That Was No Wife, That Was My Lady: Is Marvin v. Marvin Appropriate for Kentucky?

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THAT WAS NO WIFE, THAT WAS MY LADY: IS *Marvin v. Marvin* APPROPRIATE FOR KENTUCKY?

**INTRODUCTION**

A man and a woman may live as spouses in one of three definable relationships. First, they can be married according to the laws of the sovereign.\(^1\) Second, they may establish a putative marriage—a marriage which does not comply with the laws of the sovereign, but into which at least one of the parties entered with a reasonable belief that the marriage was valid.\(^2\) Finally, they may live as spouses in a meretricious relationship. Both parties in a meretricious relationship have knowledge that the relationship is not a valid marriage.\(^3\)

California, for purposes of dividing property upon dissolution of marriage, treats the property acquired during a putative marriage as quasi-marital property, and equates the rights of the putative spouse upon separation with those of the legitimate spouse.\(^4\) On December 27, 1976, the California Supreme Court recognized the potential for similar treatment of the meretricious spouse in certain circumstances.\(^5\) While the court

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\(^{1}\) E.g., Ky. Rev. Stat. §§ 402.010-.090 (1972 & Supp. 1976) [hereinafter cited as KRS]. In this comment, such a spouse will be referred to as a valid spouse or a legitimate spouse.

\(^{2}\) Comment, Rights of the Putative and Meretricious Spouse in California, 50 Cal. L. Rev. 866, 866 (1962).

\(^{3}\) Id. at 873. This relationship has also been termed “sinful.” *In re Marriage of Cary*, 109 Cal. Rptr. 862, 864 (Ct. App. 1973).

\(^{4}\) Cal. Civ. Code § 4452. (West Supp. 1977). The statute provides in part: Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi community property if the union had not been void or voidable. Such property shall be termed “quasi-marital property.”

\(^{5}\) Marvin v. Marvin, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). It is fairly clear that the California Supreme Court did not, with its decision in *Marvin*, extend the property rights of a legitimate spouse to the spouse in a meretricious relationship. See text accompanying note 6 infra for recognition of this fact. This facet of the decision was largely ignored by the media. H. Kay & C. Amyx, *Marvin v. Marvin: Preserving the*
expressly noted that a meretricious spouse was not "married," and therefore not entitled to the rights of a valid spouse, the court's decision requires California courts to examine the relationship of a separating couple in order to determine whether a spouse had an equitable interest in the community property. The purpose of this comment is to trace briefly the development of the California position and compare the development of Kentucky law in the area of spousal property rights. This comparison will then be used to determine whether Kentucky should adopt California's treatment of the meretricious spouse.

I. THE DEVELOPMENT UNDER CALIFORNIA LAW OF PROPERTY RIGHTS ARISING FROM MARITAL RELATIONSHIPS

A. Rights Based on Marital Property Law

California, by statute, places the putative spouse on an equal footing with the legitimate spouse regarding property rights in the "marital" property. Decisions of the California courts recognized this equality long before adoption of the statute. In *Coats v. Coats* a California court established for the first time that a putative spouse could receive disposition of...
marital property upon dissolution in much the same way as a valid spouse. Although the property was not technically "community property," the court held that the rules of community property could be applied by analogy, using "equitable principles." Under California's community property law, a valid spouse is entitled to a share of the property regardless of that spouse's proportional contribution to its acquisition. By analogy, the proportionate contribution of each party in a putative relationship is also immaterial.

The path of the meretricious spouse took a much different turn. The property rights of the meretricious spouse were first set forth in Vallera v. Vallera. The plaintiff brought an action for separate maintenance and division of community property based on a common law marriage to the defendant. The court found that the defendant was already legally married and thus there had been no common law marriage. Moreover, the court found neither party had a good faith belief that their relationship constituted a legally recognizable marriage. Absent such a belief, cohabitation alone would give rise to no property rights. The court would allow certain property rights only if the plaintiff had entered an agreement to combine earnings and share equally in joint accumulations, or had established the proportion which her funds contributed to the acquisition of the property.

Justice Curtis, in dissent, laid the foundation for the later expansion in Marvin v. Marvin. His opinion was based on the

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11 Id. at 444.
13 Id. at 441.
14 134 P.2d 761 (Cal. 1943).
15 Id. at 762.
16 Id. at 763. This result is based on the idea that the status of marriage gives rise to a reasonable expectation of certain benefits. Absent a good faith belief in a valid marriage, the accompanying benefits could not be present. Id.
17 Id. Any agreement between cohabiting parties not limited specifically to financial matters might be invalid if based on the illicit cohabitation. See Hill v. Westbrook's Estate, 213 P.2d 727, 730 (Cal. App. 1950) (the court severed the portion of the contract based on illicit cohabitation). Cf. Cougler v. Fackler, 510 S.W.2d 16 (Ky. 1974) (a bargain based in whole or in part on consideration of illicit sexual intercourse is invalid).
18 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Whatever reading is given Marvin, it cannot be denied that the case was an expansion of California law. Kay & Amyx, supra note 5, at 956. See also Comment, Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin, 90 Harv. L. Rev. 1708, 1713 (1977).
following progression of California law: (1) a valid wife is entitled to a one-half interest in the community property; (2) this division also applies to parties who think they are married even if in fact they are not; (3) an express agreement to share jointly accumulated property, despite illicit cohabitation, is valid and binding; and (4) contributions made by a meretricious spouse to the acquisition of property are valid and binding. Curtis asked why, if an express agreement was valid and binding, an implied agreement would not also be binding. Curtis argued that an implied agreement to share jointly acquired property should be found to exist whenever the woman contributed her services in the home, discarding what he felt was the only argument against recognizing such an equitable principle: non-recognition is necessary to punish the woman for being involved in an illicit relationship.

The Vallera decision presented problems for other courts; they were forced to equate a meretricious relationship to a “market place transaction” in order to provide a basis for disposing of property upon the dissolution of the relationship. Keene v. Keene interpreted the contribution exception in Vallera narrowly. In Keene, the couple lived together for eighteen years without being married. The “wife” worked on their farm by raising turkeys, chickens, sheep, and cattle; clearing land; sowing, raising, and harvesting the grain crops; and growing and harvesting the nut crops. The court held that these services were not a contribution of funds within the meaning of Vallera so that the woman had no protectable interest in the jointly accumulated property.

134 P.2d at 763-64. Such service would primarily include homemaking. Curtis felt this rationale was unsound especially when one realized that an equally “guilty” party would profit by not having to divide the property. This idea was not accepted in Marvin. Instead, the court agreed with the majority in Vallera. The Marvin court held that while a putative marriage contains an expectation of a legal marriage and the incidents thereof, a meretricious relationship does not. Thus, no punishment is involved in failing to award that which was not expected. 557 P.2d at 121, 134 Cal. Rptr. at 830.


Id. at 332, 21 Cal. Rptr. at 596.
The dissent, voiced by Justice Peters, noted the double standard established by allowing the equally “guilty” man to take all the property, and also advocated the position taken by Justice Curtis in Vallera. While favoring an implied agreement to share equally in jointly accumulated property, Justice Peters would have required more than “mere wifely” duties. In addition, Justice Peters argued against attaching this particular legal disadvantage to cohabitation, observing that if two people were not living together and other circumstances were identical to those in Keene, a business relationship and implied contract would exist.

The California Court of Appeals vindicated the Keene and Vallera dissenters in In re Marriage of Cary. While noting that community property principles had previously been applied to putative spouses but that meretricious spouses had been denied relief, the court held that the passage of the Family Law Act had altered this situation. The court felt that the Act announced the California legislature’s intent that concepts of guilt and innocence were no longer relevant in determining family property rights, enabling the court to treat the meretricious spouse as the putative spouse, provided that an actual family relationship existed. The objective of the decision was

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25 Id. at 336, 21 Cal. Rptr. at 600.
26 Id. See text accompanying notes 19-22 supra for Justice Curtis’ position.
27 371 P.2d at 338, 21 Cal. Rptr. at 602.
28 Id. Cf. In re Estate of Thornton, 499 P.2d 864 (Wash. 1972). The Washington Supreme Court was faced with a claim to property by a woman who had maintained a meretricious relationship with a man for 16 years and had taken part in the management of their cattle ranch. “The record [was] clear that [she] worked hard in the cattle-raising project over a period of 16 years and that her efforts significantly contributed to the success of the business venture.” Id. at 885.

Rejecting a dismissal of her claim, the court held that she had presented sufficient evidence to support a finding that an implied partnership had been created. Id. at 867-68. In addition, the court held that a “relatively longterm, stable meretricious relationship in which the partners hold themselves out as husband and wife,” may give rise to property rights. Id. at 866.

Upon retrial, the trial court found, and was affirmed by the Washington Court of Appeals, that (a) the woman was a managerial employee and not a partner, and (b) the couple had not held itself out as being man and wife. In re Estate of Thornton, 541 P.2d 1243, 1246-47 (Wash. App. 1973).

30 CAL. CIV. CODE §§ 4000-5138 (West 1970). The court focused primarily on § 4452 which was substantially the same as that set out in note 4 supra.
31 109 Cal. Rptr. at 866.
applauded, but the court’s reasoning was widely criticized, mainly on the grounds that it was not the intent of the legislature to include the meretricious spouse under the Family Law Act. However, the Marvin decision soon laid the controversy to rest.

B. Property Rights Based on Nonmarital Remedies

The California Supreme Court agreed in some respects with the criticisms leveled against Cary. In Marvin v. Marvin, for example, the court supported the result in Cary, but not the rationale. Michelle Marvin, plaintiff, and Lee Marvin, defendant, had lived together for seven years without marrying. All the property acquired by the couple had been placed in the defendant’s name. Plaintiff gave up her career as a professional singer in order to assume “wifely chores” on defendant’s behalf. The parties allegedly entered into an oral agreement whereby they would “combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined.” Since California enforced specific agreements to pool joint accumulations, the plaintiff had a protectable interest in the property, assuming that the oral agreement could be proven. The court rejected the argument that the contract was against public policy and therefore void, because of its facilita-

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One basic criticism was that if the concept of good faith were no longer to be a factor, there would have been no need to provide specifically for the rights of the putative spouse in Cal. Civ. Code § 4452. Comment, In re Cary: A Judicial Recognition of Illicit Cohabitation, supra, at 1232-35.

33 See note 32 and accompanying text supra for these criticisms.

34 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Procedurally, Marvin was an appeal from a judgment for defendant on the pleadings. Thus, the case speaks only to whether a cause of action exists and assumes plaintiff’s allegations are true.

35 Id. at 120-21, 134 Cal. Rptr. at 829-30.

36 Id. at 110, 134 Cal. Rptr. at 819.

37 See note 17 and accompanying text supra for a discussion of these agreements.
tion of an immoral relationship. Such contracts were held to be void only to the extent that they were based on illegal or immoral consideration.  

Marvin's importance is due to its considered dicta more than to its holding. The court clearly indicated that the plaintiff could have property rights even absent an express agreement. The court rejected the reasoning in Cary, holding that the Family Law Act did not extend to meretricious relationships. Instead, the court adopted the approach of Justice Curtis' dissent in Vallera, reasoning that a court could not logically enforce an express contract between nonmarital partners while ignoring the "common law principle that holds that implied contracts can arise from the conduct of the parties." The court also rejected the limited meaning of "funds" announced in Keene by including the contribution of services within its definition of "funds." The effect of the decision is to treat cohabitators only as other unmarried persons, and not as putative spouses, thus providing for the lawful, reasonable expectations of the parties to be fulfilled. The judicial attitude evident in Marvin is a result of "nonmarital relationships in modern society and the social acceptance of them" more than a product of any logical extension of equitable doctrines. Ultimately, the result requires courts to scrutinize the financial relationship of the man and the woman.

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38 557 P.2d at 112, 134 Cal. Rptr. at 821.
39 Id. at 122-23, 134 Cal. Rptr. at 831-32. Such remedies could be based on implied agreements, resulting trusts, joint ventures, implied partnerships, constructive trusts, or quantum meruit. Id.

The suggestion has been made that the implied-in-fact remedies might be limited in use. This belief is based on the fact that courts may be "reluctant to find non-gratuitous intent and implied contracts in a familial setting where transactions are not at arm's length and where many benefits undoubtedly are conferred without any expectation of return." Comment, supra note 18, at 1715.

40 134 P.2d 761, 763-64 (Cal. 1943). For a portion of Justice Curtis' reasoning, see notes 19-21 and accompanying text supra.
42 557 P.2d at 118, 134 Cal. Rptr. at 827.
43 See text accompanying note 24 supra for the Keene definition.
44 557 P.2d at 119, 134 Cal. Rptr. at 828.
45 Id. at 121, 134 Cal. Rptr. at 830.
46 Id. at 122, 134 Cal. Rptr. at 831.
47 Id.

7 In scrutinizing the relationship, Marvin provides few concrete guidelines. For a suggestion of some of the relevant factors in this examination, see Kay & Amyx, supra note 5, at 968-73. The authors recommend use of the following presumption to best
Justice Clark concurred insofar as the decision recognized the validity of an express or implied-in-fact agreement between the parties. However, Clark took the majority to task for providing broad equitable remedies defined and limited only by an extremely vague outline. Contending that the court created more problems than it solved, Clark wrote that "the majority perform[ed] a nunc pro tunc marriage, dissolve[ed] it, and distribute[d] its property on terms never contemplated by the parties, case law or the Legislature." 49

II. KENTUCKY LAW ON PUTATIVE AND MERETRICIOUS RELATIONSHIPS

A comparison of Kentucky law with the analysis of California law in Justice Curtis' dissent in Vallera v. Vallera\textsuperscript{59} is helpful in determining the appropriateness of adopting the Marvin position in Kentucky. This comparison requires an examination of Kentucky law regarding property rights of legitimate and nonlegitimate spouses, and also regarding spousal agreements and contributions. The law of contracts, trusts, and restitution have affected the property rights of the nonlegitimate spouse in Kentucky.

A. Spousal Property Rights Upon Dissolution of a Valid Marriage

The Kentucky method for the division of marital property combines the concept of community property (a 50/50 division) with the principles of equity. Generally, Kentucky courts have the authority to divide equitably property accumulated by

\[\text{id. at 972.}\]

\[\text{id. at 124, 134 Cal. Rptr. at 833.}\]

\[\text{134 P.2d 761, 763-64 (Cal. 1943). See notes 19-21 and accompanying text supra for a discussion of this analysis.}\]
both spouses during the marriage. Title to any specific property is not controlling.\textsuperscript{51}

\textit{Colley v. Colley}\textsuperscript{52} was an attempt by Kentucky's highest court to resolve long standing confusion on the proper classification of property at the dissolution of a valid marriage. The Court found that Kentucky's alimony\textsuperscript{53} and restoration of property\textsuperscript{54} statutes had been misconstrued by the lower courts so that a wife had no equitable interest in property which she helped her husband accumulate through either her domestic services or her separate earnings.\textsuperscript{55} To rectify this situation, the Court held that property acquired by joint effort should be divided between the parties according to what is just and reasonable.\textsuperscript{56} Such a just and reasonable division is to be accomplished by first dividing property acquired by "team effort" according to the proportional contribution of each spouse to the total effort, with the domestic services of each spouse a factor in determining the proportional effort. Second, the trial judge must decide whether a spouse is entitled to an equitable payment as alimony; the relative "fault" of the parties is not to be a proper consideration in such a decision.\textsuperscript{57}

The bipartite procedure prescribed in \textit{Colley} is still used today. In fact, the 1972 statute which describes the disposition of property upon dissolution of the marriage\textsuperscript{58} seems to be a codification of \textit{Colley}.\textsuperscript{59} Kentucky Revised Statutes § 403.190 (1)(a) specifically makes the contribution of the spouse as a homemaker a factor to be considered in dividing marital property. Proportional shares in property allocated to a spouse as a homemaker have been approved on appeal ranging from $\frac{1}{2}$ to $\frac{1}{2}$.\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{51} \textit{R. Petrilli, Kentucky Family Law} 28-31 (Supp. 1974).
\item \textsuperscript{52} 460 S.W.2d 821 (Ky. 1970).
\item \textsuperscript{53} KRS § 403.060(1) (1970) (repealed 1972).
\item \textsuperscript{54} KRS § 403.065 (1970) (repealed 1972).
\item \textsuperscript{55} 460 S.W.2d at 825.
\item \textsuperscript{56} Id. at 826. However, fault is considered in determining the amount of alimony. Chapman v. Chapman, 498 S.W.2d 134 (Ky. 1973).
\item \textsuperscript{57} Id. at 827.
\item \textsuperscript{58} KRS § 403.190 (Supp. 1976).
\item \textsuperscript{59} See Petrilli, \textit{supra} note 51, at 29-31 (Supp. 1974).
\item \textsuperscript{60} Heustis v. Heustis, 346 S.W.2d 778, 780 (Ky. 1961).
\item \textsuperscript{61} Lockard v. Lockard, 205 S.W.2d 317, 319 (Ky. 1947).
\end{itemize}
B. Property Rights of the Nonlegitimate Spouse

Unlike most jurisdictions, no Kentucky decision has ever squarely confronted the issue of the rights of a putative spouse to a division of accumulated property. However, Kentucky courts have tackled the related questions of first, awarding alimony to a putative or meretricious spouse, and second, recovery of workmen’s compensation by the putative or meretricious spouse. While the division “of property acquired during marriage by the team effort of the marital partners, is, strictly speaking, not alimony,” the situations are similar enough to warrant examination.

The strongest indicator that Kentucky will not allow a putative spouse to be treated on a par with a valid spouse for the division of property is the legislative intent evidenced by the form of Kentucky’s version of the Uniform Marriage and Divorce Act. Section 209 of the Uniform Marriage and Divorce Act provides, in part, that “[a] putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status. . . .” Kentucky, however, omitted this section when it adopted the Act. Nevertheless, the comments to the Uniform Act provide that “[p]assage of the Act without this section should not . . . be

42 Several jurisdictions follow the California rule and hold that when an innocent person marries in good faith a person who is incapable of marriage, the innocent person is entitled to an interest in the property accumulated by the joint efforts of the parties during the relationship. This rule is not confined to community property states. See, e.g., Albæ v. Harbin, 30 So.2d 459 (Ala. 1947); Schlumberg v. Schlumberg, 41 N.E.2d 801 (Ind. 1942); Fuller v. Fuller, 7 P. 241 (Kan. 1885); Donnelly v. Donnelly, 84 A.2d 89 (Md. 1951); Batty v. Greene, 92 N.E. 715 (Mass. 1910); Allen v. Allen, 10 N.W. 113 (Mich. 1881); Chismond v. Chismond, 52 So.2d 624 (Miss. 1951); Reed v. Reed, 516 S.W.2d 568 (Mo. App. 1974); Fowler v. Fowler, 84 A.2d 836 (N.H. 1951); Conkling v. Conkling, 8 A.2d 298 (N.J. 1936); Lawrence v. Heavner, 61 S.E.2d 697 (N.C. 1950); Walker v. Walker, 84 N.E.2d 258 (Ohio 1948); Krauter v. Krauter, 190 P. 1088 (Okla. 1949); Jenkins v. Jenkins, 153 P.2d 262 (Utah 1944); Buckley v. Buckley, 96 P. 1079 (Wash. 1908); Philips v. Philips, 144 S.E. 875 (W. Va. 1928); and Siskoy v. Siskoy, 27 N.W.2d 488 (Wis. 1947).

Some states statutorily recognize the rights of the putative spouse. E.g., COLO. REV. STAT. § 14-2-111 (1973); MONT. REV. CODES ANN. § 48-12 (Supp. 1975).

43 Colley v. Colley, 460 S.W.2d 821, 826 (Ky. 1970).

44 KRS §§ 403.010, 403.110-.350 (Supp. 1976).

45 Uniform Marriage and Divorce Act § 209.

46 The comment at 9 Uniform Laws Annotated; Matrimonial, Family, and Health Laws § 209, at 363 (Supp. 1974-77) indicates variations from the official text by adopting jurisdictions.
taken to imply a legislative judgment adverse to continuing development of this or similar doctrines by the case law.”

Therefore it is necessary to examine Kentucky case law in the alimony and workmen’s compensation cases.

In *Strode v. Strode*, the appellee, whose husband had been missing for five years, married the appellant. Appellant later abandoned her and answered her claim for alimony by stating that he already had a wife in Texas, thus his marriage to appellee was void. The Court held that the appellant was estopped from benefiting from his own wrong. Since the woman was entirely blameless and had married in good faith, alimony was granted.

The result in *Strode* was later rejected in *Rose v. Rose*. In *Rose*, the wife had entered into two marriages. Even though at the time of her second marriage she thought her first husband was dead, the wife was denied alimony. The Court attempted to distinguish *Strode* by noting that the husband was the bigamous spouse in that case. However, in both cases the wife had a good faith belief that she could enter a valid marriage. The Court repudiated the *Strode* allowance of alimony to a putative spouse, holding that “when the marriage has been finally determined to be void, no allowance can be made, for the court has power only to make such orders in favor of a lawful wife.”

In *Jones v. Jones* the Court reemphasized the *Rose* position that no alimony could be awarded to a putative spouse. Although the good faith of the woman entering the bigamous marriage was not nearly as clear as in *Rose*, the *Jones* opinion echoes the inflexibility of the *Rose* decision, holding that the putative spouse is not “entitled to any of the benefits ordinarily accruing to a wife who obtains a divorce from her husband.” Given the denial of alimony to a bigamous spouse, even when the spouse believed in good faith that the marriage was valid, and the apparent rejection of alimony for the spouse who marries an already married individual, Kentucky courts have apparently foreclosed any right to alimony for a putative

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7 Uniform Marriage and Divorce Act § 209 (Commissioner’s Note).
66 Ky. (3 Bush) 227 (1867).
118 S.W.2d 529, 532 (Ky. 1938).
Id.
231 S.W.2d 15 (Ky. 1950).
Id. at 18.
spouse, at least when the putative relationship is the result of bigamy.

The putative spouse is treated as a legitimate spouse in the field of workmen’s compensation while the meretricious spouse is not. In *Andrews v. Kopper Coal Co.*,\(^7\) the woman "remarried" after she honestly thought her first husband was dead. Later, her second husband died under circumstances which would allow his spouse to collect workmen’s compensation. A necessary condition for recovery of benefits is dependency on the deceased, with a wife presumed to be wholly dependent. Nevertheless, the company denied that Mrs. Andrews could benefit from this presumption, since her first husband was still alive. The Court held that "the parties were to all intents legally married; if the marriage was contracted in good faith, the claimant was the lawful wife of deceased employee."\(^7\) However, it is difficult to determine if this liberal attitude will carry over to a division of property since here the putative spouse is not recovering from the other spouse, a factor which may well have influenced the Court.

Similar claims by a meretricious spouse have been denied. In *Norrington v. Charles E. Cannell Co.*,\(^6\) the Court refused to allow workmen’s compensation to a woman who lived with a man for seventeen years without ever being married. In *Jones v. Campbell Co.*,\(^7\) the Court held that although the woman was wholly dependent, the fact that she had lived with the decedent without getting married barred recovery. This restrictive judicial attitude seems to persist today,\(^7\) indicating that the meretricious spouse has little if any basis for making a claim.

C. Property Rights Based on Nonmarital Remedies

Kentucky courts have recognized certain types of interests in property accumulated by couples that live together. In *Smith v. Smith*,\(^7\) the couple lived together, unmarried, for fifteen years. They married in 1963 and then separated in 1964.

\(^7\) 161 S.W.2d 52 (Ky. 1942).
\(^7\) *Id.* at 55.
\(^7\) 383 S.W.2d 137 (Ky. 1964).
\(^7\) 353 S.W.2d 208 (Ky. 1961).
\(^7\) PETRILLI, supra note 51, at 9.
\(^7\) 497 S.W.2d 418 (Ky. 1973).
The Court directed the chancellor, in distributing property pursuant to a divorce proceeding, first to assign to the wife any property acquired before marriage in which she had a legally recognizable interest, and secondly to divide the property acquired through the joint effort of the parties during the marriage. Unfortunately, the Court provided no indication as to what constitutes a "legally recognizable and enforceable interest." The following cases provide an indication of the scope and limits of such an interest.

The case of Arnz v. Johnson involved a couple who had obtained a divorce but later sought to have it annulled. Unfortunately, since the couple's attorney forgot to file the petition for annulment, their living arrangement after their reunion was illicit. When her "husband" died, Mrs. Arnz asked for a wife's share in the estate. The Court held that since the divorce had not been annulled, there was no valid marriage; therefore Mrs. Arnz could not be treated as a wife. Thus the Court again rejected equating the putative spouse with the validly married spouse. However, the Court in Arnz v. Arnz Adm'r, found that a contract existed between the decedent and Mrs. Arnz. Mr. Arnz had promised to will his entire estate to Mrs. Arnz if she would quit her employment and assume the duties of a housewife. The Court found that the contract was not against public policy, and was therefore binding, since it had not been based upon illicit consideration.

In Donnelly v. Donnelly's Heirs, a woman, in good faith, married a man who was already married. His first wife subsequently died and the couple continued to live together, the woman still ignorant of the first marriage. The husband died...
seventeen years later. The Court held that even if the woman were not entitled to the "wifely" right of dower she had an equitable claim to relief which the husband, and consequently his heirs, were estopped from denying. However, this claim was based on the fact that the woman had brought a substantial estate into the relationship and was defrauded of it by the decedent. Thus the Court's decision did not amount to a recognition of the putative spouse but was a recognition of the possibility of fraud in this situation.

The restitutionary interest of an unmarried cohabitor has also been legally recognized. In Cougler v. Fackler a man engaged in an illicit relationship with a woman gave the woman a sum of money based on her promise to buy a house with the money and deed it to him when she obtained title. The Court decided that such a promise would be binding provided the illicit relationship formed no part of the consideration. In this case, however, the man could not recover on a contract basis, since the Statute of Frauds was violated. Nevertheless, the Court used its equity power to restore to the man the amounts paid to the woman in performance of the agreement. In a similar case, a woman cohabited with a man and gave him $500 to purchase land. The Court established a trust in her favor to the extent of the purchase money.

CONCLUSION

The preceding discussion, on the surface, seems to indicate that Kentucky courts will recognize certain property rights in the putative and meretricious spouse. Trusts have been established for the meretricious spouse; express contracts between putative spouses have been enforced. In addition, Kentucky recognizes that an implied contract is merely a form of express contract. Using the reasoning advanced by the California

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8 Id. at 119. Actually, the Court held that the parties were legally married to each other at the time of the decedent’s death, thus the wife was entitled to dower. In stating that the woman may not have been entitled to dower, the Court was merely presenting the result if she were found not to be married.

87 510 S.W.2d 16 (Ky. 1974).

8 Id. at 18, 19.

89 McDonald v. Fleming, 51 Ky. (12 B. Mon.) 285, 288 (1851).

90 Victor’s Ex’r v. Monson, 283 S.W.2d 175, 176 (Ky. 1955).
Supreme Court in *Marvin v. Marvin*,\(^1\) it appears inconsistent to recognize common-law applications of express contracts in meretricious relationships and yet to reject similar application of implied contracts. Acceptance of this idea would require courts to examine the relationship between meretricious couples to determine whether the conduct of the parties established an implied contract to share in the jointly accumulated assets.

However, this line of reasoning is not convincing in the context of Kentucky law. First, extension of the California common law was based on a clear acceptance of the putative spouse's property rights.\(^2\) Kentucky seems reluctant, from both a legislative and a judicial standpoint, to make this clear acceptance.\(^3\) Second, the *Marvin* ruling allows a meretricious spouse to recover an equitable share, an amount which may or may not equal what a spouse would recover.\(^4\) The factors the California court examines to determine the amount of this share are similar to those which Kentucky courts examine in the disposition of property upon dissolution of a valid marriage.\(^5\) If the *Marvin* concepts were accepted in Kentucky, the

\(^1\) 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

\(^2\) See text accompanying notes 9-13 supra for an analysis of these rights in California.

\(^3\) See text accompanying notes 62-77 supra in which the rejection of the doctrine is discussed.

\(^4\) The Minnesota Supreme Court recently decided to accept the *Marvin* rationale and limit the disposition of property to the meretricious spouse by using the principles of equity. Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977). The unmarried couple in that case lived together for 21 years, holding themselves out as man and wife. The man supplied all funds for the acquisition of real and personal property while the woman worked solely in the home. The court rejected the woman's attempt to recover property as a wife. Instead, the property was divided equally based on the theory that the man had made an irrevocable gift of those assets acquired with his earnings. The woman's contribution was treated similarly. *Id.* at 255. In trying to fulfill the intentions of the parties, the court used the Minnesota partition statute to divide the property. Thus, the court utilized a statute to effectuate the intent of the parties.

\(^5\) As noted, *Marvin* provides few guidelines for its myriad of remedies. See note 47 supra for a further discussion of this problem and a suggestion of the factors the court should consider. Compare these factors with those listed in KRS § 403.190 (Supp. 1976) which provides in part:

1. [The court] shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:
   (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
   (b) Value of the property set apart to each spouse;
meretricious spouse could recover essentially that which a valid spouse is awarded. The differences between the two states of "marriage," in terms of disposition of property, would be minimal. Such a result would seem to be in opposition to the public policy of strengthening and preserving the integrity of the institution of marriage. While California supports a similar policy, the Marvin court did not adequately explain why their decision would not weaken the institution of marriage.

Finally, there are additional difficulties due to the overbreadth of the Marvin decision. As Justice Clark pointed out in his dissent, the majority has probably restored the necessity of producing evidence of the conditions existing between the parties at the time of dissolution. The precise effect to be given to the Statute of Frauds, the possibility of extending Marvin to homosexual relationships, the uncertainty in the valuation of services, and the difficulty of proving an implied contract are some of the many potential problems presented by the broad language of the Marvin decision. In short, "it remains to be seen whether the implied remedy portion of the

id.

To the extent that people consider property divisions before entering a relationship, the court ignored the fact that this situation could discourage a person from entering a meretricious relationship. If Kentucky were to adopt the Marvin concepts, the non-income producing spouse could receive essentially the same amount upon dissolution of the relationship, whether married or not. As long as one party knows that his efforts will not be protected if a meretricious relationship is established, that party would be discouraged from entering such a relationship.

Id. at 123, 134 Cal. Rptr. at 832.

The court rejected application of the Statute of Frauds. Id. at 115, 134 Cal. Rptr. at 824. However, it has been suggested that the requirement of a writing for a marriage settlement is sufficiently analogous to a contract for nonmarital cohabitation to require some documentation. Comment, Property Rights of Unmarried Cohabitors on Dissolution of the Relationship, 30 Okla. L. Rev. 494, 497 (1977).

There appears to be no reason why it could not, as the decision espouses remedies which have no basis in marriage.
opinion will engender more confusion than justice."

If the California Supreme Court had limited itself to allowing property rights for the meretricious spouse only within a familial relationship, confusion would be minimal. Under such an alternative system the quasi-marital rights of the putative spouse would be protected whenever the court determines that a familial relationship existed. It has been contended that such a procedure would merely tolerate meretricious relationships, not encourage them. However, this idea implies recognition of the rights of the putative spouse. As noted earlier, Kentucky has chosen not to recognize these rights.

Given Kentucky's seeming rejection of equal treatment for the putative spouse, and its obvious rejection of any recovery by the meretricious spouse, it would seem that Kentucky should not, at this time, adopt a position similar to that taken in Marvin. Should Kentucky courts decide to follow the general rule on treatment of the putative spouse, and should the courts or the legislature take at least a neutral position on the need to encourage marriage, then the adoption of Marvin would be logically consistent with the rest of Kentucky law. As the law now stands in Kentucky, however, what was a logical step for California would be an illogical leap for Kentucky.

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101 Comment, supra note 18, at 1720.
102 Id. See also Latham v. Hennessey, 554 P.2d 1057, 1059 (Wash. 1976).
103 See text accompanying notes 62-77 supra in which the rejection of the doctrine is discussed.