to infer the existence of a support contract between the parties and overturned a rehabilitative award to Michelle Triola on the grounds that merely establishing the plaintiff's need and the defendant's ability to pay was insufficient. \textit{Marvin}, 122 Cal. App. 3d at 816, 176 Cal. Rptr. at 559. Because Ms. Triola could show no basis in equity or law for the rehabilitative award, it was deleted from the judgment. \textit{Id.} at 876, 176 Cal. Rptr. at 559.


convenient or rewarding thing to do. For courts to attempt through hindsight to sort out the intentions of the parties . . . runs too great a risk of error. . . . There is, therefore, substantially greater risk of emotional afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously, and what compensation, if any, the parties intended to be paid.\textsuperscript{79}

In economic terms, enforcing these implied-in-fact contracts may impose excessive error costs. In other words, as the Morone court recognized, enforcing these contracts would allow cohabitants with no previous expectation of compensation to change their tack after their relationships have ended and claim that they had a reasonable expectation of compensation. Consequently, courts would be intervening and writing a new contract for the parties when neither party ever had any intention to become legally bound. Thus, enforcing implied-in-fact contracts for support would lead to inconsistent, uncertain, and potentially fraudulent results.\textsuperscript{80} Moreover, the couple’s choice not to marry suggests that they never intended to create a lifetime support obligation.\textsuperscript{81}

Such a scenario also raises the specter of common law marriage. Common law marriage is a status remedy that was imported from Europe to cope with the increased incidence of cohabitation during the 19th century.\textsuperscript{82} The requirements of common law marriage are twofold. First, the parties must prove a present agreement to marry. Second, they must openly live in a marital-type relationship and hold themselves out to the community as husband and wife.\textsuperscript{83} The legal consequence of common law marriage is the imposition of legal marital status.

Most states have now abolished common law marriage,

\textsuperscript{79} Id. at 468, 407 N.E.2d at 441, 429 N.Y.S.2d at 596. But see Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976) (allowing recovery under implied contract theory).

\textsuperscript{80} William A. Reppy, Jr., Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status, 44 LA. L. REV. 1677, 1691 (1984) (noting that a court could find an implied terminable-at-will contract just as easily as a promise to support for life).

\textsuperscript{81} Id.


largely because of deeply rooted policies that encourage formalized marriages. In addition, common law marriages create proof problems that invite perjury and fraud.\textsuperscript{84} Given the strong legislative distaste for common law marriage, courts should be hesitant to uphold implied-in-fact agreements for services between cohabitants for the same reasons. Although some argue that a benefit is naturally contemplated in return for services,\textsuperscript{85} others argue that it is difficult to prove that the services were rendered in expectation of future support. A more plausible explanation is that the services were rendered for the support received at the time.\textsuperscript{86} In addition, the provider of the services is also receiving a benefit: free rent and support. Thus, an implied-in-fact services contract is more analogous to an employment contract terminable at will. Even if the parties have an implied understanding that services will be exchanged for support, if the agreement is silent as to the duration of performance, a term should be supplied that allows either party to terminate at will.\textsuperscript{87}

This reasoning was followed by the New York Court of Appeals in \textit{Morone v. Morone}.\textsuperscript{88} The court held that although New York would recognize express contracts between cohabitants, it would not extend this recognition to contracts implied-in-fact. The couple in \textit{Morone} had cohabited for 23 years, during which time Ms. Morone had borne Mr. Morone two children, performed domestic duties, and held herself forth as Mr. Morone's wife. Ms. Morone's first cause of action was based on an implied-in-fact contract claim. Ms. Morone alleged that the parties had an implied-in-fact contract because she had provided domestic services in the expectation of compensation and because Mr. Morone accepted the services knowing that she expected compensation. The court dismissed the claim, reasoning that the relationship of the parties created a presumption that the services were rendered gratuitously.\textsuperscript{89} The court further noted that it would run the risk of fraud and disagree-

\textsuperscript{84} Prince, supra note 34, at 196.
\textsuperscript{85} Id. at 205.
\textsuperscript{86} A more compelling argument is presented when the relationship has produced children. In such a case, if one party has focused their energies on raising the children, an expectation of support is more likely.
\textsuperscript{87} See Farnsworth, supra note 4, § 7.17 at 555.
\textsuperscript{89} The court noted that domestic services are often rendered between parties living together merely because they find it a convenient or rewarding thing to do. Id. at 488, 407 N.E.2d at 441, 429 N.Y.S.2d at 596.
ment in ascertaining the terms of such a contract; moreover, the contract would violate the legislative policy in abolishing common law marriage.90

Nevertheless, the court upheld Ms. Morone's second cause of action. The second claim was based on an alleged express oral partnership agreement between the parties, in which Ms. Morone would provide domestic services in return for the defendant's promise to support and care for her. The agreement contemplated that the parties would equally split the net profits from their partnership. The appellate court determined that such a promise by Mr. Morone was enforceable as long as the parties' sexual relationship provided no part of the consideration for the agreement.91

In contrast, the well-reasoned dissent by Judge Jones concluded that a promise "to take care of" someone was too vague to be enforceable. He asserted that a promise to support must be specific, stating a standard of support or measure of lifestyle to be maintained. Judge Jones also pointed out that the damages sought, net profits from the partnership, were equally indefinite and inconsistent with the terms of the alleged contract.92

In spite of the obstacles mentioned above, even a terminable-at-will implied contract for services in exchange for support may afford some relief at its termination. In our hypothetical situation, suppose that Ms. Jones and Mr. Jones had no express agreement for lifetime support, and the circumstances do not demonstrate such an understanding. Aside from a possible ancillary agreement to share property, Ms. Jones should also be able to seek relief under a quasi-contract theory and receive compensation for the value of the services she provided.

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90. Id.

91. Id. at 489, 407 N.E.2d at 440, 429 N.Y.S.2d at 594. Here again, the distinction between support and property was blurred. Although the promise was to support, the court chose to award property as damages for breach of the promise to support. Thus, the court declined to award specific performance.

92. Judge Jones noted that the agreement did not require Mr. Morone to pursue profit making activity and that ascertaining the profits would be difficult. The judge pointed out that the relief requested, one-half of the net profits, was at odds with the actual terms of the contract, which were a promise to provide services in exchange for a promise to support. Id. at 490-91, 407 N.E.2d at 443, 429 N.Y.S.2d at 597-98 (Jones, J., dissenting).
VI. QUASI-CONTRACT

In the event that cohabitants cannot prove a legal contract, a remedy still exists. Quantum meruit measures recovery under implied-in-law contract or quasi-contract, and may be used only when no contract in fact exists.\footnote{93}{"Quantum meruit' as an amount of recovery simply means 'as much as deserved' . . . and measures the recovery under an implied contract to pay compensation as the reasonable value of services rendered." Kintz v. Read, 28 Wash. App. 731, 735, 626 P.2d 52, 55 (1981) (quoting Lester N. Johnson Co. v. Spokane, 22 Wash. App. 265, 274, 588 P.2d 1214 (1978)).}

Quantum meruit is designed to compensate a plaintiff for the value of services rendered; in other words, it restores to the plaintiff the value of benefits received by the defendant.\footnote{94}{Bruch, supra note 41, at 124.} This area of law is still developing and falls between contract and tort.\footnote{95}{GRANT GILMORE, THE DEATH OF CONTRACT 88 (1974).} Damages are normally assessed at the market value of the plaintiff’s time and expenses. If the duration of the relationship was lengthy, the damages could be substantial. Market value is not consistently used as a measure of damages, however. Some courts have departed from the objective fair market valuation method to assess damages and adopted a more subjective method to value the benefit of services received.\footnote{96}{In one case, the Wisconsin Supreme Court did not look at the fair market value of services rendered, but instead looked to the subjective value that the supporting party placed on the services received. Because the supporting party had provided a substantial legacy for the dependent party in his will, the court concluded that the value of the legacy was a reasonable valuation of the dependent party’s services. Watts v. Watts, 137 Wis. 2d 506, 405 N.W.2d 303 (1989).}

The main advantage of the quantum meruit theory is that it affords relief to parties who did not have an express agreement and would otherwise be left in an impoverished economic position. Quantum meruit also allocates the burden of financial compensation to the parties who were benefitted by the relationship. This avenue of relief is limited, however. A court may deny recovery if the benefit was gratuitously conferred; in other words, if Mrs. Jones had chosen to stay home and raise the children without the expectation of compensation, quantum meruit would not be appropriate.\footnote{97}{FARNSWORTH, supra note 4, § 2.20, at 106.} The disadvantage of applying this doctrine to cohabitants is that, once again, the cohabitant seeking relief may have to overcome the presumption of gratuity between parties in family-like relationships.
This approach is distinguishable, however, from implied-in-fact contracts because the intent of the recipient is irrelevant in quasi-contract; only the intent of the providing party is important. Therefore, the presumption of gratuitousness does not pose the same problem in quasi-contract. An action in quasi-contract is based upon the premise that a duty arises to make restitution when retention of a benefit conferred would be unjust. This cause of action is not based upon an agreement between the parties. Rather, it is based on an implied-in-law obligation to prevent injustice; it is not designed to give one party an unexpected windfall.

Relief in quasi-contract may be measured either by the increase of the recipient's wealth resulting from the benefit conferred or, alternatively, by the recipient's cost avoided less the market value of the benefit received by the injured party. To illustrate, in our hypothetical situation, Ms. Jones would have the option of requesting the value of her services (as a cost avoided to Mr. Jones) less any benefit conferred on her by Mr. Jones. In the alternative, she could request an award equal to the increase of Mr. Jones' wealth attributable to her efforts.

One scholar has attacked the quantum meruit measure of relief on the grounds that the value of services less value of support bears no relationship to the rehabilitative needs of a homemaker at the termination of a cohabitation relationship. However, one must remember that cohabitation is not the legal equivalent of a marriage relationship, and the function of support between cohabitants is not necessarily analogous to the function of support between spouses. The real key in a quantum meruit action is the restitution of a benefit conferred under circumstances that make its retention unjust. Quantum meruit does not provide reliance damages.

In a marriage, the parties have presumptively made a lifetime commitment. Upon dissolution of the marriage, the parties have valid concerns about support as a function of rehabilitation. Relief in quasi-contract, however, is based on unjust enrichment. The purpose of this remedy is to compensate, not rehabilitate. Therefore, this remedy is retrospective, not prospective.

Applying this theory, a recent Wisconsin decision, Watts v.
Watts,\textsuperscript{100} took an interesting approach. The parties cohabited for twelve years, during which time they held themselves forth as married, raised two children, filed joint tax returns, maintained joint bank accounts, and purchased property as husband and wife. Ms. Watts alleged that she quit her job and moved in with Mr. Watts when he indicated that he would provide for her. During the period of the parties' cohabitation, Mr. Watts' net worth increased from $382,756 to $1,496,657.

When the parties' relationship ended, Ms. Watts brought suit against Mr. Watts on several legal theories, including the Warden theory\textsuperscript{101} that analogously applies the divorce statute as well as breach of contract, partition, and unjust enrichment theories. The Wisconsin Supreme Court rejected the Warden approach on the grounds that the legislature did not intend to extend the Wisconsin dissolution statute to encompass cohabitants.\textsuperscript{102} Nevertheless, the court recognized that the plaintiff had a cause of action in contract, partition, and unjust enrichment.\textsuperscript{103}

The court stated that in order to prove unjust enrichment, the plaintiff must show: (1) a benefit conferred on the defendant, (2) appreciation of the benefit, and (3) inequitable retention of the benefit.\textsuperscript{104} On remand, the trial court held that the defendant had been unjustly enriched and awarded the plaintiff a judgment of $113,090.\textsuperscript{105} The court reasoned that ample evidence showed that Ms. Watts' services enriched Mr. Watts by enabling him to increase his property holdings.\textsuperscript{106} Having determined that Ms. Watts was entitled to compensation for the value of her services performed over the span of the relationship, the court adopted an innovative approach when it valued her services. Mr. Watts had executed a will leaving Ms. Watts ten percent of his personal estate; the trial court concluded that this amount was an appropriate measure of the value of her services. Accordingly, the court awarded Ms. Watts approximately ten percent of the increase in Mr. Watts'

\textsuperscript{100} 137 Wis. 2d 506, 405 N.W.2d 303 (1987).
\textsuperscript{101} See supra text accompanying notes 29-32.
\textsuperscript{102} Watts, 137 Wis. 2d at 517-18, 405 N.W.2d at 309.
\textsuperscript{103} Id. at 538, 405 N.W.2d at 316.
\textsuperscript{104} Id. at 531, 405 N.W.2d at 313.
\textsuperscript{105} Watts v. Watts, 152 Wis. 2d 370, 448 N.W.2d 292 (Ct. App. 1989). The trial court also found that the parties had an implied contract to share the increase of wealth accumulated during the relationship but awarded no damages. Id.
\textsuperscript{106} Id. at 381, 448 N.W.2d at 296-97.
net estate. This award was a departure from the more traditional method of using fair market value to determine the value of services in quantum meruit; however, courts in cohabitation actions often expand traditional remedies in order to award the appropriate relief.

In conclusion, contract theories for support and services contracts between cohabitants provide legal remedies that protect the expectations of the parties, compensate injured parties, and prevent the unjust enrichment of one party at the expense of another. As the above cases illustrate, however, state courts are still struggling with the legal nature of cohabitant causes of action. Consequently, this area of law is still indistinct and poorly defined. This confusion is caused in part by its relatively recent emergence and expansion in American jurisprudence.

The inconsistencies of the state courts are also mirrored in the federal court system. Federal courts are similarly unsure of the precise legal nature of suits between cohabitants. As a result, the analysis and remedies utilized by the federal courts often differ dramatically.

VII. FEDERAL COURTS

The initial question faced by federal courts is whether cohabitant causes of action are suits at law over which a federal court has jurisdiction in diversity or whether they are suits in equity that fall under the domestic relations exception to federal diversity jurisdiction. Although a domestic relations case may meet the statutory requirements for federal question jurisdiction or federal diversity jurisdiction, the federal courts traditionally view domestic relations litigation as a matter more properly litigated in state courts. The rationale for this exception is that the states have a paramount interest in the marriage and family concerns.

107. Id. at 382, 448 N.W.2d at 297.
111. Atwood, supra note 110, at 589.
This rationale was reflected in Anastasi v. Anastasi, in which the United States District Court for the District of New Jersey remanded a palimony case to a New Jersey state court on the grounds that the case fell within the domestic relations exception to federal jurisdiction.112 The Anastasi court based its decision on the fact that the New Jersey Supreme Court, in Crowe v. De Gioia113 had recently held that cohabitation actions were most appropriately heard in the equity or chancery division rather than the law division of the state court.114 The federal district judge noted that New Jersey had a significant state interest in hearing cohabitation cases. To protect that interest, the trial court would have to make the same kinds of inquiries that are relevant in domestic relations actions.115 As a result, the federal court concluded that cohabitation actions fell within the domestic relations exception to federal jurisdiction.116

In contrast, the United States District Court for the Southern District of New York retained jurisdiction of a cohabitation action in Korby v. Erickson.117 The court reasoned that the case did not fall within the domestic relations exception to federal jurisdiction because agreements between unmarried cohabitants did not create the matrimonial status necessary to qualify for the exception.118 The court noted that federal jurisdiction was appropriate because no marital rights were involved; rather, the claim was a contract action in diversity based on a pooling agreement between the parties.119

These conflicting decisions emphasize the confusing nature of cohabitation actions in federal as well as state courts. Given this confusion, is contract really the best way for cohabitants to obtain relief, or would other alternatives be more effective?

115. "Final resolution of the controversy will inevitably require extensive probing into many other issues similar to those in a matrimonial action in order 'to best achieve a just result in this evolving cause of action' . . . [T]hese are the kinds of inquiries and judgments which the state courts are best equipped to handle." Id.
116. Id.
118. Id. at 138.
VIII. LEGISLATIVE/JUDICIAL STATUS ALTERNATIVES IN RELIEF

Some authorities assert that the best way to clarify judicial uncertainty in cohabitation law is to accord cohabiting parties a separate legal status because of the strong state interest in these actions.120 States have a strong interest in clarifying cohabitation law because the state becomes the substitute source of support if one party is left economically devastated by an irresponsible partner. An inherent tension exists, however, in the state’s interest because parties often choose to cohabit instead of marry precisely because they wish to avoid state-imposed legal obligations. Nevertheless, some authorities have proposed that giving cohabitants a legal status is the most reasonable way to meet the cohabitants’ economic needs.121 These status proposals, however, invariably ignore the intentions of the parties as well as the important policy justifications underlying the institution of marriage.

A. "De Facto" Marriage: Judicially Created Status

One author has proposed that courts should confer legal status on cohabitants for purposes of spousal support.122 A finding of "de facto" marriage would impose the obligations of a legal marriage on the parties. A de facto marriage would require two conditions: (1) the parties must hold themselves forth as husband and wife, and (2) the parties must cohabit for a significant period of time.123 On a prima facie showing of de facto marriage, a presumption of an agreement for spousal support would arise, and the burden of proof would shift to the contesting spouse to prove no support obligation.124 The support awarded would be rehabilitative in nature, allowing the de facto spouse to make a transition to a new life. The author rationalizes that because cohabitation is often a substitute for marriage, a cohabitant may often expect and hope for future support.125

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120. See Fernandez, supra note 9; Reppy, supra note 80; and Kandoian, supra note 83.
121. See Fernandez, supra note 9; see also Reppy, supra note 80; and Kandoian, supra note 83.
122. Fernandez, supra note 9, at 371.
123. Id. at 371-72.
124. Id. at 389.
125. Id. at 391. This model differs from traditional common law marriage, which requires not only that the parties hold themselves forth as husband and wife but also
One major flaw in this status theory is that even in a marriage dissolution action no presumption of post-marital support automatically arises. To place such a burden on cohabitants would often give one party a windfall merely because the supporting party could not prove an agreement to the contrary. Such a scenario is hardly in accord with the expectations of most cohabitants. Even those cohabitants who hold themselves forth as husband and wife would not expect an automatic presumption of support beyond that provided for legally married spouses. Thus, an unfair burden would be placed on the supporting party to overcome the presumption of a support agreement.

B. Legislative Status

Yet another author proposes that legislation should be enacted to create a new status: lawful cohabitation. Cohabitants would enter the status either by formal recordation or through "common-law cohabitation," in which certain acts of the couple would cause the status to attach. The legal result of this status would be to confer quasi-marital status on cohabitants for purposes of support, property division, taxes, social security, and intestate succession. The property and support rights of the cohabitants would be somewhat narrower than those arising from marriage.

This scheme is also flawed in that it would still impose legal status on many couples who had no desire to assume such overwhelming legal obligations. Such legislation would also require substantial judicial intervention at the cessation of a cohabitation relationship. If the parties have "registered" their status, they would not have the option of dissolving it on their own and avoiding the court system. Thus, as in marriage, the termination of the relationship would require adjudication and termination of the status. The detriments of increased judicial proceedings and state intervention outweigh the benefits realized by such a small section of society.

that they have a present agreement to be husband and wife. See, e.g., HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.4, at 105 (2d Practitioner's ed. 1987).

126. See supra note 8.

127. Reppy, supra note 80, at 1678.

128. Id.

129. Id.

130. Id. at 1684.
C. Abolishment of Marital Distinctions

Others would have society pursue the status approach even further and determine legal status based on an objective view of the parties' relationship. Rather than using a bright-line, formalized test such as marriage to determine legal obligations, a court would consider factors indicating the nature of the relationship and degree of commitment. Important factors would include pooling of finances, child bearing, childcare responsibilities, and the overall stability of the relationship. Such an approach encourages recognition of non-traditional families and discourages discrimination of alternative lifestyles. Nevertheless, this approach thrusts legal obligations on those who may not have desired them.

The dangers inherent in status remedies have been recognized by the Washington State Supreme Court in recent actions, and the court has limited the status rights and privileges of unmarried cohabitants. In the first case, Davis v. Department of Employment Security, the court held that a person who voluntarily terminates employment to live in a cohabitant relationship does not qualify for unemployment compensation. Although the Washington State Employment Security Act allows unemployment compensation for those persons who quit work because of marital status, the court refused to extend the statute to cover cohabitants. The court noted that "Lindsey does not stand for the proposition that a meretricious relationship is the same as a marriage."

The second case, Peffley-Warner v. Bowen, involved the rights of cohabitants in intestate succession. The plaintiff argued that because Lindsey recognized the expanded property rights of cohabitants, that doctrine should also be applied to intestate succession. The Washington Supreme Court rejected this argument and limited Lindsey to property divisions following termination of a cohabiting relationship. The court refused to expand the Lindsey theory to encompass

132. Id. at 239.
134. Id. at 278, 737 P.2d at 1266; see supra notes 25-28 and accompanying text.
inheritance rights.\textsuperscript{137}

Similarly, the Washington Appellate Court in Division Three refused to expand \textit{Warden}\textsuperscript{138} to encompass awarding attorney fees in cohabitation actions.\textsuperscript{139} The court reasoned that \textit{Warden} and \textit{Lindsey} applied the divorce property disposition statute\textsuperscript{140} only by analogy and that the remainder of the Domestic Relations Act was not applicable to cohabitation relationships.\textsuperscript{141}

This recent line of cases indicates that the Washington courts are not yet ready to accord full legal status to cohabitants despite the \textit{Lindsey} and \textit{Warden} holdings. These recent cases recognize the inherent problems in extending state-imposed legal privileges and obligations to cohabitants outside of individual agreements and support the case for restricting remedies for cohabitants to express contract or quasi-contract theories.

These status proposals attempt to define legal obligations for cohabitants. The difficulty with status solutions is that once the bright line of demarcation for legal responsibilities is abolished, parties no longer have certainty in planning relationships and their legal effects. The formalities of marriage were originally instituted to avoid uncertainty, define marital obligations, and protect against bigamy.\textsuperscript{142} If legal support obligations are imposed by the state on cohabitants based on factors other than formalized marriage, the court must make objective and subjective determinations every time a relationship is disputed. The result would be unnecessary litigation and excessive administrative costs. Imposing legal status on cohabitants would also create uncertain results in income taxation, intestate succession, employment benefits, social security benefits, and worker's compensation. Thus, an administrative or judicial finding would be necessary every time an issue arose as to a cohabitant's rights.

IX. CONCLUSION

Express contract and quasi-contract actions offer efficient

\textsuperscript{137} Peffley-Warner, 113 Wash. 2d at 252-53, 778 P.2d at 1027.
\textsuperscript{138} Warden v. Warden, 36 Wash. App. 693, 676 P.2d 1037 (1984); see supra notes 25-28 and accompanying text.
\textsuperscript{140} WASH. REV. CODE § 26.09.080 (1989).
\textsuperscript{141} Helmer, 48 Wash. App. at 699, 740 P.2d at 362.
\textsuperscript{142} Kandoian, supra note 83, at 1853.
remedies for cohabitants who are left at an economic disadvantage because of reliance on their relationship. Contract actions are preferable to alternatives that would confer legal status on cohabitants because contract actions more closely honor the parties' intent and expectations. If cohabitants have not entered into an agreement, an injured party may still seek relief on an unjust enrichment or quasi-contract theory. Relief under this theory protects against potential abuse of unequal bargaining power and economic control by the stronger party. Freedom of contract allows cohabitants to allocate efficiently responsibilities and benefits between them, and enforcement of these agreements will encourage parties to deal fairly with each other in a responsible manner.

On the other hand, courts should be cautious to recognize implied-in-fact contracts between cohabiting parties because of the possibility of fraud and the difficulty in ascertaining the terms of the bargain. In particular, this caution is warranted when post-cohabitation support is requested. If the parties fail to allocate their resources prior to cohabitation, quasi-contract theory will protect a vulnerable party against unjust enrichment and compensate for services rendered without awarding an unexpected windfall.

The flexibility and diversity of contract remedies are more than adequate to protect the rights of cohabitants. By comparison, status remedies are not as economically efficient and give the state a much more intrusive role because the state must impose its will on the parties. Finally, the policy concerns which have abolished common law marriages in the majority of states are also applicable to status remedies. Status remedies blur the distinctions between marital rights and individual rights, ultimately causing confusion as to legal rights and responsibilities. People often choose to cohabit and avoid marriage precisely to escape the legal responsibilities that status remedies would impose. The state should honor that choice.

Status proponents may argue that contract theories are ineffective remedies in an intimate domestic relationship. The vast quantity of case law, however, demonstrates the contrary. Issues arising in the context of cohabitation relationships are successfully being adjudicated, and the courts are effectively utilizing a variety of contract theories. Awards of support and property based on contract theories are proving to be the most efficient remedy for cohabitants. At the same time, contract
theory preserves the scope and legal integrity of marital obligations and rights.

Although Washington courts have previously hinted at a status approach for cohabitants in *Lindsey* and *Warden*, those cases should be strictly limited to their facts and not applied to support awards. More recent decisions support this view. In conclusion, a judicial trend supporting contract theory would create more certainty and efficiency in cohabitation law.