Golden Gate University Law Review

Volume 6 | Issue 1 Article 6

January 1975

A Continuing Controversy: Assessing the Still Uncertain Status of the Meretricious Spouse in California

Suzanne J. Chapot

A CONTINUING CONTROVERSY: ASSESSING THE STILL UNCERTAIN STATUS OF THE MERETRICIOUS SPOUSE IN CALIFORNIA

A meretricious spouse is one who cohabits with another person, with the knowledge that they have not entered into a valid marriage.[1] The cohabitation must last longer than a single night, but case law has provided no express definition of when the relationship acquires its meretricious character. The test for determining such a relationship is not whether the parties are free to marry, but whether they know that they are not validly married.[2]

Traditionally, California courts have been unwilling to enforce any sort of "community property" rights when meretricious relationships are involved. Consequently, upon termination of such a relationship, unless the parties can prove express agreements or equitable liens or trusts, courts are not likely to view one spouse as having an interest in that property acquired during the relationship which stands in the other spouses name.[3]

Over the past fifteen years there has been a substantial increase in the number of couples cohabiting without being

1. Coolidge, *Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866, 873 (1962). Either spouse, or both, may be meretricious.

2. *Id.* at 874.

3. *See* Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951); Oakley v. Oakley, 82 Cal. App. 2d 188, 192, 185 P.2d 848, 850 (1947). There are generally four situations in which a meretricious spouse will be awarded rights to property acquired during the meretricious relationship. If the meretricious spouse has contributed part or all of the purchase price for the property, and title is in the name of the other spouse, a resulting trust occurs, and the meretricious spouse is entitled to a share proportionate to her/his contribution. *See* Padilla v. Padilla, 38 Cal. App. 2d 319, 321, 100 P.2d 1093, 1094 (1940); Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43 (1909), *cited in* Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943). If the meretricious spouse is induced to transfer title to property to the other spouse, and can prove either actual fraud, or constructive fraud and a confidential relationship between the spouses, a constructive trust is imposed. *See* Keene v. Keene, 57 Cal. 2d 657, 665 n.5, 371 P.2d 329, 333 n.5, 21 Cal. Rptr. 593, 597 n.5 (1962). If a constructive trust cannot be proven, an equitable lien may be imposed. Title and ownership are retained, but the property becomes security for the outstanding debt. *See, e.g.*, Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 102, 69 P.2d 845, 848 (1937); Garcia v. Venegas, 106 Cal. App. 2d 364, 369-70, 235 P.2d 89, 92 (1951). Finally, if an express agreement to pool earnings and share in accumulations, or to compensate for services, has been made, and the non-marital relationship is not the consideration for the promise to share, such agreement may be en-

married.[4] This Comment will discuss the traditional approach of the California courts toward division of property acquired during such non-marital relationships[5] and four recent California court of appeal cases which deal with the division of that property. Two of the cases, *In re Marriage of Cary*[6] and *Estate of Atherley*,[7] have rejected the traditional approach of denying certain property rights, while two others, *Beckman v. Mayhew*[8] and *Marvin v. Marvin*,[9] adhere to this approach. The *Cary* and *Atherley* courts declared that an actual legal marriage was not as important as the existence of a family relationship in determining community property rights. This Comment will also discuss some considerations which the California Supreme Court, which has granted a hearing in *Marvin*, will hopefully ponder as it approaches the task of clarifying the present uncertain status of meretricious spouses in California.

I. THE FOUNDATION CASES: VALLERA AND KEENE

The trend toward liberal interpretation of the family and community property laws in California's appellate courts has come to an abrupt halt with the decisions in *Beckman* and *Marvin*. In *Beckman*, the Third Appellate District refused to follow the lead of the *Cary* and *Atherley* decisions. Instead, the court relied on the precedent set by the California Supreme Court in *Vallera v. Vallera*[10] and *Keene v. Keene*[11] which had established the traditional view that no community property rights arose from a meretricious relationship. *Beckman* relied on *Vallera* and *Keene* in holding that a meretricious spouse who had rendered twelve years of

forced. *See* Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943). The importance of proving that the relationship is not the consideration for the promise is demonstrated by the case of Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 213 P.2d 727 (1950).

4. A comparison of the 1970 and 1960 census statistics indicates that there has been an eight-fold increase in the number of couples living together without being married. *See* 2 U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, table 11, at 4B (1970); 2 U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, table 15, at 4B (1960).

5. California courts use the term meretricious to describe such relationships. *See* text accompanying notes 14-16 *infra*. For a discussion of the definition of the term see text accompanying note 89 *infra*.

6. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), *noted in* 25 HASTINGS L.J. 1226 (1974); 12 SAN DIEGO L. REV. 436 (1975) *and* 9 U.S.F.L. REV. 186 (1974).

7. 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

8. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

9. 50 Cal. App. 3d 84 (1975), *hearing granted*, L.A. No. 30520, Cal. Sup. Ct., Sept. 17, 1975.

10. 21 Cal. 2d 681, 134 P.2d 761 (1943).

11. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

domestic service to the meretricious community had no right to property owned by the other spouse which had been improved, and the value of which had greatly appreciated, during the meretricious relationship.[12] The *Marvin* court used the same reasoning to deny similar rights to a meretricious spouse who had rendered six years of service to the meretricious community.[13]

Case law early established that cohabitation alone was not sufficient to create, in a meretricious spouse, an interest in property acquired during a meretricious relationship.[14] The courts consistently distinguished the putative relationship, based upon a good faith belief in a valid marriage, wherein the relationship alone created property rights, from the meretricious relationship, in which no good faith belief in a valid marriage existed.[15] The putative spouse could reasonably expect that he or she would continue to enjoy the benefits of a valid marriage, and, therefore, the equity courts would protect those expectations. The meretricious spouse, presumably, would have no such expectations of a continuing interest in property, since he or she knew that the marriage was not valid.[16] Consequently, unless the meretricious spouse could establish rights based on a contract theory or a theory of equitable liens or trusts, he or she would acquire no rights to property accumulated during the relationship.

Vallera laid the foundation for the traditional approach. The case involved a man and woman who cohabited for approximately three years. Upon suit by the woman for maintenance and

12. 49 Cal. App. at 535, 122 Cal. Rptr. at 607 (1975).

13. 50 Cal. App. 3d at 94-97. In a separate part of its opinion, the *Marvin* court also considered the meretricious relationship in light of "an agreement between the parties concerning property acquired or compensation for services while living together." *Id.* at 97.

14. However, property rights of meretricious spouses were recognized and protected. *Cf.* Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307 (1931). Although the *Flanagan* court denied the meretricious spouse community property rights in the estate of her meretricious partner, it did so because she had been provided for in the decedent's will. The court did indicate that the spouse might have had an action in quasi-contract if she had not taken under the will. *Id.* at 667, 3 P.2d at 308.

15. *See Legal Problems in Family Law–Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Right of the Meretricious Spouse*, 6 U.C. DAVIS L. REV. 354, 357 (1973) [hereinafter cited as *Illicit Cohabitation*].

For a discussion of the division of property of putative spouses see Estate of Atherley, 44 Cal. App. 3d 758, 770, 119 Cal. Rptr 41, 48 (1975). A putative spouse is one who has a good faith belief in the existence of a valid marriage. No marriage ceremony is necessary, as even a good faith belief in the validity of a common law marriage is sufficient. Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845; Sanchez v. Arnold, 114 Cal. App. 2d 772, 251 P.2d 67 (1952).

16. *See* Keene v. Keene, 57 Cal. 2d 657, 662, 371 P.2d 329, 332, 21 Cal. Rptr. 593, 596 (1962); Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 719, 200 P.2d 49, 54 (1948).

division of the property accumulated during the relationship, the trial court found that there was no good faith belief in a valid marriage, that there was no community property, and that the woman was not entitled to maintenance. The trial court did, however, hold that property acquired during a part of the relationship was held by the parties as tenants in common, each spouse owning an undivided one-half interest.[17]

On appeal, Justice Traynor, writing for a four judge majority, held that a meretricious spouse did not acquire right to property accumulated during the relationship by "reason of cohabitation alone."[18] This holding was consistent with the rule already established in previous California cases.[19] The court then went on to discuss, in dictum, circumstances under which a meretricious spouse might be entitled to a share of the property acquired during the relationship. The court cited instances in which there were express agreements to pool resources and share in the joint accumulations gained therefrom, which agreements could be enforced by the courts.[20] The court also noted that "[e]ven in the absence of an express agreement . . . the woman would be entitled to share in the property jointly accumulated in the proportion that her funds contributed toward its acquisition."[21] In the instant case, Justice Traynor could find no evidence of an agreement, nor could he find any contribution on the part of the woman toward the accumulation of the property. Consequently, the woman emerged from the relationship with no property rights enforceable in the courts, and the man owned all the accumulated property.

The dissent of Justice Curtis in *Vallera* pointed out that since the illicit relationship itself did not preclude an equitable division

17. Apparently, the trial court was willing to consider the value of the woman's services within the home as valid consideration for an interest in the property as long as there were no third parties involved. Justice Curtis' dissent, in the appellate court's decision of *Vallera*, notes that the property divided by the trial court was acquired after Mr. Vallera's divorce, so that only the equities between the meretricious parties were involved. 21 Cal. 2d at 687, 134 P.2d at 764.

18. *Id.* at 684-85, 134 P.2d at 763.

19. *See* note 5 *supra*.

20. Cases in which the spouses have the foresight to execute express agreements have been infrequent, but if the California Supreme Court does not grant property rights to meretricious spouses, meretricious spouses should be encouraged to make such agreements. For examples of cases involving express agreements see Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951); Baskett v. Crook, 86 Cal. App. 2d 355, 195 P.2d 39 (1948); Bacon v. Bacon, 21 Cal. App. 2d 540, 69 P.2d 884 (1937).

21. 21 Cal. 2d at 685, 134 P.2d at 763.

of the property, the court should be willing to find an implied agreement between the parties to a meretricious relationship to share in the accumulated property.[22] Justice Curtis felt that there should be no distinction between contributions of money, which would be protected, and contributions of services in the home, which the majority opinion would not protect. He did not want to treat the meretricious relationship on principles of business (*i.e.*, express agreements or equitable trusts or liens), but argued that the relationship was familial and should be treated accordingly.[23]

Justice Curtis argued that the community resulting from a meretricious relationship should be divided according to the equitable principles used in dividing the property acquired during a putative relationship. He recognized, and wanted to protect, both the value of the meretricious wife's service within the home and her reasonable expectations of sharing in the property accumulated during the relationship. If these expectations were not protected, in most cases the woman would be punished for entering into the illicit relationship by having no property rights, and the man would benefit by taking all of the accumulated property.

> Just because the man, who in the instant case was equally guilty, earned the money to buy the property, we should not bar the woman from any rights at all in the property, although her services made the acquisition possible. Such a rule gives all the advantages to be gained from such a relationship to the man with no burdens.[24]

After *Vallera*, a number of cases involving meretricious relationships reached the California appellate courts. The courts referred to the *Vallera* dictum concerning agreements and liens and trust, as "rules of law," but generally managed to apply the "rules" in a manner which protected the property interests of the meretricious spouse.[25] It was not until nineteen years after *Vallera*

22. *Id.* at 686, 134 P.2d at 764.

23. *Id.*

24. *Id.* at 687, 134 P.2d at 764.

25. *See* Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951) (five year meretricious relationship; court found agreement to share); Mack v. White, 97 Cal. App. 2d 497, 218 P.2d 76 (1950) (fourteen year meretricious relationship; woman retrieved property on a theory of fraud). *But see* McQuin v. Rice, 88 Cal. App. 2d 914, 199 P.2d 742 (1948) (after a five year meretricious relationship the court rejected a theory of trusts); Oakley v. Oakley, 82 Cal. App. 2d 188, 185 P.2d 848 (1947) (after a five year meretricious relationship, the woman was unable to recover any property interest).

that the California Supreme Court was again presented with a case involving the property rights of meretricious spouses.

On its facts, *Keene* presented a much more sympathetic case for the meretricious spouse than *Vallera*. The parties had lived together as husband and wife from 1938 through 1956. Fifteen years before the meretricious relationship began, Mr. Keene had purchased ranch property in Butte County. The couple lived on the ranch for a period of eight years. Plaintiff (the woman) performed all of the services of a housewife, and, in addition, made substantial contributions in services toward the maintenance of the ranch and its livestock.[26] During this same period the parties traveled extensively as husband and wife. The couple ended their relationship in 1956 and plaintiff brought suit for divorce[27] and to impress a trust upon certain properties.

Plaintiff could not produce evidence of an express agreement to support her claim to a share in the accumulated property. She argued, instead, that *Vallera* allowed a meretricious spouse to share in property jointly accumulated during a meretricious relationship in proportion to the contribution made by the spouse, and that plaintiff's contribution of services entitled her to a share of the accumulated property.[28]

The majority in *Keene* dismissed the value of plaintiff's services to the meretricious community, and refused to sustain her reading of *Vallera*. The majority focused on the *Vallera* court's use of the word "funds" in referring to contributions which would entitle meretricious spouses to share in property acquired during the relationship. By narrowly defining "funds" to mean money or negotiable paper,[29] the court totally negated the value of plaintiff's service. Thus, plaintiff was found to have no interest in the ranch property, on which she had lived and worked for eight years, no interest in the proceeds of the sale of the ranch property and no interest in the businesses subsequently engaged in by

26. There was substantial evidence that plaintiff entirely cared for the couple's large commercial turkey flock, took care of other poultry, tended to orphaned lambs, herded cattle, cleared rocks, grew and maintained a large vegetable garden, and helped to sow and maintain commercial crops. 57 Cal. 2d at 669-70, 371 P.2d at 336-37, 21 Cal. Rptr. 600-01.

27. Spouses involved in both putative and meretricious relationships often file an action in which they ask for a divorce (now dissolution), alleging either a valid marriage, or a good faith belief in such a marriage. This is a strategic decision made by the plaintiffs and their attorneys in such suits.

28. 57 Cal. 2d at 662, 371 P.2d at 332, 21 Cal. Rptr. at 596.

29. *See id.* at 663, 371 P.2d at 332, 21 Cal. Rptr. at 596.

defendant with the assistance of plaintiff. This holding was predicated on the fact that she had contributed services to the community rather than money.

Justice Peter's lone dissent in *Keene* took exception to the majority opinion's basic premise. Justice Peters argued that the term "funds" should not be interpreted narrowly, that services should be included in the definition, and that the two cases cited by the majority in support of their opinion[30] included "services as well as money or tangible property" in their definition of "funds."[31] He further argued that under a theory of trust, a spouse's contribution of services which led to the accumulation of property should entitle the spouse to a proportionate share of the property in the same manner as if money had been contributed.[32]

Justice Peters did not embrace the theory Justice Curtis articulated in his *Vallera* dissent that because of the familial nature of the relationship, equitable considerations should grant meretricious spouses an equal interest in property accumulated during the relationship, whether the contributions consisted of money or services.[33] Instead, Justice Peters focused on the more traditional business agreement theory in determining the spouse's property rights, but wanted the theory expanded so that services of a spouse could be considered valid consideration or contribution, entitling the service-contributing spouse to share in the property.[34] He was unwilling to recognize the normal duties of a housewife as adequate contribution, but felt that services beyond the "customary duties of a housewife" must be shown in order to warrant an award of community funds to a meretricious spouse.[35]

After the *Keene* court narrowed the scope of community property rights allowed in *Vallera*, there seemed to be little doubt that absent an express or implied business agreement and a monetary contribution, a meretricious spouse had no rights to property accumulated during the relationship. Thus, when the plaintiffs in *Beckman v. Mayhew*[36] and *Marvin v. Marvin*[37] came

30. The cases, both from other jurisdictions, were Delamour v. Roger, 7 La. Ann. 152 (1852), and Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43, 132 Am. St. Rep. 879 (1909).

31. 57 Cal. 2d at 672, 371 P.2d at 338, 21 Cal. Rptr. at 602.

32. *Id.* at 673, 371 P.2d at 339, 21 Cal. Rptr. at 603.

33. For Justice Curtis' own language see 21 Cal. 2d at 686, 134 P.2d at 763.

34. 57 Cal. 2d at 672-73, 371 P.2d at 339, 21 Cal. Rptr. at 603.

35. *Id.*

36. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

37. 50 Cal. App. 3d 84 (1975), *hearing granted*, L.A. No. 30520, Cal. Sup. Ct., Sept. 17, 1975.

before the California appellate courts seeking a determination of their rights to property accumulated during a meretricious relationship, the courts had ample precedent for denying relief.

The *Beckman* and *Marvin* courts could rely upon the opinion of the *Vallera* majority which refused to recognize the meretricious relationship as a basis for property rights, despite its concessions that principles traditionally applied to business relationships could be used by meretricious spouses to establish property rights. The *Beckman* court acknowledged but refused to follow the *Vallera* dissent,[38] which viewed the relationship as familial, rather than businesslike, and which maintained that equity should divide the meretricious property as it would divide community property in a valid marriage. Additionally, the *Beckman* and *Marvin* courts relied on the *Keene* majority,[39] which narrowed *Vallera* by requiring that there be a "monetary" contribution shown before a spouse could claim any property rights, to support its decision. The *Keene* dissent also viewed the relationship in business, rather than familial terms. Although it argued that services should be viewed as contributions, the *Keene* dissent felt that services beyond those normally present in a meretricious relationship must be shown before the service-contributing spouse could be compensated.[40] The *Beckman* and *Marvin* courts were not willing to take this small step toward protection of meretricious spouses.

II. THE TREND AWAY FROM THE VALLERA-KEENE DOCTRINE

The Family Law Act of 1969[41] took effect on January 1, 1970, eight years after the *Keene* decision. The new law represented a basic shift in California's treatment of family relations by eliminating fault and guilt as necessary elements of a suit for dissolution of marriage.

38. 49 Cal. App. 3d at 535, 122 Cal. Rptr. at 607-08.

39. *Id.* at 534, 122 Cal. Rptr. at 607; 50 Cal. App. 3d at 97.

40. Justice Peters, adhering to the majority opinion's business agreement reasoning, argued that contract law recognizes services as valuable consideration. 57 Cal. 2d at 673, 371 P.2d at 339, 21 Cal. Rptr. at 603. However, there was no support for the recognition of a woman's services within the home as valuable consideration. *Cf.* Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 213 P.2d 727 (1950); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951). Therefore, Justice Peters argued that services beyond, or in addition to, those within the home be recognized as valuable consideration. 57 Cal. 2d at 673, 371 P.2d at 339, 21 Cal. Rptr. at 603.

41. Ch. 1608, § 8, [1969] Cal. Stat. 3314-44, *codified in* CAL. CIV. CODE §§ 4000-5138 (West 1970 & Supp. 1975).

> First in priority, then, in any divorce reform was the elimination of the artificial fault standard. That is the premise of the Family Law Act. The intent has been to devise practicable procedures and a basis for dissolution which is descriptive of the actual reasons underlying marital breakdown.[42]

With regard to the division of community property, the Act removed the incentive for introducing fault into the proceedings. The property, with limited exception, was to be divided equally upon dissolution of the marital relationship.[43] The courts no longer had the discretion to regard the innocent party or punish the guilty party in awarding the community property.

A. *In re Marriage of Cary*

The Family Law Act provided the basis for Paul Cary's suit against Janet Cary,[44] with whom he had lived for eight years, but to whom he had not been legally married. The suit was for a "nullity of the marriage" under California Civil Code section 4001. A central issue in the trial became the property rights of the respective parties, and the trial court determined that the property should be divided equally. Paul appealed this decision.

The court of appeal, in sustaining the trial court's judgment, with one modification,[45] determined that Paul, Janet and their four children were a "family" within the meaning and intent of the Family Law Act, regardless of whether Paul and Janet had entered into a valid marriage. The court noted that the Cary relationship had continued for more than eight years, and that the couple had presented themselves as being married when purchasing a home, when obtaining credit, in filing tax returns, and in all of their business and social activities. They had four children whose birth certificates and school registration forms listed Paul and Janet Cary as their parents. Janet performed services within the home and Paul worked at an outside job.

---

42. 4 CAL. ASSEM. J. 8057 (1969).

43. *See* CAL. CIV. CODE §§ 4800-13 (West 1970 & Supp. 1975). Exceptions to the equal division of property include: (1) awarding an asset to one party to effect an equal division when economic circumstances warrant it; (2) awarding property to one party as an offset if there has been a misappropriation; and (3) in default situations, where the community assets are less than $5,000, awarding all of the property to the nondefaulting party. *Id.* § 4800(b) (West 1970).

44. Although the Carys were never married, the case is cited as *In re* Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

45. The trial court had inadvertently ordered Paul to deliver to Janet a $3,000 promis-

The *Cary* court first discussed the traditional approach of the California courts to the treatment of community property and its division upon divorce. The court noted that the community property principles were often applied in putative marriages where no valid marriage in fact existed, but where one or both parties to the relationship had a good faith belief that there was a valid marriage.[46] The court further observed that in the good faith situations, no distinction was made between contributions of money or contributions of services made toward the accumulation of property; as with the valid marriage situation, the type of contribution did not matter.[47]

Cary then discussed the meretricious spouse situation, in which the courts had traditionally refused to grant relief to the parties seeking to enforce rights to property accumulated during the meretricious relationship. The court pointed out that the refusal was often based upon a view that the relationship was "sinful" and the parties were "guilty," and should not, therefore, be allowed to enforce their rights in the courts.[48] Since the *Cary* court viewed the Family Law Act as an expression of a public policy that guilt and innocence "are no longer relevant in the determination of family property rights, whether there be a legal marriage or not,"[49] the court could find no justification for penalizing meretricious spouses for their "guilt." In the putative marriage situation, it was possible, and often likely, that one party would know that the marriage was invalid.[50] Under the Family Law Act, however, Civil Code section 4452 called for a division of the property acquired during a putative marriage in accordance with the community property statute (Civil Code section 4800). Consequently, neither the bad faith party was penalized, nor the good faith party rewarded. The *Cary* court felt that where both parties knew of the invalidity of the marriage, it would be unreasonable, and would frustrate the objectives of the Family Law Act, to refuse to equally divide the property acquired during the relationship.

> We should be obliged to presume a legislative intent that a person, who by deceit leads

sory note instead of one for $1,500; both parties conceded the error.

46. 34 Cal. App. 3d at 348-49, 109 Cal. Rptr. at 863-64.

47. *Id.* at 349, 109 Cal. Rptr. at 863.

48. *Id.* at 349-50, 109 Cal. Rptr. at 864 and cases cited therein.

49. 34 Cal. App. 3d at 352-53, 109 Cal. Rptr. at 866.

50. *See* Estate of Vargas, 36 Cal. App. 3d 714, 716, 111 Cal. Rptr. 779, 779 (1974); Macchi v. La Rocca, 54 Cal. App. 98, 201 P. 143 (1921).

> another to believe a valid marriage exists between them, shall be legally guaranteed half of the property they acquire even though most, or all, may have resulted from the earnings of the blameless partner. At the same time we must infer an inconsistent legislative intent that two persons who, candidly with each other, enter upon an unmarried family relationship, shall be denied any judicial aid whatever in the assertion of otherwise valid property rights.[51]

In answer to the argument that its decision would encourage meretricious relationships by discouraging the unemployed spouse from marrying because the property would be divided even with no marriage, *Cary* said that the doctrine which gave a meretricious spouse no rights was an even stronger incentive for the income-producing spouse not to marry.[52] In the latter situation, if both parties knew that there was no valid marriage, the income-producing spouse would be allowed to keep all the property upon termination of the relationship, absent an express agreement to share the property, or an equitable lien or trust. *Cary* also stressed that its decision should not be read as applying to all unmarried-living relationships. *Cary* simply held that the family relationships "with cohabitation and mutual recognition and assumption of the usual rights, duties and obligations attending marriage" should be protected.[53]

B. *Estate of Atherley*

One and one-half years after *Cary*, the Fourth Appellate District of the California Court of Appeal was presented with *Estate of Atherley*[54]—a case involving rights of meretricious spouses. *Atherley* fully supported the reasoning and the holding of the *Cary* opinion. As with *Cary*, the *Atherley* facts clearly pointed to a relationship between the spouses that could be described as familial. Harold Atherley died in 1969. Two women filed for a determination of heirship as surviving spouse. Ruth Atherley was married to the decedent in 1933, and lived with him until 1947 when the decedent left Ruth and began to live with Annette Atherley. Decedent and Annette lived together, both working and pooling

51. 34 Cal. App. 3d at 352, 109 Cal. Rptr. at 865-66.
52. *Id.* at 353, 109 Cal. Rptr. at 866.
53. *Id.* at 353, 109 Cal. Rptr. at 867.
54. 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

their resources, and they began to acquire property. In 1961, decedent and Annette traveled to Mexico in order that decedent could secure a divorce from Ruth.[55] In 1962 Annette and Harold were married in Reno, Nevada, and remained together, with both spouses contributing funds and services to the acquisition and improvement of their property until Harold's death.

On the basis of these facts, the trial court determined that Ruth was the surviving spouse, that Annette had a putative spouse's interest in the property accumulated from the time of the invalid, but good faith, marriage to Harold in 1962, but that Annette had no interest in the property acquired from 1948 to 1962—during which period she was a meretricious spouse. All of the property in the estate had been accumulated after 1948.

The *Atherley* court first disposed of the argument that Ruth was equitably estopped to deny the invalidity of the Mexican divorce. Although the court conceded that Ruth may have acquiesced to some extent in the divorce, she had continued to consider herself married to Harold, and to hold herself out as such. Therefore, it was not "unconscionable to allow Ruth to assert the invalidity of the [Mexican] divorce."[56] The court also concluded that Ruth had successfully rebutted the presumption which arises in favor of the validity of the second marriage when there are two successive marriages.[57]

Finally, the court turned to a consideration of the trial court's disposition of the decedent's estate. The court relied on the Family Law Act, with its elimination of fault or guilt in granting divorces and dividing marital property, in sustaining the rights of the meretricious spouse. The analysis was much the same as that used by the *Cary* court. The court stated that "a meretricious spouse now has the same property rights as a putative spouse."[58] In addition to the *Cary* decision, the *Atherley* court pointed to recent changes in California's community property statutes, which were aimed at ending sex-based discrimination in community property. Since the non-income producing meretricious spouse, whose rights were not protected, was usually the woman, the court felt the changes in the law were further evidence of a subtle policy to protect family relationships and prop-

55. The Mexican divorce was arranged by an attorney, and the couple assumed that it would be valid in the United States. *Id.* at 761-62, 119 Cal. Rptr. at 43.

56. *Id.* at 764, 119 Cal. Rptr. at 45.

57. *Id.* at 765-66, 119 Cal. Rptr. at 45-46.

58. *Id.* at 769, 119 Cal. Rptr. at 48.

erty rights gained therefrom.[59] As with *Cary*, the *Atherley* court emphasized with italics that it was seeking to protect *family* property rights rather than the rights of meretricious spouses per se, and that a showing of an actual family relationship would be required before property rights of the meretricious spouse would be protected.[60]

Thus confronted with the claims of legal and non-legal spouses to decedent's estate, the *Atherley* court approved the theory for dividing the property used in *Sousa v. Freitas*,[61] which involved a legal and a putative spouse. Annette was entitled to one-half the estate because all of it had been acquired during her relationship with Harold, just as if it had been community property. In addition, Annette was awarded her separate property, and the property to which she had a right of survivorship as a joint tenant with Harold.

C. *Cary* AND *Atherley*: A TREND?

After *Cary* and *Atherley*, there seemed to be little doubt that California courts would use their equity powers to apply the Family Law Act and its equal division of property provisions to "family" relationships, and not just to "valid" marriages. No longer persuasive were arguments that the Family Law Act was intended to strengthen the marriage relationship, or that:

> 1. Society has a "well-settled interest" in lawful marriages that requires protection; therefore, the benefits and protections of the community property system apply only to lawfully contracted marriages;
> 2. Where there has been a good faith belief that there was a lawful marriage but the marriage was void or voidable, then the courts find equitable considerations present and apply an "equitable community property system" where it would be equitable to do so;
> 3. "Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage en-

59. By stressing the family relationship aspect of the meretricious community, the court was able to credit the services within the home as a valuable contribution to the community, and a valuable consideration entitling the spouse to a share of the property acquired during the relationship. *See id.* at 769 n.11, 119 Cal. Rptr. at 48 n.11.

60. *Id.* at 769, 119 Cal. Rptr. at 48.

61. 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970).

> tered into in good faith are not present in [a meretricious relationship]" and the community property system is withheld.[62]

The trend of the *Cary* and *Atherley* decisions indicated that the application of equitable considerations to unmarried family relationships outweighed society's interests in valid marriages. The length and relative stability of the relationships, the Carys' children, the Atherleys' substantial property acquisitions and Ms. Keene's services to the unmarried family unit all point to strong family relationships. Equity should be willing to protect the parties to these relationships in spite of the lack of valid marriages.

Accordingly, the traditional policy considerations which seemed inherent in *Vallera* and *Keene*—that: (1) recognition of meretricious spouses' implied promises to share joint accumulations equally might weaken the institution of marriage; and (2) the rights of meretricious spouses are difficult to enforce judicially—"lose much of their cogency in light of the inequitable results reached by the courts in cases such as *Keene*."[63] Despite this fact, the *Cary-Atherley* trend has not been followed in two appellate court decisions which must now be examined in greater detail.

III. RECENT REINFORCEMENT OF THE VALLERA-KEENE DOCTRINE

A. *Beckman v. Mayhew*

Beckman v. Mayhew[64] was decided five months after *Atherley*. The majority opinion in *Beckman* rejected the *Cary-Atherley* argument that courts should protect family relationships, and, instead, adhered to the traditional doctrine of *Vallera* and *Keene*.

The plaintiff and defendant lived together in a "non-marital family relationship"[65] for twelve years. They did not hold themselves out as married,[66] and used their individual last names for some purposes, and the defendant's last name for other pur-

62. Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226, 1241-42 (1974) (citation omitted).

63. *Illicit Cohabitation*, *supra* note 15, at 369.

64. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

65. "Non-marital family relationship" is a phrase which the *Beckman* court adopted to refer to meretricious relationships. *See id.* at 531 n.1, 122 Cal. Rptr. at 605 n.1.

66. *Id.* at 532, 122 Cal. Rptr. at 606. It is mentioned in the opinion that if the couple had married, the plaintiff would have lost a government pension which she received monthly. *Id.*

poses. The couple filed joint tax returns and had a joint checking account under defendant's last name. Defendant worked, and deposited his pay in the joint checking account; plaintiff performed the services of a housewife. On conflicting evidence, the trial court found that plaintiff deposited little, if any, of her government pension in the joint account.

The couple lived on land which defendant's former wife had quitclaimed to him. During the relationship a $4,000 debt on the property was paid off with funds from the checking account. Defendant built a new home on the property, purchasing building materials with a $10,000 loan, a note for which was signed by both plaintiff and defendant.[67] The property was purchased in 1957 for $5,200. Plaintiff and defendant lived on the property from 1959 to 1971; when they separated, the property was worth approximately $46,000.

Relying on *Cary*,[68] plaintiff brought suit against defendant claiming entitlement to one-half the land, but the trial court denied her any rights in the property. In sustaining the trial court's conclusion concerning plaintiff's property rights, the *Beckman* court rejected *Cary*'s analysis of the Family Law Act.

> The Family Law Act deals with divisions of property at the termination of solemnized marriages and (in Civ. Code, §§ 4452 and 4455) at the termination of putative marriages. Neither in terms nor by implication does it deal with non-marital family relationships of the kind involved in *Vallera*, *Keene* and the present case.[69]

The *Beckman* court felt that if the Legislature wanted to overrule the *Vallera-Keene* rule, by including meretricious relationships under the Act, it would not have chosen such an "extraordinarily indirect, extremely devious and remarkably subtle" means of doing so.[70]

The *Beckman* court also dealt with the view that the

67. *Id.* at 533, 122 Cal. Rptr. 606. The appellate court remanded the case to the trial court on the issue of plaintiff's liability on the note, on which defendant claimed sole liability. *Id.* at 535, 122 Cal. Rptr. at 608.

68. The *Atherley* case had not been decided when plaintiff's briefs were filed, but the court acknowledged that *Atherley* supported plaintiff's position, and the court discussed *Atherley* in its opinion. *See id.* at 534, 122 Cal. Rptr. at 607.

69. *Id.* at 535, 122 Cal. Rptr. at 607.

70. *Id.*

Vallera-Keene rule discriminated against women, and that changing social attitudes were such that the rule should be changed. Although revealing some sympathy for this view, the majority opinion contended that the doctrine of stare decisis compelled adherence to the *Vallera-Keene* rule.[71] The concurring opinion in *Beckman* more forcefully answered the developing social attitudes-sex discrimination criticisms of *Vallera* and *Keene*. In this opinion Justice Paras pointed out, as had the majority in *Keene*, that there are cases in which the man, rather than the woman, is seeking to enforce rights to property acquired during meretricious relationships.[72] Therefore, in his view the *Vallera-Keene* rule insures equal protection because, regardless of gender, no meretricious spouse will have rights in property accumulated during the relationship protected in the absence of an express agreement to share.[73] Moreover, Justice Paras could find no developing social attitude which would prefer "informal living arrangements to solemnized marriage, nor any reason . . . to suggest one."[74]

B. *Marvin v. Marvin*

Marvin v. Marvin[75] is the most recent California court of appeal case to deal with meretricious relationships. The opinion adamantly rejected *Cary* and *Atherley*, criticized both courts for rewriting the requirements of the Family Law Act, and expressly agreed with both the majority and concurring opinions in *Beckman*.[76]

Marvin involved a meretricious relationship which lasted for six years, from 1964 through 1970. When the parties entered into the relationship they both knew defendant (Lee Marvin) was legally married to another woman. The defendant's wife brought an action for dissolution after the relationship began, and the final decree was entered in 1967. When plaintiff and defendant entered into their relationship they made an oral agreement that they

71. *Id.*

72. *Id.* at 536, 122 Cal. Rptr. at 608. In most cases where a man is suing for property rights as a meretricious spouse, the facts involve property already owned by the woman when the relationship begins or property acquired by the woman during the relationship. The man is not able to show contribution of money services either to the relationship or toward the acquisition of the property. *See, e.g.*, Holmes v. Holmes, 98 Cal. App. 2d 536, 220 P.2d 603 (1950); Elliot v. Wood, 95 Cal. App. 2d 314, 212 P.2d 906 (1949); Baskett v. Crook, 86 Cal. App. 2d 355, 195 P.2d 39 (1948).

73. *See* 49 Cal. App. 3d at 536, 122 Cal. Rptr. at 608.

74. *Id.*

75. 50 Cal. App. 3d 84 (1975), *hearing granted*, L.A. No. 30520, Cal. Sup. Ct., Sept. 17, 1975.

76. *See id.* at 96-97.

would combine their earnings and efforts and share equally in any property accumulated during the relationship. They agreed that they would hold themselves out as husband and wife and that plaintiff would render services to defendant as "companion, homemaker, housekeeper and cook."[77] The couple separated in 1970, and plaintiff brought suit for a declaration of rights, support and maintenance, and for other relief. Appeal was taken after plaintiff's complaint was dismissed for failure to state a cause of action.[78]

The *Marvin* court began its opinion by discussing meretricious relationships and property rights acquired by parties to such relationships. The court recognized that under prior case law agreements by meretricious spouses to share in their jointly accumulated property may be enforced,[79] but that if the relationship is substantially involved in the agreement (that is, if the relationship is consideration for the promise to share acquired property), or if there is no agreement, the parties acquired no property rights.[80] All arguments that the meretricious relationship itself may serve as a basis for an equitable distribution of the property acquired during the relationship were dismissed. The court ignored the *Keene* dissent's recognition of a "family," which both *Cary* and *Atherley* relied on, and noted that rendition of personal services to the relationship will not entitle a meretricious spouse to property rights.[81]

In addition, the *Marvin* court found that: (1) the Family Law Act nowhere recognizes, explicitly or implicitly, the rights of parties to meretricious relationships; and (2) the protection of the

77. *Id.* at 88. Subsequently, the agreement was modified so that plaintiff would end her career to devote her time to defendant, and defendant would support her financially. *Id.*

78. *Id.* at 90.

79. *Id.* at 93-94, *citing* Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).

80. 50 Cal. App. 3d at 94.

81. *Id.* at 95. *Marvin* goes on to cite Powell v. Rogers, 496 F.2d 1248 (9th Cir. 1974), as further authority for denying the meretricious spouse property rights, and also because it rejects *Cary*. 50 Cal. App. 3d at 95. *Powell* involved a woman who wished to qualify as a "surviving wife" or "widow" under the worker's compensation death benefits. Plaintiff and decedent were together for fourteen years and had three children. The children qualified for the benefits, but the court held that the plaintiff could not qualify under California law. The court had great sympathy for the plaintiff and suggested that Congress should consider enacting federal common-law marriage legislation to protect persons in states (like California) which do not recognize common-law marriages. The court did not reject *Cary*, but did not feel it could accept "this decision, standing alone, as recognition of common-law marriage in California." Powell v. Rogers, *supra* at 1251.

Family Law Act cannot be enjoyed unless one at least has a good faith belief that one is validly married.[82] The court did not discuss the legislative history or basis for the Act. Further, the court made no mention of the changes in the community property laws which the *Atherley* court felt further strengthened the argument that parties to "family relationships" should have their property rights protected.[83]

Turning to a consideration of the oral agreement between plaintiff and defendant to share equally in their accumulated property, the *Marvin* court conceded that such an agreement is not automatically illegal. The court recognized that such agreements will be enforced as long as the "illicit relationship" is not the basis of the agreement.[84] In the present case, however, the court found that the agreement between plaintiff and defendant would not be enforceable because it had been made "in contemplation of an illicit relationship."[85] Plaintiff not only knew that she and defendant were not validly married, but she knew that when the relationship began defendant was legally married to someone else. Since the agreement plaintiff and defendant made was based upon plaintiff's promise to act as "companion, homemaker, housekeeper and cook" to defendant, her promise to enter into the relationship was consideration for defendant's promise to share their accumulated property and, therefore, the agreement was illegal and unenforceable.[86]

Plaintiff's attempts to amend the complaint to "more strongly allege a 'familial relationship' " were to no avail. The court felt that, rather than cure the defect, amendment would merely have "emphasize[d] the existence of the meretricious relationship and its involvement in the agreements allegedly made between the parties."[87] Such involvement was held to be "fatal." The court thus rejected *Cary* and *Atherley*'s view that the expectations of parties to "family relationships" merit protection, regardless of whether the relationships are based on valid, putative or meretricious "marriages."

---

82. 50 Cal. App. 3d at 96.
83. *See* text accompanying note 64 *supra*.
84. *See* 50 Cal. App. 3d at 97.
85. *Id.* at 98.
86. *Id.*
87. *Id.* at 99.

IV. THE VALLERA-KEENE DOCTRINE VS. THE CARY-ATHERLEY BALANCING PROCESS

The *Cary* and *Atherley* courts based their opinions on a consideration of factors which previous courts, in dealing with meretricious relationships, had refused to recognize. Prior to *Cary*, the courts had looked only to the policies against protecting the rights of parties involved in meretricious relationships, and had found that the policies were sufficiently important to outweigh the need to protect the meretricious spouse. *Cary* and *Atherley* implicitly used a balancing process, and found that a "family" relationship should create legal rights which the courts will protect, whether or not a valid marriage has occurred. However, with the reaffirmation of the *Vallera-Keene* doctrine by the *Beckman* and *Marvin* courts, meretricious spouses have again been placed in the position of having no legal protection for their property rights, absent express or implied agreements. Whether the reasoning of *Beckman* and *Marvin* will prevail over that of *Cary* and *Atherley* will probably be determined by the California Supreme Court in 1976.

The *Beckman-Marvin* thesis appears to be that society's view of families and family relationships is not changing, or, if change is occurring, that the courts should not recognize or support the change. This thesis reflects a return to policy considerations which have traditionally been relied upon to justify denial of the protections of the community property laws to meretricious spouses, and a rejection of the *Cary-Atherley* balancing test with its recognition of "family." *Beckman* and *Marvin* see the underlying, and most important, policy consideration as that of protecting conventional morality,[88] which is contravened by meretricious relationships. In order to protect conventional morality meretricious relationships must be discouraged; the most effective way to discourage such relationships is to deny legal protection to meretricious spouses, no matter what equities are involved.

There appears to be an inherent bias against women in the traditional approach toward meretricious relationships of denying property rights in order to protect morality. The term "meretricious" is defined as: "(1) of or relating to a prostitute: having a harlot's traits; (2) exhibiting synthetic or spurious attractions:

88. *See, e.g.*, 49 Cal. App. 3d at 536, 122 Cal. Rptr. at 608.

based on pretense or insincerity."[89] Opinions denying rights to meretricious spouses refer to "illicit" relationships, and define "morality" as the basis for their decisions.[90] The *Vallera, Keene, Beckman* and *Marvin* opinions, despite protestations that men have also been denied claims as meretricious spouses, appear to be implicitly adhering to the literal definition of meretricious. The courts seem to view a meretricious relationship as one involving a woman who enters the relationship intending to contribute nothing of value (personal services being of no value), but expecting to be awarded a portion of the property that the man has acquired during the relationship. In order to protect the man from the evil designs of such women, the courts deny the woman (in most cases it is the woman being denied) all property rights.[91]

The *Keene* opinion, which both *Beckman* and *Marvin* rely on, manifests this view. By narrowly defining "funds" so as to exclude personal services,[92] the courts have insured that in conventional non-marital family situations the woman is left with no protection if she has no money or property of value to contribute toward the acquisition of new property. Thus, when the relationship ends the woman is left with nothing even if she has diligently worked within and around the home in furtherance of the relationship. Even when the woman is in a position to make a contribution of money or property, it must be contributed before or at the time of acquisition; later contributions to property already acquired by a spouse are not protected.[93] In most cases, therefore, the man is being protected, even to the extent of allowing him the entire benefit of the increase in value of property he acquired before the relationship began, no matter how much that increase is due to the monetary or personal service contributions of the woman.

In addition to the policy of protecting what the court conceives to be conventional morality, usually at the expense of the female meretricious spouse, there are other, less subjective, pol-

89. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1413-14 (1966) (unabridged).

90. *See* Marvin v. Marvin, 50 Cal. App. 2d 84, 94 (1975); Beckman v. Mayhew, 49 Cal. App. 3d 529, 536, 122 Cal. Rptr. 604, 608 (1975).

91. There is certainly no more reason why a man involved in a non-marital family relationship should be denied "community property" rights than a woman, if he has contributed to the relationship. For cases involving men who made no contribution see authorities cited at note 72 *supra*.

92. 57 Cal. 2d at 659-64, 371 P.2d at 332-35, 21 Cal. Rptr. at 596-99.

93. *See id.* at 664-68, 371 P.2d at 333-36, 21 Cal. Rptr. at 597-600.

icy considerations which are mentioned as reasons for the denial of meretricious property rights. These considerations include concern about illegitimate children, confusion of public records and land titles,[94] and the protection of the legal spouse of persons involved in meretricious relationships.[95] While each of the considerations is deserving of some weight in determining whether or not meretricious spouses are entitled to property rights, none are strong enough to overcome the protection *Cary* and *Atherley* accord to the familial relationship which may develop between meretricious spouses.

What the *Cary* and *Atherley* courts have done is expand the number of policy considerations which should be used in determining the rights of meretricious spouses. The courts have turned, in effect, to a balancing test, and have determined that there are equitable considerations in non-marital family relationships which require that the court protect the property rights of persons involved in such relationships. By emphasizing the "family" aspects of the relationships the courts are recognizing the value of stable personal relationships, the fact that children are born of such relationships and should be protected, that persons involved in such relationships make contributions of personal services (particularly women who remain at home), and that there is no single, or unchanging, "morality" in need of the courts' protection. Given relationships involving these considerations, *Cary* and *Atherley* view the question of whether meretricious spouses should be protected as one of whether a family relationship should be protected, regardless of legal marital status. Both courts feel that public policy has dictated that such relationships are deserving of protection.

Unfortunately, neither *Cary* nor *Atherley* was willing to expressly rest its decision on these equitable considerations, which, balanced against the traditional considerations of *Beckman-Marvin*, lead to a protection of non-marital family spouses. Instead, both courts relied on the Family Law Act, with its disavowal of "guilt" and "innocence," and the changes in the community property laws, as authority for their decisions, and as expressions of public policy impliedly recognizing such relation-

94. *See* Weyrauch, *Informal and Formal Marriage*, 28 U. CHI. L. REV. 88, 99 (1960).

95. *Vallera, Keene, Atherley* and *Marvin* all involved situations where the male member of the meretricious relationship was legally married to someone else when the meretricious relationship began, and each case found that the female meretricious spouse knew of the valid marriage when she entered the relationship.

ships. However, as pointed out by both *Beckman* and *Marvin*, the Family Law Act and the community property laws nowhere indicate any recognition of meretricious relationships or property rights acquired by persons involved in such relationships.[96] It is a very long step to imply recognition of community property rights in a meretricious spouse from the Legislature's express purpose of eliminating guilt and fault as grounds for dissolution of marriage, awarding of alimony and division of community property. Both *Cary* and *Atherley* concede that not all meretricious relationships are deserving of protection, and that only those involving family relationships should qualify. Even with this limitation, it is unlikely that the Family Law Act was intended to become the basis for the recognition of what amounts to common-law marriage in California.[97]

Therefore, when the California Supreme Court reviews *Marvin*, it is unlikely that the court will be willing to so broadly interpret the Family Law Act as to include the meretricious family relationship within its scope. This does not mean, however, that the court must affirm *Marvin* and overrule *Cary* and *Atherley*. The basis of the *Vallera-Keene* doctrine is judge-made law.[98] Most courts, in the absence of legislation covering such relationships, have determined that meretricious relationships are against public policy, and have treated parties involved in them accordingly by not allowing them to recover property acquired during the relationship. *Cary* and *Atherley* have pointed out that public policy does change and that the law must change with it. Even the *Beckman* court recognized that the basis of the *Vallera-Keene* doctrine may no longer be valid, although the court felt constrained by stare decisis to uphold the doctrine. The Supreme Court, how-

96. *See* Marvin v. Marvin, 50 Cal. App. 3d 84, 96-97 (1975); Beckman v. Mayhew, 49 Cal. App. 3d 529, 535, 122 Cal. Rptr. 604, 607 (1975).

97. California Civil Code section 4452 covers situations where a marriage is found to be void or voidable, and "the court finds that either or both parties believed in good faith that the marriage was valid"; in this situation the putative marriage is recognized. In addition, there are statutes which deal with incestuous marriages, CAL. CIV. CODE § 4400 (West 1970), bigamous marriages, *id.* § 4401 (West 1970), and marriages wherein there is age incapability, an existing spouse not known to be alive for a period of time, unsound mind, fraud, force and physical disability, *id.* § 4425 (West 1970).

98. For instance, *Vallera* asserts without discussion that "a woman living with a man as his wife, . . . with no genuine belief that she is legally married," does not acquire "the rights of a co-tenant in his earnings . . . ." 21 Cal. 2d at 684, 134 P.2d at 763.

Only Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307 (1931), is cited in support of this assertion. The brief *Flanagan* opinion merely assumes, without citing authorities, that, unless one is validly married or a putative spouse, "a claim of community property rights [is] clearly unfounded." *Id.* at 666, 3 P.2d at 308.

ever, is free to overrule or modify the traditional doctrine, and *Cary* and *Atherley* present compelling reasons for abandoning *Vallera-Keene* and adopting their balancing process.[99]

If the *Cary-Atherley* balancing process is accepted, the determination of when a relationship loses its meretricious character and achieves the dignity of a "non-marital family relationship" is crucial. Although rigid standards would obviously be unworkable, the application of the principles set forth in *Cary* and *Atherley* necessitates a practical means for determining when a relationship should merit the protection of the community property laws. There are various considerations involved, under *Cary* and *Atherley*, in determining when a meretricious relationship becomes a "family" relationship. These considerations are not intended to be inclusive, and the weight of each will vary according to the particular facts of the case. Both cases involved relationships that had lasted for a relatively long period of time, *Cary* eight years and *Atherley* twenty-two years. In both cases the spouses held themselves out as married, used the same name, acquired property together, and filed joint tax returns. In each case the obvious intention of the parties was to live and to be treated as if they were married. In *Cary*, the couple had four children, and all records concerning the children named both of the Carys as parents. The combination of these factors led the *Cary* and *Atherley* courts to conclude that a familial relationship had been established.

If the supreme court is unwilling to adopt the *Cary-Atherley* approach to non-marital family relationships, it should at least be willing to expand the business agreement theory of *Vallera* and *Keene* to include a recognition of the value of personal services and to require compensation for the services. More equitably, the court should recognize that personal services are a contribution to the "meretricious" community, and that property acquired or improved during the meretricious relationship should be divided between the spouses. If the court does adopt *Cary-Atherley*, these theories might still be used to give the courts discretion to protect the rights of meretricious spouses who are not involved in a family relationship that is as stable and as long-lasting as those in the *Cary* and *Atherley* cases.

99. Whatever conclusion the California Supreme Court reaches, the term "meretricious," with its negative, sexist connotation, should be abandoned whether or not the relationship under consideration is found to be familial.

CONCLUSION

We are living in a world of change and, in order to achieve justice, it is occasionally necessary for the law to invent new remedies and to modify old ones. Recognition of change and the realization that flexibility is a necessary part of our legal system seem to be underlying themes of both the *Cary* and *Atherley* decisions. Contrary to Justice Paras' opinion in *Beckman*, unmarried living arrangements are becoming more and more common, and many of these relationships, despite the lack of a marriage ceremony, are stable, lasting and familial. It is not unreasonable to assume that the parties to these non-marital relationships have every expectation of sharing equally in property acquired during the relationship, and, if the relationship should end, of having a right to an interest in the property remaining. It is to be hoped that *Cary* and *Atherley* will be followed and expanded and that the supreme court's review of *Marvin* will mark the end of the *Vallera-Keene* doctrine.

Suzanne J. Chapot