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## A Small Step Forward: The ALI Domestic Partners Recommendation\*

*Mark Strasser*\*\*

### I. INTRODUCTION

The American Law Institute (“ALI”) has recently recommended that nonmarital, cohabiting couples should be presumed to have taken on certain financial obligations with respect to each other, absent explicit agreement to the contrary. For example, if the parties separate after having been together for a substantial period, one partner may be ordered to pay support to the other partner, and property acquired during the relationship will be presumed to belong to both parties and, thus, will be subject to distribution. In essence, the ALI recommendation treats the parties as married with regard to their financial obligations to each other but treats the parties as unmarried with regard to third parties’ obligations to them.

Although the ALI recommendation has a variety of strengths and deserves serious consideration, it is likely to generate some controversy. Some commentators are likely to suggest that the proposal does not go far enough, since the proposal is “confined to the *inter se* claims of domestic partners”<sup>1</sup> and does not provide the basis for any claims against any third parties.<sup>2</sup> Others are likely to worry that adoption of this proposal will adversely affect the traditional understanding of family. Those making this latter claim might have two very different fears in mind: (1) that this change will induce couples who otherwise would have married not to marry, and (2) that this

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) § 6.01 cmt. a [hereinafter PRINCIPLES (Tentative Draft No. 4)].

2. *See id.* (“Nothing in this Chapter creates claims against any other persons or the state.”).

change will make nonmarital status too close to marital status and, thus, will change the meaning of “marriage” or, perhaps, “family.” Neither fear is well-founded, although for very different reasons. This Article focuses on (1) why the ALI recommendation will neither undermine marriage nor the family, and (2) why adoption of the ALI recommendation will promote fairness in many cases.

Adoption of the ALI recommendation regarding the dissolution of domestic partnerships will not undermine the institutions of marriage and family because (1) the recommendation essentially reflects developing state law in many respects, (2) to the extent that it does not, the recommendation is unlikely to cause confusion either in the courts or in society about what marriage and family mean, who in fact is married, or what constitutes a family, and (3) the recommendation changes the current incentive structure in many states, thereby making marriage *more* attractive. Because the ALI recommendation restricts itself to *inter se* benefits and because states already recognize claims of nonmarital partners to a share of the assets acquired during the relationship, the ALI proposal is likely to have relatively little effect on societal or legal understandings of marriage but a potentially large effect on the lives of individual claimants.

Part II of this Article describes which couples can qualify as domestic partners and how domestic partnerships differ from marriages. Part III discusses the policy and fairness considerations that militate in favor of imposing financial obligations on domestic partners with respect to one another and in favor of shifting the background presumptions regarding when the division of property or the provision of support would appropriately be ordered upon dissolution of such a relationship. Part IV discusses use of the contract paradigm to decide when support or a property division might be ordered, suggesting that although this model has certain advantages, the required “meeting of the minds”<sup>3</sup> poses unnecessary difficulties. Part V discusses the potential for conceptual confusion regarding which relationships are marriages and which are not. This section makes clear that courts and society have had no difficulty in distinguishing between these different types of relationships and discusses how the contract paradigm itself mischaracterizes the nonmarital cohabitant

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3. *Jacobson v. Gulbransen*, 623 N.W.2d 84, 90 (S.D. 2001) (“To form a contract, there must be a meeting of the minds or mutual assent on all essential terms.”) (citing *Read v. McKennan Hosp.*, 610 N.W.2d 782, 786 (S.D. 2000)).

relationship in important respects. The article concludes that although there are weaknesses in the ALI proposal, it has a variety of strengths and deserves serious consideration.

## II. MARRIAGE AND DOMESTIC PARTNERSHIP

The ALI domestic partnership proposal cannot be evaluated until its basic elements are understood. The proposal permits a wide range of couples to qualify for domestic partnership status as long as certain conditions have been met. However, the proposal makes clear that domestic partnerships are not the equivalent of marriage and that the latter has a variety of benefits that the former does not.

### *A. Who Are Domestic Partners?*

Domestic partners are defined as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”<sup>4</sup> Whether a couple has shared a life together will be determined in light of a number of factors including the parties’ “oral or written statements,”<sup>5</sup> the extent to which their finances were intermingled,<sup>6</sup> “[t]he extent to which their relationship fostered . . . [either] interdependence” or one party’s dependence on the other,<sup>7</sup> the extent to which the members of the couple acted or assumed roles in furtherance of their life together,<sup>8</sup> the “extent to which the relationship wrought change in the life” of either party,<sup>9</sup> the emotional or physical intimacy of the relationship,<sup>10</sup> and the reputation of the couple in the community.<sup>11</sup> While couples “not related by blood or adoption” will be presumed to be domestic partners if they have maintained a common household for a sufficiently long and continuous period of time,<sup>12</sup> couples who are “related by blood or adoption” will not enjoy that presumption, but nonetheless can qualify as domestic part-

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4. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(1).

5. *Id.* § 6.03(7)(a).

6. *See id.* § 6.03(7)(b).

7. *Id.* § 6.03(7)(c).

8. *See id.* § 6.03(7)(d).

9. *See id.* § 6.03(7)(e).

10. *See id.* § 6.03(7)(h).

11. *See id.* § 6.03(7)(i).

12. *Id.* § 6.03 cmt. d.

ners.<sup>13</sup>

The ALI recommendation requires that the individuals live together, and a couple that might otherwise be treated as domestic partners will not be so treated if the couple does not share a primary residence.<sup>14</sup> This reflects a requirement that states sometimes impose. For example, in *Taylor v. Fields*,<sup>15</sup> a California appellate court refused to enforce a promise of “lifetime financial care,”<sup>16</sup> at least in part, because Taylor did not make a “showing of a stable and significant relationship evolving out of cohabitation,”<sup>17</sup> notwithstanding her having had a forty-two year relationship with Fields.<sup>18</sup> Because the couple had never lived together<sup>19</sup> but at most had occasionally spent weekends together as husband and wife,<sup>20</sup> the court held that a necessary prerequisite to recovery for nonmarital partners was lacking.<sup>21</sup>

Even if the individuals share a residence, the ALI requirement that individuals share a residence for a significant period of time will not afford individuals a claim when they have only spent a week or a month together.<sup>22</sup> However, the ALI specifically eschews a bright-line rule to determine what constitutes a “significant period of time” for purposes of establishing whether a domestic partnership exists,<sup>23</sup> suggesting instead that “the greater the change wrought by the relationship on the life of either or both parties, and the greater the losses associated with dissolution of the relationship, the shorter the

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13. *Id.* § 6.03 cmt. d (“[W]hen parties are related by blood or adoption . . . the claimant bears the burden of satisfying the proof of requirements of Paragraph (6).”).

14. *See id.* § 6.03 cmt. c, illus. 1.

15. 224 Cal. Rptr. 186 (Ct. App. 1986).

16. *Id.* at 192.

17. *Id.* at 189. The court also refused to enforce the agreement because it held that the contract was based on illicit meretricious consideration. *See id.* at 193 (“Leaving aside the lack of a claim of cohabitation for the purposes of discussing this point, here, as in *Jones*, Taylor’s rendering of sexual services for Leo is inseparable from the rest of the contract. . . . [That] service forms an inseparable part of the consideration for the agreement and renders it unenforceable in its entirety.”).

18. *See id.* at 188.

19. *See id.* at 189, 192.

20. *See id.* at 192.

21. *See id.*

22. The ALI implies that three years would be a reasonable period for a couple without children. *See* PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03 cmt. d.

23. *Id.* § 6.03 cmt. e (“‘[A] significant period of time’ should not be set by a uniform rule.”).

period of time necessary to satisfy the requirement.”<sup>24</sup>

States adopting the ALI recommendation that no bright line be established would thereby afford the courts some flexibility with respect to whether a domestic partnership existed in a particular case. As an added benefit, state adoption of the recommendation might dissuade potential defendants from engaging in “strategic behavior,”<sup>25</sup> such as forcing a partner to leave the home a week before the relationship would have qualified as a domestic partnership.

Of course, according courts this flexibility may result in courts occasionally wrongly determining that certain individuals are or are not domestic partners. Further, there is the systemic cost that is imposed when courts are required to hear and weigh evidence to determine whether particular individuals are domestic partners rather than, for example, ascertain whether they have met criteria that might be applied mechanically. The gains in fairness by affording the courts this discretion, however, would presumably more than outweigh these added costs.<sup>26</sup>

#### *B. Domestic Partnerships Versus Marriages*

Chapter 6 of the ALI *Principles of the Law of Family Dissolution* discusses the “legal obligations that domestic partners have toward one another at the dissolution of their relationship.”<sup>27</sup> Individuals who have been domestic partners for a significant period of time may be subject to claims for support or property division when their relationship ends.<sup>28</sup> However, the ALI takes great care to distinguish between the rights and responsibilities of marital partners and the rights and responsibilities of domestic partners. “Marriage creates a legal status that encompasses not only *inter se* rights and responsibilities of the spouses, but also rights and responsibilities of the spouses in relation to third parties and the state.”<sup>29</sup> In contrast, while “American law has recognized *inter se* claims of domestic partners, it has generally declined to establish rights with respect to third parties

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24. *Id.*

25. *Id.*

26. *See infra* Part III (discussing fairness concerns).

27. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01 cmt. a.

28. *See id.* § 6.03 cmt. b.

29. *Id.* § 6.01 cmt. a.

and the state.”<sup>30</sup>

The ALI proposal is thus modeled on current state law. Rather than suggest, for example, that the state afford certain benefits to domestic partners, the recommendation involves a modification and clarification of the conditions under which domestic partners will have acquired financial obligations with respect to one another and of the contents of those obligations once acquired.

The ALI recommendation does not equate domestic partnership with marriage. On the contrary, it emphasizes important differences between these two types of relationships. For example, a state recognizing this new domestic partnership status does not thereby recognize a new form of marriage and would not be forced to extend benefits to a new set of beneficiaries. Indeed, rather than create an additional drain on limited state resources, this recommendation, if adopted, would help to relieve the state of some of the financial obligations that it might otherwise be forced to bear. The recommendation would protect “society from social welfare burdens that should be borne, in whole or in part, by individuals”<sup>31</sup> since it requires the distribution of assets acquired during the relationship rather than permitting the shrewd party to keep the assets and forcing the less sophisticated party to seek public assistance.

Consider two unmarried individuals, Lee and Pat, who have lived together for decades. Lee works outside the home, and Pat works inside the home. All the property that has been acquired during the relationship is in Lee’s name, notwithstanding that Lee has been able to devote time and energy to the acquisition of these assets precisely because Pat has been doing so much work within the home. Were these individuals to separate, Pat might be left without any property or means of support and might have to receive public assistance. However, were they to separate after the jurisdiction in which they lived had adopted the ALI domestic partnership recommendation, Pat would receive some of the property acquired during the relationship and, in addition, might be entitled to support.

The ALI makes clear that states adopting its recommendation would not thereby “revive the doctrine of common-law marriage.”<sup>32</sup> Common law marriage not only affects the rights and responsibilities

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30. *Id.*

31. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02(2).

32. *Id.* § 6.01 cmt. a.

of the partners with respect to each other but also affects the rights and responsibilities of third parties with respect to the couple,<sup>33</sup> whereas the proposed change would only affect the rights and responsibilities of the parties themselves.<sup>34</sup> Thus, according to the ALI domestic partnership proposal, a state or employer would not be required to extend to a domestic partner the benefits that would be due to a spouse. Had the ALI instead recommended a reinstatement of common law marriage,<sup>35</sup> perhaps coupled with a recommendation of a change in the name of such unions to “domestic partnerships,” the states and employers would potentially have been subject to a variety of new financial responsibilities.<sup>36</sup>

States have had no difficulty distinguishing between marriages and long-term nonmarital relationships. Consider *Williams v. Corbett*,<sup>37</sup> a case in which the Georgia Supreme Court held that a woman in a meretricious<sup>38</sup> relationship was not entitled to workers’ compensation benefits as a dependent of a worker who had died on the job.<sup>39</sup> Had the woman had a common law marriage instead of having merely cohabited with the deceased,<sup>40</sup> she might have been able to receive those benefits.<sup>41</sup> Consider also *Jones v. D. Canale &*

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33. *See id.* § 6.01 cmt. a (“Where recognized, common-law marriage is fully equivalent to ceremonial, or formal marriage. In terms of legal incidents, there is no distinction between a lawful common-law marriage and a lawful ceremonial marriage.”).

34. Indeed, the rights of third parties such as innocent spouses whose marital partners have established domestic partnerships with others would also not be affected by these provisions. *See id.* § 6.01 cmt. c (“The rule . . . defers fully to the claims of a spouse, but allows claims of a domestic partner to the extent that they would not displace those of a spouse.”).

35. Common law marriages are often thought to be fraught with difficulties including proving their existence. They have been described as “a fruitful source of perjury and fraud.” *Estate of Gavula* (Appeal of Ardos), 417 A.2d 168, 171 (Pa. 1980).

36. *See* Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 196 (1985) (“The purpose in repealing common-law marriage statutes was to deny couples selecting informal, non-ceremonial arrangements the status benefits of marriage.”).

37. 398 S.E.2d 1 (Ga. 1990).

38. Formerly, in many states, meretricious relationships (i.e., sexual relationships which were nonmarital) had a pejorative connotation. *See, e.g.*, *Van v. Zahorik*, 597 N.W.2d 15, 21 (Mich. 1999) (distinguishing between “conventional marriages” on the one hand and “illicit’ or ‘meretricious’ relationships” on the other hand) (quoting *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979)). Some states now no longer use the term pejoratively. *See infra* notes 60, 62–63 and accompanying text.

39. *See Williams*, 398 S.E.2d at 2.

40. *See id.* (affirming that “one cannot recover dependency benefits arising from a living arrangement that includes neither ceremonial nor common-law marriage.”).

41. *See id.* *See also* *Fireman’s Fund Ins. Co. v. Smith*, 259 S.E.2d 675 (Ga. Ct. App.

*Co.*,<sup>42</sup> in which the Tennessee Supreme Court had to determine whether the plaintiff was entitled to workers' compensation death benefits after the death of her partner of twenty-five years.<sup>43</sup> The court held that she was not entitled to those benefits because both she and her partner had known that they were not legally married.<sup>44</sup> Had she validly contracted a common law marriage with him in another state<sup>45</sup> or even had she believed falsely, but in good faith, that she was married to the decedent and thus been a putative spouse, she might have qualified for benefits.<sup>46</sup>

A separate issue is whether a widowed person who has a meretricious relationship would stop receiving the workers' compensation benefits which had been awarded after the former spouse's death. That might depend upon the construction of the existing statute.<sup>47</sup> For example, the Delaware statute extinguishes survivor benefits only upon the death or remarriage of the surviving spouse.<sup>48</sup> In *Wilmington Finishing Co. v. Leary*,<sup>49</sup> a Delaware court refused to read the remarriage provision as including those who were in a meretricious relationship precisely because that would treat the latter relationship as if it were a common law marriage, which Delaware refuses to recognize.<sup>50</sup>

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1979) (remanding workers' compensation benefits case to determine whether claimant was common law wife of deceased).

42. 652 S.W.2d 336 (Tenn. 1983).

43. *See id.* at 336.

44. *See id.* at 338. *See also* Lavoie v. Int'l Paper Co., 403 A.2d 1186, 1191 (Me. 1979) ("We find nothing in the Act as it now exists . . . which would indicate that the Legislature intended to enlarge the meaning of the word 'family' under the Workers' Compensation Act to include a woman with whom a deceased employee was living in a union not solemnized by formal marriage.").

45. *See* Shelby County v. Williams, 510 S.W.2d 73, 73-74 (Tenn. 1974) ("Though Tennessee does not recognize as valid a common law marriage contracted within this state, our courts do recognize as valid a common law marriage contracted in a state where such a marriage is valid.") (quoting Troxel v. Jones, 322 S.W.2d 251 (Tenn. Ct. App. 1958)) (citations omitted).

46. *See D. Canale & Co.*, 652 S.W.2d at 338 (discussing case in which benefits were granted when claimant believed falsely but in good faith that she was married to the decedent).

47. *See, e.g.*, Todd v. Workmen's Comp. Appeal Bd., 692 A.2d 1086 (Pa. 1997) (construing statute to permit widow to receive benefits).

48. *See* DEL. CODE ANN. tit. 19, § 2330(g) (1995) ("Should any dependent of a deceased employee die, or should the surviving spouse remarry, the right of such dependent or such surviving spouse to compensation under this section shall cease."); *Wilmington Finishing Co. v. Leary*, No. 99A-06-001 JEB, 2000 WL 303320, at \*1 (Del. Super. Ct. Mar. 8, 2000).

49. 2000 WL 303320.

50. *See id.* at \*3.

The ALI proposal that public benefits not be awarded to domestic partnerships follows the example set by several,<sup>51</sup> but not all,<sup>52</sup> states. For example, in *Peffley-Warner v. Bowen*,<sup>53</sup> the Washington Supreme Court held that a woman who had been in a meretricious relationship for twenty-two years<sup>54</sup> did not qualify as a wife under the laws of intestate succession, which meant that she could not receive widow's benefits under the Social Security Act.<sup>55</sup> That court reached a similar result in *Davis v. Employment Security Department*,<sup>56</sup> in which a woman who had quit her job to live with her domestic partner in another place was denied unemployment benefits because she was held to have voluntarily left her job without good cause.<sup>57</sup> Had she instead "voluntarily [left] her job in order to *marry* and move to a place where it would be impracticable to commute to her old job,"<sup>58</sup> she would have had good cause for stopping work.<sup>59</sup> The court explained that "while the definition of the term 'meretricious' has lost its original derogatory connotation in recent court decisions, the term 'marital' is still defined as 'of or relating to marriage or the marriage state.'"<sup>60</sup> Precisely because marriage and domestic partnerships are not equivalent, the court refused to hold that the plaintiff's quitting for the sake of a domestic partnership qualified as leaving for good cause.<sup>61</sup>

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51. *See* *Ins. Co. of N. Am. v. Jewel*, 164 S.E.2d 846, 847 (Ga. Ct. App. 1968) ("In cases where there was a meretricious relationship as knowingly living in adultery, most of the courts have denied compensation, basing this denial on grounds of public policy.") (citations omitted). In this case, the court denied worker's compensation benefits to a woman who had been involved in a meretricious (and, in fact, adulterous) relationship with the deceased employee. *See id.* at 847-48.

52. *See* *West v. Barton-Malow Co.*, 230 N.W.2d 545 (Mich. 1975) (permitting woman in meretricious relationship to receive workers' compensation death benefits); *Dep't of Indus. Relations v. Workers' Comp. Appeals Bd.*, 156 Cal. Rptr. 183 (Ct. App. 1979) (permitting woman in meretricious relationship with the deceased to receive workers' compensation death benefits); *Parkinson v. J. & S. Tool Co.*, 313 A.2d 609 (N.J. 1974) (permitting woman living with but no longer civilly married to decedent to receive workers' compensation death benefits).

53. 778 P.2d 1022 (Wash. 1989) (en banc).

54. *See id.* at 1023.

55. *See id.* at 1023, 1027.

56. 737 P.2d 1262 (Wash. 1987) (en banc).

57. *See id.* at 1264.

58. *Id.* at 1266 (emphasis added).

59. *See id.*

60. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

61. *See id.*

The *Davis* court's analysis is important to consider for at least two reasons. It makes clear both that "meretricious," at least when applied to relationships,<sup>62</sup> no longer carries the negative association that it once had<sup>63</sup> and that courts have no difficulty distinguishing between marital and nonmarital relationships.

The California Supreme Court has also made clear that it can easily distinguish between marital and nonmarital relationships. In *Norman v. Unemployment Insurance Appeals Board*,<sup>64</sup> the court denied unemployment compensation benefits to someone who had quit her job to join her fiancé in the state of Washington.<sup>65</sup> The court pointed out that the claimant had not "represent[ed] that her marriage was imminent, that her presence in Washington was required to prepare for the wedding, or, indeed, that she had any definite or fixed marital plans."<sup>66</sup> The court explained that California law does not "equate a nonmarital relationship with marriage"<sup>67</sup> and suggested that the "[l]egislature's decision to give weight to marital relationships in the determination of 'good cause' supports public policy encouraging marriage . . . ."<sup>68</sup>

It might seem surprising that the court would deny unemployment benefits to a fiancé in the name of promoting marriage. The decision is more understandable in light of the court's skepticism that the plaintiff would actually marry her partner. Noting that the plaintiff had not married during the two years that the case had

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62. *But see infra* notes 175–80 and accompanying text, (describing instead meretricious sexual services).

63. For other courts suggesting that the pejorative connotation of "meretricious" does not reflect what is involved in many long-term nonmarital relationships, see *West v. Barton-Malow Co.*, 230 N.W.2d 545, 546 (Mich. 1975) ("If we read meretricious as the dictionary defines it—the relationship of a prostitute or a woman given to indiscriminate lewdness—we find no support whatsoever in the record for describing the relationship that existed between deceased and plaintiff as one based on meretricious cohabitation."); and *Kozłowski v. Kozłowski*, 403 A.2d 902, 909 (N.J. 1979) (Pashman, J., concurring) ("In recent years, cohabitation between unmarried adults has become an increasingly prevalent phenomenon. To label such conduct as 'meretricious'—that is, as akin to prostitution—would ignore the realities of today's society.").

64. 663 P.2d 904 (Cal. 1983) (en banc). *But see* *MacGregor v. Unemployment Ins. Appeals Bd.*, 689 P.2d 453 (Cal. 1983) (holding that the lack of a legally recognized marriage did not prevent plaintiff from showing good cause for leaving employment because plaintiff had established a family unit consisting of herself, her fiancé, and their child).

65. *See Norman*, 663 P.2d at 905.

66. *Id.* at 906.

67. *Id.* at 907.

68. *Id.* at 908.

wound its way through the courts,<sup>69</sup> the court at least implicitly treated the case as if it had involved nonmarital cohabitants.

States should not refuse an individual unemployment compensation because that individual quits a job to join a domestic partner. Indeed, permitting receipt of benefits in such a case promotes many of the same societal interests that would be promoted in a case in which an individual quits a job to join a marital spouse. Nonetheless, the fact that states may deny such compensation in those circumstances illustrates that courts neither confuse nor conflate marital and domestic partnership status. Thus, adoption of the ALI recommendation should not be avoided for fear that such confusion or conflation would occur.

### III. THE PROMOTION OF FAIRNESS

The overriding justification for the ALI proposal is to promote fairness. In many cases, the less sophisticated or more trusting partner suffers when a nonmarital relationship ends and the assets acquired during that relationship are distributed. Adoption of the ALI recommendation would promote a much fairer distribution of assets in many of the kinds of cases under examination here.

#### *A. What Is Fair?*

The primary objective of the ALI recommendation is the “fair distribution of the economic gains and losses incident to termination of the relationship of domestic partners.”<sup>70</sup> Ascertaining which distribution would be fair is the difficult task. Even where the parties have expressly agreed to a particular distribution, worries about coercion and deception may arise. However, most couples do not expressly state how their assets should be distributed should their relationship end, and the failure to do so makes it all the more difficult for courts to effect a fair distribution of the assets acquired during the relationship.

All else equal, fairness dictates distributing the assets acquired during the relationship in accordance with the express agreement of the parties, and, in fact, the ALI recommendation suggests that an

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69. *See id.* at 909 (“It may be of some interest that, indeed, at oral argument more than 2 years later, we were informed that no marriage had as yet occurred.”).

70. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02.

express agreement with respect to the distribution of assets should be enforced,<sup>71</sup> absent unconscionability, fraud, etc.<sup>72</sup> However, this method of resolution would cover only a small percentage of the cases since few couples “make explicit contracts to govern their relationship or its termination,”<sup>73</sup> notwithstanding the “rapidly increasing percentage of Americans [who] form domestic relationships”<sup>74</sup> without observing the formalities of marriage.

### B. Default Rules

Where no explicit agreement has been made, there must be some default rule regarding how the property is to be allocated should the relationship come to an end, even if the recommended distribution involves leaving the property with the person who currently possesses or has title to it.<sup>75</sup> Traditionally, where no express agreement was made, whoever had title to the property at issue could keep it.<sup>76</sup> The advantages of this rule, which might be called the “title theory,” include clarity and predictability. Absent an explicit agreement to the contrary, the person with title would own the property in question, and courts would not be faced with difficult decisions regarding the

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71. The recommendation explains:

A contract between domestic partners that (i) waives or limits claims that would otherwise arise under this Chapter or (ii) provides remedies not provided by this Chapter, is enforceable according to its terms and displaces any inconsistent claims under this Chapter, so long as it satisfies the requirements of Chapter 7 for the enforcement of agreements.

*See id.* § 6.01(2).

72. *See id.* ch. 7 for a discussion of the conditions under which contracts should not be enforced.

73. *Id.* § 6.02 cmt. a.

74. *Id.* § 6.02 cmt. a.

75. *See Beal v. Beal*, where the court stated:

Historically, courts have been reluctant to grant relief of any kind to a party who was involved in what was termed a “meretricious” relationship. Courts took the position that the parties had entered into a relationship outside the bounds of law, and the courts would not allow themselves to be used to solve the property disputes evolving from that relationship. Generally, the parties were left as they were when they came to court, with ownership resting in whoever happened to have title or possession at the time. The rationale was predicated on public policy or even an invocation of the clean hands doctrine.

577 P.2d 507, 508 (Or. 1978) (en banc).

76. *See Shuraleff v. Donnelly*, 817 P.2d 764, 768 (Or. Ct. App. 1991) (“Awarding property to the one with title had been the rule in cases where courts refused to act in non-marital relationships.”).

appropriate distribution of assets when the intents of the parties could not be clearly ascertained.

While the title theory has advantages, it has serious disadvantages as well. For example, the title theory is likely to lead to inequitable results and to put at risk exactly those individuals who are least likely to be equipped to adequately assess that risk. An Oregon appellate court explained that employing such a rule often results in unfairness, since it gives an “advantage to the party who was more cunning or shrewd.”<sup>77</sup> Looking beyond who has title to the contested property “prevent[s] the party with title, or [the party] in possession of property, from enjoying ownership without consideration of the contribution of the other party.”<sup>78</sup>

Consider, for example, *Sharp v. Kosmalski*<sup>79</sup> in which a fifty-six-year-old widower, Sharp, “whose education did not go beyond the eighth grade, developed a very close relationship with” a school teacher, Ms. Kosmalski.<sup>80</sup> He bestowed gifts on her and eventually proposed to her. Kosmalski refused Sharp’s offer of marriage, but continued to accept gifts from him and, with his permission, withdrew substantial sums of money from his bank account.<sup>81</sup> Eventually, Sharp conveyed his interest in his farm to her.<sup>82</sup> Not long after,<sup>83</sup> Kosmalski ordered Sharp to leave the home, at which point he had assets of only \$300.<sup>84</sup> The New York Court of Appeals remanded the case for a determination of whether the defendant had been unjustly enriched.<sup>85</sup> The court warned that the “case seem[ed] to present the classic example of a situation where equity should intervene to scrutinize a transaction pregnant with opportunity for abuse and unfairness.”<sup>86</sup> Had the court merely looked at the express agreement of the parties, it likely would have held that Kosmalski must be allowed to retain the property, Sharp’s lack of sophistication notwithstanding.<sup>87</sup>

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77. *Id.*

78. *Id.*

79. 351 N.E.2d 721 (N.Y. 1976).

80. *See id.* at 722.

81. *See id.*

82. *See id.*

83. Sharp conveyed his interest to Kosmalski in September 1971, and Kosmalski ordered Sharp out of the home in February 1973. *See id.* at 723.

84. *See id.*

85. *See id.* at 724.

86. *Id.*

87. *See id.* at 723. To make matters worse, Sharp had only recently been widowed (the

## C. Hewitt v. Hewitt

In *Hewitt v. Hewitt*,<sup>88</sup> the Illinois Supreme Court had to decide whether to distribute property in a case involving two nonmarital cohabitants who had separated.<sup>89</sup> *Hewitt* is important both because it has been discussed in numerous cases<sup>90</sup> and because the weaknesses of the opinion suggest some of the weaknesses in arguments against adoption of the ALI proposal.

In *Hewitt*, the plaintiff alleged that she and the defendant had lived together “in an unmarried, family-like relationship to which three children [had] been born”<sup>91</sup> and that he had promised “he would ‘share his life, his future, his earnings and his property’ with her.”<sup>92</sup> The intermediate appellate court found that there had been an express oral contract on which plaintiff could base her cause of action.<sup>93</sup> The Illinois Supreme Court reversed, fearing that recognizing her cause of action would mean that “unmarried cohabitants [could] acquire property rights merely by cohabitation and subsequent separation,”<sup>94</sup> notwithstanding plaintiff’s claim that those cases were distinguishable because her claim was based on an express contract.<sup>95</sup>

The Illinois high court rejected the approach in which only express contracts would be enforced, apparently agreeing with the intermediate appellate court and the California Supreme Court<sup>96</sup> that “if common law principles of express contract govern express agreements between unmarried cohabitants, common law principles of implied contract, equitable relief and constructive trust must govern the parties’ relations in the absence of such an agreement.”<sup>97</sup> Yet, the court failed to note that (1) a jurisdiction might choose to enforce

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case does not indicate how long after the death the conveyance occurred), *see id.* at 722, and, thus, was likely even more vulnerable than he might have been.

88. 394 N.E.2d 1204 (Ill. 1979).

89. *See id.* at 1205.

90. *See, e.g.*, Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999); Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990); County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993).

91. *Hewitt*, 394 N.E.2d at 1205.

92. *Id.*

93. *See id.* at 1206.

94. *Id.* at 1207–11.

95. *See id.*

96. The *Hewitt* court was referring to the California Supreme Court’s decision in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

97. *Hewitt*, 394 N.E.2d at 1207.

only express contracts,<sup>98</sup> and (2) even if a jurisdiction recognized implied contracts and a variety of equitable remedies, the parties would not be acquiring property rights simply by virtue of living together but instead because of implicit understandings or society's need to promote justice and fairness.

The *Hewitt* court feared that by upholding the lower court decision it would somehow “rehabilitate the doctrine of common law marriage,”<sup>99</sup> notwithstanding its recognition that affirming the lower court decision would not entitle the plaintiff, Victoria, to have all the benefits that a common law spouse would have had.<sup>100</sup> Despite language in the opinion to the contrary, the court would likely have reversed the intermediate appellate decision even if it had been persuaded that an affirmance would not have rehabilitated common law marriage. The court believed that “[o]f substantially greater importance than the rights of the immediate parties [was] the impact of such recognition upon our society and the institution of marriage,”<sup>101</sup> which is why the court's recognition that the plaintiff's claims had merit was ultimately unavailing.<sup>102</sup>

Ironically, it is doubtful that permitting recovery would have had a significant impact upon society or the institution of marriage,<sup>103</sup> and “cohabitation has flourished [in Illinois] despite judicial unwillingness to recognize contracts between cohabitants.”<sup>104</sup> Given that a *Hewitt* affirmance would likely have had little or no adverse impact on society, the decision was especially unfortunate since, as an Illi-

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98. The Minnesota statute states, in pertinent part:

If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if:

(1) the contract is written and signed by the parties, and  
(2) enforcement is sought after termination of the relationship.

MINN. STAT. ANN. § 513.075 (West 2000).

99. *Hewitt*, 394 N.E.2d at 1210.

100. *See id.*

101. *Id.* at 1207.

102. *See id.* at 1211 (“We do not intend to suggest that plaintiff's claims are totally devoid of merit.”).

103. *See* Jan Skelton, *Hewitt to Ayala: A Wrong Turn for Cohabitants' Rights*, 82 ILL. B.J. 364, 366 (1994) (“[I]t is unlikely that refusing to recognize the contracts of cohabitants actually encourages marriages or discourages cohabitation.”).

104. *Id.* (citing Gary Lloyd Smith, *Hewitt v. Hewitt: Non-Marital Cohabitation and the Doctrine of Immorality*, 69 ILL. B.J. 368, 371 (1981)).

nois appellate court has subsequently suggested, “[t]he result in *Hewitt* was particularly harsh in light of its facts.”<sup>105</sup>

Bracketing whether *Hewitt* was rightly decided, some of the bases upon which that decision rested have either since disappeared or have been accounted for in more nuanced ways by other states.<sup>106</sup> For example, the *Hewitt* court emphasized that the Illinois legislature had refused to adopt no-fault divorce.<sup>107</sup> However, since the decision, Illinois has adopted no-fault divorce and has decriminalized cohabitation,<sup>108</sup> thus undermining the claim that Illinois public policy differs substantially from that of other states in these respects.<sup>109</sup>

The *Hewitt* court noted that under Illinois statutory law, a putative spouse has the rights of a legal spouse “if he goes through a marriage ceremony and cohabits with another in the good-faith belief that he is validly married.”<sup>110</sup> Once he or she learns of the invalidity of the marriage, the status of putative spouse terminates. The court concluded that this statutory language indicates an “unmistakeable [sic] legislative judgment disfavoring the grant of mutual property rights to knowingly unmarried cohabitants.”<sup>111</sup> Yet, at least as plausible a way to interpret the Illinois legislature’s intent would have been to say that the legislature granted the putative spouse the “rights of a legal spouse”<sup>112</sup> precisely because that person would have had a reasonable and justified expectation of those benefits until he or she had learned of the invalidity of the marriage.

If this is the correct interpretation, however, then there are important implications for the treatment of the nonmarital cohabitant. While the nonmarital cohabitant might not have a justified and reasonable expectation with respect to benefits provided by third parties, he or she probably would have such an expectation with respect to those benefits expressly or impliedly promised by his or her partner, and, thus, a promise to confer such benefits should be enforce-

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105. *Medley v. Strong*, 588 N.E.2d 244, 246 (Ill. Ct. App. 1990).

106. *See infra* notes 116–19 and accompanying text (discussing Tennessee’s treatment of nonmarital cohabitants).

107. *Hewitt*, 394 N.E.2d at 1210.

108. *See Skelton, supra* note 103, at 366 (noting the Illinois Legislature’s adoption of no-fault divorce and decriminalization of cohabitation).

109. *See id.* (noting the change in Illinois public policy).

110. *Hewitt*, 394 N.E.2d at 1210.

111. *Id.*

112. *Id.*

able. The legislative intent to promote fairness and to prevent the disappointment of reasonable and justified expectations would be served by allowing the nonmarital cohabitant to receive those benefits.

The interpretation of the Illinois legislature's intent offered above—that promises between nonmarital partners are enforceable but that third-party obligations are not thereby created—reflects the manner in which some states have handled the difference between spouses and nonmarital cohabitants. The former is entitled to third-party benefits and the latter is only entitled to *inter se* benefits.<sup>113</sup> For example, while refusing to recognize an obligation to extend benefits to nonmarital cohabitants,<sup>114</sup> the Tennessee Supreme Court has manifested a more generous attitude with respect to nonmarital partners' *inter se* obligations and benefits. In *Martin v. Coleman*,<sup>115</sup> the court was willing to divide up a business between two unmarried cohabitants, notwithstanding that the two had “a meretricious relationship,”<sup>116</sup> and one stayed at home while the other provided for the financial needs of the couple.<sup>117</sup>

Three factors suggest that *Hewitt* should no longer be followed: (1) the existence of a different and plausible explanation of legislative intent that would have supported a different result; (2) legislative actions subsequent to *Hewitt* that undermined the basis upon which that decision was made; and (3) the potential for very harsh and unfair results if *Hewitt* is neither overruled<sup>118</sup> nor confined to its facts. Regrettably, Illinois courts have nonetheless continued to reward the nonmarital cohabitant who is shrewd enough to keep the property in

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113. See *supra* notes 42–46 and accompanying text (discussing the Tennessee Supreme Court's treatment of *D. Canale & Co.*).

114. See *supra* notes 44–46 and accompanying text (discussing the importance of the fact that the parties knew that they were not married).

115. 19 S.W.3d 757 (Tenn. 2000).

116. *Martin*, 19 S.W.3d at 761 (Tenn. 2000); see also *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991) (inferring existence of a partnership from the circumstances and allowing distribution of assets to a domestic partner).

117. See *Martin*, 19 S.W.3d at 759 (“Delores Coleman did not work outside the home. Robert Coleman, an engineer, was the family's sole provider.”).

118. Thus, the Illinois Supreme Court might take the opportunity to overrule the *Hewitt* decision in light of subsequent legislative actions and cases that have undermined the decision. Cf. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“[W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings . . . .”) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

his own name.<sup>119</sup>

In *Ayala v. Fox*,<sup>120</sup> Lawrence Fox proposed to the plaintiff “that they jointly pay for the construction of a single-family home,”<sup>121</sup> “promis[ing] plaintiff that title to the property would be transferred to their names as joint tenants with the right of survivorship and that plaintiff Ayala would receive one-half of the equity of the house in the event that they stopped residing together.”<sup>122</sup> However, “Fox failed to transfer the title into joint tenancy and failed to pay plaintiff her half of the equity in the property.”<sup>123</sup> Notwithstanding the clear agreement and plaintiff’s actions supporting the existence of that agreement,<sup>124</sup> the court denied recovery, suggesting that plaintiff was “seeking recovery based on rights closely resembling those arising from a conventional marriage, namely, an equitable interest in the ‘marital’ residence.”<sup>125</sup> The court feared that if it were to uphold the plaintiff’s rights, it “would, in effect, be granting to an unmarried cohabitant substantially the same marital rights as those which married persons enjoy.”<sup>126</sup>

The *Ayala* court’s reasoning is unpersuasive. Merely because the plaintiff was seeking an equitable remedy to enforce a promise to share title in property does not somehow imply that the plaintiff was seeking to have the parties treated as if they had married. Had they shared living quarters but not had a sexual relationship, the court presumably would have enforced the agreement, notwithstanding that it would thereby have given an equitable interest in the common residence. The *Ayala* decision rewarded deception and unfair dealing and can hardly be thought to have implemented good public policy.

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119. See, e.g., *In re Estate of Hall*, 707 N.E.2d 201, 205–06 (Ill. App. Ct. 1998) (discussing *Hewitt* with approval when denying claim of same-sex partner to survivor benefits).

120. 564 N.E.2d 920 (Ill. App. Ct. 1990).

121. *Id.* at 920.

122. *Id.*

123. *Id.*

124. See *id.* As stated by the court:

In reliance on Fox’s promises, plaintiff obligated herself to pay a \$48,000 mortgage, which was recorded on May 16, 1978. . . . From September 1978 to October 1988, plaintiff and Fox lived in the house and jointly contributed to the mortgage payments. From 1978 to 1981, Fox was unemployed, and, consequently, plaintiff paid the majority of the mortgage payments, taxes, and insurance during that period.

*Id.*

125. *Id.* at 922.

126. *Id.*

## IV. THE CONTRACT PARADIGM

Some states have distributed the assets acquired during a non-marital relationship in light of contract principles. While this is preferable to the policy suggested by the *Hewitt* court, this approach nonetheless has drawbacks which the ALI proposal avoids, since the difficulties in establishing the parties' intentions may militate in favor of modifying the presumptions usually employed in the contract paradigm.<sup>127</sup>

*A. The Express or Implied Contract Model of Relationships*

States use a variety of doctrines to avoid unfair results when nonmarital relationships end. Some states make use of contract principles to govern allocation of the partnership resources, whether the agreements have been express or merely implied.<sup>128</sup> Others make use of equitable doctrines like unjust enrichment to assure a fair allocation of goods acquired during the relationship.<sup>129</sup>

In *Shuraleff v. Donnelly*,<sup>130</sup> an Oregon case, the parties separated after having lived together for fourteen years.<sup>131</sup> The court had to decide how the parties' property should be divided, which depended on the appropriate characterization of the parties' relationship.<sup>132</sup>

The parties owned farmland on which they had planted holly for eventual sale. The plaintiff, Shuraleff, argued that she and her partner

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127. For reasons that the contract paradigm is inappropriate because it mischaracterizes the relationship at issue, *see infra* notes 197–211 and accompanying text.

128. See *Wilcox v. Trautz*, where the court stated:

These financial and property arrangements stem from a relationship that involves sexual cohabitation, but, in creating them, the parties are principally motivated by an intention to hold, or dispose of, property in a mutually acceptable way in order to manage day-to-day matters and to avoid litigation when the relationship ends. Such financial planning is enforceable according to the usual rules of contract.

693 N.E.2d 141, 146 (Mass. 1998).

129. See *Suggs v. Norris*, where the court stated:

We now make clear and adopt the rule that agreements regarding the finances and property of an unmarried but cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements. Moreover, where appropriate, the equitable remedies of constructive and resulting trusts should be available as should recovery under a quasi-contractual theory on *quantum meruit*.

364 S.E.2d 159, 162 (N.C. Ct. App. 1988).

130. 817 P.2d 764 (Or. Ct. App. 1991).

131. *See id.* at 765.

132. *See id.*

had merely had a “‘business’ relationship”<sup>133</sup> and that “the only property subject to distribution [was] the real property held in joint names.”<sup>134</sup> Notwithstanding that each had business skills that had been contributed to the business (she in investment and management and he in building and maintenance<sup>135</sup>), the court rejected the contention that the couple had had a pure business relationship.<sup>136</sup> After noting that some of the properties acquired during the relationship “were in the names of the parties as ‘husband and wife,’”<sup>137</sup> that the defendant, Donnelly, was listed as a beneficiary of Shuraleff’s Public Employees Retirement System account,<sup>138</sup> and that “neither party had assigned a value to the other’s labor”<sup>139</sup> in their business, the court concluded that their relationship had been a “domestic one”<sup>140</sup> and held that an equitable result could only be achieved “by including assets held in each party’s name alone.”<sup>141</sup>

In *Shuraleff*, the plaintiff had put some of the assets in her own name and had instructed their accountant not to discuss these matters with Donnelly.<sup>142</sup> The plaintiff thereby indicated her intent not to have these assets jointly owned.<sup>143</sup> Although the court accepted that plaintiff did not intend that these assets be jointly held, it noted that “a mechanistic application . . . regarding ‘intent’ would reward

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133. *Id.* at 766.

134. *Id.*

135. The court explained why it refused to accept that the couple had only had a business relationship:

Despite plaintiff’s attempt to characterize the relationship here as only a “business” one, it was a domestic one. The parties had an intimate relationship and lived together for 14 years. Although plaintiff claimed that she and defendant strictly accounted each month for individual expenses, the evidence shows that, over the years, accounts were often muddled with both parties making trade-offs. Furthermore, in this so-called “business” relationship, neither party assigned a value to the other’s labor. Plaintiff’s strengths were primarily in investment and management. Defendant used his physical skills and knowledge of construction to construct the homes and the bridge and to improve the properties.

*Id.* at 767.

136. *See id.*

137. *Id.* at 765.

138. *See id.* at 766 n.2. She was “a teacher and consultant in the Eugene public school system.” *Id.* at 765.

139. *Id.* at 767.

140. *Id.*

141. *Id.* at 768.

142. *See id.*

143. *See id.*

plaintiff, despite her failure to make it clear to defendant, in the face of his belief in their common goal, that she was subtracting her investments from that endeavor.”<sup>144</sup> Rather than refuse to include the separate property in the distribution because the parties did not have a common intent with respect to which properties would be jointly owned, the *Shuraleff* court instead promoted equity by including the separate property within the distribution. Here, fairness required going beyond the terms of the parties’ agreement, and use of a formal contract model would have produced inequitable results.<sup>145</sup>

Frequently, when nonmarital partners break up, the partners do not share the same understanding of what they had agreed to do, and the less sophisticated or the more trusting partner ends up with a much smaller share of the collective property than that party thought was his or her due. Certainly, it will be difficult to determine which, if either, of the parties correctly remembers the agreement if nothing was written down—the oral agreement may have been made long ago or may have been amended when the circumstances changed during the course of the relationship.<sup>146</sup> Matters may be even less clear if the agreement is implied from the circumstances. Thus, there may be a variety of circumstances in which the content or, perhaps, even the existence of the contract cannot be established.

Even if the plaintiff cannot establish that an oral contract existed or, perhaps, all of the terms of that contract, a separate question is how, if at all, the assets should be distributed when the relationship ends. As an Indiana appellate court suggested, failure to distribute the assets might “do more to discredit the legal system in the eyes of those who learn of the facts of the case than to strengthen the institution of marriage or the moral fiber of our society.”<sup>147</sup>

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144. *Id.*

145. Had Donnelly in fact understood and agreed to this distribution of property recommended by Shuraleff, the ALI proposal would have permitted the inequitable distribution. See *supra* note 71 (discussing contracts between nonmarital partners).

146. Compare *Kozlowski v. Kozlowski*, where the court reasoned:

Whether we designate the agreement reached by the parties in 1968 to be express, as we do here, or implied is of no legal consequence. The only difference is in the nature of the proof of the agreement. Parties entering this type of relationship usually do not record their understanding in specific legalese. Rather, as here, the terms of their agreement are to be found in their respective versions of the agreement, and their acts and conduct in the light of the subject matter and the surrounding circumstances.

403 A.2d 902, 906 (N.J. 1979).

147. *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1330 (Ind. Ct. App. 1980).

Given the possible difficulties involved in ascertaining the intents of the parties, states might adopt any one of a number of ways of handling the distribution of assets when a nonmarital relationship ends. They might: (1) refuse to effect a distribution even if the parties had made an express agreement to do so,<sup>148</sup> (2) require that the agreement be in writing,<sup>149</sup> (3) enforce express but not implied contracts,<sup>150</sup> (4) enforce express and implied contracts but eschew equitable remedies like constructive trust or quantum meruit,<sup>151</sup> (5) enforce express and implied contracts and employ other equitable remedies,<sup>152</sup> or (6) “distribute cohabitants’ property as they do in divorce cases.”<sup>153</sup> Arguably, the difficulty in ascertaining intent militates in favor of shifting the ownership presumptions, precisely because there is such potential for confusion and unfairness. It simply cannot be thought good public policy to reward individuals for failing to fulfill their promises or for misrepresenting to their partners how the assets are characterized.<sup>154</sup> As the Arizona Supreme Court explained, “The rule of non-enforcement . . . favors the strongest, the most unscrupulous, the one better prepared to take advantage or

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148. See *supra* notes 91–101 and accompanying text (discussing the *Hewitt* approach).

149. See *supra* note 98 (Minnesota statute requiring that agreement be in writing).

150. See *Carnes v. Sheldon*, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981) (“[W]e are unwilling to extend equitable principles to the extent plaintiff would have us do so, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature.”).

151. See *Wilcox v. Trautz*, 693 N.E.2d 141, 145 (Mass. 1998) (Massachusetts does “not recognize common law marriage, do[es] not extend to unmarried couples the rights possessed by married couples who divorce, and reject[s] equitable remedies that might have the effect of dividing property between unmarried parties.”).

152. In *Watts v. Watts*, the court noted:

Courts traditionally have settled contract and property disputes between unmarried persons, some of whom have cohabited. Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal and does not automatically preclude one of the parties from seeking judicial relief, such as statutory or common law partition, damages for breach of express or implied contract, constructive trust and quantum meruit where the party alleges, and later proves, facts supporting the legal theory. The issue for the court in each case is whether the complaining party has set forth any legally cognizable claim.

405 N.W.2d 303, 306 (Wis. 1987).

153. Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1267 (1998); see also MARY ANN GLENDON, *THE NEW FAMILY & THE NEW PROPERTY* 281 (1981).

154. But see *supra* notes 99–109 and accompanying text (discussing the reasons that the *Hewitt* court found convincing as a matter of policy for not enforcing such agreements).

the more cunning of the cohabitants . . . [which is not] equitable or good public policy.”<sup>155</sup>

### *B. Shifting the Presumptions*

The ALI recommendation would handle a number of the cases discussed here rather well. When there is a meeting of the minds that the parties do not want the distribution of assets to follow the ALI recommendation, they can memorialize that intention in writing and thereby avoid the ALI default rules. Absent an express or implied agreement, however, the ALI asset distribution method would apply.<sup>156</sup> The proposed system “shifts the burden of showing a contract to the party who wishes to avoid such fairness-based remedies, rather than putting it on the one who seeks to claim them.”<sup>157</sup>

The ALI recommendation involves a compromise. Respecting the intent of the parties is viewed as important. However, given the difficulty in ascertaining the intent of the parties and the great potential for unfairness absent a shift in presumption, the ALI recommendation is sensible and, arguably, one of the best approaches to a problem with no easy or straightforward solution.

### *C. The Effect of Adopting the ALI Compromise*

The adoption of the ALI proposal might at first seem likely to induce some individuals to choose nonmarital cohabitation over marriage. Yet, on closer examination, the ALI recommendation cannot plausibly be thought to be intended or likely to “encourage parties to enter a nonmarital relationship as an alternative to marriage.”<sup>158</sup> Indeed, as the ALI suggests, “to the extent that some individuals avoid marriage in order to avoid responsibilities to a partner, [the modification] . . . reduces the incentive to avoid marriage because it diminishes the effectiveness of the strategy.”<sup>159</sup> Further, because “informal domestic relationships are not generally recognized by third parties, including governments, which often make

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155. Cook v. Cook, 691 P.2d 664, 670 (Ariz. 1984).

156. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.02 (adoption of the *Principles* would put in place a “set of default rules that apply to domestic partners who do not provide explicitly for a different set of rules.”).

157. *Id.* § 6.03 cmt. b.

158. *Id.* § 6.02.

159. *Id.*

marriage advantageous under various regulatory and benefit schemes,”<sup>160</sup> the state incentives to marry are still in place. Thus, in a relationship in which one of the partners has a stronger economic position than the other, the ALI recommendation makes marriage at least as attractive as non-marriage for both parties: the economically weaker party would derive benefits from third parties, for example, by becoming eligible to receive benefits from the state, and the economically stronger party would have lost some of her ability to protect assets from the other party and thus would no longer have the same incentives not to marry. Just as would be true were they to have married, the parties would have to agree to opt out in order for the presumptions regarding ownership of assets to be changed.<sup>161</sup>

In *Western States Construction, Inc. v. Michoff*,<sup>162</sup> Justice Springer argued in dissent that “[p]ermitt[ing] community property to be created by cohabitation or contract is a disincentive to marriage; it gives unmarried persons the rights of community property without imposing upon them the mutual assumption of duties that is attendant to the marital status.”<sup>163</sup> He was objecting to the state’s willingness to allow nonmarital cohabitants to contract to have their property treated as community property because unmarried persons would then “be in a position to *choose* whether or not they wish to be governed by community property law; whereas, community ownership is thrust upon married persons at the time of their marriage unless they agree in writing not to hold property as community.”<sup>164</sup> He suggested that by affording nonmarital cohabitants this option, “married couples will automatically be controlled by community property laws unless they decide to ‘opt out’; whereas unmarried couples will now have the odd privilege of being able to choose (impliedly or expressly, orally or in writing) whether they wish to hold property regularly or as ‘community property by analogy.’”<sup>165</sup> Justice Springer worried that the difference in how the law treated marital versus

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160. *Id.*

161. *See id.* § 6.03 cmt. b (“As in marriage, in the ordinary case the law should provide remedies at the dissolution of a domestic relationship that will ensure an equitable allocation of accumulated property and of the financial losses arising from the termination of the relationship.”); *see also id.* § 6.02 cmt. a (stating that couples may avoid the consequences of the ALI recommendations by an agreement to the contrary).

162. 840 P.2d 1220 (Nev. 1992).

163. *Id.* at 1229 (Springer, J., dissenting).

164. *Id.*

165. *Id.*

nonmarital couples would induce some couples not to marry.<sup>166</sup>

The ALI recommendation removes the difficulty highlighted by Justice Springer. Given that many states permit nonmarital couples to make contracts governing the disposition of property acquired during the relationship,<sup>167</sup> adoption of the ALI recommendation would remove the advantage Justice Springer finds so objectionable since under the ALI recommendation both marital and nonmarital couples would have to opt out to avoid the imposition of marital or community property laws. Thus, one of the incentives in current law not to marry would be removed by adoption of the ALI recommendation.

#### V. THE POTENTIAL FOR CONCEPTUAL CONFUSION

A different criticism of the ALI recommendation is that states adopting it will promote conceptual confusion regarding what counts as a marriage or a family. Yet, states already recognize nonmarital relationships without promoting confusion. Indeed, given the contradictory justifications which have been offered to explain why these relationships should not be recognized, the failure to recognize these relationships is what promotes the most confusion.

##### *A. Existing Practices*

The ALI recommendation is hardly as novel as might originally be thought. States already recognize the existence of nonmarital cohabitant relationships and do not confuse such relationships with marriages. The wisdom of refusing to extend more benefits to those in nonmarital cohabitant relationships<sup>168</sup> raises a separate question that will not be discussed here, but it is quite clear that the recognition of such relationships by the courts has not resulted in conceptual conflation or confusion. Indeed, even when nonmarital partners have received third-party benefits,<sup>169</sup> they have received such benefits out of equity rather than because the court could not differentiate

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166. *See id.*

167. *See* Leonard Wagner, Note, *Recognizing Contract and Property Rights of Unmarried Cohabitants in Wisconsin: Watts v. Watts*, 1988 WIS. L. REV. 1093, 1097–1102 (discussing practices in different states).

168. Especially for same-sex couples, who do not have the option to marry.

169. *See supra* note 52 (discussing awarding state benefits to nonmarital partners).

between marital and nonmarital partners.<sup>170</sup>

A related concern is that adoption of the ALI recommendation will somehow increase confusion about what constitutes a “family.” This concern is unfounded precisely because “family” is already a rather inclusive term.<sup>171</sup> For example, definitions of family have been at issue in zoning cases, and individuals with no romantic or blood relationships whatsoever have been defined as family.<sup>172</sup> Given the large variety of groups of individuals that have already been recognized in this country as constituting families,<sup>173</sup> including single-parent households, blended families, adoptive families, families involving same-sex partners and their children, and so forth,<sup>174</sup> adoption of the ALI recommendation will not change the understanding of the groups of individuals to which that term can refer.

### *B. Prostitution and Gratuitous Services*

Historically, courts have seemed the most confused when attempting to justify their refusal to recognize nonmarital relationships or their refusal to enforce agreements between nonmarital domestic partners. Courts sometimes refused to enforce such contracts because they viewed these contracts as cold-hearted agreements for payment for sexual services,<sup>175</sup> sometimes because such relationships

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170. Sometimes, nonmarital partners receive third-party benefits because of a specific legislative enactment. Even in that situation, however, the courts and the legislature do not confuse who is married and who is not. *See, e.g.*, *Crawford v. City of Chicago*, 710 N.E.2d 91, 98 (Ill. App. Ct. 1999) (“[N]othing in the DPO [Chicago’s Domestic Partners Ordinance] purports to create a marital status or marriage as those terms are commonly defined. Rather, the DPO addresses only health benefits extended to City employees and those residing with them.”).

171. *Cf. Katz, supra* note 153, at 1253 (“[F]amily law is the study of the establishment, supervision, and termination or reorganization of family and family-like relationships like husband and wife, parent and child, and unrelated persons living with each other in a committed relationship.”).

172. *See, e.g.*, *Carroll v. City of Miami Beach*, 198 So. 2d 643 (Fla. Dist. Ct. App. 1967) (nuns); *Robertson v. W. Baptist Hosp.*, 267 S.W.2d 395 (Ky. Ct. App. 1954) (nurses); *Borough of Glassboro v. Vallorosi*, 568 A.2d 888 (N.J. 1990) (students); *Missionaries of Our Lady of La Salette v. Vill. of Whitefish Bay*, 66 N.W.2d 627 (Wis. 1954) (priests).

173. *See Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”).

174. *See Martha Minow, All in the Family & in All Families: Membership, Loving and Owning*, 95 W. VA. L. REV. 275, 286 (1992/1993) (discussing various types of families).

175. Compare *Glasgo v. Glasgo*, where the court reasoned:

We believe that it ill behooves courts to categorize either the Hewitts’ or the Glas-

were viewed as involving love and a sense of duty and thus the services were presumed to have been performed gratuitously without expectation of payment,<sup>176</sup> and sometimes out of fear that the relationships would be viewed as indistinguishable from marriage if even only limited benefits were conferred.<sup>177</sup> Recently, courts have rejected that the cases before them involve meretricious or gratuitous services and have upheld the distribution of the assets acquired during the nonmarital relationship.<sup>178</sup>

The point here should not be misunderstood. Insofar as an agreement is construed as financial support in exchange for sexual services, that agreement will be deemed void as against public policy and hence unenforceable. As the Supreme Court of California made

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gos' relationships as "meretricious" or "illicit" in any sense of those terms. Such epithets should be reserved for cases in which they are deserved. There are still situations to which such terms apply, but this case is not one of them. Here the specific facts which might give rise to a description of a meretricious relationship are conspicuously absent: the parties had been married formerly, they sought to rear their children in a family setting, they conducted themselves for a significant period of time as a conventional American family, the wife showed concern for her own and her children's future economic security. All the parties failed to do to conform to societal norms of marital behavior was to complete the legal formalities. To apply the traditional rationale denying recovery to one party in cases where contracts are held to be void simply because illegal sexual relations are posited as consideration for the bargain is unfair, unjust, and unduly harsh. Such unnecessary results probably do more to discredit the legal system in the eyes of those who learn of the facts of the case than to strengthen the institution of marriage or the moral fiber of our society. To deny recovery to one party in such a relationship is in essence to unjustly enrich the other.

410 N.E.2d 1325, 1330 (Ind. Ct. App. 1980).

176. See *Roznowski v. Bozyk*, 251 N.W.2d 606 (Mich. Ct. App. 1977) ("Without proof of the expectations of the parties, the presumption of gratuity will overcome the usual contract implied by law to pay for what is accepted.") (citing *Weessies v. Van Dyke's Estate*, 123 N.W. 608, 610 (Mich. 1909)). *York v. Place* also explains:

[I]n the normal course of human affairs persons living together in a close relationship perform services for each other without expectation of payment. Payment in the usual sense is not expected because the parties mutually care for each other's needs. Also because services are performed out of a feeling of affection or a sense of obligation, not for payment.

544 P.2d 572, 574 (Or. 1975).

177. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979) ("In our judgment the fault in the appellate court holding in this case is that its practical effect is the reinstatement of common law marriage.").

178. Because these decisions did not involve third-party benefits, the courts have tended to reject the argument that the distribution would thereby make the relationship between nonmarital partners indistinguishable from marriage.

clear in *Marvin v. Marvin*,<sup>179</sup> “a contract between nonmarital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services.”<sup>180</sup> Yet, a contract between cohabitants need not be for meretricious sexual services, even if the contract is “expressly made in contemplation of a common living arrangement.”<sup>181</sup> For example, even where one of the parties works exclusively inside the home while the other party works outside of the home,<sup>182</sup> it would be inaccurate to claim that financial support was being offered solely for sexual services, since the individual working inside the home might perform a variety of tasks such as cooking, cleaning, and child-rearing that are quite distinct from the provision of sexual services<sup>183</sup> and that a paid employee would have to perform if the partner in question were unwilling or unable to do the work. Thus, the *Marvin* court suggests that “[a] promise to perform homemaking services is, of course, a lawful and adequate consideration for a contract—otherwise those engaged in domestic employment could not sue for their wages. . . .”<sup>184</sup>

Agreements between cohabitants that are not based on the provision of sexual services have been upheld whether or not the partners

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179. 557 P.2d 106 (Cal. 1976) (en banc).

180. *Id.* at 112; *see also* Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998) (A contract between unmarried cohabitants “is subject to the rules of contract law and is valid even if expressly made in contemplation of a common living arrangement, except to the extent that sexual services constitute the only, or dominant consideration for the agreement.”); Kinnison v. Kinnison, 627 P.2d 594, 595 (Wyo. 1981) (“Only when it is shown that such an agreement has meretricious sexual services as its consideration will the court deny enforcement as being against public policy.”).

181. *Marvin*, 557 P.2d at 114.

182. *See, for example, Carlson v. Olson*, where the court observed the nature of a non-marital couple’s relationship:

The appellant Oral Olson and the respondent Laura Carlson began to live together as husband and wife in October of 1955. At the time she was 22, and he was 31. They lived together for 21 years, raised a son to majority, and acquired a modest home and some personal property. They did not, however, ever legally marry, although they held themselves out to neighbors, friends, relatives, and the public as husband and wife. During the relationship she did not work outside the home.

256 N.W.2d 249, 250 (Minn. 1977).

183. *See* Carroll v. Lee, 712 P.2d 923, 927 (Ariz. 1986) (en banc) (“Paul received the cooking, cleaning and household chores he bargained for while Judy received monetary support. Together they were able to acquire property through their joint efforts. Clearly Judy’s homemaking services can be valued and constituted adequate consideration for the couple’s implied agreement.”).

184. *Marvin*, 557 P.2d at 113 n.5 (citing Taylor v. Taylor, 152 P.2d 480, 484 (Cal. Ct. App. 1954)).

were of the same sex.<sup>185</sup> However, where courts find the services themselves to be meretricious, they have refused to enforce the agreements. Thus, for example, in *Taylor v. Fields*,<sup>186</sup> the court held that the provisions of sexual services was “an inseparable part of the consideration for the agreement and render[ed] it unenforceable in its entirety.”<sup>187</sup>

Courts should be commended for their willingness to enforce contracts that are not solely based on the provision of meretricious services. In many nonmarital cohabitation cases, the couple pooled financial assets or each partner contributed to the couple’s financial well-being by investing time, energy, and talents in a mutual business or undertaking.<sup>188</sup> The agreement in these cases obviously involves

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185. See *Cook v. Cook*, 691 P.2d 664 (Ariz. 1984) (agreement between members of different-sex couple remanded to determine if partnership existed); *Bramlett v. Selman*, 597 S.W.2d 80 (Ark. 1980) (agreement between members of same-sex couple upheld); *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988) (agreement between members of same-sex couple upheld); *Silver v. Starrett*, 674 N.Y.S.2d 915 (Sup. Ct. 1998) (agreement between members of same-sex couple upheld); *Kinnison*, 627 P.2d at 595 (agreement between members of different-sex couple upheld); see also *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (en banc) (“We hold income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage.”). But see *Vasquez v. Hawthorne*, 994 P.2d 240 (Wash. Ct. App. 2000) (holding that members of same-sex couple cannot have meretricious relationship because they cannot marry), review granted 11 P.3d 825 (Wash. 2000).

186. 224 Cal. Rptr. 186 (Ct. App. 1986).

187. *Id.* at 193. A California appellate court reached a similar conclusion in *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Ct. App. 1981) (Plaintiff’s acting as the decedent’s lover “form[ed] an inseparable part of the consideration for the agreement and render[ed] it unenforceable in its entirety.”). A separate question is whether the court was correct that sexual services were an inseparable part of the agreement. See, e.g., Kristin Bullock, Comment, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029, 1046 (1992) (criticizing the *D. Canale & Co.* court for “refus[ing] to sever any illegality conveyed by the terms ‘lover’ and ‘cohabiting mate’ from Randal’s promises to be James’s housekeeper and cook”).

188. Consider *Whorton*, where the court discussed other contributions to a nonmarital relationship:

When the parties began living together in 1977, they orally agreed that Whorton’s exclusive, full-time occupation was to be Dillingham’s chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and to appear on his behalf when requested. Whorton was to render labor, skills, and personal services for the benefit of Dillingham’s business and investment endeavors. Additionally, Whorton was to be Dillingham’s constant companion, confidant, traveling and social companion, and lover, to terminate his schooling upon obtaining his Associate in Arts degree, and to make no investment without first consulting Dillingham.

248 Cal. Rptr. at 406–07.

more than meretricious services.

*C. Another Weakness in the Contract Paradigm*

The contract paradigm in which these relationships are viewed as fee-for-service is problematic even where the court recognizes that the “service” is not simply sexual. The members of the partnership likely do not view their relationship in terms of an agreement for the provision of services in exchange for pay. For example, rather than envisioning one partner’s earning as tied to his or her cleaning the toilets or washing the dishes, the parties likely view their relationship as one in which each would help and support the other without that help and support being tied to the provision of particular services.

Consider *In re Estate of Alexander (Alexander v. Alexander)*<sup>189</sup> in which the Mississippi Supreme Court had to decide whether a woman who had lived with the decedent for thirty-three years<sup>190</sup> was entitled to any benefits. Margie Alexander “sought an ‘equitable lien entitling her to full use and occupancy’ of the residence of Sam Alexander, deceased, for as long as Margie live[d] or occupie[d] the property.”<sup>191</sup> Although she and the deceased had lived together as if they were married,<sup>192</sup> they had never in fact married because she was still married to someone else.<sup>193</sup> She had never divorced because she had not known where her husband was and had thought that she could not divorce him without knowing his whereabouts.<sup>194</sup>

The court noted “the lack of evidence that the deceased, Sam Alexander, knew of any expectation of Margie to be paid when he accepted her services . . . [and the lack] of evidence that he accepted her services under circumstances which indicate to a reasonable man that her services were offered with the expectation of compensation.”<sup>195</sup> Because there had been no agreement or understanding that there would be payment for the services that had been provided for more than three decades, the court denied recovery, notwith-

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189. 445 So. 2d 836 (Miss. 1984).

190. *See id.* at 837.

191. *Id.*

192. *See id.*

193. *See id.*

194. *See id.* at 842 (Lee, J., dissenting) (“[H]er understanding was that *she could not get a divorce because she did not know the whereabouts of George.*”).

195. *Id.* at 838.

standing the sympathetic nature of her claim.<sup>196</sup>

In dissent, Justice Lee argued that requiring evidence of an agreement for payment was inappropriate, stating that “the assertion that there was no evidence that Margie expected to be paid for her services or that Sam expected to pay her . . . amount[s] to nothing more than a straw man set up for the purpose of knocking down without having to give a true assessment of the couple’s relationship.”<sup>197</sup> Indeed, Justice Lee argued that expectation of payment would have been entirely inappropriate<sup>198</sup> since “Margie and Sam clearly considered themselves man and wife, sharing equally in both their assets and liabilities.”<sup>199</sup> Thus, precisely because Sam and Margie had a domestic partnership rather than a business relationship, use of the contract model had a great potential for yielding inequitable results.

Various courts have suggested that it is simply inaccurate to infer that cohabitation itself establishes an express<sup>200</sup> or implied<sup>201</sup> agreement to distribute the assets acquired during the relationship in a particular way.<sup>202</sup> Yet, a separate question is whether the nonexis-

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196. *See id.* at 840 (“Margie’s claim naturally arouses our sympathy, but absent any evidence of ‘an implied obligation or contract’ the record before us fails to establish any proper basis for relief to her.”).

197. *Id.* at 842 (Lee, J., dissenting).

198. *See id.* (“Of course there was no expectation of payment for services!”).

199. *Id.*

200. *See Aehegma v. Aehegma*, 797 P.2d 74, 79 (Haw. Ct. App. 1990) (citing *Boland v. Catalano*, 521 A.2d 142, 145 (Conn. 1987)) (“Cohabitation, no matter for how long, does not by itself prove the existence of an express agreement for post-cohabitation rehabilitative support or an equitable division of separate property acquired or improved during cohabitation.”).

201. *See id.* (citing *Boland*, 521 A.2d at 145) (“Cohabitation, no matter for how long, does not by itself prove the existence of a contract implied-in-fact.”); *see also Boland*, 521 A.2d at 145 (“We agree with the trial referee that cohabitation alone does not create any contractual relationship or, unlike marriage, impose other legal duties upon the parties.”).

202. *See Martin v. Coleman*, 19 S.W.3d 757, 761–62 (Tenn. 2000) (rejecting distribution of retirement benefits to nonmarital cohabitant because “[i]n essence, we would be required to hold that unmarried couples may create an implied partnership simply by their continued cohabitation. We decline to do so.”).

For contrary analysis, see *W. States Const., Inc. v. Michoff*, where the court stated:

There is no evidence that the parties expressly agreed to hold their property as though they were married. The district court erred in so finding. Nevertheless, we conclude that there is substantial evidence to support the district court’s finding that Lois and Max impliedly agreed to hold their property as though they were married. In addition to living together and holding themselves out to be a married couple, this evidence included the parties filing federal tax returns as husband and wife, the

tence of such an agreement should preclude the distribution of assets acquired during the relationship. As Justice Lee suggests and as some courts have recognized, use of the contract model may be inappropriate in many domestic partnership cases precisely because it implicitly misrepresents the character of the relationship. The relationship does not involve an agreement to pay for the provision of particular services but, instead, is a relationship of mutual support based on love and affection. By mischaracterizing the relationship as a contractual one for the provision of goods and services, a court may unfairly preclude distribution of the assets and instead allow one of the parties to be unjustly enriched.<sup>203</sup>

#### *D. Property and Support*

One of the benefits of recognizing that these relationships are not simply fee-for-service agreements is conceptual since doing so more accurately reflects the nature of the relationship. Another benefit is practical in that courts will be less reluctant to order support in certain kinds of deserving cases. The ALI proposal covers both the division of property and the imposition of support obligations, but doing the latter seems especially difficult to justify if one uses the fee-for-service paradigm.

According to the ALI proposal, “property claims and support obligations presumptively arise between persons who qualify as domestic partners, as they do between legal spouses, without inquiry into each couple’s particular arrangements, except as the presumption is itself overcome by contract.”<sup>204</sup> The property claims of domestic and marital partners are treated similarly in that, as a general

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parties designating that they held the Western States stock as community property in their Subchapter S election, and Max’s insistence that Lois sign a consent of spouse to effectuate a partnership he wanted to enter.

840 P.2d 1220, 1224–25 (Nev. 1992).

203. The *Lawlis* court explains:

Thus, the protestations of Thompson that there was no understanding or promise in respect to the moneys transferred to him is, under the theory of unjust enrichment, irrelevant. Thompson asserts that only by agreement can there be a duty to make restitution where the parties are cohabiting in a nonmarital relationship. As the above decisions demonstrate, the making of an agreement is a concept entirely foreign to the quasi-contract concept of unjust enrichment and restitution. No agreement is needed.

*Lawlis v. Thompson*, 405 N.W.2d 317, 320 (Wis. 1987).

204. PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03 cmt. b.

matter, “property is *domestic-partnership property* if it would be marital property . . . had the domestic partners been married to one another during the *domestic partnership period*.”<sup>205</sup> While there is an exception to this provision,<sup>206</sup> the recommendation basically subjects property acquired during a domestic partnership to potential distribution in those circumstances in which property acquired during a marriage would be so distributed. This part of the proposal reflects the current practice of some states.<sup>207</sup>

The ALI recommendation regarding the treatment of property will likely meet less resistance than its recommendation regarding the treatment of support obligations since courts have manifested an unwillingness to order alimony for a nonmarital cohabitant absent explicit legislative authorization.<sup>208</sup> The Mississippi Supreme Court explained in *Chrismond v. Chrismond*<sup>209</sup> that “permanent alimony can only be allowed where the relation of husband and wife has existed, but this rule does not preclude an equitable division of property where there is a judicial separation of the parties on account of the invalidity of the marriage contract.”<sup>210</sup> Thus, courts might be less open to ordering support than to distributing property when nonmarital partners separate, although some courts, including the Mississippi Supreme Court, have found that requiring periodic payments not classified as alimony to former nonmarital partners is permissible under certain circumstances.<sup>211</sup>

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205. *Id.* § 6.04(1).

206. *See id.* § 6.04(3) (“Property that would be recharacterized as marital property under § 4.18 if the parties had been married, is not domestic-partnership property.”).

Compare *Connell v. Francisco*, where the court held:

Therefore, property owned by one of the parties prior to the meretricious relationship and property acquired during the meretricious relationship by gift, bequest, devise, or descent with the rents, issues and profits thereof, is not before the court for division. All other property acquired during the relationship would be presumed to be owned by both of the parties.

898 P.2d 831, 836–37 (Wash. 1995) (en banc).

207. *See Connell*, 898 P.2d at 836 (“We hold income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties. This presumption can be rebutted.”).

208. *See, e.g., Pickens v. Pickens*, 490 So. 2d 872, 873 (Miss. 1986) (“Because we afford common law marriages no recognition, there is in our law no authority to award alimony in any such [nonmarital] setting.”).

209. 52 So. 2d 624 (Miss. 1951).

210. *Id.* at 629 (citing *Fuller v. Fuller*, 7 P. 241 (Kan. 1885)).

211. In *Taylor v. Taylor*, the Mississippi Supreme Court upheld an award of \$75 per

Ironically, the refusal to impose support payments may result from an inaccurate construction of legislative intent. Presumably, when a legislature suggests that a court may order alimony for marital spouses, the legislature is not suggesting that a contract in which one nonmarital party promises to make periodic payments to another party would be void because it violates public policy. Rather, the legislature is more plausibly interpreted to be taking one of two approaches. Either the legislature simply is not taking a position on the appropriateness of ordering such support when nonmarital partners separate, or the legislature feels that ordering support is inappropriate absent some previous agreement to that effect.

Consider *Crowe v. DeGioia*,<sup>212</sup> in which the plaintiff alleged that the defendant had promised her that “he would take care of her and support her for the rest of her life, and that he would share with her his various assets.”<sup>213</sup> The New Jersey Supreme Court held that the plaintiff was not entitled to alimony<sup>214</sup> because “the power of a court to award alimony is purely statutory, and alimony may be awarded only in a matrimonial action for divorce or nullity,”<sup>215</sup> but the plaintiff was nonetheless entitled to support.<sup>216</sup> A contractual agreement to support someone for his or her entire life,<sup>217</sup> even when enforced,

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month for thirty-six months as support, as distinguished from alimony. *See* 17 So. 2d 422, 422 (Miss. 1975); *see also id.* at 422–23 (affirming previous holding that there is no foundation for alimony without a valid marriage).

212. 447 A.2d 173 (N.J. 1982).

213. *Id.* at 175.

In *Thomas v. LaRosa*, the nonmarital partners divided the family responsibilities in a similar way:

According to the complaint, in August, 1980, the parties became acquainted while both were living in Clarksburg, West Virginia. Thereafter, during the Spring of 1981, appellant and appellee agreed that they would hold themselves out and act as husband and wife. It was further agreed that appellant would perform valuable services for appellee, including being his companion, housekeeper, confidante and business helper. In consideration of the valuable services and obligations undertaken and performed by appellant, appellee promised and agreed to provide financial security for appellant for her lifetime and to educate appellant’s children. Appellee carried out such agreement for approximately eight years, but now has breached and reneged.

400 S.E.2d 809, 810 (W. Va. 1990).

214. *See Crowe*, 447 A.2d at 176.

215. *Id.* (citing *O’Loughlin v. O’Loughlin*, 96 A.2d 410 (N.J. 1953)).

216. *See id.* at 178.

217. The *Whorton* court explained:

In consideration of Whorton’s promises, Dillingham was to give him a one-half equity interest in all real estate acquired in their joint names, and in all property there-

is not alimony and thus should not be exclusively for marital partners.

Basic contract law justifies a court's ordering support payments where one of the nonmarital partners had explicitly promised the other that those payments would be made.<sup>218</sup> The ALI recommenda-

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after acquired by Dillingham. Dillingham agreed to financially support Whorton for life, and to open bank accounts, maintain a positive balance in those accounts, grant Whorton invasionary powers to savings accounts held in Dillingham's name, and permit Whorton to charge on Dillingham's personal accounts. Dillingham was also to engage in a homosexual relationship with Whorton. Importantly, for the purpose of our analysis, the parties specifically agreed that any portion of the agreement found to be legally unenforceable was severable and the balance of the provisions would remain in full force and effect.

Whorton v. Dillingham, 248 Cal. Rptr. 405, 407 (Ct. App. 1988).

218. There is some question as to whether the statute of frauds applies in these kinds of situations. In some states, an agreement to take care of another individual for the rest of his or her life will not be enforceable unless reduced to a writing. For example, the Alaskan statute provides:

In the following cases and under the following conditions an agreement, promise, or undertaking is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or by an agent of that party:

- (1) an agreement that by its terms is not to be performed within a year from the making of it;
- (2) an agreement the performance of which is not to be completed by the end of a lifetime . . . .

ALASKA STAT. § 09.25.010 (Michie 2000); *see also* Laboulais v. Cohade, 236 N.Y.S.2d 166, 167 (Sup. Ct. 1962) (“plaintiff alleges . . . that defendants agreed to provide a home and to furnish care for plaintiff for the rest of his life and to tend him in his old age.”); *id.* at 168 (“Since performance of the oral contract was not to be completed before the end of a lifetime, it was void under the Statute of Frauds.”). However, exceptions to the completed-before-the-end-of-a-lifetime rule exist. The Alaska statute further provides:

A contract, promise, or agreement that is subject to [ALASKA STAT. § 09.25.010], that does not satisfy the requirements of that section, but that is otherwise valid is enforceable if

- (1) there has been full performance on one side accepted by the other in accordance with the contract; . . .
- (4) the party against whom enforcement is sought admits, voluntarily or involuntarily, in pleadings or at any other stage of this or any other action or proceeding the making of an agreement.

ALASKA STAT. § 09.25.020 (Michie 2000). *See also* *Hall v. Hall*, where the court stated: Exceptions “taking the case out of the statute” have traditionally been recognized as to all statute of frauds provisions. Thus, a substantial change of position in reliance on an oral agreement will estop reliance on the statute (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 325, pp. 305–06), and an actual transfer of realty constituting partial performance of the oral agreement will satisfy the proof element otherwise reflected in the requirement of a writing. (*Id.* at §§ 318–19, pp. 299–301.)

271 Cal. Rptr. 773, 777 (Ct. App. 1990); *Brown v. Phillips*, 330 So. 2d 510, 512 (Fla. Dist. Ct. App. 1976) (“Lastly, we point out that appellees have raised the statute of frauds as a basis

tion goes farther than that, however. The ALI is recommending that domestic partners receive support in some cases in which either (1) partner support might be inferred to have been part of the bargain, or (2) periodic payments might be a distribution of property rather than an award of spousal support.

A few points are in order about this recommendation. First, adoption of the ALI proposal might induce some to marry who otherwise would not. For example, some people might refuse to marry because they thought that in the event of a break-up they would be less likely to be ordered to pay support were they merely to have lived with their partners than if they had married them. By removing this incentive not to marry, the ALI support proposal may in fact promote marriage.

Second, a court might adopt the ALI recommendation with respect to the distribution of property but wait for the legislature to authorize the court's ordering support for a nonmarital partner.<sup>219</sup> The court might justify this position by suggesting that because the power to award partner or spousal support is purely statutory,<sup>220</sup> this matter is particularly appropriate to be left to the state legislature.<sup>221</sup>

Third, precisely because a court's refusal to order support until authorized by the legislature to do so might produce inequitable results and might, as a public policy matter, provide a disincentive to marry, courts might decide not to wait for the legislature to act. The courts might instead decide to order distributions of property and nonmarital partner support as well, reasoning that the legislature's failure to address the provision did not amount to a legislative prohi-

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for affirmance. The performance on the part of appellant by execution of the deed takes this transaction out of the statute of frauds."). Of course, in some states, such oral agreements will not be subject to the statute of frauds as long as they could be completed within a year. *See, e.g.,* *Young v. Ward*, 917 S.W.2d 506, 510 (Tex. Ct. App. 1996) ("[A]greements to last during the lifetime of one of the parties would also not require a writing because the party upon whose life the duration of the contract is measured could die within a year of the agreement's making."); *Cannon v. Harris*, 166 P.2d 998, 999 (Kan. 1946) ("[T]he parol agreement whereby Robinson agreed to permit Mrs. Cannon to occupy the real estate as long as she lived was capable of being fully performed within one year and was not in violation of the statute of frauds.").

219. *See* *Davis v. Davis*, 643 So. 2d 931, 932 (Miss. 1994) ("[T]he endorsement of any form of 'palimony' is a task for the legislature and not this court . . .").

220. *See* *Crowe v. DeGioia*, 447 A.2d 173, 176 (N.J. 1982) (citing *O'Loughlin v. O'Loughlin*, 96 A.2d 410 (N.J. 1953)) ("The power of a court to award alimony is purely statutory, and alimony may be awarded only in a matrimonial action for divorce or nullity.").

221. *See* *Davis*, 643 So. 2d at 932.

bition of support orders for nonmarital partners but merely a legislative decision not to express a view with respect to the appropriateness of such orders.

### *E. Adulterous Relationships*

The ALI recommendation that the domestic partnership relationship be recognized even if one of the parties is married will likely arouse controversy. In *Thomas v. LaRosa*,<sup>222</sup> the Supreme Court of Appeals of West Virginia refused to enforce an agreement between domestic partners for future support,<sup>223</sup> notwithstanding the court's having enforced an agreement between domestic partners earlier that same year.<sup>224</sup> The court suggested that the cases were easily distinguishable because in this case, unlike the other, one of the parties was already married.<sup>225</sup> The court seemed to have two worries in mind: (1) the rights of the innocent spouse might be affected,<sup>226</sup> and (2) the enforcement of "such a contract when one party is already married would amount to the condonation of bigamy . . . ."<sup>227</sup>

Neither worry should prevent adoption of the ALI recommenda-

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222. 400 S.E.2d 809 (W. Va. 1990).

223. *See id.* at 815.

224. *See id.* at 811.

225. *See id.* at 811–12. Justice Miller concurred by reasoning:

I concur in the result reached by the majority that Mr. LaRosa is not subject to the financial claims of Karen J. Thomas because Mr. LaRosa is a married person. . . . Were Mr. LaRosa not married, I believe the certified question would be answered in the affirmative. Ms. Thomas's suit would survive the motion to dismiss and the question would then be the proof of the agreement and whether there was in fact an independent basis for the contractual considerations that were not meretricious.

*Id.* at 815.

226. *See id.* at 814 ("Although it is alleged that Mr. LaRosa is a man of immense wealth, continuing obligations of support to a woman who is essentially a second wife must, *ipso facto*, prejudice the rights of a lawful wife and her legitimate children."); *see also id.* at 812 (noting that in the previous case, *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990), the court had cautioned that "if either the man or woman is validly married to another person during the period of cohabitation, the property rights of the spouse and support rights of the children of such man or woman shall not in any way be adversely affected by such division of property.").

227. *Id.* at 814. But see *Donovan v. Scuderi*, where the court observed:

Whether an agreement is reached as the result of ego, braggadocio, love, kindness or affection does not affect the validity of a contract. Nor is it unenforceable because the contract may never have been struck, 'but for' the relationship, even if proven adulterous. That relationship does not disable parties from making an enforceable contract with each other so long as it does not stand or fall upon the sexual relationship.

443 A.2d 121, 127 (Md. Ct. Spec. App. 1982).

tion. The first is specifically addressed by the recommendation itself,<sup>228</sup> since the ALI has made clear that the innocent spouse's property rights will take priority over the claims of the domestic partner. The second worry is simply unfounded. The ALI neither condones nor promotes bigamy or adultery<sup>229</sup> (and states criminalizing such conduct might still prosecute the parties). However, the ALI does recognize that the failure to permit a domestic partner to recover even after an adulterous relationship may do nothing to protect marriage<sup>230</sup> and may only result in "excessively harsh" consequences.<sup>231</sup>

## VI. CONCLUSION

The ALI recommendation is intended to promote equity and, secondarily, to save the states' money. Adoption of the recommendation would neither destroy marriage nor revive common law marriage. In fact, courts that have distributed property acquired during domestic partnerships have made quite clear that their jurisdictions did not recognize common law marriage<sup>232</sup> and that they were not interested in converting their jurisdictions to "common law marriage

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228. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01 cmt. c ("The rule of Paragraph (5) defers fully to the claims of a spouse, but allows claims of a domestic partner to the extent that they would not displace those of a spouse.")

229. See *Collins v. Davis*, 315 S.E.2d 759, 762-63 (N.C. Ct. App. 1984) (Braswell, J., dissenting) (suggesting that individual in adulterous relationship should not be permitted to use the courts to enforce agreement with her partner when she knew that her partner was married to someone else).

230. See, e.g., PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01 cmt. d (discussing the individual who marries in good faith, later learns that the partner is already married to someone else, but at that point is not in a position to leave the putative marriage).

231. *Id.* § 6.01 cmt. d.

232. See, e.g., *Pickens v. Pickens*, 490 So. 2d 872, 875 (Miss. 1986) ("We begin with the undisputed: that the legal relationship of husband and wife may be created only in conformity with the procedures authorized by the statute law of this state. Cohabitation which had not ripened into a common law marriage prior to April 5, 1956, is wholly ineffective to vest marital rights in either party thereto."); *Joan S. v. John S.*, 427 A.2d 498, 499 (N.H. 1981) ("New Hampshire is a jurisdiction which does not recognize the validity of common law marriages . . . except to the limited extent provided by [statute].") (citation omitted); *Martin v. Coleman*, 19 S.W.3d 757, 760 (Tenn. 2000) ("In Tennessee, marriage is controlled by statute, and common-law marriages are not recognized." (citing *Crawford v. Crawford*, 277 S.W.2d 389, 391 (Tenn. 1955)); *Goode v. Goode*, 396 S.E.2d 430, 435 (W. Va. 1990) ("Accordingly, we hold that pursuant to the statutory requirements . . . every marriage in this state must be solemnized under a license. Therefore, the validity of a common-law marriage is not recognized."); *Kinnison v. Kinnison*, 627 P.2d 594, 595 (Wyo. 1981) ("Wyoming does not recognize the doctrine of common-law marriage.").

state[s] by the back door.”<sup>233</sup> While eschewing the reintroduction of common law marriage, however, courts and the ALI have also recognized that the failure to distribute property acquired during a domestic partnership may produce great unfairness. In many cases, “[t]o deny recovery to one party in such a relationship is in essence to unjustly enrich the other.”<sup>234</sup>

The ALI recommendation is not without fault. For example, fairness and equity would be promoted even more were the ALI to recommend that third parties accord benefits to domestic partners. The gains in fairness and equity would more than offset the diminution in the material differences between marital and nonmarital relationships, and the symbolic differences between the two types of relationships would still distinguish the relationships in the eyes of the public. In addition, many of the societal interests promoted by granting benefits to marital partners would also be promoted by granting them to domestic partners, especially to same-sex partners who cannot enter into a marriage-like relationship in any state but Vermont. Another difficulty is that the ALI goes too far when not allowing the intentions of the parties to prevail in certain circumstances. Where it was clear, for example, that the parties had orally agreed to opt out of the system recommended by the ALI, it would make sense to permit their wishes to prevail, lack of writing notwithstanding.<sup>235</sup> Finally, the ALI has failed to specify how the assets of a domestic partnership should be distributed when one of the parties in such a relationship dies. The ALI should recommend that the analogous protections be in place when such relationships end due to the death of one or both of the parties, since fairness and equity should be promoted under these circumstances as well. Nonetheless, because adoption of the recommendation will not destroy marriage or the family, will produce more equitable results in many cases, and will help prevent some of the horror stories that might otherwise occur, its adoption would have many advantages and deserves serious consideration.

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233. *Shuraleff v. Donnelly*, 817 P.2d 764, 769 (Or. Ct. App. 1991).

234. *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1330 (Ind. Ct. App. 1980).

235. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 7.05(1) (“An agreement is not enforceable if it is not set forth in a writing signed by both parties.”).

