Illicit Cohabition: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse

The meretricious spouse, male or female, knows no age limit. One who illicitly cohabits with another with knowledge that the relationship does not constitute a valid marriage qualifies as a meretricious spouse.[1] The reasons couples maintain a meretricious relationship are as varied as the different spouses themselves: the young couple who live together but forego marriage until one of them is in a financial position to adequately support the other; the middle-aged divorcée who wants to make sure the second time around and believes there is no substitute for living together; the elderly couple who seek a lasting relationship in their later years but are unable to marry because marriage would result in the reduction or termination of certain retirement or death benefits which they cannot afford to live without.

Two cases, *Vallera v. Vallera* (1943)[2] and *Keene v. Keene* (1962),[3] have had a substantial impact on the rights of the meretricious spouse in California. That impact and the implications of these decisions constitute the basis of this article.

I. CASE LAW BACKGROUND TO THE VALLERA DECISION

The first of the two cases, *Vallera v. Vallera*,[4] was decided against the following doctrinal background. Early case law established that cohabitation alone does not create in favor of the meretricious spouse an interest in property acquired during the meretricious relationship.[5] However, an express agreement between the meretricious spouses that all future earnings and all property subsequently acquired therewith shall be owned jointly will give each spouse an

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[1]Coolidge, *The Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866, 873 (1962).
[2]21 Cal. 2d 681, 134 P.2d 761 (1943).
[3]57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).
[4]21 Cal. 2d 681, 134 P.2d 761 (1943).
[5]Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307 (1931).

equitable undivided one-half interest in that property.[6] If pursuant to such an express agreement the accumulated property is in the name of only one spouse, that spouse is deemed to hold an undivided one-half interest in trust for the other spouse.[7]

The attitude of the courts in enforcing these express agreements between meretricious spouses provides insight into the later *Vallera* decision. In *Bracken v. Bracken*, the meretricious wife sued for an accounting and partition of property held in joint ownership by both spouses. The woman argued that an action for accounting and partition between meretricious spouses might follow a different rule from that applied to cotenants in a strictly business venture, presumably because spouses living as husband and wife, although meretriciously, occupy an inherently different relationship to one another from partners in an arm's-length business venture.[8] To this the court replied:

> Since respondent and appellant were not married, their rights must be adjusted on that basis, and in this action a partition . . . and accounting must be made *without regard to cohabitation* . . .[9] The former [meretricious] relations of the parties cannot be considered as giving the woman any rights incident to marriage or any rights in lieu of marital rights, nor can equity consider the woman as a wife for the purpose of compensating her for wifely duties performed . . .[10] (emphasis added)

Thus the *Bracken* court stipulated that it would determine the property interests of each meretricious spouse "without regard" for the considerations present in a husband and wife relationship — those same considerations which normally guide a court of equity when dealing with an action such as separation or divorce involving a husband and wife relationship which had been solemnized and licensed as a valid marriage. Rather, the court implied that the meretricious husband and wife stand on equal footing in the court's eyes with two businessmen engaged in a business enterprise, both relationships being subject to the basic laws of property, trusts, and contracts which traditionally apply to marketplace transactions.

II. THE VALLERA DECISION

In 1943 the California Supreme Court handed down the *Vallera* decision, the significance of which lies not in the holding, but in the dictum. The *Vallera* court held narrowly that by reason of cohabitation alone a meretricious spouse does not have an interest in proper-

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[6]Bacon v. Bacon, 21 Cal. App. 2d 540, 69 P.2d 884 (1937).
[7]Feig v. Bank of America N.T. & S. Assn., 5 Cal. 2d 266, 54 P.2d 3 (1936).
[8]Bracken v. Bracken, 52 S.D. 252, 217 N.W. 192 (1927).
[9]*Id.* at 254, 217 N.W. at 193.
[10]*Id.* at 254, 217 N.W. at 194.

ty accumulated during the relationship,[11] a rule which the *Flanagan* case (discussed *supra* section I) had previously established.[12] The court then issued dictum that: (a) if a man and a woman meretriciously cohabit as husband and wife "under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property." (citing cases); (b) " . . . in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition." (citing cases).[13] The significance of the *Vallera* dictum was demonstrated by subsequent California appellate decisions which referred to this language in *Vallera* not as dictum but as "a rule of law",[14] "the rule",[15] "the rule of the case",[16] "the general rule".[17]

The authority cited in Justice Traynor's majority opinion in *Vallera* clarifies the meaning and intent of the dictum. These cases such as *Bracken v. Bracken*[18] and *Feig v. Bank of America*[19] (discussed *supra* section I) make clear that the *Vallera* dictum[20] articulated the following principles: (a) an agreement between meretricious spouses to pool earnings and share equally in their joint accumulations would be enforced by the courts as a business agreement *despite* their cohabitation as husband and wife, and not because of any equitable rights or policy considerations which ripened as a result of their cohabitation; (b) in the absence of an express agreement, the rights of a meretricious spouse depend upon the traditional laws of trusts to give that spouse a trust interest in property accumulated to the extent to which his or her funds contributed toward its acquisition, citing *Hayworth v. Williams.*[21] According to the dictum and case law cited, therefore, the court would apply the law of business enterprise in the presence of an agreement between meretricious spouses and apply the law of resulting trusts in the absence of an express agreement.

The *Vallera* majority distinguished the equitable considerations applicable to the putative spouse as opposed to the meretricious spouse. The putative spouse is one who has a good faith belief in the

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[11] Vallera v. Vallera, 21 Cal. 2d 681, 684-5, 134 P.2d 761, 762-3 (1943).
[12] Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307 (1931); *cited* in Vallera v. Vallera, 21 Cal. 2d 681, 684-5, 134 P.2d 761, 762-3 (1943).
[13] Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).
[14] Bridges v. Bridges, 125 Cal. App. 2d 359, 362, 270 P.2d 69, 71 (1954).
[15] Profit v. Profit, 117 Cal. App. 2d 126, 130, 255 P.2d 25, 27 (1953).
[16] Weak v. Weak, 202 Cal. App. 2d 632, 638-9, 21 Cal. Rptr. 9, 13 (1962).
[17] Barlow v. Collins, 166 Cal. App. 2d 274, 278, 333 P.2d 64, 66 (1958).
[18] Bracken v. Bracken, 52 S.D. 252, 217 N.W. 192 (1927).
[19] Feig v. Bank of America N.T. & S. Assn., 5 Cal. 2d 266, 54 P.2d 3 (1936).
[20] Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763.
[21] Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43 (1909); *as cited* in Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).

validity of his or her marriage.[22] Under then existing California case law the putative spouse upon termination of the relationship would share in accumulated property as if it had been community property of a valid marriage, regardless of the proportionate contribution of each party to its acquisition.[23] The equitable considerations arising in the putative marriage, which constitute the policy rationale behind this putative spouse doctrine, involve the reasonable expectations of a putative spouse in the continuing benefits and protections normally afforded each spouse in a valid marriage. In contrast, however, the court stated that due to the lack of a good faith belief in the validity of a marriage these same equitable considerations cannot arise in the meretricious relationship.[24] In essence the court established that unlike a valid or putative marriage in which the equitable policies uniquely applicable to such familial relationships come into play, the meretricious relationship, although often comprised of a family situation identical to that of a valid marriage, must be viewed by the court strictly as a business enterprise which incidentally involves a man and a woman.

III. THE VALLERA DISSENT

Vallera was a close case; the court split four to three. Justice Curtis wrote the dissenting opinion in which Justice Carter and Justice Peters concurred. The basic difference between the majority and dissenting opinions lies in the recognition by the dissenting judges that a husband and wife meretricious relationship constitutes a familial situation requiring many of the equitable considerations reserved for the valid or putative marriage. The dissenting opinion implicitly rejected the principle of the majority opinion that the meretricious relationship must be treated as a marketplace transaction. This rejection represents a policy decision consistently adhered to by American courts that it is inappropriate and artificial to impose laws governing arm's-length business transactions on an essentially familial relationship. This policy explains the reluctance of most courts to enforce contract obligations tailored to marketplace economic transactions on parties to intrafamily agreements, who are often moved by emotional and familial forces totally foreign to the marketplace.[25]

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[22] According to CLARK, LAW OF DOMESTIC RELATIONS, 54 (1968), the putative spouse must have a good faith belief in the validity of the marriage, which is usually required to have been solemnized when that spouse was ignorant of any impediment to the marriage.

[23] Vallera v. Vallera, 21 Cal. 2d 681, 683-4, 134 P.2d 761, 762 (1943); and cases cited therein.

[24] *Id.* at 685, 134 P.2d at 763.

[25] MUELLER AND ROSETT, CONTRACT LAW AND ITS APPLICATION, 16-24 (1971).

Curtis explored the public policy behind the then extant law. The policy of California designated that both the husband and wife in a valid marriage have a one-half interest in property acquired in the community of marriage. Then, equitable policy provided that this same property division shall apply to the good faith, putative spouse. The next public policy step, as established by the majority opinion and authority cited therein, supported the court's enforcement of agreements between meretricious spouses to share equally in jointly accumulated property and the court's enforcement of interests in property acquired through the contribution of funds. The thrust of Curtis' dissent centered on the next logical step which would be the judicial enforcement of an *implied* agreement to share in jointly acquired property; the implied agreement assumed that both the meretricious husband and wife shouldered the normally expected marital duties.[26]

Curtis took that final policy step to the implied agreement because of the very inequitable position in which the meretricious wife was usually placed by rules set forth in the majority opinion. In most meretricious relationships, as in traditional marriages in general, the husband earns the money with which property is accumulated while the wife performs the personal services at home involved in maintaining a household. The spouses thus engage in traditional duties of the community of marriage, which under a valid marriage would entitle each spouse to a one-half interest in the thus jointly accumulated community property. Under the provisions of the majority opinion, however, in the absence of an express agreement a meretricious wife performing the traditional wifely duties of housekeeping, homemaking, and cooking, etc., would have absolutely no interest in the property acquired during the relationship — since she would not have contributed "funds" to the acquisition of the property. For the majority implicitly held that these aforesaid wifely personal services of Mrs. Vallera did not constitute "funds" necessary to give a resulting trust interest in the property.[27] Curtis pointed out the inequity:

> Just because the man, who in the instant case was equally guilty, earned the money to buy the property, should not bar the woman from any rights at all in the property, *although her services made the acquisition possible.* Such a rule gives all the advantages to be gained from such a relationship to the man with no burdens.[28] (emphasis added)

Curtis' implied agreement represents the seed of an equitable doctrine which could be responsive to the equities in the community of a meretricious relationship, just as the community property laws are

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[26] Vallera v. Vallera, 21 Cal. 2d 681, 685-7, 134 P.2d 761, 763-4 (1943).
[27] *Id.* at 685-6, 134 P.2d at 763-4.
[28] *Id.* at 687, 134 P.2d at 764.

responsive to the equities in a valid marriage, and the putative spouse doctrine is responsive to the equitable considerations present in a good faith, putative marriage.[29] As justification for this implied agreement Curtis argued: (a) that certainly the meretricious wife's services as cook, housekeeper, and homemaker are not valueless; (b) that if a woman's interest in accumulated property is protected when she contributes money, logically her interest should be protected when she contributes personal services of value in the home; (c) that unless there is a policy to punish the woman in a meretricious relationship — a policy which would be unjust in a civil action between two equally guilty individuals — the equitable rule applicable to the putative spouse, which provides that the proportionate contribution of each spouse to the acquisition of property is immaterial, should also be applicable to the meretricious spouse.[30] Thus Curtis' equitable doctrine would protect the meretricious wife by implying an agreement to share equally in property acquired during the relationship when the woman contributes wifely services in the home, thereby giving both spouses of the meretricious relationship an equal interest in the property towards the acquisition of which they both contributed. The doctrine of the implied agreement recognizes the value of the meretricious wife's services to the community of the relationship, and recognizes and protects the reasonable expectations of the meretricious wife to share in the joint accumulations of their community efforts. In Curtis' words: "To permit the [man] to retain the entire fruits of their joint efforts is contrary to the dictates of simple justice."[31]

IV. APPELLATE COURT DECISIONS SUBSEQUENT TO VALLERA

In general the appellate court decisions subsequent to the *Vallera* case displayed a liberal attitude toward finding, under the principles of *Vallera*, interests for both meretricious spouses in property accumulated. Most of the courts (as discussed *supra* section II) referred to the dictum in *Vallera* as an established rule of law.[32] To reiterate,

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[29] *See also* section VIII, *infra*, regarding Latin American remedies.
[30] Vallera v. Vallera, 21 Cal. 2d 681, 686-7, 134 P.2d 761, 763-4 (1943).
[31] *Id.* at 687, 134 P.2d at 764. Needless to say, in a given meretricious relationship the husband-wife roles may not be so well defined. The woman may be the sole wage earner or she may produce an income in addition to that of the man. The property consequences to each would be adjusted accordingly. Under present California law the most lopsided result occurs when one party contributes personal services only, while the other contributes the monetary support.
[32] Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Profit v. Profit, 117 Cal. App. 2d 126, 255 P.2d 25 (1953); Weak v. Weak, 202 Cal. App. 2d 632, 21 Cal. Rptr. 9 (1962); Barlow v. Collins, 166 Cal. App. 2d 274, 333 P.2d 64 (1958).

this dictum indicated that an agreement between meretricious spouses to pool resources and share equally in jointly acquired property would be enforced as would an interest in property proportionate to funds contributed toward its acquisition.[33] Under this rule the appellate courts endeavored to find often on the barest of evidence such an agreement or understanding between the meretricious spouses so that an interest in the accumulated property could be protected for the meretricious wife.

In *Garcia v. Venegas*, for example, during a meretricious relationship which lasted more than five years, each spouse made significant contributions to the maintenance of their household and to the acquisition of property. Specifically, the woman contributed her personal services in the home and the money earned from taking in boarders, while the man contributed his earnings from outside jobs.[34] The woman testified that during the relationship the man had said several times: "everything was both for him and for her", "all he bought was in her power or in her possession", "all that was there was theirs".[35] On the basis of this testimony and evidence relating to their activities as husband and wife, the appellate court found an express agreement to share equally in accumulated property, thereby bringing the spouses under the *Vallera* rule. The appellate court's finding of an express agreement was a finding of fact — an unusual occurrence on the appellate level. According to the appellate court, the trial court had incorrectly found on this evidence an agreement to compensate the woman for her personal services, a result which would have entitled her to far less than the one-half interest in the property provided by the *Vallera* rule.[36] Desirous of an equitable result, the appellate court strived to bring the meretricious wife within the protection afforded by the *Vallera* rule.

A similar judicial attitude was evident in *Bridges v. Bridges* in which the meretricious spouses, each having three children, cohabited as husband and wife for four and one-half years. Although the evidence on almost all issues was conflicting, the appellate court sustained a finding of an express oral agreement to pool assets and earnings and share equally in subsequently acquired property.[37] The finding of an express agreement rested primarily on the following evidence: testimony of the meretricious wife that the husband had said: "I will be a father to your children and you will be a mother to mine"; testimony of the wife concerning the agreement struck as to property: "Everything was supposed to be 50-50"; a conclusion by

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[33] Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).
[34] Garcia v. Venegas 106 Cal. App. 2d 364, 235 P.2d 89 (1951).
[35] *Id.* at 367-8, 235 P.2d at 91-2.
[36] *Id.* at 366-70, 235 P.2d at 90-93.
[37] Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954).

the appellate court that: "It appears that for four and a half years respondent [the wife] kept this bargain and it is a fair inference that her work and services thereunder were a material factor in the success the parties had in the accumulation of property."[38] Although the evidence of an agreement was sketchy, the equitable considerations were well defined. The appellate court held that under the *Vallera* rule this agreement between the spouses entitled the meretricious wife to a one-half interest in the accumulated property.[39]

Another indication of the willingness of the appellate courts to enforce agreements between meretricious spouses was demonstrated in the *Garcia* and *Bridges* cases. The courts encountered the argument that since the agreements in question were made between illicitly cohabiting individuals, the immorality of the relationship so tainted the contracts as to make them illegal and unenforceable; therefore, the enforcement of these agreements would be tantamount to encouraging an activity which was contrary to public policy. The appellate courts countered by ruling that in these fact patterns: "the illicit relationship was not so involved in the contract as to render it illegal";[40] the agreement is "valid and enforceable unless made in contemplation of such illicit relationship."[41] This language apparently meant that an agreement to pool resources and share in joint accumulations would be unenforceable only when it constituted consideration for prostitution.[42] To avoid the social stigma of enforcing an agreement between an illicitly cohabiting man and woman, the courts rationalized that such a meretricious relationship could be viewed as " . . . a joint business enterprise, somewhat akin to a partnership, . . . which any two persons (two women or two men, for example) might undertake."[43]

The appellate courts in these cases were forced by the dictates of the *Vallera* majority decision into the artificial rationalization of analogizing the cohabitation of man and woman to a "joint business enterprise . . . which two men might undertake." For the *Vallera* decision denied the presence of any judicially recognizable, equitable considerations in a meretricious relationship which could justify the relationship's being treated as anything but a marketplace transac-

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[38] *Id.* at 361-2, 270 P.2d at 70.
[39] *Id.* at 362, 270 P.2d at 70-1.
[40] Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951).
[41] Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 602, 213 P.2d 727, 729 (1950); *as cited* in Bridges v. Bridges, 125 Cal. App. 2d 359, 363, 270 P.2d 69, 71 (1954).
[42] *In accord see:* Coolidge, *The Rights of the Putative and Meretricious Spouse in California,* 50 CALIF. L. REV. 866, 877 (1962).
[43] Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951); *as cited* in Bridges v. Bridges, 125 Cal. App. 2d 359, 363, 270 P.2d 69, 71 (1954); Barlow v. Collins, 166 Cal. App. 2d 274, 333 P.2d 64 (1958).

tion.[44] The artificiality of this judicial edict may be seen in the reaching which the appellate courts under the *Vallera* rule had to engage in to arrive at equitable results for both meretricious spouses. Curtis' equitable doctrine of the implied agreement, on the other hand, would have obviated the necessity of the appellate courts' dabbling in fictions to achieve equitable results.

V. THE KEENE DECISION

In 1962, nineteen years after the *Vallera* decision, the question of the rights of the meretricious spouse was again before the California Supreme Court in *Keene v. Keene.* The facts of the *Keene* case presented a far more poignant situation than that in the *Vallera* case. In *Keene*, the meretricious spouses lived together as husband and wife for eighteen years. From 1938 during their first eight years, together they worked a ranch which had been previously acquired in his name. The wife managed the household and performed the traditional duties of a housewife.[45] But the trial court found that for their mutual benefit the meretricious wife did much more:

> plaintiff [the wife] did perform work and labor . . . consisting of helping in the performance of farm labor, including the raising of turkeys, chickens, sheep, cattle, the clearing of land, the sowing, raising and harvesting of grain crops and the growing and harvesting of nut crops.[46]

Justice Peters in his dissent in *Keene* added that there was substantial evidence that on the ranch the wife single-handedly cared for a commercial turkey flock, cared for "orphan" lambs, helped herd cattle, helped alongside the men in clearing rocks to allow cultivation, maintained a large vegetable garden, and helped as well in the sowing and harvesting of the commercial grain and nut crops. In 1946 the meretricious husband sold the ranch. Then until 1956 when their relationship ended, the husband had dealings in the real estate and furniture businesses. From time to time the wife assisted him in these businesses; they also traveled for pleasure during that period.[47]

In contrast, the meretricious relationship in the *Vallera* case lasted only three years, and the wife's contribution to the relationship and to the acquisition of property was limited to her wifely services as housekeeper, cook, and homemaker. In ruling on the *Vallera* facts in 1943 the Supreme Court was split four to three. The three dissenting judges voted to sustain the finding of a one-half interest in accumulated property for the meretricious wife on the equitable

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[44] Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).
[45] Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).
[46] *Id.* at 663, 371 P.2d at 332, 21 Cal. Rptr. at 596.
[47] *Id.* at 669-70, 371 P.2d at 336-7, 21 Cal. Rptr. at 600-1.

theory of an implied agreement.[48] Yet nineteen years later in 1962, the Supreme Court when faced with the far more moving facts of the *Keene* case decided six to one to deny the meretricious wife of eighteen years any interest whatsoever in the property accumulated during their relationship.[49]

In those nineteen intervening years since the *Vallera* decision several members of the court had changed; just as apparent was a change in the court's basic attitude toward the rights of the meretricious spouse, the woman in particular. In *Keene* the majority held that the meretricious wife had no interest in the joint accumulations on two basic grounds. First, since no express agreement to pool resources and share in acquired property could be proven, the wife's only recourse to bring herself within the *Vallera* rule was to contend that her extensive personal services on the ranch and, to a lesser degree, her services in the husband's businesses constituted "funds". According to the *Vallera* rule a meretricious spouse may share in property in the proportion to which his or her funds contributed to its acquisition. The *Keene* majority, however, relying on a dictionary definition as well as some legal and common usage held that the word "funds" as used in the *Vallera* case meant only money or property of value convertible into cash. Under this interpretation neither the personal services of the meretricious wife as a housewife in the home nor her extramarital personal services performed on the ranch or in the husband's businesses constituted "funds". Thus the court held that the wife could not claim an interest in property under the *Vallera* rule.[50] Secondly, after a detailed analysis of the law of resulting trusts, which provides an interest in property held in the name of another proportionate to one's contribution toward its acquisition, the court ruled: (a) the contribution must be money or property of value, and not personal services such as those of the meretricious wife in the instant case; (b) the contribution must be made either before or at the time of the acquisition; (c) later contributions to the improvement of the property do not qualify. By these criteria the meretricious wife in the *Keene* case could claim no resulting trust interest either in the ranch or in the property acquired after the sale of the ranch.[51]

The *Keene* majority's narrow interpretation of the meaning of "funds" to exclude personal services of any type as well as their denial that the personal services of the meretricious wife could constitute the basis for a resulting trust interest in property represented a severe limitation on the rights of the meretricious spouse who

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[48] Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761 (1943).
[49] Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).
[50] *Id.* at 659-64, 371 P.2d at 330-3, 21 Cal. Rptr. at 594-7.
[51] *Id.* at 664-68, 371 P.2d at 333-6, 21 Cal. Rptr. at 597-600.

normally contributes only personal services to a husband and wife relationship — the wife. *Keene* eroded the barely adequate protections provided for the meretricious spouse by the *Vallera* decision.

VI. THE KEENE DISSENT

Justice Peters, the single dissenting judge in the *Keene* case, was the only judge remaining on the court who had dissented nineteen years earlier in the *Vallera* case. Peters wrote a vigorous dissent in *Keene*, criticizing the majority for enforcing an immoral and illegal double standard which punished the meretricious wife for her "sin" but rewarded the equally guilty meretricious husband with the fruits of their joint efforts.[52]

Peters' dissent took issue with the two basic rulings of the majority opinion. First, Peters argued that the majority's interpretation of the word "funds" from the *Vallera* rule was not supported by the authority cited in *Vallera*. That authority, Peters asserted, made clear that "funds" included personal services, other than the normal services of a housewife, as well as the money and property of value referred to in the majority opinion.[53] In other words, implicit in the majority's interpretation of "funds" was an arbitrary decision to deny relief to the meretricious wife. Secondly, Peters argued that the majority's analysis of resulting trusts was incorrect in that the law does recognize personal services contributed toward the acquisition of property as a sufficient basis on which to find a resulting trust.[54]

The approach advocated by Peters to secure an enforceable interest for the meretricious wife in the joint accumulations centered on a liberal interpretation of "funds" and a liberal application of the law of trusts. However, in terms of finding for the meretricious wife a one-half interest in the joint accumulations, Peters' dissent was regressive in contrast to Curtis' dissent in the *Vallera* case. Peters stated that only those personal services of a meretricious wife beyond the normal duties of a housewife should qualify as "funds" to give her a proportionate interest in accumulated property.[55] Whereas Curtis maintained that even the normal services of a housewife as housekeeper, cook, and homemaker, have value and that the contribution of these services warranted the same interest in accumulated property as the contribution of money or property of value.[56] More significantly, Peters seemed satisfied with establishing the meretricious wife's interest through traditional trust and property theories which generally would provide her with only a small fractional inter-

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[52] *Id.* at 668-75, 371 P.2d at 336-40, 21 Cal. Rptr. at 600-4.
[53] *Id.* at 672-3, 371 P.2d at 338, 21 Cal. Rptr. at 602.
[54] *Id.* at 673-5, 371 P.2d at 338-40, 21 Cal. Rptr. at 602-4.
[55] *Id.* at 672-3, 371 P.2d at 338, 21 Cal. Rptr. at 602.
[56] Vallera v. Vallera, 21 Cal. 2d 681, 685-7, 134 P.2d 761, 763-4 (1943).

est.[57] Yet Curtis, concerned with the equitable considerations present in the meretricious relationship as representing a husband and wife relationship (discussed *supra* section III), insisted that an agreement to share equally in joint accumulations should be implied to insure that each meretricious spouse was entitled to a one-half interest in the property.[58] Thus the *Keene* case, nineteen years after the *Vallera* case, not only represented an erosion of the provisions of the *Vallera* decision but also marked the weakening of the voice of dissent.

VII. PRACTICAL REMEDIES REMAINING IN CALIFORNIA

Several practical remedies remain for the meretricious spouse under California law.[59] If the spouse can establish an express agreement to pool resources and share equally in joint accumulations, the agreement is enforceable and gives each spouse an undivided one-half interest in the accumulated property.[60] If the spouse contributes money or property of value before or at the time of the acquisition of the property, that spouse can claim an interest in the property proportionate to those "funds" contributed.[61] Similarly if one spouse contributes money or property of value before or at the time of the acquisition of property held in the name of the other spouse, a resulting trust is created in favor of the first spouse in proportion to his or her contribution.[62] Furthermore, according to dictum in the *Keene* case the theory of contract implied in fact might be available as a remedy for one spouse to collect from the other spouse the reasonable value of personal services. Under this theory, however, the services must be performed with an expectation of payment and must be of a type which ordinarily would be compensated and not be treated as a gift. Unfortunately for the meretricious spouse seeking this remedy, the situations cited by the court in which contracts are implied involve purely business dealings not commonly to be found in a husband and wife relationship, such as: "haulage of ore to dump", "transportation of cargo of fish from Canal Zone to San Diego", etc.[63]

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[57] Keene v. Keene, 57 Cal. 2d 657, 673-5, 371 P.2d 329, 338-40, 21 Cal. Rptr. 593, 602-4.
[58] Vallera v. Vallera, 21 Cal. 2d 681, 685-7, 134 P.2d 761, 763-4 (1943).
[59] For a detailed analysis of these remedies *see:* Coolidge, *The Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866 (1962).
[60] Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); and cases cited therein.
[61] *Id.*
[62] *Id.*
[63] Keene v. Keene, 57 Cal. 2d 657, 664-5, 371 P.2d 329, 333, 21 Cal. Rptr. 593, 597 (1962).

The meretricious spouse is limited in available remedies under the law as interpreted by *Vallera* and *Keene*. The present hope for relief seems to lie with an expansive application of this law by the trial and appellate courts, a liberal approach similar to that practiced by these courts in the interim period between the *Vallera* and *Keene* cases.

VIII. REMEDIES IN OTHER JURISDICTIONS

The law in many other U.S. jurisdictions is basically in accord with the remedies provided for the meretricious spouse under California law.[64] Cohabitation alone creates no property interest.[65] An express agreement between meretricious spouses to pool resources and share in subsequently acquired property will be enforced.[66] And traditional property and trust principles apply when appropriate contributions of funds, etc. are made toward the acquisition of property.[67]

At the present time fourteen states (California is not one of them) and the District of Columbia offer an alternative remedy: the common law marriage.[68] The essential element of the common law marriage is "an actual and mutual agreement to enter into a matrimonial relation . . . "[69] According to Professor Clark, the common law marriage is used to reach equitable results similar to those achieved by the putative marriage in civil law jurisdictions like California, Louisiana, and Texas.[70] Professor Clark maintains that the relief offered by the putative spouse doctrine, which basically requires a good faith belief in a valid marriage,[71] is more restrictive than the relief offered by the common law marriage, the essential element of which is merely an informal agreement to be husband and wife.[72] However, neither the common law marriage nor the putative marriage provides a remedy for the strictly meretricious spouses who have not agreed to be husband and wife and know that they are not validly married. Thus the common law marriage and the putative marriage do provide some equitable relief, but only to those who meet the requirements.

As evidenced by the small number of states which recognize the common law marriage, there exists a widespread reluctance against granting property rights to those who have not undergone a conven-

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[64]In general *see*, Anno: Illicit Relations — Property Rights, 31 A.L.R. 2d 1255 (1953); and cases cited therein.
[65]*Id.* at 1277-81.
[66]*Id.* at 1281-86.
[67]*Id.* at 1286-90.
[68]CLARK, LAW OF DOMESTIC RELATIONS, 45-6 (1968).
[69]55 C.J.S., Marriage § 6 (1948); the other elements of the common law marriage are: (1) cohabitation as husband and wife; (2) publicly holding each other out as husband and wife.
[70]CLARK, LAW OF DOMESTIC RELATIONS, 54 (1968).
[71]*See supra*, note 22.
[72]CLARK, LAW OF DOMESTIC RELATIONS, 54 (1968).

tional ceremonial marriage.[73] Professor Weyrauch outlines the policy grounds behind this trend as they pertain to the common law marriage; these policy grounds appear equally applicable in logic to the reluctance of California and other states against granting remedies to the meretricious spouse. Professor Weyrauch enumerates these grounds as follows: (1) mere cohabitation of a man and woman contravenes conventional morality; (2) this cohabitation results in illegitimate children; (3) most importantly, cohabitation as well as unrecorded common law marriages cause confusion of public records and possible clouding of titles to land.[74] But as Weyrauch suggests, these arguments must be weighed against the harsh results which can befall parties who are denied any remedy at all because their union has not been conventionally solemnized.

A recent New Hampshire statute attempts to correct the inequity of one particular consequence of the lack of remedies available to cohabiting parties. Although New Hampshire does not ordinarily recognize common law marriages, the statute provides that:

> Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years, and until the decease of one of them, shall thereafter be deemed to have been legally married.[75]

This New Hampshire statute, although undoubtedly a step forward, appears as a token gesture when compared with the remedies provided in the civil law jurisdictions of Latin America. Meretricious unions as well as concubinage, a more enduring form of meretricious relationship, constitute a widespread social phenomenon in Latin America.[76] The laws of many of these civil law countries respond to the equitable considerations which arise in concubinage. Although the present California community property system, which governs marital property, is a creature of statute, the foundation of the system is derived from the same Spanish-Mexican law which is the heritage of today's civil law in Latin America.[77] It would seem, therefore, that the policy considerations applicable to meretricious relationships in the civil law jurisdictions of Latin America have at least some bearing on those same policy considerations in California.

A progressive approach has been taken by several Latin American countries in providing an equitable solution to the problems of concubinage. One of the most far-reaching provisions is article 43, Paragraph 6 of the Cuban Constitution of 1940:

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[73] Weyrauch, *Informal and Formal Marriage*, 28 U. CHI. L. REV. 88-9, 96-100 (1960).
[74] *Id.*
[75] N.H. REV. STAT. ANN. c. 457, § 39.
[76] Arraros, *Concubinage in Latin America*, 3 J. FAM. L. 330 (1963).
[77] 10 CAL. JUR. 2d, Community Property § 3 (1953).

> The courts shall have authority to declare, where equitable reasons compel such a result, that a monogamic and stable union between persons with legal capacity to marry is equivalent to a civil marriage.[78]

Professor Arraros states that this provision gives the judiciary sufficient discretion to declare a qualifying meretricious relationship to be a valid marriage in order to reach an equitable result in matters such as property distribution.[79]

Article 767 of the Venezuelan Code provides that:

> . . . a system of community property is presumed to exist . . . in those cases of non-marital unions where the woman establishes that she has lived permanently in that state and has contributed with her work to the formation and increase of the man's worldly possessions and wealth, even although [sic] these properties appear in legal documents as being the property of only one of them.[80]

On the dissolution of a qualifying meretricious relationship, an equal division of property jointly accumulated is made according to community property principles. Under the provision only the woman has a cause of action.[81]

An approach similar to that of the Cuban Constitution (described *supra*) is practiced under the law of Bolivia and Panama. The primary difference is the minimum time period during which the concubinal relationship must endure to qualify for equitable relief. Bolivia requires a minimum of two years; Panama requires a minimum of ten years.[82]

The applicability of these Latin American remedies is dependent upon the finding of objective facts, such as the duration of concubinage, the absence of infidelity, etc. Whereas the applicability of the common law marriage and the putative marriage is dependent upon meeting subjective criteria. The intention and agreement to be husband and wife is required in the former[83] and a good faith belief in a valid marriage is required in the latter.[84] The requirements for the Latin American remedies are more definite and thus easier to prove judicially since the test is objective, rather than subjective. The objective test also has the advantage of allowing the court to look at the actual conduct and circumstances of the parties in reaching an

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[78] Le Riverend-Brusone, *Anomalous Marriages*, 10 MIAMI L. Q. 481, 484-5 (1956).
[79] Arraros, *Concubinage in Latin America*, 3 J. FAM. L. 330, 335 (1963); Professor Arraros added in a footnote at 335: "As far as I have been able to ascertain this provision has been retained in the Constitution by the Castro regime."
[80] *Id.* at 338.
[81] *Id.*
[82] *Id.* at 336.
[83] Le Riverend-Brusone, *Anomalous Marriages*, 10 MIAMI L. Q. 481, 488-9 (1956).
[84] *See* footnote 22, *supra.*

equitable solution; the court is not forced to rely on the often elusive subjective intent of the parties.[85]

Thus, contrary to Justice Traynor's conclusion in *Vallera v. Vallera* that the equitable considerations associated with marriage do not attach to the meretricious relationship,[86] many jurisdictions, operating under a community property system with an origin almost identical to that of California, do find these equitable considerations present in the meretricious relationship and do provide equitable relief for the parties. The policy behind these Latin American remedies challenges the foundation of California's very restrictive stance toward the meretricious spouse.

IX. CONCLUSION

Certain policy judgments appear to be implicit in the majority opinions of the *Vallera* and *Keene* cases. One such judgment is that a recognition of the implied agreement between meretricious spouses to share equally in joint accumulations, the approach advocated by Justice Curtis' dissent in *Vallera*, might weaken the institution of marriage. Arguably, the absence of the requirement of a marriage for what in essence would be a division of property according to the principles of marital community property could have this effect.[87] Another policy consideration appears to center on the difficulty of judicial enforcement of the rights of meretricious spouses. With the recognition of additional rights of meretricious spouses, the courts would have to face the judicial difficulty of factual proof of an agreement, valuation of personal services, accounting of contributed funds, etc. The presence of a marriage license signifying a valid marriage would greatly simplify such matters for the courts.[88] However, these arguments lose much of their cogency in light of the inequitable results reached by the courts in cases such as *Keene*. The substantial impact of the *Keene* decision is indicated by the absence — from the time the *Keene* case was decided to the date of this article — of any California Appellate or Supreme Court cases dealing with the rights of the meretricious spouse.

The husband and wife meretricious relationship is a familial relationship which creates many of the equitable considerations present in a valid or putative marriage. This is evidenced by the recognition of these equities in the remedies provided to qualifying meretricious spouses in Latin America (discussed *supra* section VIII). In the mere-

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[85] Le Riverend-Brusone, *Anomalous Marriages*, 10 MIAMI L. Q. 481, 488-9 (1956).
[86] 21 Cal. 2d 681, 684-5, 134 P.2d 761, 762-3 (1943).
[87] *See* discussion of Professor Weyrauch's article in section VIII for arguments in accord.
[88] *Id.*

tricious relationship as in the valid marriage, the husband generally contributes income while the wife contributes personal services. Simple justice dictates that property acquired as a result of these joint efforts should belong to both in equal measure. But California law in its present state punishes the meretricious spouse who renders only personal services for circumstances which are often beyond her control. One might speculate that Mrs. Keene, who labored for eight years with Mr. Keene on the ranch and then during the later ten years assisted him as she could in his businesses, would have married Mr. Keene had she been asked. In terms of property Mrs. Keene could only gain from marriage, but according to the law Mr. Keene could only lose.

Barry R. Pinnolis