

JUDICIAL ENFORCEMENT OF COHABITATION AGREEMENTS: A SIGNAL TO PURGE MARRIAGE FROM THE STATUTE OF FRAUDS

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INTRODUCTION

Enforcement of oral promises to marry or cohabit presents special problems of both a public and private nature. A further dilemma exists where, because of statute, promises of marriage may not be enforced, while some courts have recently moved toward enforcement of cohabitation agreements. The potential for varied treatment of the two areas poses a public policy question which should be resolved so as to prevent different results in what might be materially the same situation. This article will deal with the historical treatment of the two situations and present an overview of the present dilemma, with possible solutions.

"An Act for Prevention of Frauds and Perjuries"¹ was enacted in England in 1677. As implied in the title, the purpose of these provisions was to prevent fraud and perjury. All but one state (Louisiana) has adopted statutes similar to the English Statute of Frauds.² Although the Statute of Frauds typically contains sec-

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1. 29 Charles II Chapter 3 (1677).

2. ALA. CODE tit. 8, § 8-9-2 (1975); ALASKA STAT. § 09.25.010 (1977); ARIZ. REV. STAT. § 44-101 (1967); ARK. STAT. ANN. § 38.101 (1962 Replacement); CAL. CIV. CODE § 1624 (West 1973); COLO. REV. STAT. § 38-10-112 (1973); CONN. GEN. STAT. § 52-550 (1975); DEL. CODE tit. 6, § 2417 (1974 Rev.); D. C. CODE § 18-3502 (1967); FLA. STAT. § 725.01 (1975); GA. CODE § 20-401 (1975); HAW. REV. STAT. § 656 (1976 Replacement); IDAHO CODE § 9-505 (1948); ILL. ANN. STAT. ch. 59, § 1 (Smith-Hurd 1972); IND. CODE § 32-2-1-1 (1971); IOWA CODE § 622.32-35 (1977); KAN. STAT. § 33-106 (1973); KY. REV. STAT. § 371.010 (1977); ME. REV. STAT. tit. 33, § 51 (1964); MD. ANN. CODE art. 39c (1957); MASS. GEN. LAWS ANN. ch. 259, § 1 (West 1959); MICH. COMP. LAWS ANN. §§ 566.106, -.132 (1967); MINN. STAT. ANN. § 513.01 (1947); MISS. CODE ANN. § 15-3-1 (1972); MO. REV. STAT. § 432.010 (1949); MONT. REV. CODES ANN. § 13-606 (1947); NEB. REV. STAT. § 36-202 (1974); NEV. REV. STAT. § 111.220 (1973); N.H. REV. STAT. ANN.

tions relating to the sale of land, execution of wills, liabilities of representatives and heirs, and debts of others, the scope of this article is limited to its effect on cohabitation and marriage.

Commenting on the intent of the legislative enactment of the Statute of Frauds in England, an English court,³ referring to a parol promise made by one of the spouses before the marriage, said that the law prohibited the evidence of such a promise since people are likely to be led into such promises inconsiderately.⁴ In an early American case,⁵ the Maryland Court of Appeals said these types of provisions were to guard against the danger of parol proof in matters where they would be likely to lead to perjury and fraud, or where it would be miscomprehended or misconstrued.⁶ Over all, it appears that the purpose was to prevent statements and promises made during courtship or preliminary marital negotiations from being promulgated into binding contracts at the consummation of the courtship. All of the forty-nine states having statutes of fraud provisions, except for Michigan, New York, North Carolina, Pennsylvania, and West Virginia, require specifically that agreements in consideration of marriage must be in writing to be enforceable.⁷

One hundred and four years ago, for example, the Illinois State Legislature adopted and codified a law relating to frauds and perjuries from provisions of an earlier session law that had been enacted in 1819.⁸ Section 1 is similar to most other states' statutes as it relates to marriages and requires that:

No action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof,

§ 506:1-2 (1968); N.J. REV. STAT. § 25:1-5 (1940); N.M. STAT. ANN. § 31-8-14 (1953); N. Y. EST., POWERS & TRUSTS LAW § 13-201 (McKinney 1967); N.C. GEN. STAT. § 25-2-101 (1965); N. D. CENT. CODE § 9-06-04 (1975); OHIO REV. CODE ANN. § 1335.05 (Baldwin 1978); OKLA. STAT. ANN. tit. 15, § 136 (1972); OR. REV. STAT. §§ 93.020, 41.580 (1977); PA. STAT. ANN. tit. 33, §§ 1-7 (Purdon 1967); R.I. GEN. LAWS § 9-1-4 (1969); S.C. CODE § 32-3-10 (1976); S.D. COMPILED LAWS ANN. § 53-8-2 (1967); TENN. CODE ANN. § 23-201 (1955); TEX. BUS. & COM. CODE ANN. tit. 26.01 (1968); UTAH CODE ANN. § 25-5-4 (1953); VT. STAT. ANN. tit. 12, § 181 (1973); VA. CODE § 11-2 (1978); WASH. REV. CODE ANN. § 19.36.010 (1978); W. VA. CODE § 36-1-3 (1966); WIS. STAT. ANN. § 241.02 (1957); WYO. STAT. § 16-1-101 (1977). *See also* A. CORBIN, CORBIN ON CONTRACTS § 278, at 18 (1950); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 448, at 340 (3d ed. 1960).

3. *Warden v. Jones*, 2 De. G. & J. 76, 44 Eng. Rep. 916 (1857).

4. *Id.* at 83-84, 44 Eng. Rep. at 919.

5. *Stoddert v. Tuck*, 5 Md. 18 (1853).

6. *Id.* at 32-33.

7. *See* note 2 *supra*.

8. Act of 1819, § 1, 1819 Ill. Laws 14.

shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.⁹

To facilitate truth, and because courtship is a time when many vague promises and propositions taken literally but not so intended are common, marriage was included within the Statute of Frauds.

The authorship of the original English Statute of Frauds is not precisely known, but was probably drawn by judges, chancellors, and civilians. Although the Illinois statute, as well as those in other states, suggests an absolute bar to the enforceability of oral promises made in consideration of marriage, the courts, faced with a multiplicity of situations and circumstances, have found the legislative intent compelling in their adjudications of such contracts. To this end, the defense of the Statute of Frauds has been rendered inapplicable in a number of situations where the courts have evidently felt that the statute would conceal truth rather than prevent fraud.

MARRIAGE

CONSIDERATION V. CONTEMPLATION

In *Miller v. Green*,¹⁰ the plaintiff filed an action for money owed to her by the defendant; the man then filed a counterclaim in which he claimed the plaintiff was indebted to him for services rendered under an oral agreement that, if he would continue to assist her in operation and management of a hotel, she would marry him and share with him the net income from the hotel. The issue framed by the court was whether the counterclaim stated a valid cause of action since the oral agreement was made in consideration of marriage. The defendant argued that it was not an agreement made in consideration of marriage since the plaintiff promised to share with him the income from the hotel; marriage was only incidental to the contract since there was other consideration for the alleged promise. The Florida Supreme Court concluded that "any verbal executory promise or agreement made in consideration of marriage, other than a mutual promise to marry, is embraced within the Statute of Frauds."¹¹ The Florida Supreme Court agreed with an earlier Rhode Island case¹² and concluded that the statute is generally given full force and effect where, de-

9. ILL. ANN. STAT. ch. 59, § 1 (Smith-Hurd 1972).

10. 104 So. 2d 457 (Fla. 1958).

11. *Id.* at 459.

12. *Hutnak v. Hutnak*, 78 R.I. 231, 81 A.2d 278 (1951).

spite other inducement, marriage (in whole or in part) is the real consideration for the agreement.¹³ The court specifically concluded that "[t]he promise of marriage was certainly an essential element of the whole agreement."¹⁴ Because of this determination, enforcement of the oral agreement was barred by the Statute of Frauds.¹⁵

In contra-distinction to this approach, in 1957 in *Applebaum v. Wechsler*,¹⁶ the Supreme Court of Michigan enforced an oral contract whereby the decedent, upon his death would leave his property to the plaintiff.¹⁷ The court concluded that the decedent had entered into a verbal agreement with the other party the purpose of which was to give all his property to her upon his death in consideration of her caring for and comforting him, beginning immediately and prior to their contemplated marriage.¹⁸ The parties thought that marriage would be effected some day, but the defendant immediately commenced, according to the court, to "care for and comfort him, that among other things she cooked for him, did his laundry for him, comforted him, accompanied him whenever he so desired, and generally, with her sister and mother with whom she lived, accepted him back as a member of the family."¹⁹ Without elaborating, the court concluded that there was no merit in the Statute of Fraud's defense because this was not an agreement in consideration of marriage.²⁰ The court reached this conclusion after a lengthy discussion of the services that the plaintiff had rendered. Although marriage was to be a part of the agreement and was so expressly understood by each party, the fact that the services rendered were adequate to support the claim without a promise of marriage led the court to enforce the agreement.

Thus, in Michigan, an oral agreement to leave property at death in return for marriage and other services was enforced because the services could be separated from the marriage. However, in Florida an oral agreement to marry and share the net income in return for management skills was not enforceable because marriage was said to be an essential element of the agreement. The logical differences between the two case applications is inexplicable, but the courts' decisions to enforce what they thought were not fraudulent promises is understandable.

13. *Id.* at —, 81 A.2d at 279.

14. 104 So. 2d at 460.

15. *Id.* at 462.

16. 350 Mich. 636, 87 N.W.2d 322 (1957).

17. *Id.* at —, 87 N.W.2d at 329-30.

18. *Id.* at —, 87 N.W.2d at 328.

19. *Id.* at —, 87 N.W.2d at 327.

20. *Id.* at —, 87 N.W.2d at 329.

In *Watson v. Godwin*,²¹ the Texas Court of Civil Appeals concluded that an oral promise to give someone money in consideration of marriage, and in consideration of investing and looking after that money, would be barred by the Statute of Frauds; the court stated that the promise of marriage was an essential ingredient of the oral agreement.²² On the other hand, in *Green v. Richmond*,²³ the Supreme Judicial Court of Massachusetts concluded that services rendered by the plaintiff on decedent's oral promise to leave a will bequeathing the entire estate to her was not barred by the Statute of Frauds if the jury concluded sex was incidental.²⁴ In this situation, the court concluded that the jury was warranted in deciding that either the sexual relations and marriage were not of sufficient illegality or were only an incidental part of the agreement.²⁵ Therefore, here the oral agreement in consideration of marriage could be enforced.²⁶

The result is that although the language of the Statute of Frauds provisions is essentially the same in each of the jurisdictions in *Miller*, *Applebaum*, *Watson*, and *Greene*, the judiciary in *Applebaum* and *Greene* enforced the promises by concluding that the marriage element could be separated from the agreement.

MARRIAGE AS PART PERFORMANCE

The disparity in enforcement is not limited to deciding the enforceability only upon the definition of "consideration" or "contemplation" of marriage, or as an incidental part to the oral agreement. In *Gilbert v. Gilbert*,²⁷ an agreement to make a settlement in consideration of marriage was within the Statute of Frauds; even though the marriage was performed it would not be sufficient part performance to warrant enforcement of the oral agreement.²⁸ The court noted that the will in this case was not a sufficient note or memorandum to satisfy the requirements of the Statute of Frauds. Thus the Superior Court of New Jersey would not enforce an oral agreement where the marriage had been performed.²⁹ However, in *O'Shea v. O'Shea*,³⁰ as a condition imposed by the husband for marriage, the wife put her property in their joint names and the

21. 425 S.W.2d 424 (Tex. Civ. App. 1968).

22. *Id.* at 431.

23. — Mass. —, 337 N.E.2d 691 (1975).

24. *Id.* at —, 337 N.E.2d at 696-97.

25. *Id.* at —, 337 N.E.2d at 696-97.

26. *Id.* at —, 337 N.E.2d at 701.

27. 66 N.J. Super. 246, 168 A.2d 839 (1961).

28. *Id.* at —, 168 A.2d at 842.

29. *Id.* at —, 168 A.2d at 844.

30. 221 So. 2d 223 (Fla. Dist. Ct. App. 1969).

husband in return agreed to remarry and seek work only in a certain area. The District Court of Appeals of Florida found that the agreement was fully performed and thus removed from the Statute of Frauds. The court reasoned that "the marriage itself would have been sufficient consideration to support the agreement, but in addition, this agreement was supported by the husband's counter-agreement to work only out of Ft. Lauderdale."³¹ The court held that the partial performance was sufficient to remove the transaction from the operation of the statute.³² Again, in this situation at the discretion of the court, the exception to the Statute of Frauds can be positioned so that it confounds interpretation.

However, in *Lee v. Central National Bank & Trust Co.*,³³ an Illinois Court of Appeals held that an oral agreement reduced to writing after the marriage was unenforceable under the Statute of Frauds. Therefore, such an agreement and a will did not constitute an equitable assignment to legatees named in the will.³⁴ The court noted that it was bound by precedent to follow an earlier state supreme court decision in which it was stated: "Whatever may be the Court's opinion as to the policy of a statute, it is its duty to carry out its provisions so as to effectuate the intention of the lawmakers. If found to operate with inconvenience, or to produce hardship, *it is for the legislature to apply the corrective.*"³⁵ That court refused to enforce the oral agreement.

In *Sun Life Assurance Co. of Canada v. Hoy*,³⁶ a federal district court held that under Illinois law if there has been full performance on one side of an oral contract, the Statute of Frauds will not bar its enforcement.³⁷ In this case the court concluded that a prenuptial oral agreement did exist and that the husband and wife were to be designated the beneficiaries of the other's insurance policies.³⁸ Mr. Hoy completely performed his part in reliance upon the agreement. Because of Mr. Hoy's full performance, the agreement was taken outside the Statute of Frauds and held enforceable, even though the marriage itself was not a sufficient performance to remove the contract from the operation of the Statute of Frauds.³⁹ Such a divergence under Illinois law arguably can

31. *Id.* at 226.

32. *Id.* at 226-27.

33. 11 Ill. App. 3d 60, 296 N.E.2d 81 (1973).

34. *Id.* at —, 296 N.E.2d at 84.

35. *Id.* at —, 296 N.E.2d at 83 (quoting *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N.E. 397 (1887)) (emphasis added).

36. 174 F. Supp. 859 (E.D. Ill. 1959).

37. *Id.* at 865.

38. *Id.* at 863.

39. *Id.* at 865.

only be traced to the court's basic desire to preserve the truth and enforce the reasonable expectations of the parties despite the Statute of Frauds.

Even though the legislature has not removed agreements in consideration of marriage which have been partly performed, some courts have done so. Coupled with the other judicially created exceptions, marriage agreements have effectively been removed from the statute whenever the judge decides to do so. This is in marked contrast to requiring the legislature to apply the corrective.

QUASI-CONTRACTUAL REMEDY

In *Miller v. Greene*⁴⁰ the Supreme Court of Florida allowed a recovery in quantum meruit where the oral agreement could not be specifically enforced because of the Statute of Frauds. Under this theory the defendant who asserted the counterclaim was entitled to a reasonable amount for the services he rendered as administrator and manager of the hotel. He was not entitled to a share of the profits.

In contrast, the court in *Sun Life Assurance Co.* enforced the specific oral agreement presented before it.⁴¹ Mr. Hoy was thus entitled to full performance just as if marriage was not included in the statute. Thus, in the confines of the Statute of Frauds proscription of enforcement of all agreements, the courts have created sufficient exceptions and remedies such that the parties to an oral agreement may recover for the value of their services rendered. Sometimes the exceptions even allow the remedy of specific performance. Allegedly, marriage settlements and nuptial settlements, to be valid and enforceable, are required to be in writing. Recovery in quantum meruit avoids unjust enrichment and does not enforce the contract. Thus, such does not per se violate the mandate of the Statute of Frauds. However, enforcement of the contract itself, as in *Sun Life Assurance Co.*, rips at the very heart of the statute.

COHABITATION

The cases discussed above dealt with marriage; the Statute of Frauds includes that particular relationship within its proscriptions. However, in today's society, cohabitation has become an integral part of many person's lifestyles. Oral agreements made in consideration of cohabitation are not all deemed unenforceable be-

40. 104 So. 2d 457 (Fla. 1958). See discussion at notes 10-15 and accompanying text *supra*.

41. See text at notes 36-39 *supra*.

cause of the Statute of Frauds. Various works on the legal aspects of cohabitation⁴² indicate this type of relationship is increasing, but do not suggest that all agreements would be unenforceable simply because they are not in writing. Historically, the primary bar to the enforcement of such contracts has been the twin forces of illegality and public policy.

ILLEGALITY AND PUBLIC POLICY

Any agreement, whether oral or written, wherein money is exchanged for a woman becoming a mistress or for other sexual favors, has been found to be illegal. Lord Wright has stated: "The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married or to pay a sum of money or give some other consideration in return for immoral association."⁴³

Other cases suggest that the courts would enforce a promise by a man to pay money to a woman if the illicit cohabitation had been in the past, since this was not felt to promote immorality; but the promises to pay money for future sexual services or to continue an existing relationship would not be enforced since they were contrary to public policy.⁴⁴

Sebastian Poulter has suggested that there could be three possible approaches for a modern court to adopt in relation to a cohabitation agreement.⁴⁵ The first would obviously be to follow the old precedents. The second would be to focus on the redeeming features of the cohabitation agreement such as equality and exclusive arrangement. The third would be for the courts to acknowledge that attitudes have changed so that in the eyes of the law such an agreement should not be contrary to public policy. John L. Dwyer has summarized the situation in this way:

Property dealings and contractual relations and arrangements which contemplate, facilitate, promote or encourage extra-marital sexual intercourse have become commonplace in our society. The Courts have come to acknowledge that problems arising from a man and a woman setting up house together and having a family without getting married are familiar and recurring.

42. See, e.g., M. KING, *THE COHABITATION HANDBOOK: LIVING TOGETHER AND THE LAW* (1975).

43. *Fender v. St. John-Mildmay*, [1938] A.C. 1, 42 (P.C. 1937).

44. *Whaley v. Norton*, 1 Vern 483 (1687); *Ayerst v. Jenkins*, L.R. 16 Eq. 275, 282 (1873); *Benyon v. Nettlefold*, 3 Mac. & G. 94, 100 (1850).

45. Poulter, *Cohabitation Contracts and Public Policy—I*, 1974 NEW L.J. 999, 1001.

Faced with this commonplace situation and the familiar problem of how to adjust property rights between the parties when the extra-marital relationship breaks down, the Courts have accorded a substantial degree of traditional recognition and enforcement to the parties' property dealings and arrangements.⁴⁶

*Marum v. Marum*⁴⁷ held that where plaintiff and defendant have used common savings to purchase realty, and have lived together in a meretricious relationship, "the defendant's conduct in living with plaintiff without benefit of clergy for some seventeen years is not so strongly reprehensible as to foreclose all remedy . . . of the paramour's possible right to damages."⁴⁸ Therefore, she might be entitled to an equitable lien on the property in relation to the amount of money which she had contributed.

*In re Gordon*⁴⁹ held that an agreement not based on the cohabitation itself could be upheld. As to the case of marriage and the making of a will, the statute is said not to preclude quasi-contractual recovery by a party relying on the contract for the benefits conferred.⁵⁰ Yet it is generally said that when one knowingly participates in illicit relations with another, he cannot recover in quasi-contract for services rendered.⁵¹ However, if the cohabitation is found to be distinct or separate from the rest of the oral agreement and the parties are not aware that they are participating in an illegal activity, then quasi-contractual recovery may generally be had.⁵² The reason behind this distinction and the limit on quasi-contractual recovery is most likely due to the presumption that when there is a close personal relationship between the contracting parties the services were probably given gratuitously.⁵³ Similarly, the Oregon Court of Appeals, in *Bridgman v. Stout*,⁵⁴ refused to enforce an oral contract which provided that certain land would go to the survivor of two people who had lived together as husband and wife.

46. Dwyer, *Immoral Contracts*, 93 LAW Q. REV. 386, 388 (1977).

47. 194 N.Y.S.2d 327 (Sup. Ct. 1959).

48. *Id.* at 330.

49. 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S. 2d 1 (1960).

50. RESTATEMENT OF CONTRACTS § 355, Comment a (1932).

51. McDonald v. Fleming, 12 B. Man. Kg. 285 (1851). See also 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1745 (rev. ed. 1938).

52. Rhodes v. Stone, 63 Hun. 624, —, 17 N.Y.S. 561, 562 (1892).

53. RESTATEMENT OF RESTITUTION § 107, Comment C (1937). See also 17 MO. L. REV. 213 (1952).

54. 10 Or. App. 474, —, 500 P.2d 731, 733-34 (1972).

AN ALTERNATE POSITION

In contrast to the foregoing position, Judge Tobriner of the Supreme Court of California, in *Marvin v. Marvin*,⁵⁵ ruled that express contracts between non-marital partners are enforceable unless the contract is explicitly and separately founded on meretricious sexual services.⁵⁶ Thus, in California the scope of the doctrine of illegality was narrowed; both oral and written agreements in consideration of cohabitation under certain circumstances would be enforced. The court went further than simply to declare that express oral and written promises are enforceable; it reasoned that property acquired during cohabitation can be distributed to the partners even when an express agreement does not exist. The court said it would be proper to find an implied-in-fact agreement, an implied agreement of partnership or joint venture, or resulting trust when the parties' conduct indicated the appropriate intent.⁵⁷ One commentator noted that the doctrine of illegality has frequently been used to bar the enforcement of cohabitation contracts.⁵⁸ It was also noted that because of the vagueness and particular dispositions of each court, the courts have exercised considerable discretion in enforcing such agreements because most of these types of relationships have the potential to be characterized (by one wishing not to enforce the contract or agreement) as being one primarily involving sex.⁵⁹ As has been detailed, the commentator noted that *Marvin* definitely shifts the emphasis in favor of the enforcement of such agreements. Since it enhances the attractiveness of non-marital relationships and facilitates the contractual positions of cohabitation, the author concluded that *Marvin* is likely to be faulted for making cohabitation a more attractive and flexible arrangement than marriage for some people.⁶⁰

Besides the court's definitive intention to allow enforcement of oral agreements in consideration of cohabitation when founded on additional elements, the Supreme Court of California provided additional remedies to those normally available under quasi-contractual recovery. Rather than the presumption of gifts, Judge Tobriner stated that the best presumption is that unmarried cohabitants intended to deal fairly with each other.⁶¹ Therefore a

55. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

56. *Id.* at 672, 557 P.2d at 114, 134 Cal. Rptr. at 823.

57. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

58. 90 HARV. L. REV. 1708, 1713 (1977).

59. *Id.*

60. *Id.* at 1714.

61. 18 Cal. 3d at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830.

reasonable value of household services and domestic chores can be recovered. Extending beyond the actual intent of the parties are the subjective considerations of implied-in-fact remedies which are probably a more important extension than simply enforcing the actual intent of the parties.

The Supreme Court of Minnesota in *Carlson v. Olson*⁶² also adopted the position enunciated in *Marvin*. That court concluded that the trial court enforced what the evidence indicated were the reasonable expectations of the parties in that the parties had lived together for twenty-one years, had raised a son to maturity, and had held themselves out to the public as husband and wife. Their home and personal property were held in joint tenancy. Thus the trial court was justified in concluding that the parties intended that their accumulations were to be divided on an equal basis, even though no oral or written agreement existed.⁶³ The Supreme Judicial Court of Massachusetts, in *Davis v. Misiano*,⁶⁴ held that there is a right to receive support outside of a marriage relationship, and noted that the complainants sought only to compel the defendant to provide general financial support, and therefore was distinct from the question of whether parties could enter into enforceable agreements providing for distribution of property and income.⁶⁵

Because of these developments, agreements in consideration of cohabitation have become enforceable as to specific elements of agreement, as to the implied elements of an arrangement, as well as to quantum meruit remedies. These developments mandate that the enforceability of an agreement in consideration of cohabitation is not to be based on whether it is oral or written, but on whether it is inseparably founded on sexual services.

Therefore the starting point of enforceability for agreements in consideration of marriage is different from enforceability of agreements in consideration of cohabitation. In the latter's touchstone it is whether sexual services form the basis of the relationship; no thought is given to agreements being written or oral. For marriage, the initial question is whether the agreement is written; and exceptions, at the court's discretion, may be made if sex can be separated from the other elements.

62. 256 N.W.2d 249 (Minn. 1977).

63. *Id.* at 255.

64. — Mass. —, 366 N.E.2d 752 (1977).

65. *Id.* at —, 366 N.E.2d at 754.

MARRIAGE AND COHABITATION—LEGISLATURE'S CHOICE

Sebastian Poulter has identified further possible advantages of enforceable cohabitation agreements.⁶⁶ First, the creation and dissolution of the agreement are accomplished by the parties themselves rather than the state. Secondly, termination can be had either by consent or at the will of either party without the need for a long waiting period. Thirdly, the predetermined method of distribution is preferable to the present discretionary and possibly capricious judicial distribution or reallocation.⁶⁷ There are however several disadvantages: any children would be illegitimate; the tax position would generally be less favorable; state benefits would be less freely available; and the parties would not inherit from one another.⁶⁸

Perhaps the real question, however, is not whether the recognition of such agreements would be prejudicial to marriage, but rather, is it proper for the courts to place agreements in consideration of cohabitation in a preferred position to contracts in consideration of marriage; the current trend places cohabitation above marriage. When in the past agreements sounding in legalized prostitution would be contrary to public policy, they now are enforced when oral, even though they would not be if the parties had bargained for marriage. Such a situation seems clearly contrary to public policy.

Even if we accept the premise that family forms other than marriage must be acknowledged in order to prevent hardship and injustice, it is not necessary to conclude that agreements in consideration of one form should require a writing to be enforceable while another form has no such requirement. Carol Bruch has stated: "It is clear that community mores have changed markedly in recent years and that the movement has been firmly in the direction of greater tolerance of non-marital unions. It follows that judicial recognition of express contracts for the pooling of re-

66. Poulter, *Cohabitation Contracts and Public Policy—I*, 1974 NEW L.J. 999.

67. *Id.* at 1000.

68. Poulter also enumerates two questions which the courts should rationally address in regard to contracts or agreements in consideration of cohabitation:

Would the recognition of a cohabitation contract by the courts as an enforceable agreement have any tendency to convert a substantial number of people away from legal marriage? . . . [W]ould the rejection of such agreements by the courts reduce the number of those people who (out of choice rather than necessity) currently decide to live together rather than marry?

Id. at 1002. He answers both questions in the negative, and concludes, then, that the contracts would not be prejudicial to marriage. *Id.*

sources is founded upon sound policy."⁶⁹ She noted, however, that courts upholding express contractual agreements between parties to informal domestic unions balk at the enforcement of implied agreements.⁷⁰ She has suggested that other than the difficulties of proof, which are subject to the constraints of the Statute of Frauds, the policies at stake are no different in either situation.⁷¹ Although this is true in respect to the even-handed enforcement of obligations, it bypasses the alleged purposes and foundations of the Statute of Frauds as pertaining to agreements in consideration of marriage, since by definition, if the policies are the same, there should be no differentiation between oral agreements in consideration of cohabitation and oral agreements in consideration of marriage. However, the judicial position has reached a tenable position only to the extent that the legislature has spoken in the area of marriages and not in the area of cohabitation. This follows the reasoning of the Illinois Court of Appeals holding that the judiciary is only to effectuate the intention of the lawmakers in enforcing provisions of the Statute of Frauds.⁷² If it operates with inconvenience or hardship, the legislature is to make the necessary changes. The alternatives available to remedy the breach of public policy are limited—either cohabitation must be added to the statute or marriage must be dropped. The legislature, therefore, should assess the developments in this area and either modify the Statute of Frauds so that agreements in consideration of marriage would not be included, or amend the Statute of Frauds to include cohabitation along with marriage. In either case the legislature must look to the objectives and purposes of the Statute of Frauds and the current status of both contract and marriage laws.

Professors Willis suggested over fifty years ago that conditions had so changed that the initial reasons for the adoption of the statute no longer existed. In particular, he suggested the primary rationale for the Statute of Frauds was first the uncontrolled discretion of the jury; second, the rule as to competency of witnesses; and third, the immaturity of contract law in the seventeenth century.⁷³ Today the rules of evidence and procedure clearly restrict and limit the discretion of the jury both in hearing facts and evidence and separating or determining liability. These

69. Bruch, *Property Rights of De Facto Spouses, Including Thoughts on Value of Homemakers' Services*, 10 FAM. L.Q. 101, 108 (1976).

70. *Id.* at 108-09.

71. *Id.* at 109.

72. *Lee v. Central Nat'l Bank & Trust Co.*, 11 Ill. App. 3d 60, —, 296 N.E.2d 81, 83 (1973).

73. Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 429 (1928).

same developments in federal and state courts also limit the competency of witnesses. Furthermore, contract law has developed significantly in terms of agreements, offers, acceptances, consideration, conditions, and illegality. Nevertheless, the case for retention of the Statute of Frauds revolves primarily around the fact that a writing is excellent evidence of the existence of an agreement and preserves the exact wording of an agreement.

Given the judicially created exceptions to the Statute of Frauds,⁷⁴ the legislature must decide whether the present format preserves either the original intent or enhances justice and truth today. It has been suggested that those persons who enter into cohabitation arrangements, regardless of whether they create express oral promises regarding property or other matters, do so (1) in ignorance of the legal consequences of marriage; or (2) assume that some legal protections are available; or (3) give absolutely no thought to the legal consequences of the relationship.⁷⁵ Regardless of the position and circumstances at the beginning of the relationship, the desires of the parties may change. Marriage dissolution and divorce laws specify the balancing of rights and obligations between the marital partners when the marriage has existed, but no such provisions exist for couples living in cohabitation arrangements. To this end, express agreements or implied-in-fact agreements, as supported by *Marvin*, are needed to bring legal enforcement to the parties' expectations. Professor Bodenheimer has suggested four principles which should govern property dispositions by people who have lived together without marriage:

1. Where an unmarried couple enters an express contract, the agreement should be enforced according to the terms, regardless of their non-marital status.
2. If the unmarried couple agrees that their relationship should entail no property or monetary consequences, again the agreement should govern.
3. If the facts and circumstances indicate an implied partnership or joint enterprise, recovery should be allowed in agreement with the implied expectations.
4. The law should relieve inequity and hardship of one partner and prevent an injustice to the other when there is no agreement one way or the other.⁷⁶

These four principles bespeak justice and fairness, but to exe-

74. See text at notes 10-39 *supra*.

75. Bruch, *Property Rights of De Facto Spouses, Including Thoughts on Value of Homemakers' Services*, 10 FAM. L.Q. 101, 135 (1976).

76. Brief for Brigitte Bodenheimer, *et al.* as Amica Curiae at 25, *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

cute them without regard to the requirement of a writing when the agreement is in consideration of marriage would create an improper preference in favor of cohabitation agreements. As previously indicated, the arguments for continuing the general nature of the Statute of Frauds, as well as for its repeal, have been frequently expressed. The factors involved in the general context apply equally to the specific question of application to cohabitation and marriage agreements. The articles and means of proof in an agreement involving cohabitation or marriage would seem to be the same. The status of the parties coming into a cohabitation agreement or a marriage agreement, as well as the potential for change over a period of years, appears to be the same in both instances. The impetuous and gallant nature of men and women prior to marriage or a cohabitation arrangement would seem to be the same. If in fact the legislature is not going to make such agreements expressly illegal, then perhaps the state, which has a direct influence upon the distribution of property and termination of a marriage should regulate cohabitation contracts. The legislature should consider what means of enforcement or alternate choices it desires to leave to individuals entering cohabitation agreements when these alternatives may or may not be available to people entering marriages. Questions of the enforceability of a cohabitation agreement would probably not occur during a relationship, but one can reasonably anticipate the problems and ensuing legal action upon the dissolution of the relationship. The two areas which would probably resolve in litigation are distribution of property and the care, custody and control of children. Poulter has noted that:

Society's concern for the welfare of its families is implemented by the twin policies of our present divorce law, first to seek to 'buttress rather than undermine the stability of marriage' and secondly, when a marriage has irretrievably broken down 'to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.'⁷⁷

In other words, the critical components of regulation fall not to the formation of the marriage, but rather its perpetuation. The current status of cohabitation contracts places them above marriage, thus undermining the stability of marriage, both in the formation stage and the dissolution period. Oral cohabitation agreements are better than oral marriage agreements because the former are enforceable. Cohabitation agreements are better than

77. Poulter, *Cohabitation Contracts and Public Policy*—I, 1974 NEW L.J. 999, 1002 (footnotes omitted).

marriage agreements because the parties alone conclude the conditions of termination without any outside control or influence. Whether the state or the parties involved determine specifically their property rights at the time of dissolution of the relationship should not be so critical as to prevent express decisions on behalf of the parties unless children are unprotected. Poulter contends that there is no adequate machinery to insure that any arrangements which the courts do approve are in fact implemented.⁷⁸ He further maintains that the social stigma and disabilities associated with illegitimacy have been progressively reduced.⁷⁹ He therefore concludes that express cohabitation agreements should be permissible.⁸⁰

Nevertheless, leaving the situation as it currently exists gives preference to cohabitation over marriage. The superiority of and societal preference for marriage must be re-established at least to the extent of ending the penalties attached to oral agreements in consideration of marriage. Intending to prevent fraud and perjury is fine, but when the apparatus designed to accomplish this end also degrades and lessens the very relationship to be protected, the system is malfunctioning and the legislature should apply the corrective.

CONCLUSION

The Statute of Frauds articulates an absolute bar to the enforcement of oral agreements in consideration of marriage. However, courts have found various ways to effectuate the agreement or provide a remedy when equity and justice might be offended by the operation of the statute. For example, some courts have found that when marriage is only incidental to the arrangement, the Statute of Frauds does not operate. Similarly, part performance has been utilized to remove the agreement. Specific performance, as well as quasi-contractual recovery, has been allowed when services were rendered. In all these situations other courts have held that the Statute of Frauds is still operative. Many courts which once held cohabitation agreements contrary to public policy are now enforcing them as long as they are not founded purely on provision of sexual services.

The only tenable basis for requiring agreements in consideration of cohabitation to be in writing must rest on the theory that

78. *Id.*

79. *Id.*

80. Poulter, *Cohabitation Contracts and Public Policy—II*, 1974 New L.J. 1034, 1036.

writing facilitates proof. Given the development of contemporary rules of evidence, as well as the notion of parol evidence, much of the historical notion underlying the Statute of Frauds has been eroded. Given the judicial developments and the social acceptance of non-marital relationships, the legislature should not act to add cohabitation to the Statute of Frauds, but rather should remove marriage from subjection to it.

Within the present legal framework, cohabitation agreements result in outcomes more preferable than marriage contracts because of the difference in the starting point of enforcement. Even where judicially created exceptions allow enforcement of the parties' expectations, or provide quasi-contractual remedies to avoid unjust enrichment, the statutory foundation of marriage agreements raises presumptions which are not even considered in enforcing oral agreements of cohabitation. Because of the changes in society, legalized prostitution can now be called an agreement to cohabit and courts will enforce it, saying it is not contrary to public policy, unless it is inseparably founded on sex. This violates public policy in another manner by elevating cohabitation agreements above marriage contracts, since the former are valid, though oral, while the latter are invalid. It is therefore proposed that the legislature should act now to remove marriage from the Statute of Frauds. Failure to do so shall only further erode the institutions of family and marriage.

