

## ARTICLES

### Cohabitation in the Common Law Countries a Decade After *Marvin*\*: Settled In or Moving Ahead?\*\*

Carol S. Bruch\*\*\*

What has happened in the years since English and American courts began their liberalization of the law concerning nonmarital relationships? The common law, which gave a much-heralded birth to the new developments, has experienced only modest doctrinal growth. Legislation, in contrast, has produced the most innovative developments of the past decade. And, in Australia and New Zealand, where law reform bodies have considered the relative roles of cohabitation and marriage law, new substantive rights are being extended to de facto spouses.

This Article traces these developments, then considers their implications for our evolving notions of the family. It concludes that courts and legislatures while retaining a clear preference for traditional family forms, should nevertheless be expected now to begin clarifying and simplifying laws affecting cohabitants.

Although inexact, for the sake of convenience the terms "Commonwealth countries" and "Commonwealth" will be used to refer to England, Australia, Canada and New Zealand, and the term "common law countries" will be used to denote these countries and the United States together.

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\* *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

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\*\*\* Professor of Law, University of California, Davis. The Author expresses her thanks to Dean S.M. Cretney for sharing his unpublished work cited *infra* note 20, to Professor Leonel Pereznieta Castro for his comments on an earlier draft, and to Debra Weiss (King Hall 1988) and Timothy Firch (King Hall 1989) for their fine research assistance.

## I. INITIAL REACTIONS

### A. Common-Law Developments

Following the lead of the English Court of Appeal<sup>1</sup> and the California Supreme Court,<sup>2</sup> Canada, Australia, New Zealand and many American states made common-law remedies available to cohabitants in the late 1970s. To do this required only modest doctrinal adjustments: courts abandoned public policy objections to legal claims between the parties,<sup>3</sup> recognized the economic value of homemakers' nonmonetary contributions,<sup>4</sup> and replaced presumptions that the services of cohabitants were rendered to one another as gifts with presumptions of fair dealing.<sup>5</sup>

### B. Statutory Reforms

Legislative activity of the period was confined almost exclusively to the Commonwealth countries. De facto spouses sometimes received pension or death benefits, either because they fell within statutory definitions of "spouse" by virtue of a period of stable cohabitation,<sup>6</sup> or be-

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<sup>1</sup> In *Cooke v. Head*, [1972] 1 W.L.R. 518, the constructive trust doctrine was liberalized to provide relief for a cohabiting woman who had contributed both funds and manual labor to the construction of a home standing in the name of her former de facto spouse. Three years later the court expanded this shift away from prior law, which measured financial contributions alone, in another cohabitation case, *Eves v. Eves*, [1975] 1 W.L.R. 1338. See Bruch, *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction*, 29 AM. J. COMP. L. 217, 219-21 (1981) [hereafter Bruch, *Common Law Countries*].

<sup>2</sup> *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (all common-law remedies, including implied-in-law agreements, are available).

<sup>3</sup> See Bruch, *Common Law Countries*, *supra* note 1, at 219-28; see also Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 106-14 (1976) [hereafter Bruch, *De Facto Spouses*].

<sup>4</sup> See sources cited *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> Certain surviving nonmarital partners are recognized under both the Australian and Canadian governments' federal civil service retirement schemes, although the Canadian plan requires that the couple have held themselves out as married. Bruch, *Common Law Countries*, *supra* note 1, at 229.

The Canadian plan . . . distinguishes between relationships in which neither party was married to another and those in which a de facto spouse's claim may be permitted to displace that of a legal spouse. The Australian priorities are arranged according to the length of the relationship, the degree to which the survivor was dependent upon the covered party, and the age of the employee or pensioner at the time that the

cause they were given recovery under statutes permitting courts to provide for specified survivors upon a person's death.<sup>7</sup> And, in some Canadian provinces and one Australian state, legislation also authorized courts to order support upon the separation of certain cohabiting couples.<sup>8</sup> Two of these statutes, those of Ontario and Prince Edward

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relationship began.

*Id.* at 229-30 (describing details of the plans and citing Canada Pension Plan § 63, 1974 Can. Stat. ch. 4 (amending 1 CAN. REV. STAT. ch. C-5, § 63); Superannuation Act, 1976 (Cth), § 3, AUSTL. ACTS P. 182 (1976)).

<sup>7</sup> In England, one who was dependent on the decedent at the time of death may request a portion of the estate for maintenance either in case of intestacy or if the decedent's will did not adequately provide for the survivor. Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63, § 1(1)(e), (2)(b), (3); *Malone v. Harrison*, [1979] 1 W.L.R. 1353. *But see In re Beaumont*, [1979] 3 W.L.R. 818; Glover, *Family Provision*, 10 FAM. L. 105 (1980). A surviving spouse, in contrast, receives a "reasonable" award, whether or not it is required for support purposes. Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63, § 1(2)(a). Protection for surviving cohabitants is given by similar statutes in Ontario, Western Australia, and South Australia. And, in South Australia, some cohabitants will be given the same rights as a legal spouse. Bruch, *Common Law Countries*, *supra* note 1, at 231-32 (citing Succession Law Reform Act, 1977 (Ont.), § 64(b), 1977 Ont. Stat. ch. 40, § 64(b); Inheritance (Family and Dependents Provision) Act, 1972 (W.A.), §§ 6,7(1)(f); Inheritance (Family Provision) Act, 1972-1975 (S.A.), §§ 4, 7(1); Administration and Probate Act, 1919-1975 (S.A.), §§ 4, 72g, 72h(2)). The Ontario statute has since been liberalized. See discussion *infra* of Succession Law Reform Act, 1980, § 57(b), (d)(i), 8 ONT. REV. STAT. ch. 488, § 57(b), (d)(i) (1980) and Succession Law Reform Amendment Act, 1986, 1986 Ont. Stat. ch. 53, § 2, 8 ONT. REV. STAT. ch. 488, § 57(b), (g)(ii) (1987). A narrower form of relief, extending only to the mother of the decedent's child, is available in New Zealand. Bruch, *Common Law Countries*, *supra* note 1, at 231-32, (citing Vaver, *The Legal Effects of De Facto Relationships*, 2 N.Z. RECENT L. (n.s.) 161, 164 (1976)).

<sup>8</sup> Bruch, *Common Law Countries*, *supra* note 1, at 234-35, describes the situation in 1981:

In three Canadian provinces and one Australian state, legislation granting support rights to some former cohabitants is already in effect. The [Family Law Reform Act, 1978 (Ont.), § 52, 1978 Ont. Stat. ch. 2, § 52] authorizes support at separation in three instances. The first is pursuant to a written support agreement that meets the statute's tests for enforceability. [*Id.*] The second occurs when a support agreement has been set aside either because it "results in circumstances that are unconscionable" or because there has been a default in the payment called for by the agreement. [*Id.* at § 18(4)(a), (c).] Finally, if the couple has cohabited "continuously for a period of not less than five years, or . . . in a relationship of some permanence where there is a child born of whom they are the natural parents" and the support action is brought within one year of the parties' separation, the Act's normal provisions for spousal support will apply. [*Id.* at § 14(b)(i).] Prince Edward Island recognizes the first two of

Island, allowed cohabitants to enter into contracts under the same conditions as those provided for parties entering antenuptial and marriage contracts: such agreements had to be made in writing and witnessed and were permitted to deal with property ownership, support obligations and limited issues of child rearing.<sup>9</sup>

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these grounds for support, but not the third. [Family Law Reform Act, 1978 (P.E.I.), §§ 15(a), 19(4)(a) & (c), 52, [1974] 1 P.E.I. REV. STAT. ch. F-2.1, §§ 15(a), 19(4)(a), (c), 52 (1979).] British Columbia's statute strikes a different balance: a shorter time period applies, but there are no exceptions. The Family Relations Act, 1978 (B.C.), defines "spouse" for support law purposes to include those who have "lived together as husband and wife for a period of not less than 2 years" so long as the application for support is made within a year of separation. [Family Relations Act, 1978 (B.C.), § 1, 1978 B.C. Stat. ch. 20, § 1, *codified at* 2 B.C. REV. STAT. ch. 121, § 1 (1979).]

Since 1837 a Tasmanian statute has permitted a woman to recover support from a man with whom she has cohabited for at least 12 months if he has wrongfully abandoned her or committed other specified acts of misconduct. [Maintenance Act, 1967 (Tasm.), § 16.]

Some of these provisions have been liberalized in the years since. *See infra* notes 57-59 and accompanying text.

<sup>9</sup> Family Law Reform Act, 1978 (Ont.), § 52, 1978 Ont. Stat. ch. 2, § 52; Family Law Reform Act, 1978 (P.E.I.), § 52, [1974] 1 P.E.I. REV. STAT. ch. F-2.1, § 52 (1979):

- (1) A man and a woman who are cohabiting and not married to one another may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or upon ceasing to cohabit or death, including
  - (a) ownership in or division of property;
  - (b) support obligations;
  - (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
  - (d) any other matter in the settlement of their affairs.
- (2) Where the parties to an agreement entered into under subsection (1) subsequently marry, the agreement shall be deemed to be a marriage contract.

Section 54 of the Act imposes the requirement of a witnessed writing. Sections 51 and 52 grant the same latitude to contracting engaged or married couples, subject, however, to the restriction that they may not limit either spouse's rights concerning a matrimonial home. Should cohabitants later marry, § 11(2) applies that restriction to their agreement. Following separation, cohabitants are also permitted to agree on child custody and access matters under § 53; these provisions and all other provisions concerning a child's support, education or moral training, whether in an antenuptial, marriage, or cohabitation contract, may be disregarded by the court under § 55 when the court determines that to do so is in the best interests of the child. *See generally* O'Hoski, *The Legal Recognition of Domestic Contracts: The Experience of Ontario*, in MARRIAGE

Relief for the death of a nonmarital partner was expressly authorized under worker's compensation statutes in British Columbia<sup>10</sup> and Oregon,<sup>11</sup> under New Zealand's no-fault accident legislation,<sup>12</sup> and

AND COHABITATION IN CONTEMPORARY SOCIETIES 228 (J. Eekelaar & S. Katz eds. 1980).

<sup>10</sup> Workmen's Compensation Act, 1968 (B.C.), § 17(11)-(13), 1968 B.C. Stat. ch. 59, § 17 (as amended and re-enacted by Workmen's Compensation Amendment Act, 1974 (B.C.), § 14, 1974 B.C. Stat. ch. 101, § 14), authorizes the Compensation Board in its discretion to make an award equivalent to that which a widow would have received if the worker left no dependent widow but was survived by a woman who cohabited with him for three years immediately preceding his death (one year being sufficient if the couple had children). If the worker is survived by a dependent widow from whom he was living separate and apart, a surviving cohabitant who meets the durational requirements just described may be awarded the difference between the compensation the widow would have received if she and the worker had cohabited at the date of his death and that lesser amount she will receive as a separated dependent widow. Any dependent widow or qualifying surviving cohabitant is also entitled to a lump sum death benefit. These provisions have since been recodified in the Workers Compensation Act, 1979 (B.C.), § 17(11)-(13), 1979 B.C. REV. STAT. ch. 437, § 17(11)-(13), and amended to provide the same coverage to dependent widowers and surviving male cohabitants in the Charter of Rights Amendments Act, 1985 (B.C.), § 121, 1985 B.C. Stat. ch. 68, § 121. The same amendments authorize certain support payments for cohabitants of injured workers who are receiving compensation. Charter of Rights Amendments Act, 1985 (B.C.), § 124, 1985 B.C. Stat. ch. 68, § 124 (adding § 98(5) to the Workers Compensation Act, 1979 (B.C.), 1979 B.C. REV. STAT. ch. 437). Although the language throughout refers to a "common-law wife or husband," it apparently refers in the lay sense to a cohabitant. One with a true common-law spouse could not also leave another widow or widower. See *Phipps v. Cartmill*, 25 B.C.L.R. 222, 226 (1980) (applying Estate Administration Act's definition of common-law spouse to couple who cohabited but did not hold themselves out as married); Bruch, *Common Law Countries*, *supra* note 1, at 240 n.111.

<sup>11</sup> OR. REV. STAT. ANN. § 656.226 (1989) (authorizing award to surviving de facto wife if cohabitation lasted at least one year and children of the relationship survive). See also *Department of Indus. Relations v. Workers' Compensation Appeals Bd.*, 94 Cal. App. 3d 72, 156 Cal. Rptr. 183 (1979) (reversing earlier case law to hold that de facto spouse could qualify for benefits as dependent who had been "in good faith a member of the family or household of the employee").

<sup>12</sup> Accident Compensation Act, 1972, §§ 123(1)(c), 124(a), 1975 N.Z. Stat. 1569, 1572-73 (authorizing benefits to dependent survivor of de facto relationship without specifying a required period of cohabitation). The provision is now found at Accident Compensation Act, 1982, 1982 N.Z. Stat. No. 181, § 65(1):

For the purposes of [sections dealing with payments to surviving dependent spouses] the expression "spouse" means either of a man or woman who —

- (a) Are married to each other; or
- (b) Not being married to each other, have cohabited immediately preceding the date of death of the deceased person, and, in the opinion of the [Accident Compensation] Corpo-

under statutes permitting recovery against third parties for wrongful death in South Australia,<sup>13</sup> the Australian Capital Territory<sup>14</sup> and the Northern Territory of Australia.<sup>15</sup>

Although social welfare schemes of the time in England, Australia and New Zealand suspended the prior welfare and social security benefits of a woman if she cohabited,<sup>16</sup> certain old age and widow's benefits were available under Australian law if the relationship continued for at least three years and the woman was wholly or substantially dependent on her partner.<sup>17</sup> And, in Australia and New Zealand, members of the armed forces who lived in stable de facto relationships received the same extra pay and benefits granted their married colleagues.<sup>18</sup>

## II. THE SECOND STAGE: THE 1980s

### A. Common-Law Developments

In the years since, a rapidly expanding number of jurisdictions have accepted and applied common-law remedies to cohabitants.<sup>19</sup> However,

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ration, have entered into a relationship in the nature of marriage.

<sup>13</sup> Wrongs Act, 1936-1975 (S.A.), § 4. Section 9 of the Act permits the court to apportion damages between a surviving legal spouse and a surviving de facto spouse, should they both exist. Bailey, *Legal Recognition of De Facto Relationships*, 52 AUSTL. L.J. 174, 175-76 (1978).

<sup>14</sup> Compensation (Fatal Injuries) Ordinance, 1968 (A.C.T.), § 4(2)(h); Bailey, *supra* note 13, at 176.

<sup>15</sup> Compensation (Fatal Injuries) Ordinance, 1974 (N.T.), § 4; Bailey, *supra* note 13, at 176. *See also* K. v. J.N.P. Co., [1976] 1 Q.B. 85 (permitting recovery for mother's expenses when her three children fell within the Act although the mother, as a surviving cohabitant, did not). The dissenter's more generous view was favorably commented on in Pearl, *The Legal Implications of a Relationship Outside Marriage*, 37 CAMBRIDGE L.J. 252, 266-67 (1978).

<sup>16</sup> Bruch, *Common Law Countries*, *supra* note 1, at 239 (citing Pearl, *supra* note 15, at 256); Hughes, *Domestic Purposes Benefit: Lessons from the Furmage Case*, 1979 N.Z.L.J. 32; Sackville, *Social Security and Family Law in Australia*, 27 INT'L & COMP. L.Q. 127, 152, 156-59 (1978).

<sup>17</sup> Sackville, *supra* note 16, at 152.

<sup>18</sup> Helsham, *Comment: De Facto Relationship and the Imputed Trust*, 8 SYDNEY L. REV. 571, 572 (1979) (Australia); Vaver, *The Legal Effects of De Facto Relationships*, 2 N.Z. RECENT L. (n.s.) 161, 162 (1976) (New Zealand). Their de facto spouses, however, were subject to the normal rules restricting their access to either public funds or support rights against their partners during the cohabitation.

<sup>19</sup> *See, e.g.*, *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Carroll v. Lee*, 148 Ariz. 10, 712 P.2d 923 (1986); *Boland v. Catalano*, 202 Conn. 333, 521 A.2d 142 (1987); *Mason v. Rostad*, 476 A.2d 662 (D.C. 1984); *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); *Donovan v. Scuderi*, 51 Md. App. 217, 443 A.2d 121

few further common-law reforms have occurred. Indeed, in the Commonwealth, some retrograde motion has taken place as judges have

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(1982); *Artiss v. Artiss*, 8 Fam. L. Rep. (BNA) 2313 (Haw. Cir. Ct. 1982); *Eaton v. Johnson*, 235 Kan. 323, 681 P.2d 606 (1984); *Hierholzer v. Sardy*, 128 Mich. App. 259, 340 N.W.2d 91 (1983); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986); *Hudson v. DeLonjay*, 732 S.W.2d 922 (Mo. Ct. App. 1987); *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981); *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984); *Joan S. v. John S.*, 121 N.H. 96, 427 A.2d 498 (1981); *Dominguez v. Cruz*, 95 N.M. 1, 617 P.2d 1322 (Ct. App. 1980); *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980); *Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159 (1988), *cert. denied*, 322 N.C. 426, 370 S.E.2d 236 (1988); *Knauer v. Knauer*, 323 Pa. Super. 206, 470 A.2d 553 (1983); *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987); *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981); *Pettkus v. Becker*, 19 R.F.L.2d 165 (1980) (Supreme Court of Canada); *Murray v. Roty*, 28 R.F.L.2d 247 (1982) (Ontario Supreme Court); *Herman v. Smith*, 42 R.F.L.2d 154 (1984) (Alberta Queen's Bench); Bruch, *Common Law Countries*, *supra* note 1, at 221-25 (discussing British and American decisions of the late 1970s and Commonwealth reception of early British cases). *But see* *Grishman v. Grishman*, 407 A.2d 9 (Me. 1979) (following *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979), in which the Illinois Supreme Court denied relief on the grounds of public policy). *Hewitt* has since been narrowly construed by the Illinois Appellate Court, which imposed a constructive trust on assets purchased by a woman cohabitant. Titles were held jointly or in the man's name alone. *See Spafford v. Coats*, 118 Ill. App. 3d 566, 455 N.E.2d 241 (1983). A commentator suggests that *Hewitt* itself may be open to question since the recent adoption of no-fault divorce in Illinois can be read to undercut the legislative preference for marriage relied on by the *Hewitt* court. *See* Rubin, *Spafford v. Coats: An Alternative to Palimony*, 74 ILL. B.J. 286, 288 (1986). *See also* *Murphy v. Bowen*, 756 S.W.2d 149 (Ky. Ct. App. 1988) (apparently recognizing express and implied-in-law agreements, but declining to find an agreement implied-in-fact over a persuasive dissent). A creative but unsuccessful defense on illegal contract grounds was asserted by a woman who claimed that she had "prostitut[ed]" herself in exchange for the home provided by her lover; she sought to defeat his claimed interest in the property. *See Taylor v. Frost*, 202 Neb. 652, 653-54, 276 N.W.2d 656, 658 (1979). As anticipated, same-sex couples have been accorded relief under *Marvin* principles in increasing numbers. *See Whorton v. Dillingham*, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (1988); *Small v. Harper*, 638 S.W.2d 24 (Tex. Ct. App. 1982); Bruch, *De Facto Spouses*, *supra* note 3, at 106; *see also* Bruch, *Common Law Countries*, *supra* note 1, at 225 n.36; *infra* notes 53 & 69. *But see* *Jones v. Daly*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981) (distinguished in *Whorton*).

In *Moors v. Hall*, 143 A.D.2d 336, 532 N.Y.S.2d 412 (App. Div. 1988), a New York court permitted a woman to recover in quantum meruit for domestic services rendered to her lover although the plaintiff conceded that no express agreement was established and that, if established, it would have violated the statute of frauds. The court distinguished *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980), which held that only express agreements between cohabitants are enforceable in New York, on the ground that the plaintiff and defendant never lived together. The woman's concession concerning the statute of frauds is puzzling, as the Court of Appeals had held it inapplicable to cohabitation agreements in *Morone*. *See* 50 N.Y.2d at 487, 413 N.E.2d at 1157, 429 N.Y.S.2d at 595; *see also infra* note 60.

continued to focus on the same doctrinal questions that occupied them in the late 1970s.<sup>20</sup> In England, where the Court of Appeal had developed a "new form" of constructive trust that gave recovery for indirect contributions to property,<sup>21</sup> domestic services now have a more circumscribed effect.<sup>22</sup> Judicial reluctance to acknowledge that forgoing paid employment to devote full-time attention to child and home care may constitute evidence of an expectation of a share in the family's financial fortunes,<sup>23</sup> as well as action in reliance on that understanding, has led

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<sup>20</sup> For the earlier cases, see Bruch, *Common Law Countries*, *supra* note 1, at 221-22. Because "there is no special property regime in equity or at common law for married couples . . . the same *principles* apply to property claims [based on ownership] on the ending of a relationship . . . whether the partners are married or not." Cretney, "Money and the Family Outside Marriage," 1 (Oct. 1987) (paper delivered at the Family Law Conference, Family Breakdown and Money, London). Recent cases dealing with ownership interests include *Burns v. Burns*, 1984 Ch. 317 (C.A.) (living together for 19 years, giving up job to care for home and two children for 17 years and laying patio insufficient to support intention to create interest in specific asset); *Layton v. Martin*, [1986] 2 F.L.R. 227 (Scott, J.) (secretarial assistance in business and services as mistress for 13 years, cohabitant for 5 years, insufficient); *Bristol and West B.S. v. Henning*, [1985] 1 W.L.R. 778 (C.A.) (beneficial interest in home established but did not bind mortgage); *Grant v. Edwards*, 1986 Ch. 638 (C.A.) (intention and detrimental reliance both required); *cf. Midland Bank v. Dobson & Dobson*, [1986] 1 F.L.R. 171 (C.A.) (no reliance, hence no claim, in litigation between spouses).

<sup>21</sup> See *supra* note 1.

<sup>22</sup> Compare *Eves v. Eves*, [1975] 1 W.L.R. 1338 with *Burns v. Burns*, 1984 Ch. 317 (C.A.). Lowe and Smith criticize *Burns* and suggest the case would have been decided more favorably to the woman prior to Lord Denning's retirement. See Lowe & Smith, *The Cohabitant's Fate?*, 47 MOD. L. REV. 341, 344 (1984). Lord Denning's role in the earlier doctrinal developments is described in Bruch, *Common Law Countries*, *supra* note 1, at 220-21.

<sup>23</sup> The requisite mutual intention to share ownership of property may be inferred, but the cases do so only if contributions of money or "real and substantial" labor that the court deems equivalent to money have been made. As one commentator points out, the type of labor recognized is of a distinctly masculine sort:

To gain an interest in the house she must perform acts which are typically male, such as heavy building work and making financial contributions, whereas what she probably did was to commit herself to a future of reduced or non-existent earning capacity. Activities such as childcare have hitherto been excluded as not referable to the acquisition of the house.

Sufrin, *Intention and Detriment*, 50 MOD. L. REV. 94, 99 (1987) (discussing *Midland Bank v. Dobson & Dobson*, [1986] 1 F.L.R. 171 (C.A.) and *Grant v. Edwards*, 1986 Ch. 638 (C.A.)); accord *Eekelaar, A Woman's Place — A Conflict Between Law and Social Values*, 51 CONV. & PROP. LAW. (n.s.) 93, 94 (1987). See *Cooke v. Head*, [1972] 1 W.L.R. 518 (woman's use of sledge hammer and cement mixer sufficed); *Burns v. Burns*, 1984 Ch. 317 (C.A.) (claimant's substantial financial contributions to family expenses that enabled mortgage payments to be made were relevant although living together for 19 years, during 17 of which she gave up her job to rear the couple's



to doctrinal confusion.<sup>24</sup> Commentators have roundly criticized the cases,<sup>25</sup> and many Commonwealth jurisdictions have ignored the English retreat.

The Canadian Supreme Court, for example, soundly embraced the use of constructive trust as a remedy for unjust enrichment in 1980<sup>26</sup> and later applied the doctrine in a case in which the enrichment arose

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two children, was not); *Layton v. Martin*, [1986] 2 F.L.R. 227 (Scott, J.) (services of 13-year mistress who cohabited with man for 5 years and supplied secretarial services to his business were "to all intents and purposes, those of a wife" and unavailing). Contrast the American view. *See, e.g., Carroll v. Lee*, 148 Ariz. 10, 13, 712 P.2d 923, 926 (1986) (exchange of homemaking services for monetary support will support express or implied pooling agreement); *Marvin v. Marvin*, 18 Cal. 3d 660, 665-66, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976) (homemaking services can support an implied agreement); Note, *Let's Live Together — Expanding the Rights of Unmarried Cohabitants in Arizona*, 1986 ARIZ. ST. L.J. 745, 753-54.

<sup>24</sup> *Eekelaar, supra* note 23, at 93 ("No one could look upon the state of English law regarding the acquisition of interests in the matrimonial [or cohabitational] home with any pride.") Although English courts will impose an implied, resulting or constructive trust in some cases, recovery depends on a mutual intention to establish the asserted interest plus detrimental reliance by the claimant on that understanding. *See Grant v. Edwards*, 1986 Ch. 638 (C.A.); *Burns v. Burns*, 1984 Ch. 317 (C.A.); *Layton v. Martin*, [1986] 2 F.L.R. 227; *cf. Midland Bank v. Dobson & Dobson*, [1986] 1 F.L.R. 171 (C.A.). *Sufrin* states:

[T]he Court has brought the requirement of detriment to the centre of the stage. . . . The hard line taken in *Dobson* makes one despair but some aspects of *Grant* . . . offer more hopeful possibilities. This will depend, however, on the courts clarifying the concepts they are using rather than mixing up aspects of constructive trusts with an imprecise version of proprietary estoppel.

*Sufrin, supra* note 23, at 100. *Accord Warburton, Interested or Not?*, 50 CONV. & PROP. LAW. (n.s.) 291, 295 (1986); *cf. Montgomery, A Question of Intention?*, 51 CONV. & PROP. LAW. (n.s.) 16, 27-28 (1987) (suggesting that "everyday living" may establish requisite detrimental conduct, but noting that "confusion and injustice" are still a danger).

<sup>25</sup> *See Eekelaar, supra* note 23, at 100 (endorsing proprietary estoppel in place of trust doctrine: "If reasonable expectation [was] induced by the defendant . . . [i]t should be enough that [plaintiff's action in reliance] was done on the basis that she would have security in the home and/or a share in its capital value."); *Lowe & Smith, supra* note 22, at 344-45 (suggesting that agreement be imputed or "[m]ore radically the court could openly develop the concept of a constructive trust into a remedy against unjust enrichment as in the United States"); *Sufrin, supra* note 23, at 100; *Warburton, supra* note 24, at 295 (arguing that although detriment is relevant to cases of proprietary estoppel, it has no proper function in cases of inferred common intention). *Cf. Montgomery, supra* note 24, at 28 (applauding focus on common intention but calling for a more liberal view of unpaid contributions and parties' intentions).

<sup>26</sup> *See Pettikus v. Becker*, 117 D.L.R.3d 257 (1980).

solely from the rendering of domestic services.<sup>27</sup> The High Court of Australia has agreed that actual intent to create a trust is not necessary to sustain relief by way of constructive trust.<sup>28</sup> More dramatically, even before the High Court developments, legislation in the Australian state of New South Wales, described below,<sup>29</sup> was enacted to obviate the difficulties of the English cases.<sup>30</sup> And, in New Zealand the Court of Appeal has expressed receptivity to evolving trust doctrines that one commentator welcomes as a "radical departure" from the leading English cases.<sup>31</sup>

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<sup>27</sup> *Sorochan v. Sorochan*, 29 D.L.R.4th 1 (1986) (making no distinction between contributions of domestic and farm labor). The Alberta Court of Queen's Bench has subsequently given relief on the basis of domestic services alone. See *Herman v. Smith*, 34 A.L.R.2d 90 (1984). The doctrinal developments are detailed in Welstead, *Domestic Contribution and Constructive Trusts: The Canadian Perspective*, 1987 DENNING L.J. 151, and criticized in Davies, *Unjust Enrichment and the Remedies of Constructive Trust and Quantum Meruit*, 25 ALTA. L. REV. 286, 293 (1987) (arguing that "unexceptional household service" for 42 years does not give rise to a reasonable expectation of compensation).

<sup>28</sup> *Muschinski v. Dodds*, 160 C.L.R. 583, 62 A.L.R. 429 (1985); *Baumgartner v. Baumgartner*, 76 A.L.R. 75 (1987). It is as yet unclear whether relief is granted on the basis of unconscionable conduct or of unjust enrichment, or precisely what difference the choice makes. In *Baumgartner*, Justice Toohey's concurring opinion suggests that either approach "rejects Lord Denning[s] notion of 'a constructive trust of a new model' imposed 'whenever justice and good conscience require it,' " yet also awaits "the development of a general [principled] doctrine." *Baumgartner v. Baumgartner*, 76 A.L.R. at 86-87 (citations omitted). Compare the analysis of Cooke, P., of the New Zealand Court of Appeal, *infra* note 31. Although the rhetoric of the Australian Justices' opinions suggest that nonfinancial contributions are relevant, the only concrete evidence of that is in *Baumgartner*, where a cohabitant was credited with an amount equal to what she would otherwise have earned and contributed to the household during the three months that she was unemployed at the time of childbirth. See also *Sovova v. Ojvan*, 72 A.C.T.R. 10 (1987) (woman's domestic services and contributions to household expenses precluded man's avoidance of equal partition of land held by them as tenants in common in equal shares).

<sup>29</sup> See *infra* text accompanying notes 74-105.

<sup>30</sup> Wade identifies three aspects of the general law as the mischief the New South Wales legislation was designed to rectify: the prerequisite of an express or implied (but not imputed) promise for recovery under constructive trust or promissory estoppel theories, the limited effect given nonfinancial contributions under resulting and constructive trust doctrines, and "the unrealistic requirement that contributions be related to the promise and perhaps that the promise relate directly to an identifiable piece of property." Wade, *De Facto Property — Remedial Legislation and the Chancellor's Foot*, 25 LAW SOC'Y J. (N.S.W.), Apr. 1987, at 48, 50. The extent to which the Australian High Court has left these difficulties behind remains to be seen. See *supra* note 28.

<sup>31</sup> Atkin, *De Factos Engaging Our Attention*, 1988 N.Z.L.J. 12 (referring in particular to the approach now advanced by Cooke, P.). In 1983, then-Justice Cooke of the

Liberalization of the law of constructive trusts was unnecessary in the United States, where unjust enrichment principles had already produced a doctrine capable of ready application to cohabitation cases.<sup>32</sup> Other matters have occupied the courts' attention instead, and some innovations have resulted, particularly in litigation-related matters.<sup>33</sup> Support pending trial has been awarded in cases alleging an express or implied agreement to support,<sup>34</sup> attorney's fees have been granted as a

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New Zealand Court of Appeal endorsed the Canadian Supreme Court's move to unjust enrichment in the *Pettkus* case, and Justice McMullin joined in the call to continue developing the law of trusts "to meet different circumstances and relationships and changing social conditions." *Hayward v. Giordani*, [1983] N.Z.L.R. 140, 153. Cooke, P. later remarked,

I respectfully doubt whether there is any significant difference between the deemed, imputed or inferred common intention spoken of by Lord Reid and Lord Diplock (and now by the English Court of Appeal in *Grant v. Edwards*) and the unjust enrichment concept used by the Supreme Court of Canada. Unconscionability, constructive or equitable fraud, Lord Denning's "justice and good conscience" and "in all fairness": at bottom in this context these are probably different formulae for the same idea. . . . One way of putting the test is to ask whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property. If, but only if, the answer is Yes, the Court should decide on an appropriate interest — not necessarily a half — by way of constructive trust . . . .

*Pasi v. Kamana*, [1986] 1 N.Z.L.R. 603, 605; *accord* *Oliver v. Bradley*, [1987] 1 N.Z.L.R. 586. Although Atkin is hopeful that this will ultimately permit recovery in a case predicated exclusively on nonfinancial contributions of domestic services, the Court of Appeal's decision in *Oliver v. Bradley* leaves some doubt. The woman in that case held title to the house and had contributed an amount sufficient for her own support to the household expenses, but was "more like 'an older sister' than a step-parent to the man's two children who lived with them" and had neither contributed to the cost of the house nor performed major work improving the property. Atkin, *supra*, at 14. A more searching inquiry would have inquired whether it was the "older sister" who performed most of the household tasks and whether such tasks, rather than manual labor, might not appropriately support an expectation of shared financial well-being. *See supra* note 23.

<sup>32</sup> *See* Bruch, *Common Law Countries*, *supra* note 1, at 222-23.

<sup>33</sup> Not all developments have been favorable to claimants. In California, an Evidence Code requirement of clear and convincing proof to rebut ownership in accord with record title, usually ignored in marital property disputes, has been applied to defeat a cohabitant's claim of constructive trust. *See Tannehill v. Finch*, 188 Cal. App. 3d 224, 232 Cal. Rptr. 749 (1986); *Toney v. Nolder*, 173 Cal. App. 3d 791, 219 Cal. Rptr. 497 (1985). *But see* *Alderson v. Alderson*, 180 Cal. App. 3d 450, 225 Cal. Rptr. 610 (1986) (applying preponderance of the evidence standard without discussion).

<sup>34</sup> *See, e.g.,* *Curtis v. [Firth] Curtis*, No. 14514, Idaho Dist. Ct. (5th Jud. Dist.) (Interim Findings of Fact and Order of March 28, 1988); *Crowe v. De Gioia*, 90 N.J. 126, 447 A.2d 173 (1982). The theory used to permit temporary support in *Crowe* is

matter of common law,<sup>35</sup> and a federal bankruptcy court has permitted relief from a stay protecting its exclusive jurisdiction so that a state court could resolve a *Marvin* dispute involving the debtor.<sup>36</sup> Courts have also interpreted statutory language to extend some causes of action to cohabitants.<sup>37</sup>

Some American courts have reached more broadly to accommodate de facto spouses' claims. Traditional doctrines of estoppel<sup>38</sup> and partnership law<sup>39</sup> have been applied for the first time to litigation between former cohabitants. And some courts give recovery following lengthy cohabitation without precisely articulating the basis for relief.<sup>40</sup> The development of greatest potential scope is the application by analogy of marital property statutes to cohabitants in two states.<sup>41</sup> Thus far these

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described *infra* note 44. The California Supreme Court's opinion in *Marvin* held that contractually based support would be enforced, while leaving open the question of support in other cases; the question of temporary support was not addressed. As to new equitable remedies more generally, see *infra* note 42 and accompanying text.

<sup>35</sup> *Curtis v. [Firth] Curtis*, No. 14514, Idaho Dist. Ct. (5th Jud. Dist.) (Interim Findings of Fact and Order of March 28, 1988). The court found that the defendant had insufficient assets to pay the costs and attorney's fees "necessary to litigate this case and present her side of the story to the Court." The court concluded, as a matter of law, that "equitable courts should protect the rights and relationships of the parties that enter into stable relationships . . . and, in fact, public policy demands that the rights of those involved be dealt with fairly and justly." *Id.* at 3-5.

<sup>36</sup> *In re Ericson*, 26 Bankr. 973, 976-77 (Bankr. C.D. Cal. 1983) (applying domestic relations exception).

<sup>37</sup> See *infra* notes 50-53 and accompanying text.

<sup>38</sup> *Grant v. Edwards*, 1986 Ch. 638 (C.A.); *Pascoe v. Turner*, [1979] 1 W.L.R. 431 (C.A.); see also *Greasley v. Cooke*, [1980] 1 W.L.R. 1306. According to former Law Commissioner, Dean S.M. Cretney, however, the scope of the doctrine remains unclear. Cretney, *supra* note 20 (contrasting cases cited in this note with *Coombes v. Smith*, [1986] 1 W.L.R. 808; *Re Basham*, [1987] 1 All E.R. 405).

<sup>39</sup> *Carroll v. Lee*, 148 Ariz. 10, 712 P.2d 923 (1986) (implied partnership agreement applied to jointly held property); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986) (analogy to common-law partnership applied without regard to title).

<sup>40</sup> *Artiss v. Artiss*, 8 Fam. L. Rep. (BNA) 2313 (Haw. Cir. Ct. 1982) ("ostensible family relationship" of 24 years justified property division under express or implied-in-fact contract theory by analogy, in equity, to divorce statute); *Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606 (1984) (court had equitable powers to divide property acquired while couple lived together following their divorce; parties had jointly purchased home and incorporated a business); *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) (implied-in-fact contract to hold property as if married where couple had cohabited for 23 years after their divorce); *In re Estate of Steffes*, 95 Wis. 2d 490, 290 N.W.2d 697 (1980) (facts supported contract implied in fact or in law).

<sup>41</sup> See *Artiss v. Artiss*, 8 Fam. L. Rep. (BNA) 2313 (Haw. Cir. Ct. 1982) (granting relief upon an express contract and, in equity, by analogy to divorce statute's equitable distribution statutes upon an implied-in-fact agreement); *Marriage of Lindsey*, 101

cases have not been followed by sister states, however, and no other new equitable doctrines have developed in the United States. The California Supreme Court's suggestion in the *Marvin* case that such growth might be appropriate<sup>42</sup> appears to have fallen on mostly inattentive ears.

Absent legislation, significant problems remain in areas traditionally regulated by statute in the common law countries: support rights and a variety of rights *vis-à-vis* third parties. The *Marvin* court made a spe-

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Wash. 2d 299, 678 P.2d 328 (1984) (applying a rule analogous to that provided by statute for the disposition of community property upon divorce); *Warden v. Warden*, 36 Wash. App. 693, 695, 676 P.2d 1037, 1039 (1984) (trial court's support order for the female cohabitant, house payments in lieu of support, not appealed and therefore not at issue; property disposition consistent with *Lindsey*). *Warden* was decided by the Washington Court of Appeals two weeks before *Lindsey* was decided by the state supreme court; the supreme court denied review in *Warden* two months later. Neither case cited the other. A different branch of the state's court of appeals has since declined to extend *Lindsey* and *Warden* to award attorneys' fees by analogy to the divorce statutes. *Western Community Bank v. Helmer*, 48 Wash. App. 694, 740 P.2d 359 (1987) (declining to extend state's equitable doctrine of attorneys' fees as consequential damages). The Washington Supreme Court has made clear that its holdings authorizing the "just and equitable" disposition of property accumulated during cohabitation applies to litigation between the parties, but does not elevate the status of their relationship to that of a marriage *vis-à-vis* third parties. *See, e.g., Davis v. Employment Sec. Dep't*, 108 Wash. 2d 272, 280-81, 737 P.2d 1262, 1266-67 (1987) (noting that public funds were at stake in the woman's request for unemployment benefits, which was denied).

<sup>42</sup> *Marvin v. Marvin*, 18 Cal. 3d 660, 684 n.25, 557 P.2d 106, 123 n.25, 134 Cal. Rptr. 815, 832 n.25 (1976) (opinion not intended to preclude development of "additional remedies to protect the expectations of the parties . . . in cases in which existing remedies prove inadequate . . ."). In *Artiss*, the court based its decision expressly on its equitable powers "to adapt to new conditions (including new life styles) arising out of different social or economic systems the fundamental principles underlying the common law and to adopt a new rule appropriate to relationship[s] unknown to [the] common law." *Artiss v. Artiss*, 8 Fam. L. Rep. (BNA) at 2313. In contrast, *Crowe v. De Gioia*, 102 N.J. 50, 505 A.2d 591 (1986) provides an example of an opportunity not taken. The trial judge expressed his deep regret at having no statutory authorization to award the plaintiff attorney's fees in her successful action to enforce an express agreement for support, remarking, "[E]quity cries out for [the defendant] to pay [the plaintiff's] counsel fee." *Id.* at 52, 505 A.2d at 591-92. The New Jersey Supreme Court affirmed, with one judge dissenting. That judge noted that awards of counsel fees in matrimonial actions began as a matter of equity and criticized the majority's refusal to read its own court rules as permitting counsel fees when an agreement to support has been established and "the factors pertinent to the claimant's need for . . . fees are virtually indistinguishable from the factors that are controlling in a matrimonial action." *Id.* at 55, 505 A.2d at 594. Contrast the Idaho trial court decision in *Curtis*, described *supra* note 35. Temporary support pending trial of the *Crowe* action had been approved by the New Jersey Supreme Court in an earlier appeal in the case. *See infra* note 44 and accompanying text.

cial point of mentioning that it had not been asked to decide and therefore would leave open the question of whether support could be granted where it had not been expressly provided for by contract.<sup>43</sup> Yet only two later cases in sister states have granted noncontractually based support rights.<sup>44</sup> One is left to wonder whether judicial reluctance to provide support to former cohabitants displays less an unwillingness to consider doctrinal growth and more a dislike of any inter-adult support.<sup>45</sup> If so, it displays an inauspicious manifestation of cohabitation as

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<sup>43</sup> 18 Cal. 3d at 685 n.26, 557 P.2d at 123 n.26, 134 Cal. Rptr. at 832 n.26. The *Marvin* court and courts in other states have recognized that express agreements to support are enforceable. *Id.* at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825; *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Curtis v. [Firth] Curtis*, No. 14514, Idaho Dist. Ct. (5th Jud. Dist.) (Partial Judgment of Sept. 30, 1988) (ordering support for rehabilitation over two-year period, including costs of tuition, books and supplies following cohabitation of 10 years); *Koslowski v. Koslowski*, 80 N.J. 378, 403 A.2d 902 (1979). Following remand in *Marvin* there was a second appeal, in which the court of appeals interpreted the earlier supreme court case to permit the award of noncontractual support in appropriate cases. *Marvin v. Marvin*, 122 Cal. App. 3d 871, 876, 176 Cal. Rptr. 555, 558 (1981); *see also supra* note 34 (concerning temporary support); *infra* note 44.

<sup>44</sup> *See Crowe v. De Gioia*, 90 N.J. 126, 447 A.2d 173. In *Crowe*, the New Jersey Supreme Court upheld a support award *pendente lite* to preserve the *status quo ante* in a suit on an alleged express contract for support. "[A]pplying traditional equitable principles," the court based its decision on the judiciary's power to issue a preliminary injunction "when necessary to prevent irreparable harm." *Id.* at 132, 447 A.2d at 176-77. A later decision in the same case that denied the plaintiff's request for attorney's fees is discussed in *supra* note 42. Two additional cases, one preceding and one subsequent to *Marvin*, also awarded support without statutory authorization, but have since been undercut. *Taylor v. Taylor*, 317 So. 2d 422 (Miss. 1975), ordered support of \$75 per month for 36 months to woman who, although married to another man, cohabited with the defendant for 18 years. *Id.* at 422-23. The court made clear that because there was no valid marriage between the parties, the award was not based on statutes authorizing post-divorce spousal support. *See id.* at 423. Eleven years later the same court recharacterized its earlier decision, however, saying it was a property distribution payable over 36 months rather than a support award. *See Pickens v. Pickens*, 490 So. 2d 872, 875 (Miss. 1986). And, a New York trial court gave support under implied contract principles in *McCullon v. McCullon*, 96 Misc. 2d 962, 410 N.Y.S.2d 226 (1978), holding as an alternative ground that support was available because the couple had contracted a common-law marriage in Pennsylvania that would be recognized in New York. *McCullon* is of limited importance because the New York Court of Appeals has since held that only express contracts will support recovery between cohabitants. *See Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980). Finally, in *Tapley v. Tapley*, the New Hampshire Supreme Court held that no claims for support would be permitted on the basis of implied contract or *quantum meruit* claims. *Tapley v. Tapley*, 122 N.H. 727, 729, 449 A.2d 1218, 1219 (1982).

<sup>45</sup> *See generally* Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988).

a shadow institution of marriage.

A variety of tort remedies have remained beyond the reach of cohabitants, mostly in relation to claims against third parties. Only a few courts have extended the common-law right of a married person to recover damages for loss of a spouse's consortium to de facto spouses, and each decision has been brought into question by later developments.<sup>46</sup> Many more courts have refused the extension. These courts assert a state interest in promoting marriage, question whether injury to a cohabiting partner is reasonably foreseeable and express concern with difficulties in determining which unmarried parties should be permitted to recover if the objective test of marriage were to be abandoned.<sup>47</sup> The California Supreme Court applied similar reasoning in disallowing a common-law claim for negligent infliction of emotional distress made by a cohabitant who had witnessed the tortious injury and death of his nonmarital partner.<sup>48</sup> Finally, courts have shown an uneven reception

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<sup>46</sup> See *Norman v. General Motors Corp.*, 628 F. Supp. 702 (D. Nev. 1986); *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980); *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983) (since overruled by *Elden v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988)); Comment, *Consortium Rights of Unmarried Cohabitants*, 9 AM. J. TRIAL ADVOC. 145 (1985). *Bulloch* and *Norman* were decided by federal courts, applying what they expected the state courts in which they sat would hold to be the law. In each instance, the prediction was inaccurate. See *Elden v. Sheldon*, 46 Cal. 3d at 278 n.7, 758 P.2d at 589 n.7, 250 Cal. Rptr. at 261 n.7 (citing relevant contrary state court cases). Cf. *Stahl v. Nugent*, 212 N.J. Super. 340, 514 A.2d 1367 (1986) (husband permitted to claim loss of consortium when wife injured during engagement).

<sup>47</sup> See, e.g., *Felch v. Air Florida*, 562 F. Supp. 383 (D.D.C. 1983); *Elden v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988); *Hendrix v. General Motors Corp.*, 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983); *Laws v. Griep*, 332 N.W.2d 339 (Iowa 1983); *Feliciano v. Rosemar Silver Co.*, 401 Mass. 141, 514 N.E.2d 1095 (1987); *Haas v. Lewis*, 8 Ohio App. 3d 136, 456 N.E.2d 512 (1982). The *Elden* court, for example, reasoned, "[T]he state's interest in promoting the responsibilities of marriage and the difficulty of assessing the emotional, sexual and financial relationship of cohabiting parties to determine whether their arrangement was the equivalent of a marriage, reinforce our [decision]." 46 Cal. 3d at 279, 758 P.2d at 589-90, 250 Cal. Rptr. at 262.

<sup>48</sup> *Elden v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988) (overruling *Ledger v. Tippitt*, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985)). The court stated that "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk." The court distinguished other cases that allowed recovery where the plaintiff and victim shared a relationship that was "the 'functional and emotional equivalent' of a nuclear family relationship." *Id.* at 274, 277, 758 P.2d at 586, 588, 250 Cal. Rptr. at 258, 260. It referred specifically to the state's interest in promoting marriage, the burden on courts to determine the parties' emotional relationships, and "the need to limit the number of persons to whom a negligent defendant

to claims between the parties themselves for the intentional infliction of emotional distress.<sup>49</sup>

Cohabitants' claims under worker's compensation, unemployment benefit and wrongful death laws have also been largely unsuccessful.<sup>50</sup> Because these causes of action originated in statutes rather than under the common law, only those named by statute have traditionally been granted relief.<sup>51</sup> It is therefore not surprising that cohabitants have been granted relief only when the statutory language could be construed to include them, for example, as dependents<sup>52</sup> or as "family" or "household" members.<sup>53</sup> Even here, however, relief has been uneven. In a du-

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owes a duty of care," noting an inability to "draw a principled distinction between [de facto spouses] and de facto siblings, parents, grandparents or children." *Id.* at 274-77, 758 P.2d at 586-88, 250 Cal. Rptr. at 258-60. The dissent questioned the court's policy analysis, remarking, "The [legislative and case law] trend in this state is toward *removing* legal distinctions based on marital status that serve only to burden the unmarried without advancing some corresponding societal interest." *Id.* at 282, 758 P.2d at 592, 250 Cal. Rptr. at 264 (citing *Marvin* and statutes concerning housing, credit and parentage that disallow discrimination based on marital status).

<sup>49</sup> Compare *Murphy v. Murphy*, 109 A.D.2d 965, 486 N.Y.S.2d 457 (1985) (permitting recovery) with *Artache v. Goldin*, 133 A.D.2d 596, 519 N.Y.S.2d 702 (1987) (disallowing claim).

<sup>50</sup> See, e.g., *Norman v. Unemployment Ins. Appeals Bd.*, 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983) (quitting job to follow de facto partner to new location not "good cause" for purposes of determining eligibility to receive unemployment insurance benefits); *Nieto v. City of Los Angeles*, 138 Cal. App. 3d 464, 188 Cal. Rptr. 31 (1982) (cited with approval by the California Supreme Court in *Elden v. Sheldon*, 46 Cal. 3d at 274-75, 758 P.2d at 586-87, 250 Cal. Rptr. at 258-59) (wrongful death); *Crenshaw v. Indus. Comm'n*, 712 P.2d 247 (Utah 1985) (worker's compensation death benefits). But cf. *MacGregor v. Unemployment Ins. Appeals Bd.*, 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984) (preservation of "familial relationship" with nonmarital spouse and child constitutes "good cause"). Legislation in England and New South Wales now expressly grants standing to sue for wrongful death to certain cohabitants. See *infra* notes 64 & 99 and accompanying text.

<sup>51</sup> See the discussion of two cases that are exceptions to this pattern in Bruch, *Common Law Countries*, *supra* note 1, at 236 n.90a. Neither exception involved cohabitation. See also *People v. Delph*, 94 Cal. App. 3d 411, 156 Cal. Rptr. 422 (1979) (refusing to define "spouse" for purposes of the "marital communications" privilege to included de facto spouses).

<sup>52</sup> See, e.g., *Department of Indus. Relations v. Workers' Compensation Appeals Bd.*, 94 Cal. App. 3d 72, 156 Cal. Rptr. 183 (1979).

<sup>53</sup> See, e.g., *id.* (death benefits awarded to cohabitant as "good faith member of the family or household" of the deceased employee); *Donovan v. Workers' Compensation Appeals Bd.*, 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982) (homosexual relationship can satisfy "good faith member of the family or household" requirement); *Henderson v. Travelers Ins. Co.*, 354 So. 2d 1031 (La. 1978) (cohabitant was a "dependent family member" for the purposes of worker's compensation benefits). *Donovan*



bious opinion, the federal court of appeals has permitted a debtor to discharge support ordered to his former cohabitant.<sup>54</sup> The court reasoned that support obligations arising out of cohabitation are neither payments to a former spouse nor obligations arising from "family duties" and, hence, may be discharged.<sup>55</sup>

Similarly, courts have sometimes construed contract clauses that refer to family members to cohabitants' disfavor. When contractual obligations of third parties are at issue, courts have been reluctant to interpret statutory language to include de facto family members.<sup>56</sup>

Thus the common law has provided important yet seriously incomplete advances in providing relief for cohabitants' legal needs. Although the vast majority of jurisdictions now permit suits to resolve the parties' property disputes, the gap-filling functions of the law remain largely

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is noted at *Donovan v. County of Los Angeles and State Compensation Insurance Fund: California's Recognition of Homosexuals' Dependency Status in Actions for Worker's Compensation Death Benefits*, 12 J. CONTEMP. L. 151 (1986). In *MacGregor v. Unemployment Ins. Appeals Bd.*, 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823, the California Supreme Court awarded unemployment insurance benefits to a woman who had quit her job to follow her male partner and their child to New York. The court concluded she had "good cause" for leaving, as required by the state's unemployment insurance statute. *Id.* at 214, 689 P.2d at 459, 207 Cal. Rptr. at 829. Given the presence of the child and consequent need to preserve family unity, it held inapplicable statutory language that had been adopted to prevent nonmarital partners from being treated as favorably as "persons who are married or whose marriage is imminent." *Id.* at 211-13, 689 P.2d at 457-58, 207 Cal. Rptr. 827-28. *But see In re Cummings*, 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826 (1982) (same court upheld prison regulations excluding cohabitant from overnight visitation privileges extended to members of an inmate's "immediate family"). *See also supra* notes 47-48.

<sup>54</sup> *See Niermeyer v. Doyle (In re Doyle)*, 70 Bankr. 106 (Bankr. 9th Cir. 1986).

<sup>55</sup> The suggestion in *Niermeyer* that application of a state's divorce statutes is required is misconceived. *See Niermeyer v. Doyle (In re Doyle)*, 70 Bankr. at 108. The common law is equally a source of state law. In contrast, as to other areas of federal law, federal courts have accepted state law definitions to bring persons within the protection of federal statutes. This has frequently occurred as to putative purposes for couples who mistakenly but in good faith believed that they were married. *See, e.g., Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066 (2d Cir. 1984) (social security widow's benefits available to putative spouse); *Brown v. Devine*, 574 F. Supp. 790 (N.D. Cal. 1983) (federal civil service survivor benefits available to putative spouse); *Newburger v. Commissioner*, 61 T.C. 457 (1974) (support pursuant to annulment decree was alimony for purposes of I.R.C. §§ 71, 215). Comparable treatment should be accorded to putative spouses under bankruptcy law and, in all areas, to those receiving support awards following cohabitation.

<sup>56</sup> A New Jersey appellate court, for example, refused to treat a cohabitant as a "spouse" or "relative" under an automobile liability insurance policy, even though the couple held themselves out as married. *State Farm Mut. Auto. Ins. Co. v. Pizzi (Merkin)*, 12 Fam. L. Rep. (BNA) 1263 (N.J. Super. Ct. App. Div. 1986).

unavailable to de facto spouses absent legislative solutions.

## B. Statutory Developments

### 1. Extension of Earlier Enactments

One of the most common legislative activities during the 1980s has been the extension of statutes that had already provided some protections to cohabitants. In Canada, for example, New Brunswick and Newfoundland have adopted provisions previously found in some other provinces concerning cohabitation contracts and support rights,<sup>57</sup> and Manitoba has adopted comparable support provisions.<sup>58</sup> And, in Ontario, amendments have reduced durational cohabitation requirements. That province had previously given support rights at a relationship's end by death or separation to cohabitants who had lived together for five years or, if the couple had a natural child, in a relationship of some permanence. Ontario now provides relief following three years of cohabitation or as to relationships of some permanence if the parties

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<sup>57</sup> The Newfoundland legislation came into effect July 1, 1980. See Day, *Newfoundland*, in *MATRIMONIAL PROPERTY LAW IN CANADA* N-1, N-4 (A. Bissett-Johnson & W. Holland eds. 1983). Domestic contracts of the sort authorized by Ontario may be entered by cohabiting couples and may, should the parties so choose, "adopt the provisions of the Act [applicable to married persons]." The Matrimonial Property Act (Nfld.), Nfld. Stat. 1979 ch. 32, as amended by The Attorney General Statutes Amendment Act, 1980, 1980 Nfld. Stat. ch. 24, § 11.

In New Brunswick, the provincial Marital Property Act and related Family Service Act came into force in 1981. See Reid & Landry, *New Brunswick*, in *MATRIMONIAL PROPERTY LAW IN CANADA*, *supra*, at NB-1, NB-3, NB-42 (1987). Support rights are given under the latter act

to unmarried men and women who have cohabited continuously for a period of not less than three years in a relationship in which one person has been substantially dependent upon the other for support or who have cohabited in a relationship of some permanence where they are natural parents of a child . . .

so long as the application for support is brought within a year of ending the cohabitation. *Id.* at NB-42 (describing 1980 N.B. Acts ch. C-2.1, originally called the Child and Family Services and Family Relations Act; renamed by ch. F-2.2 in 1984).

<sup>58</sup> Greenberg, *Manitoba*, in *MATRIMONIAL PROPERTY LAW IN CANADA*, *supra* note 57, at M-1, M-76 (1986):

Where an unmarried couple has cohabited for one year or more and has a child, the parties . . . have recourse under the Family Maintenance Act for a lump sum award [citing §§ 8(1)(a), 11]. If there are no children, maintenance may be ordered under the . . . Act where the couple has cohabited continuously for at least 5 years in a relationship in which one person has been substantially dependant on the other for support [citing § 2(3)].

*Id.*

were either the natural or adoptive parents of a child.<sup>59</sup>

The liberalization of earlier statutes is important. It indicates that those states brave enough to abandon a simple litmus test of legal marriage and to undertake the perceived administrative difficulties of defining which additional couples should be protected have had favorable experiences with their first legislative efforts. Indeed, rather than being overwhelmed by cases in which the requisite kind of relationship was too difficult to ascertain or in which the new definitions extended relief inappropriately, these and sister legislatures have concluded that the experiment deserves to be extended. This endorsement based upon experience augers well for future statutory developments.

## 2. New Statutes

A few statutory developments have sought to restrict, rather than extend, protections for cohabitants. Two American states, for example, have imposed what may prove to be largely ineffectual writing requirements for cohabitation agreements.<sup>60</sup> Many more states have specified

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<sup>59</sup> Succession Law Reform Amendment Act, 1986 (Ont.), 1986 Ont. Stat. ch. 53, § 2 (amending ONT. REV. STAT. ch. 488, § 57(b), (g)(ii)); Family Law Act, 1986 (Ont.) § 29, 1986 Ont. Stat. ch. 4, § 29. See *supra* note 8 for a description of the earlier family law provisions.

<sup>60</sup> See MINN. STAT. §§ 513.075-.076 (1989); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (Vernon 1987); Knoblauch, *Minnesota's Cohabitation Statute*, 2 LAW & INEQUALITY 335 (1984); Comment, *Texas Legislation on the Statute of Frauds in Palimony Suits: Is an Oral Contract Worth the Paper It's Written On?*, 25 HOUS. L. REV. 979, 993-1000 (1988) (discussing the Minnesota cases that have continued to grant relief on equitable grounds and doctrines that may prove effective in avoiding the Texas statute). Many more states have rejected legislative proposals that would have imposed writing requirements. See Bruch, *Common Law Countries*, *supra* note 1, at 226; Comment, *Implications of the Repeal of Louisiana Civil Code Article 1481*, 48 LA. L. REV. 1201, 1202 (1988) (setting forth proposal that failed in the Louisiana Legislature, but failing to note that legislature's action might have been prompted by distaste for the bill's statute of frauds provision). Equitable doctrines have also been used to avoid perceived difficulties with the statute of frauds in states having no statute specifically directed at cohabitation agreements. In *Moors v. Hall*, 143 A.D.2d 336, 532 N.Y.S.2d 412 (App. Div. 1988), for example, a New York court permitted a woman to recover in quantum meruit for domestic services rendered to her lover although the plaintiff conceded that no express agreement was established and that, if established, it would have violated the statute of frauds. The court distinguished *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980), which held that only express agreements between cohabitants are enforceable in New York, on the ground that the plaintiff and defendant in *Moors* never lived together. (The court failed to note that *Morone* had expressly held the statute of frauds inapplicable to cohabitation claims. Cf. 50 N.Y.2d at 487, 413 N.E.2d at 1156-57, 429 N.Y.S.2d at 595.) And

the circumstances under which cohabitation will reduce or terminate spousal support being received from a former spouse.<sup>61</sup> And the California legislature acted to restrict access to unemployment insurance benefits by a cohabitant who quits a job to follow a de facto spouse to a new home.<sup>62</sup>

Far more common, however, has been legislative activity to the benefit of cohabitants. A number of these reforms concern rights upon the death of one party. In England, for example, a surviving cohabitant may now succeed to a secure tenancy in council housing,<sup>63</sup> and suit may be brought for a partner's wrongful death if the couple had lived to-

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in California a defendant will be estopped from raising a statute of frauds objection to prevent fraud and unconscionable injury that would result from refusal to enforce oral contracts in certain circumstances — *i.e.*, after one party has been induced by the other seriously to change position in reliance on the contract, or when unjust enrichment would result if a party who has received the benefits of the other's performance was allowed to rely upon the statute.

Whorton v. Dillingham, 202 Cal. App. 3d 447, 456, 248 Cal. Rptr. 405, 411 (1988); *accord* Cline v. Festersen, 128 Cal. App. 2d 380, 275 P.2d 149 (1954) (cohabitation cases). Why the courts find the statute potentially applicable at all as to contracts of indefinite duration is unclear. *See* 2 A. CORBIN, CORBIN ON CONTRACTS § 446, at 552 (1950) ("Contracts for . . . performance that is to begin within a year and is to continue for an indefinite, unspecified period . . . are held not to be within the one-year clause of the statute.") *See also supra* note 19.

<sup>61</sup> *See, e.g.*, ALA. CODE § 30-2-55 (1983); CAL. CIV. CODE § 4801.5 (West Supp. 1987); ILL. ANN. STAT. ch. 40, para. 510(b) (Smith-Hurd Supp. 1988); OKLA. STAT. ANN. tit. 12, § 1289(D) (West Supp. 1988); 23 PA. CONS. STAT. ANN. § 507 (Purdon Supp. 1988); UTAH CODE ANN. § 30-3-5 (Supp. 1987); Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 644-49 (1981-82); *see also* N.Y. DOM. REL. LAW § 248 (McKinney 1986).

<sup>62</sup> In *Norman v. Unemployment Ins. Appeals Bd.*, 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983), the California intermediate court of appeal had held that a woman who quit her job to accompany her de facto spouse to his new home was entitled to unemployment insurance benefits. While the case was pending before the California Supreme Court, the legislature enacted legislation designed to prevent that result. *Norman* itself was, in fact, overruled by the California Supreme Court on the law as it read before the legislative action. The history is recounted in *MacGregor v. Unemployment Ins. Appeals Bd.*, 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984). In that case, applying the new law, the court nevertheless granted benefits to a woman who quit her job to follow her de facto spouse, distinguishing *Norman* and the statute on the ground that the *MacGregor* couple had a child. *See id.* at 213-14, 689 P.2d at 458-59, 207 Cal. Rptr. at 828-29.

<sup>63</sup> Housing Act, 1985, §§ 87, 113; Williams, *Ouster Orders, Property Adjustment and Council Housing*, 18 FAM. L. 438, 440-41 (1988) (discussing ouster orders under the Domestic Violence and Matrimonial Proceedings Act 1976).

gether for a least two years immediately preceding the death.<sup>64</sup> And, in Manitoba, recent amendments to the Pension Benefits Act give survivorship rights and rights to division of the pension upon separation to cohabitants who have met the Act's durational requirements, but only if they have held themselves out as married.<sup>65</sup>

An unusual recent amendment to California's laws concerning adult adoptions seems designed to accommodate the needs of cohabiting homosexual couples who use adoption to create a legal family tie.<sup>66</sup> The statute now permits adult adoptions to be set aside upon the parties' consent, an option that does not exist for other adoptions.<sup>67</sup>

Innovative provisions have also been adopted by two California cities in their capacities as employers. These local ordinances extend employment benefits usually reserved to married employees to cohabiting heterosexual or homosexual employees who file "domestic partnership" affidavits.<sup>68</sup>

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<sup>64</sup> Fatal Accidents Act, 1976, § 1 (as amended by the Administration of Justice Act, 1982); Cretney, *supra* note 20, at 8.

<sup>65</sup> Greenberg, *supra* note 58, at M-77. Time begins to run for the durational requirements "on the day on which the . . . pension plan receives a declaration in the form prescribed . . . declaring that the member is a party to a common-law relationship with another person identified in the declaration and [ends] on the day the member notifies the plan . . . in writing that the . . . relationship has been terminated." Pension Benefits Act (Man.) § 1(2). The durational requirements are imposed by § (a)(2) of the Act, which defines a common-law spouse as a person publicly represented by another person as the spouse of the second person for 1 year if neither party is prevented by law from marrying the other and 3 years if at least one party is not legally free to marry the other.

<sup>66</sup> See Gamble, *Estate Planning for the Unmarried Person*, 125 TR. & EST., Apr. 1986, at 25, 28 (describing use of adult adoptions for estate planning purposes among homosexual couples, but noting that nothing comparable to divorce is available to end an adoptive relationship). See the subsequent amendment to California's law of adult adoption cited *infra* note 67.

<sup>67</sup> Compare CAL. CIV. CODE § 227p(c)(6) (West Supp. 1989) (regulating adult adoptions) with CAL. CIV. CODE §§ 227b, 227d (West 1982) (specifying otherwise-controlling rules for setting aside adoptions).

<sup>68</sup> Krause, *Legal Position: Unmarried Couples*, in LAW IN THE U.S.A. FACES SOCIAL AND SCIENTIFIC CHANGE (Supplement) 34 AM. J. COMP. L. 533, 543 n.44 (J. Hazard & W. Wagner eds. 1986) (American reports, XII Congress, International Academy of Comparative Law). Professor Krause sets forth the Berkeley ordinance (below) and reports that the town of West Hollywood adopted a similar ordinance in February, 1985.

*Domestic Partnership Defined.* A "domestic partnership" shall exist between two persons (regardless of their gender) and each of them shall be the "domestic partner" of the other if they both complete, sign, and cause to be filed with the designated City Department an "affidavit of Domestic

More generally, Canadian and American reforms prohibiting discrimination based on marital status have had modest effects on the rights of cohabitants. Although the purpose of these laws is to prevent discrimination on the basis of a person's status as married or single, and not necessarily on whether or not a married or single person cohabits, in some instances cohabitants have benefited. In New York, for example, related regulations of the State Division of Housing and Community Renewal requiring that vacancy leases be extended to "non-immediate family members" residing in rent-stabilized housing were held to require that a lease be offered to a surviving homosexual partner.<sup>69</sup> And in Canada, the equality principle of Section 15 of the

Partnership" attesting to the following: a. the two parties reside together and share the common necessities of life; b. the two parties are: not married to anyone; eighteen (18) years or older, not related by blood closer than would bar marriage in the State of California, and mentally competent to consent to contract; c. the two parties declare that they are each other's sole domestic partner and they are responsible for their common welfare; d. the two parties agree to notify the City if there is a change of the circumstances attested in the affidavit; e. the two parties affirm, under penalty of perjury, that the assertions in the affidavit are true to the best of their knowledge.

*Termination.* A member of a domestic partnership may end said relationship by filing a statement with the designated City Department. In the statement the individual filing must affirm, under penalty of perjury, that: (1) the partnership is terminated, and (2) a copy of the termination statement has been mailed to the other partner.

*New Statements of Domestic Partnership.* No individual who has filed an affidavit of domestic partnership may file another such affidavit until six (6) months after a statement of termination of the previous partnership has been filed with the designated City Department.

*Range of Benefits to be Extended to Domestic Partners.* 1. Medical Coverage; 2. Dental Coverage; 3. Cash payments in lieu of double health/dental benefits; 4. Bereavement leave; 5. Family sick leave; 6. Pensions; 7. Survivor's benefits; 8. Credit Union membership.

Items 1-5 are basically City-controlled benefits. Consequently, the City may unilaterally include domestic partners as recipients of these benefits. The other items will require agreement by other agencies before domestic partners can be extended these benefits.

City of Berkeley, Cal., Ordinance Concerning Domestic Partnership Policy (Dec. 4, 1984). The six month waiting period is comparable to the required waiting period for obtaining a divorce in California. See CAL. CIV. CODE § 4514 (West Supp. 1989).

<sup>69</sup> Two Assocs. v. Brown, 12 Fam. L. Rptr. (BNA) 1351 (N.Y. Sup. Ct. 1986). The court concluded that the survivor and his deceased partner, who had lived together in the building for seven years, had a relationship much closer than that of most family members and held "that a gay life partner has the same right as a [non-immediate]

new Canadian Charter of Rights and Freedoms<sup>70</sup> and federal and provincial human rights legislation have heightened the scrutiny applied to distinctions between married people and de facto spouses.<sup>71</sup> Unless discrimination based on cohabitation is specifically addressed, however, as is the case in New South Wales,<sup>72</sup> it seems likely that objections based not on marital status, but rather on distaste for nonmarital cohabitation, will fail.<sup>73</sup>

Yet these statutory reforms have also been piecemeal and inadequate.

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family member . . . under the Rent Stabilization Law." *Id.*

<sup>70</sup> See McLellan, *Marital Status and Equality Rights*, in EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 411 (A. Bayefsky & M. Eberts eds. 1985) [hereafter EQUALITY RIGHTS] (discussing taxation, matrimonial property, intestacy, testators' family maintenance, wrongful death, support, adoption, evidence, debtor protection, worker's compensation, criminal law and public pensions). See also Bruner, *Sexual Orientation and Equality Rights*, in EQUALITY RIGHTS, *supra*, at 457, 474 (arguing that laws giving "even limited legal rights to unmarried couples may be held accountable for discriminating against unmarried couples who happen to be of the same sex"). Such arguments have been unsuccessful in the United States, where preferences for heterosexual couples are considered discrimination based on sexual preference rather than on gender, and hence subject to a rational basis standard of review under Equal Protection analysis. See, e.g., *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

<sup>71</sup> All Canadian provinces and the federal government have human rights legislation prohibiting various forms of discrimination. "[M]ost . . . prohibit discrimination on the basis of marital status in relation to hiring and firing, denial of services, facilities and accommodation, membership in trade unions, trade or occupational associations or self-governing professions." McLellan, *supra* note 70, at 415. Two provinces expressly include cohabitation in their definitions of marital status, Ontario extending protection to persons living with a member of the opposite sex in a conjugal relationship outside marriage and Saskatchewan referring to those "living together in a common law relationship." *Id.* (citing Human Rights Code, 1981 (Ont.), 1981 Ont. Stat. ch. 53, § 9(g); Human Rights Code (Sask.), Sask. Reg. 216/79, § 1(a)).

<sup>72</sup> NEW SOUTH WALES LAW REFORM COMM'N, OUTLINE OF REPORT ON DE FACTO RELATIONSHIPS 3 (June 1983) (Anti-Discrimination Act, 1977 (N.S.W.), prohibits specified forms of discrimination on the basis of "marital status [which is] defined to include the status of living in a de facto relationship").

<sup>73</sup> See, e.g., McLellan, *supra* note 70, at 416-20, 438-41 (discussing cases). One of the cases involved a challenge to the income tax law that provides a deduction to spouses that is unavailable to similarly situated unmarried couples. Professor Cumming would have found the classification unreasonable and discriminatory. *Id.* at 439 (discussing *Bailey v. Minister of Nat'l Revenue* (1980), 1 C.H.R.R. D/193). McLellan reports that the Canadian Human Rights Commission has recommended that the law be amended to remove differential treatment of legal and de facto spouses in claiming the married exemption. *Id.* at 439 n.136 (citing CANADIAN HUMAN RIGHTS COMM'N, ANNUAL REPORT, 1980 (1981)).

Only in Australia and New Zealand have law revision bodies attempted more global, policy-based responses to cohabitation.

### 3. Law Revision in Australia and New Zealand

#### *a. New South Wales*

The most significant statutory development of the 1980s has occurred in New South Wales, Australia. In 1983 that state's Law Reform Commission published an ambitious study<sup>74</sup> that resulted in the enactment of a unified, policy-based approach to the legal issues attending cohabitation.<sup>75</sup> In contrast to the English Law Commission, which has considered the subject since 1979 but has produced no recommendations,<sup>76</sup> the New South Wales group moved vigorously and creatively.

The Commission included a sociologist, a judge of the Family Court of Australia,<sup>77</sup> an attorney, and a law professor.<sup>78</sup> It began by producing an issues paper in 1981 that was based on its research and discussions

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<sup>74</sup> NEW SOUTH WALES LAW REFORM COMM'N, REPORT ON DE FACTO RELATIONSHIPS (June 1983) [hereafter N.S.W. REPORT]. Published at the same time was an OUTLINE OF REPORT ON DE FACTO RELATIONSHIPS [hereafter N.S.W. OUTLINE]. The Commission had earlier published ISSUES PAPER: DE FACTO RELATIONSHIPS (1981) [hereafter N.S.W. ISSUES PAPER], which provided demographic and social information, presented a survey of laws affecting cohabitants and their children, and identified a number of policy questions the Commission expected to address.

<sup>75</sup> See Adoption of Children (De Facto Relationships) Amendment Act, 1984 (N.S.W.); Compensation to Relatives (De Facto Relationships) Amendment Act, 1984 (N.S.W.); De Facto Relationships Act, 1984 (N.S.W.); Mental Health (De Facto Relationships) Amendment Act, 1984 (N.S.W.); Law Reform (Miscellaneous Provisions) (De Facto Relationships) Amendment Act, 1984 (N.S.W.); Wills, Probate and Administration (De Facto Relationships) Amendment Act, 1984 (N.S.W.). The differences between the Commission's recommendations and the statutes as enacted are minor.

<sup>76</sup> The Commission concluded in 1979, based on an internal study paper, that a review of the rules about de facto relationships might be appropriate. LAW COMM'N, 14TH ANNUAL REPORT, 1978-79, LAW COMM'N No. 97. A survey of the law on the enforceability of agreements between cohabitants was produced in 1983 and the Commission expressed its intention to give further attention to identifying legal problems of cohabitation which in practice cause hardship. LAW COMM'N, 18TH ANNUAL REPORT, 1982-83, LAW COMM'N No. 131. The history is given by Astor and Nothdurft, *Report of the New South Wales Law Reform Commission on De Facto Relationships*, 48 MOD. L. REV. 61, 62 (1985). The Commission has still not produced any recommendations. B. HOGGETT & D. PEARL, *THE FAMILY, LAW AND SOCIETY: CASES AND MATERIALS* 300 (2d ed. 1987).

<sup>77</sup> P.E. Nygh, former law professor and dean of the law faculty of Macquarie University.

<sup>78</sup> R. Sackville, former dean of law at the University of New South Wales, was Chairman of the Commission.



with interested groups. Summarizing its contents into a thirteen-page document, it distributed approximately four thousand copies free of charge throughout New South Wales and Australia.<sup>79</sup> It held seminars with concerned groups (including one attended by 200 attorneys, focusing on the Issues Paper), conducted an "open house" with members of the public who had experienced legal problems in connection with cohabitation, engaged in discussions with the 55 persons and groups who submitted written comments, undertook a comparative legal study, conducted a survey of attorneys and social workers "to discover the extent to which their clients encountered legal problems associated with *de facto* relationships" and collected case studies based on interviews with cohabitants.<sup>80</sup>

The Commission learned that substantial numbers of cohabitants "seek advice on legal and welfare problems, most frequently on property claims, custody and maintenance of children, protection from domestic violence and entitlement to social security."<sup>81</sup> It concluded that serious injustices and anomalies existed in the law and that there was broad agreement (in both the legal and lay communities) that reform was necessary.<sup>82</sup>

The Commission chose not to equate cohabitation with marriage both because it wished to retain the special status of marriage and because it wished to avoid impairing "the freedom of people to choose their own relationships" outside the constraints of marriage law.<sup>83</sup> It sought instead to "examine specific areas of law, to ascertain whether there are injustices or significant anomalies and, if so, to decide what remedial action should be taken."<sup>84</sup>

Articulating a set of principles to guide its deliberations,<sup>85</sup> the

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<sup>79</sup> Four and a half thousand copies were printed. Astor and Nothdurft, *supra* note 76, at 63.

<sup>80</sup> *Id.* at 64.

<sup>81</sup> *Id.* at 65. De facto relationships accounted for 4.7 percent of all couples in 1982, with 36 percent of these couples caring for children. *Id.* During the period from 1976 to 1982 the number of cohabiting couples more than doubled, compared to an increase of only 16 per cent in the number of married couples. *Id.*

<sup>82</sup> *Id.* at 65-66.

<sup>83</sup> N.S.W. OUTLINE, *supra* note 74, at 4-5.

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 5-6.

The policy of the law is not, and should not be, actively to discourage de facto relationships, whether by withholding benefits, imposing penalties or otherwise. In a pluralist society, people may choose to live together in such relationships.

The basis for the intervention of law, in conferring rights or imposing

Commission defined a de facto relationship as “ ‘the relationship between a man and woman who, although not legally married to each other, live together as husband and wife on a *bona fide* domestic basis.’ ”<sup>86</sup> It also declined to condition rights and obligations on a showing of dependence. The Commission reasoned that interdependence is often present in cases meriting relief and that even one not financially dependent on a cohabiting partner might have made substantial financial and nonfinancial contributions to the relationship and “suffer serious injustice” if dependence were a prerequisite to recovery.<sup>87</sup> Durational requirements were, however, imposed for property and support claims between the parties, intestate succession, and adoption law.

Patterning its scheme for the resolution of property disputes on the existing equitable distribution law for marital property, the

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obligations on de facto partners, should be the minimisation of injustice or the removal of significant anomalies.

It should not be assumed that the rights and obligations of de facto partners should be the same as those of married couples. In some cases it may be appropriate for the law to distinguish between them.

Conflicting claims may be made by a person's spouse and by his or her de facto partner. There is no uniform solution to this problem. In some cases, such as succession on intestacy or property disputes, the legitimate expectations of a spouse should be protected against the claims of a party to a *short-term* relationship.

In general, the law should not impose a regime on de facto partners that may be inconsistent with their specific wishes, particularly in relation to financial matters.

Where proposals affect children, their welfare should be the primary concern.

In defining the basis on which rights are conferred or obligations imposed, it is not necessarily appropriate that uniform criteria should be employed in all cases. In particular, a requirement that the relationship should have continued for a specific period will be appropriate in some cases, but not in others.

*Id.* (emphasis in original).

<sup>86</sup> *Id.* at 6. The Commission indicated that several factors would be relevant in deciding whether the defined relationship exists:

the nature and extent of common residence; the duration of the relationship; the degree of financial interdependence between the partners; the ownership, use and acquisition of property; whether or not the couple have children; the organisation of the household; the degree of mutual commitment and moral support; and “public” aspects of the relationship.

*Id.* at 6-7. The Commission recommended that a person be permitted to seek a judicial declaration that a de facto relationship existed “with another person on a particular date or for a particular period.” *Id.* at 7.

<sup>87</sup> *Id.* at 5.

Commission sought to ensure that adequate recognition would be given to "substantial indirect contributions (whether financial or otherwise) to the well-being of the other partner or the family."<sup>88</sup> The resulting legislation authorizes a court to make an equitable distribution of the parties' assets<sup>89</sup> if the couple lived together for at least two years or, in cases not meeting that requirement, if specified circumstances exist<sup>90</sup>

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<sup>88</sup> N.S.W. REPORT, *supra* note 74, at 151. Wade, *supra* note 30, restates the legislative intent and describes the first four trial court cases to be decided concerning property distribution under the Act. The fourth of these, Wilcock v. Sain, 11 Fam. L. R. (Butterworths) 302 (1986), departs from the earlier cases and legislative intent to hold that § 79 of the Family Law Act, 1975 (Cth), which regulates property distribution between spouses upon divorce, does not provide a model for property distribution between former cohabitants under § 20 of the De Facto Relationships Act, 1984 (N.S.W.). See generally Wade, *De Facto Relationships Act — the First Property Order Decisions*, 24 LAW SOC'Y J. (N.S.W.), Oct. 1986, at 28 (describing the first three cases in greater detail).

<sup>89</sup> The enacted statutory language provides

(1) On an application by a de facto partner for an order . . . to adjust interests with respect to the property of the de facto partners or either of them, a court may make such order adjusting the interests of the partners in the property as to it seems just and equitable having regard to —

- (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them; and
- (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely: —
  - (i) a child of the partners;
  - (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.

De Facto Relationships Act, 1984 (N.S.W.), § 20(1)(a), (b). Bailey-Harris, *Property Division on Separation: Will the Married and the Unmarried Pass at the Crossroads?*, 8 U.N.S.W. L.J. 1, 14-17 (1985), criticizes the Act for its failure to take future needs into account in allocating cohabitants' property rights, noting that future needs are relevant under the Australian law directing the equitable distribution of marital property.

<sup>90</sup> See De Facto Relationships Act, 1984 (N.S.W.), § 17.

- (1) Except as provided by subsection (2), a court shall not make an order under this Part unless it is satisfied that the parties to the application have lived together in a de facto relationship for a period of not less than 2 years.
- (2) A court may make an order under this Part where it is satisfied —

and the court concludes that serious injustice would otherwise result.<sup>91</sup>

In the support area, the Commission recommended that support be authorized only to alleviate financial hardship arising from the termination of the relationship.<sup>92</sup> Its goal was to preserve a distinction between cohabitation and marriage, when courts may order spousal support for needs such as illness, which are not related to the relationship.<sup>93</sup> The resulting statute provides support only if a former cohabitant is unable to provide adequate self-support because of child care responsibilities stemming from the relationship or because the person's earning capacity was adversely affected by the relationship and training is needed to increase the person's earning capacity.<sup>94</sup> It also places strict maximum durational limits on support awards, terminating those related to child care no later than the date when the youngest child reaches twelve (or, in the case of handicap, sixteen).<sup>95</sup> Awards related to impaired earning capacity end no more than three years after the order was entered or four years after the parties last cohabited, whichever comes first.<sup>96</sup>

In order to grant cohabitants wide powers to define their own relationship, the Act authorizes cohabitation agreements and permits them to displace the property and support provisions described above. Certain formalities must be observed, however, and the circumstances must

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- (a) that there is a child of the parties to the application; or
  - (b) that the applicant —
    - (i) has made substantial contributions of the kind referred to in section 20(1) (a) or (b) [set forth *supra* note 89] for which the applicant would otherwise not be adequately compensated if the order were not made; or
    - (ii) has the care and control of a child of the respondent, and that the failure to make the order would result in serious injustice to the applicant.

*Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See *infra* note 94 and accompanying text.

<sup>93</sup> N.S.W. OUTLINE, *supra* note 74, at 8.

<sup>94</sup> De Facto Relationships Act, 1984 (N.S.W.), § 27. The child in the applicant's care must be either a child of the partners or a child of the respondent. *Id.* Support *pendente lite* is also authorized by the Act. *Id.* § 28. Bailey-Harris notes that future needs, which are also relevant to property distribution for married couples in Australia, are considered only in the context of support requests under the New South Wales legislation. Bailey-Harris, *supra* note 89, at 14.

<sup>95</sup> De Facto Relationships Act, 1984 (N.S.W.), § 27.

<sup>96</sup> *Id.* The section also lists factors for the court to take into account in establishing an award. *Id.* Lump sum maintenance is also authorized. *Id.* § 36.

not have so changed since the agreement was entered that its enforcement would lead to serious injustice.<sup>97</sup>

Upon the death of a cohabitant who leaves no surviving spouse or children other than children of the relationship, the surviving cohabitant is given the same intestacy rights a surviving spouse would have had. However, only a cohabitant who lived with the deceased continuously for at least two years prior to the death takes in preference to a surviving spouse or children not of the relationship.<sup>98</sup>

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<sup>97</sup> N.S.W. OUTLINE, *supra* note 74, at 11-12:

[The formal requirements] are designed to ensure that the partners have received appropriate advice and are aware of the consequences of the agreement. The safeguards include requirements that the agreement be in writing and that each partner receive independent legal advice before entering [it]. Where the requirements have been satisfied, the agreement should not be . . . varied or overturned by a court in proceedings for [property distribution or support] . . . .

There should be one exception to this general rule. In [property or support proceedings], the court should have power to override a cohabitation agreement where the parties' circumstances have so changed since the date of the agreement that enforcement of its terms would lead to serious injustice. The exception should not apply to *separation* agreements . . . .

*Id.* The complex provisions implementing these recommendations are found in sections 44-52 of the Act. Authorized agreements may be entered into in contemplation of cohabitation, during the relationship or upon separation. De Facto Relationships Act, 1984 (N.S.W.), § 44. If the safeguards have not been satisfied, the court may take account of the agreement, but is not required to do so. *Id.* § 47(2).

<sup>98</sup> Wills, Probate and Administration (De Facto Relationships) Amendment Act, 1984 (N.S.W.), § 3, Schedule 1, §§ (2), 4(a)-(b) (defining spouse to include de facto spouses except as specified in connection with surviving spouses or children not of the relationship and adding § 61B(3A)-(3B) to the Wills, Probate and Administration Act, 1898 (N.S.W.), providing the two-year rule for those special cases). When there is a surviving legal spouse, the two-year cohabitation requirement is supplemented by a requirement that the deceased not have spent any part of the two-year period cohabiting with his or her spouse. Wills, Probate and Administration Act, 1898 (N.S.W.), § 61B(3A); *see also* N.S.W. OUTLINE, *supra* note 74, at 12; N.S.W. REPORT, *supra* note 74, at 233-34. The legislation has been criticized. The Victoria Law Institute, which has been asked by the State Attorney-General to review the New South Wales Report and legislation, reported that its Probate Wills and Imports Committee noted that the N.S.W. provisions require a *de facto* partner of the person dying intestate to satisfy a two-year cohabitation period in order to claim [as against other protected survivors], and the Committee did not think that this was appropriate where the parties had been living together and there were children of their union.

The Committee agreed that, provided *de facto* could be satisfactorily defined, the surviving *de facto* partner should be able to claim from the deceased's estate . . . under part IV of the *Administration and Probate Act* 1958. The Committee did not think that a *de facto* spouse should be

Other reforms relating to the death or injury of a de facto partner provide standing for the other partner to sue the tortfeasor for infliction of emotional distress or wrongful death.<sup>99</sup> De facto spouses are also included as "nearest relatives" in legislation concerning specified medical treatment.<sup>100</sup> No minimum period of cohabitation was imposed for these provisions, nor for the inclusion of a dependent surviving cohabitant as one eligible to claim worker's compensation benefits.<sup>101</sup>

Remedies for domestic violence were enacted that authorize restraining orders, including orders relating to the occupancy of the couple's residence.<sup>102</sup> Finally, couples who have lived together, normally for at least three years, may now petition jointly to adopt the child of one of them or a child related to one of them who has been reared by the couple as their own.<sup>103</sup>

By the time of their enactment in 1984, the reforms drew little publicity or public comment.<sup>104</sup> Although a number of questions have arisen concerning statutory interpretation,<sup>105</sup> the Acts themselves seem to broadly be accepted.

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given automatic rights to share in the event of intestacy.

60 LAW INST. J. (Victoria) 215 (1986). The writer of a letter to the Australian Law Journal remarked, "[O]ne might suspect that with time the changes sought to be effected by [the Wills Amendment] will ultimately prove to be . . . more controversial [than provisions of the De Facto Relationships Act]. Letter of C. Bartlett, 59 AUSTL. L.J. 191 (1985); see also "Fred," *The Return of Cross Patch & Co*, 23 LAW SOC'Y J. (N.S.W.) 511 (1985) (criticizing the preferences for some de facto spouses over surviving widows and other family members).

<sup>99</sup> Law Reform (Miscellaneous Provisions) (De Facto Relationships) Amendment Act, 1984 (N.S.W.).

<sup>100</sup> Mental Health (De Facto Relationships) Amendment Act, 1984 (N.S.W.).

<sup>101</sup> Compensation to Relatives (De Facto Relationships) Amendment Act, 1984 (N.S.W.); N.S.W. OUTLINE, *supra* note 74, at 13-14.

<sup>102</sup> De Facto Relationships Act, 1984 (N.S.W.) §§ 53-55.

<sup>103</sup> Adoption of Children Act, 1965 (N.S.W.) § 19, *as amended by* Adoption of Children (De Facto Relationships) Amendment Bill, 1984 (N.S.W.). Although the Act nominally imposes a requirement of 3 years of cohabitation before the adoption can be applied for, the court may waive the requirement if it "is of the opinion that, having regard to the circumstances of the case, the welfare and interests of the child will be better served by doing so . . . ." *Id.*

<sup>104</sup> See Letter of C. Bartlett, *supra* note 98.

<sup>105</sup> A humorous article treating some points of ambiguity is Eades, *De Facto Relationships Act: Grumpy & Ors v. Snow White re The Prince*, 26 LAW SOC'Y J. (N.S.W.), Apr. 1988, at 51.

b. *Victoria*

A much more modest statutory reform took effect in Victoria in 1988.<sup>106</sup> The Property Law Act permits a court to adjust the parties' interests in real property if the couple cohabited for two years or other specified circumstances exist.<sup>107</sup> The Act authorizes property distributions that are "just and equitable," taking into account direct and indirect contributions to the parties' financial resources<sup>108</sup> and welfare. Homemakers' services are expressly acknowledged and the court is directed to "hav[e] regard to" any written agreement between the parties.<sup>109</sup>

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<sup>106</sup> Property Law (Amendment) Act, 1987 (effective June 1, 1988). For background and a description of the Act's features, see Bartlett, *De Facto Relationships: The State of Play*, 62 LAW INST. J. (Victoria) 170 (1988).

<sup>107</sup> Property Law (Amendment) Act, 1987 (Victoria) § 281. The two-year requirement may be ignored if the court finds that there is a child of the partners or that failure to make the order would result in serious injustice to the de facto partner who applied for the order and that partner —

- (i) has made substantial contributions . . . for which the partner would otherwise not be adequately compensated . . . ; or
- (ii) has the care and control of a child of the other de facto partner.

*Id.* § 281(2). Relevant contributions are defined in § 285 of the Act, set forth in note 109 *infra*. Applications for relief must ordinarily be brought within two years of the relationship's end, although exceptions are permitted if the applicant would be more disadvantaged by a refusal to hear the case than the other partner would be harmed by having the case heard. *Id.* § 282.

<sup>108</sup> "Financial resources" are defined extremely broadly by § 275 of the Act to include prospective retirement benefits, trusts which may benefit one or both of the partners, property that is under the partial or complete control of one or both and capable of being used for either or both, or "any other valuable benefit." The court is also authorized to continue the proceedings to await a significant change in financial circumstances that might enable the court to enter a more just order. *Id.* § 286.

<sup>109</sup> *Id.* § 285 reads:

- (1) A court may make an order adjusting the interests of the de facto partners in the real property of one or both of them that seems just and equitable to it having regard to —
  - (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property or to the financial resources of one or both of the partners; and
  - (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following:

Unlike the New South Wales Act, Victoria's Act has no maintenance provisions and imposes no requirements for representation by counsel at the time of entering a nonmarital agreement. Nor does it encompass the intestacy, tort, worker's compensation, medical, adoption or domestic violence issues addressed in New South Wales.<sup>110</sup> Victoria's Property Law Act does, however, expressly preserve the parties' rights to all other common law and statutory rights<sup>111</sup> and, accordingly, should put to rest public policy objections to recovery by de facto partners. Other aspects of the reform, however, are extremely innovative. The Law Institute of Victoria plans to publish a "standard form Co-habitation Financial Agreement,"<sup>112</sup> and a recorded message is already available to inform those who telephone the Institute of the Act's provisions.<sup>113</sup>

*c. South Australia*

The reforms in New South Wales and Victoria are conceptually different from the steps taken some years earlier in South Australia. There, in one of the earliest legislative responses to cohabitation, the Family Relations Act of 1975 provided a statutory definition of "putative spouse" in certain cases of lengthy cohabitation or nonmarital parenthood.<sup>114</sup> The definition was designed as a prelude to extending a

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- (i) A child of the partners;
  - (ii) A child accepted by one or both of the partners into their household, whether or not the child is a child of either of the partners; and

(c) any written agreement entered into by the de facto partners.

<sup>110</sup> See *supra* notes 98-103 and accompanying text.

<sup>111</sup> Property Law (Amendment) Act, 1987 (Victoria) § 277. The Australian case law concerning constructive trusts is described *supra* note 28.

<sup>112</sup> Bartlett, *supra* note 106, at 171.

<sup>113</sup> Telephone interview with the office of Carol Bartlett, Director of Research and Information, Law Institute of Victoria, Melbourne, Australia (Dec. 28, 1988).

<sup>114</sup> Section 11(1) of the Act provides that a person may be declared to have been the "putative spouse" of another on a "certain date" if on that date the couple was cohabiting and had done so for the five years immediately preceding that date or for periods aggregating five years within the immediately preceding six-year period, or were cohabiting and have had sexual relations resulting in the birth of a child. Family Relationships Act, 1975 (S.A.) § 11(1), S. AUSTL. STAT. 1837-1975, at 49. A judicial declaration is required by the section before rights may be granted on the basis of status as a "putative spouse"; the death of either or both of the de facto spouses does not prevent the court from making a declaration under the section although "credible corroborative evidence" will be required if both parties are not living at the time of the action. Family Relationships Act, 1975 (S.A.) § 11(3)-(5), S. AUSTL. STAT. 1837-1975, at 50. The statutory term "putative spouse" in the Act is in no way related to the notion of a putative spouse as one who has a good faith belief that he or she is married,



number of rights accorded married couples to qualifying couples. In other words, although individual rights were to be considered independently, the kind of couple potentially deserving of equal treatment was uniformly defined.

*d. New Zealand*

What may become the most generous legislative response to questions of cohabitation is currently under consideration in New Zealand. There, the recommendations of a government working group on the reform of family property law are out for public comment until April 1989.<sup>115</sup> It is anticipated that legislation will be introduced by the government later in 1989 to implement many of the working group's recommendations.<sup>116</sup>

The report proposes two tiers of judicial response to questions of heterosexual cohabitation<sup>117</sup> in the context of property, support and inheritance law.<sup>118</sup> For those relationships deemed equivalent to marriage, rights comparable to those attending marriage might apply: equal division of what would have been marital property had the couple been married,<sup>119</sup> support rights fully comparable to those attending mar-

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familiar to students of American family law. No belief in marriage is required under the South Australian definition.

<sup>115</sup> Foreword, REPORT OF THE WORKING GROUP ON MATRIMONIAL PROPERTY AND FAMILY PROTECTION (October 1988) [hereafter N.Z. REPORT].

<sup>116</sup> Telephone interview with W.R. Atkin, Senior Lecturer in Law, Victoria University of Wellington and Member of the Working Group on Matrimonial Property and Family Protection, Wellington, New Zealand (Dec. 28, 1988).

<sup>117</sup> Although two members of the working group wished its recommendations to encompass homosexual relationships as well, reasoning that the same "emotional, sexual and dependency dynamics [exist] as [in] marriage," the majority of the group wished to restrict its current work to monogamous heterosexual units. The group concluded, however, that an inquiry should be begun soon to "see how [the law] can be adapted to do better justice in a wide spectrum of relationships where difficulty can arise because of intermingling of property." N.Z. REPORT, *supra* note 115, at 66-67.

<sup>118</sup> The group chose not to follow the New South Wales example of a comprehensive package of reforms, concluding both that the task would have been too large and that specific areas should be addressed separately in order to "tailor the solutions to the perceived problems." *Id.* at 69.

<sup>119</sup> Some of the working group recommended that the equal sharing provisions of the matrimonial regime be applied only if the court first concludes that the circumstances support this result. Relevant to that determination would be the duration of the relationship, the parties' respective contributions to the partnership and the presence of mutual children. Also relevant would be whether either partner was legally married to another and, if so, whether the matrimonial property of the legal spouses had been divided. Other group members supported a presumptive application of the marital

riage,<sup>120</sup> and inheritance rights.<sup>121</sup> For other cases of cohabitation, relief along the lines of the Australian legislation would be prescribed for property distribution: the nature and degree of contributions would be evaluated, with equal regard given to monetary and nonmonetary contributions.<sup>122</sup> In either case, two years of cohabitation or special circumstances would be a prerequisite to relief.<sup>123</sup>

*e. Summary*

In each of these jurisdictions, a functional approach to the legal concerns of cohabitants has led to recommended reforms modeled on, but not identical to, marriage law. While some rule-of-thumb durational

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property rules in all cases in which a de facto marriage was established, albeit subject to a somewhat easier ability to rebut equal sharing than is available to legal spouses. *Id.* at 70-71.

<sup>120</sup> *Id.* at 76:

The grounds for entitlement under existing law relate very much to need or the capacity of the earner spouse to meet those needs. It is difficult to see why this particular regime should not apply to couples in a de facto relationship. There is also the point that placing a maintenance obligation on a de facto spouse in these limited circumstances will diminish the obligation of the State to give support and will thus be of indirect benefit to the public.

*Id.*

<sup>121</sup> The group recommends that devolution on death reflect the "marital" property rules enacted for inter vivos cases. If the decedent is still legally married at the time of death, the group recommends precedence for the claims of a legal spouse if that person has not already received her share of matrimonial property by court order or agreement. The de facto spouse's claim would be satisfied out of the remaining "matrimonial" property. *Id.* at 72. As to inheritance law, the group unanimously recommends that a de facto partner should be permitted to apply for further provision from the deceased partner's estate. If no legal spouse survives, the de facto spouse would take under the first category of preference, which included the spouse and dependent children of the deceased. If a legal spouse does survive, the de facto spouse would be placed in a secondary category, together with close relatives of the deceased. These parties would be required to establish need or that they have made a contribution to the assets or welfare of the deceased. Under the scheme matrimonial property claims are satisfied before inheritance claims are met. *Id.* at 73-74.

<sup>122</sup> *Id.* at 71.

<sup>123</sup> *Id.* at 67:

The group agreed that the courts should be given a discretion to depart from the [two-year durational] requirement . . . where to do otherwise would cause injustice. Factors to be taken into account might include a substantial contribution to the partnership (including childcare) or a considerable intermingling of property.

*Id.*

requirements have been imposed,<sup>124</sup> each enactment or proposal authorizes courts to waive them in special circumstances.

### C. Conflict of Laws

It is interesting that conflict of laws issues have received almost no attention from legislatures or courts, even though many cases deal with couples who have moved from place to place.<sup>125</sup> Yet courts usually apply, without discussion, the law of their place of residence at the time of trial.<sup>126</sup> To the extent that recovery is based on an analogy to divorce laws, or on doctrines that are uniformly available, this is not surprising. But when a doctrine such as contract or partnership law is asserted, or public policy objections exist in one state and not another, choice of law problems are present. The few cases on point suggest, again without discussion, a developing rule of validation that upholds a right to recover when either the place of earlier cohabitation or of final cohabitation permits relief.<sup>127</sup> This rule would be in line with current choice of

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<sup>124</sup> See Finlay, *The Informal Marriage in Anglo-Australian Law*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES, *supra* note 9, at 156, 163 (noting that rules of thumb, though imprecise, convert an otherwise difficult judicial inquiry concerning the nature of the parties' relationship into a matter of relatively simple proof).

<sup>125</sup> See, e.g., *Alderson v. Alderson*, 180 Cal. App. 3d 450, 225 Cal. Rptr. 610 (1986); *Warden v. Warden*, 36 Wash. App. 693, 676 P.2d 1037 (1984). As a result, jurisdictional issues have arisen in a few cases. Although some federal courts have been willing to hear *Marvin* claims, reasoning that they do not fall within the "domestic relations exception" to diversity jurisdiction, others have disagreed. Compare *Korby v. Erickson*, 550 F. Supp. 136 (S.D.N.Y. 1982) (sustaining federal jurisdiction) with *Anastasi v. Anastasi*, 544 F. Supp. 866 (D.N.J. 1982) (reversing earlier decision to hold case fell within domestic relations exception). In *Bower v. Weisman*, a woman's action in New York state court was removed to federal court by the defendant, who then commenced an action in California. Each court declined to stay its proceedings pending resolution of the other action. *Bower v. Weisman*, 650 F. Supp. 1415, 1417-20 (S.D.N.Y. 1986). Further proceedings in the case have been reported. See *Bower v. Weisman*, 674 F. Supp. 109 (S.D.N.Y. 1987); *Bower v. Weisman*, 674 F. Supp. 113 (S.D.N.Y. 1987). Jurisdiction under California's long-arm statute was also upheld in an action against a nonresident defendant who had cohabited in California from 1977 to at least 1979. *Kroopf v. Guffey*, 183 Cal. App. 3d 1351, 228 Cal. Rptr. 807 (1986). The court properly considered the defendant's proffered public policy objections based on the homosexual nature of the relationship to be irrelevant to the jurisdictional question. See *id.* It is doubtful that any such public policy defense will be sustained at trial on the merits. See *Whorton v. Dillingham*, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (1988).

<sup>126</sup> See, e.g., *Alderson v. Alderson*, 180 Cal. App. 3d 450, 225 Cal. Rptr. 610; *Warden v. Warden*, 36 Wash. App. 693, 676 P.2d 1037. Related jurisdictional issues are discussed *supra* note 125.

<sup>127</sup> See *Bower v. Weisman*, 650 F. Supp. 1415 (S.D.N.Y. 1986) (applying New

law theories as to questions of status and contract formation.<sup>128</sup> The only statute to address the question expressly<sup>129</sup> takes an interesting intermediate position: a court in Victoria is authorized to grant relief only if at least one of the parties lives in the jurisdiction on the date the claim is filed and the couple either cohabited there for at least one third of their relationship or substantial contributions to the relevant property were made there by the party seeking relief.<sup>130</sup> The provision prescribes judicial jurisdiction, but also suggests the intended substantive reach of the law.<sup>131</sup>

### III. DISCUSSION

The views expressed by commentators have, not surprisingly, displayed the full range of possible positions. One Australian law professor has recommended that cohabiting couples be treated in the same manner as married couples.<sup>132</sup> An English law professor, on the other

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York's center-of-gravity choice-of-law rule in diversity action to permit claim for implied contract under California law; no such claim permitted under New York local law); *Artiss v. Artiss*, 8 Fam. L. Rep. (BNA) 2313 (Haw. Cir. Ct. 1982) (finding false conflict with law of Quebec and applying Hawaiian law to relationship between couple that had earlier lived in Ontario and Quebec); *Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. 1983) (applying *Restatement (Second) of Conflict of Laws*' significant relationship test).

<sup>128</sup> A validation rule usually applies, for example, to marriages that are valid under one law but invalid under another. See E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 13.5 (1982).

<sup>129</sup> Property Law (Amendment) Act, 1987 (Victoria) § 280.

<sup>130</sup> The section reads:

A court may make an order under this Division only if it is satisfied —

- (a) that one or both of the de facto partners lived in Victoria on the day on which the application was made; and
- (b) that —
  - (i) both partners have lived together in Victoria for at least one third of the period of their relationship; or
  - (ii) substantial contributions of the kind referred to in section 285(1)(a) or (b) [set forth *supra* note 109], have been made in Victoria by the partner making the application.

*Id.* Relief is also conditioned on the durational requirements or special circumstances discussed *supra* note 107 and accompanying text.

<sup>131</sup> To the extent that it regulates jurisdiction other courts with jurisdiction under their own statutes may apply substantive provisions of the Act to grant relief.

<sup>132</sup> See Finlay, *Defining the Informal Marriage*, 3 U.N.S.W. L.J. 279 (1980). For the proposal of an American author who would treat cohabitants in a stable relationship the same as married couples for most purposes, see Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981).

hand, has recommended that the law permit cohabitants to contract with one another, but make no other provision for them.<sup>133</sup> Others have applied the functional approach found in much of the cohabitation literature to question whether marriage itself continues to serve a useful legal purpose, suggesting that discrete legal problems be addressed instead without regard to the parties' marital status.<sup>134</sup>

The vast body of commentary is more circumscribed or temperate. It either addresses specific legal issues, such as the law of social security, domestic violence or income taxation, and recommends treatment comparable to that given married couples<sup>135</sup> or, like the reforms extant in New South Wales and Victoria and those under consideration in New Zealand, suggests a more general effort to relieve specific inequities without necessarily equating the effects of cohabitation to those of marriage.<sup>136</sup> At the same time, however, there is increased support for a return to the doctrine of common-law marriage for those cohabitants who fulfill the traditional requirements.<sup>137</sup>

Taken as a whole, the law is evolving as anticipated.<sup>138</sup> As nontradi-

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<sup>133</sup> See Deech, *The Case Against the Legal Recognition of Cohabitation*, 29 INT'L & COMP. L.Q. 480 (1980).

<sup>134</sup> See, e.g., Clive, *Marriage: An Unnecessary Legal Concept?*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES, *supra* note 9, at 71; Hoggett, *Ends and Means: The Utility of Marriage as a Legal Institution*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES, *supra* note 9, at 94.

<sup>135</sup> See, e.g., Bates, *Lessons from the Present Challenges for Family Law and Social Security Law in Australia*, 1986 J. SOC. WELFARE L. 267, 270-74; Orlando, *Exclusive Possession of the Family Home: The Plight of Battered Cohabitees*, 45 U. TORONTO FAC. L. REV. 153 (1987); Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240 (1980).

<sup>136</sup> E.g., Reppy, *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984) (recommending reinstatement of common-law marriage for couples who hold themselves out as married and creation of "a new status of lawful cohabitation for persons who agree to support and property obligations less demanding than those arising out of lawful marriage"). Some commentators have addressed their recommendations to the courts. See, e.g., Cook, *Family Law: Surveying 15 Years of Change in Alabama*, 36 ALA. L. REV. 419, 440-46 (1985) (endorsing Marvin); Note, *Reasonable Expectations in Nonmarital Cohabitation: A Proposal for Recovery*, 21 B.C.L. REV. 889 (1980) (endorsing Marvin); Comment, *Right of Concubines to Equal Protection Under the Laws of Louisiana*, 11 S.U.L. REV., Spring 1985, at 65 (endorsing equal treatment of married and unmarried couples as a matter of Constitutional law).

<sup>137</sup> See, e.g., Krause, *supra* note 68; Reppy, *supra* note 136. For an early proponent, see Weyrauch, *Informal and Formal Marriage*, 28 U. CHI. L. REV. 88 (1960).

<sup>138</sup> See, e.g., M. GLENDON, STATE, LAW AND FAMILY ch. 3 (1977); Bruch, *Common Law Countries*, *supra* note 1 *passim*; Bruch, *De Facto Spouses*, *supra* note 3 *passim*; Glendon, *Marriage and the Withering Away of Marriage*, 62 VA. L. REV.

tional family forms become more prevalent, attention increasingly focuses on the economic and social functions of households and less on normative moral concerns. The language of the New Zealand working group is illustrative. In providing the reasons for the group's conclusion that the current law is unsatisfactory and in need of reform, it states:

- (1) Many de facto partners fulfill the same family functions as legal spouses *i.e.*, raising a family, mutual financial and emotional support, sexual relations, running a household. It is inequitable to deny recognition to a relationship which is a marriage in substance. Further, because a de facto relationship is similar to a legal marriage in many cases, the parties encounter the same problems and therefore need remedies comparable to those available to legal spouse: *i.e.*, rights of a matrimonial nature rather than reliance on [common-law remedies]. Legal rights will reduce opportunities for exploitation and the need for litigation.
- (2) De facto relationships are an undeniable reality. Even though some sections of the community argue that legislative recognition of de facto relationships will detract from the special status accorded to legal marriage and the family, the law should recognize reality and ameliorate unnecessary hardship and patent injustice. It is hardly surprising that de facto relationships are already recognized in some areas [of the law].<sup>139</sup>

The same arguments apply, of course, to same-sex relationships. It is accordingly predictable that these households will gradually come to share in the legal protections afforded cohabiting heterosexuals.<sup>140</sup> Just as cohabitation law remains a shadow institution of marriage,<sup>141</sup> the law of same-sex relationships is taking its place as a shadow institution of cohabitation law.

Although the process has begun, it is at best incremental, even in those jurisdictions undertaking relatively large scale reforms. And legal marriage retains a special status in both the rhetoric and the substance of judicial opinions and law reform proposals alike.

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663, 692 (1976).

<sup>139</sup> N.Z. REPORT, *supra* note 115, at 65.

<sup>140</sup> The Board of Directors of the San Francisco Bar Association has recently given tentative approval to a resolution seeking State Bar support for legislation to authorize same-sex marriage in California. Telephone conversation with Peter Keane, Esq., President of the San Francisco Bar Association, Apr. 20, 1989.

<sup>141</sup> See M. GLENDON, *supra* note 138; Bruch, *Common Law Countries*, *supra* note 1, at 219-25; Glendon, *supra* note 138.

## CONCLUSION

Earlier patterns in legislative and common-law developments appear to persist: In the United States, it is primarily courts, not legislatures, that have responded to calls for reform, while the Commonwealth countries continue to exhibit the opposite tendency. Yet because the common law operates in the context of individual cases and defers to the legislature in some areas, courts can only proceed in an incremental fashion. American reforms are, accordingly, modest and incomplete and will remain so until American legislatures choose to address the inconsistencies or inadequacies of case law.

On the whole, American commentators' suggestions for legislative reform have fallen on deaf ears, perhaps because access to traditional common-law remedies has relieved pressures for legislative action. The absence of legislative interest suggests (1) acceptance of the way the courts have dealt with these matters, (2) a belief that the courts are capable of dealing effectively with the issues, (3) a reluctance to take a public position on matters of uncertain public appeal, (4) the absence of an effective lobbying effort by those whose interests are at stake,<sup>142</sup> or

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<sup>142</sup> One should note that the California legislature refused to interfere with the courts' discretion when it defeated a proposed writing requirement for cohabitation agreements, but acted to permit the setting aside of adult adoptions upon the parties' agreement. The first bill had no natural constituency to oppose it, as currently cohabiting couples without written agreements are unsophisticated about the legal matters confronting them and have no organized voice, and former cohabitants whose legal claims might have been cut off are even less likely to have the funds or organizational structure to make their views known. The proposal appeared to have no appeal to the members of the legislature hearing it, so was readily defeated when the State Bar Association and this Author pointed out that unsophisticated parties would be hurt by a writing requirement. The adoption bill, on the other hand, serves the particular problems of homosexual couples. These individuals have formed organizations to address their needs and have a still small, but growing voice at the local and state level in California. Although access to the institution of marriage continues to be denied them, there is increased receptivity to decreasing discrimination against them when the interests of third parties are not at stake. Because adult adoptions have been permitted in California and there seems no reason to bar adult parties, homosexual or heterosexual, from a mutual decision to terminate the status, supporting the bill that provided this relief required no particular endorsement of homosexual relationships. Efforts to obtain family health insurance for cohabiting households (heterosexual or homosexual) have, on the other hand, been seen as requests to sanction the lifestyle. Nevertheless, due to local lobbying efforts some California cities now recognize that cohabiting employees provide services of the same economic value as their married colleagues and conclude that it is only fair that they receive comparable health insurance coverage. If one employee is given coverage for his immediate family under his employment contract, so should another, although the relationship remains informal. Accordingly, Berkeley and

(5) some combination of these factors. In the United States, it seems that the law may have "settled in," at least for the time being.

Legislation, in contrast to the common law, permits sweeping reforms. So long as constitutional requirements are met, no areas are beyond its reach. Yet legislatures, like courts, frequently operate incrementally, especially in areas of change. Thus, the range of recent (predominantly statutory) reforms in the Commonwealth countries is varied. Changes have occurred in England, several Canadian provinces, New Zealand, and much of Australia,<sup>143</sup> as described above, while New South Wales has enacted a comprehensive reform and New Zealand is moving in that direction. It is the Commonwealth countries, aided by a parliamentary model that facilitates comprehensive legislation, that appear most prepared to move ahead to develop new remedies.

The experience of the past decade supports this legislative reshaping of cohabitation law. Although courts have performed yeoman service in the face of doctrinal constraints, the gaps and complexities of traditional common-law doctrines remain and increasingly seem cumbersome and inappropriate.

Creativity to match that of the courts should now be demanded of American legislatures. Only that branch can address the needs of cohabiting parties in a straightforward fashion.

This is not to minimize the challenges facing drafters of omnibus legislation.<sup>144</sup> The institution of marriage has been an object of legislative and judicial solicitude for centuries, and the laws and doctrines reflecting this concern have developed and multiplied over time. Identifying and evaluating each one would constitute an enormous task. Yet an approach that offers a more manageable drafting task poses especially weighty policy questions: Should a certain class of cohabitants be deemed equivalent to spouses for all purposes or for all but specifically excepted purposes? In either event, legal questions remain for those not within the protected class.

Important models that deal with these issues are now available for

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West Hollywood now provide the same employment benefits married couples receive to those who have filed prescribed "domestic partnership" affidavits. *See supra* note 68; *see also supra* note 140 (discussing bar association proposal to authorize same-sex marriage).

<sup>143</sup> Professor Bates, writing before the New South Wales reforms, concluded that recognition of de facto relationships "has been piecemeal and sporadic and lacks any kind of conceptual basis." Bates, *Private Law and Public Policy: An Extrapolation from Seidler v. Schallhofer*, 57 AUSTL. L.J. 460, 462 (1983).

<sup>144</sup> Doctrinal issues aside, comprehensive legislation may be slow in coming unless drafters of uniform or model laws or state law revision bodies take up the task.



consideration, both in the literature<sup>145</sup> and in the work of the Commonwealth countries. The virtues of these approaches are several. Each replaces the detailed factual inquiry of common-law remedies with an objective means of determining which couples merit legal relief. And each promises cohabitants benevolent protections of the law that are currently unavailable to them. Simplification along any of these lines promises both greater predictability for those who cohabit and a more economical judicial process for those who must litigate. It is time to move ahead.

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<sup>145</sup> Professor Reppy, for example, has suggested the creation of a new status, that of "lawful cohabitation," capable of entry by express declaration or through behavior. Couples who meet the statutory definition would be entitled to a range of rights, as defined by the legislature, unless they have opted out of the scheme in whole or in part. Reppy, *supra* note 136, *passim*. Although these aspects of Professor Reppy's proposal are appealing, the substantive rights he suggests for "lawful cohabitants" are unduly restrictive. A belief that cohabitants either intend or deserve far less protection than legal spouses is unlikely to stand the test of sociological inquiry or a reading of the cases. *See generally* Weitzman, Dixon, Bird, McGinn & Robertson, *Contracts for Intimate Relationships: A Study of Contracts Before, Within, and in Lieu of Legal Marriage*, 1 ALT. LIFESTYLES 303 (1978).

