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PROPERTY RIGHTS OF UNMARRIED COHABITANTS IN NEW YORK: PROPOSAL FOR LEGISLATIVE ACTION TOWARDS A MORE EQUITABLE FUTURE

INTRODUCTION

The number of couples living together without benefit of marriage has increased significantly in recent years.¹ Property right conflicts and disputes among these couples on separation or death have also increased significantly. Most controversies that arise at the end of a cohabitation relationship² concern the distribution of property acquired during cohabitation. Though many states have community property rights or equitable distribution laws that apply to married couples,³ few states protect the property interests of those who live together unprotected by the benefit of marriage. Our legal system has failed to keep up with the changing times. Without an express⁴ or, at

1. Census statistics indicate that between 1960 and 1970 the number of unmarried couples living together in the United States increased eightfold. 2 U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, table 11, at 4B; census figures from 1986 indicate that over 2.2 million couples of opposite sex cohabit without marriage in the United States today. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 412, HOUSEHOLDS, FAMILIES, MARITAL STATUS AND LIVING ARRANGEMENTS: March 1986 (Advance Report) 2, fig.2.

2. Throughout this Comment, the term "cohabitation" is used to describe a relationship where two adults live together, do not hold themselves out as spouses, and both realize that they are not formally married.

3. See Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21 (1974). A concept of jointly held marital property exists in community property states such as California and Washington. In states such as New York that have equitable distribution laws, the courts equitably distribute property acquired during marriage regardless of who holds legal title. See also *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. Westchester County 1985), *modified on other grounds*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (2d Dep't), *aff'd as modified*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

4. See *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979) (agreement between non-marital partners enforceable since not explicitly based on sexual ser-

least in some cases, implied promise⁵ to share, one partner in a cohabitation relationship may have no legal right to property held in the other partner's name.

At one time, the doctrine of common-law marriage could be invoked by cohabiting couples,⁶ creating a legal relationship that protected property interests. Common-law marriage was accorded status in the early days of this country's development when travel between remote settlements was difficult and there were few places where marriage licenses could be obtained.⁷ The historical considerations that gave birth to common-law marriage no longer exist, therefore, many states that once recognized common-law marriage have abolished it either by statute or judicial decision.⁸ New York State, supporting its deci-

vices); *Marum v. Marum*, 21 Misc. 2d 474, 475, 194 N.Y.S.2d 327, 328-29 (Sup. Ct. Nassau County), *modified on other grounds*, 8 A.D.2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959) (equitable lien created when promise made to convey one-half of the property); *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976) (court recognized and enforced an express agreement between unmarried cohabitants).

5. See *Marvin v. Marvin*, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976) (unmarried cohabitants to share in property accumulated during period of cohabitation where evidence establishes an implied agreement to do so); *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984) (court willing to imply a contract so as to make a just and equitable disposition of property accumulated by unmarried cohabitants).

6. See Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 ST. LOUIS U.L.J. 30 (1960). The generally accepted requirements of a common-law marriage are: 1) an agreement to get married (in some states it may be implied); 2) a reasonable period of open cohabitation; 3) reputation of marriage in the community; and 4) capacity of the parties to enter into a valid marriage. Annotation, *Habit and Repute as Essential to Common-Law Marriages*, 33 A.L.R. 27 (1924).

7. See Kirkpatrick, *supra* note 6, at 45-46; Annotation, *Validity of Common-law Marriage in American Jurisdictions*, 133 A.L.R. 758 (1941).

8. *Gildersleeve v. Gildersleeve*, 259 A.D. 1043, 1043, 21 N.Y.S.2d 297, 298 (2d Dep't 1940) (claim asserting common-law marriage rejected as void); *Andrews v. Andrews*, 166 Misc. 297, 300, 1 N.Y.S.2d 760, 763 (Sup. Ct. Orange County 1937). See also N.Y. DOM. REL. LAW § 11 (McKinney 1987 & Supp. 1990).

sion with public policy concerns,⁹ abolished common-law marriages entered into after 1933.¹⁰

Since common-law marriage no longer exists in New York State, cohabiting persons have sought equitable solutions to property disputes based upon varying theories such as trust principles,¹¹ co-ownership or tenancy principles,¹² express¹³ or implied¹⁴ agreements, and partnerships.¹⁵ Some of these attempts have been successful, others have failed.

The first section of this Comment will discuss the different solutions, both in law and in equity, accepted by New York

9. Objections to common-law marriage include the lack of public records to verify property rights of informally married couples and the likelihood of fraudulent claims. See Comment, *Common Law Marriage and Unmarried Cohabitation: An Old Solution to a New Problem*, 39 U. PITT. L. REV. 579, 581-82 (1978); Kirkpatrick, *supra* note 6, at 30.

10. See N.Y. DOM. REL. LAW § 11 (McKinney 1987 & Supp. 1990) (effective April 19, 1933).

11. See *infra* notes 64-81 and accompanying text. See, e.g., *Bontecou v. Goldman*, 103 A.D.2d 732, 732-33, 477 N.Y.S.2d 192, 194 (2d Dep't 1984). The court stated that "a constructive trust may be imposed when property has been acquired under such circumstances that holder of legal title may not in good conscience retain the beneficial interests therein." *Id.* The essential elements which must be shown to establish a constructive trust "are: 1) a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance thereon; and 4) breach of the promise and unjust enrichment." *Id.* at 733, 477 N.Y.S.2d at 194.

12. A tenancy in common is created when two or more persons own property with no right of survivorship between them. When one tenant in common dies, his interest passes to his devisees or heirs. In a joint tenancy, the property owners each have a right of survivorship. When one joint tenant dies the survivor(s) take all. A tenancy by the entirety exists only between husband and wife, with a right of survivorship that cannot be severed without the consent of both spouses. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 207-25 (2d ed. 1988). See *infra* notes 82-117 and accompanying text.

13. When parties to a contract manifest their agreement by words, the contract is said to be express. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 19 (3d ed. 1987). See *infra* notes 28-47 and accompanying text.

14. When parties to a contract manifest their agreement by conduct it is said to be implied in fact. RESTATEMENT (SECOND) CONTRACTS § 4 (1979). A contract implied in law is not a contract but an obligation imposed by law to do justice. See *Bradkin v. Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970). See *infra* notes 48-63 and accompanying text.

15. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 14 Cal. Rptr. 815 (1976) (court held that the parties were to equally share in the property); *In re Estate of Thornton*, 81 Wash. 2d 72, 499 P.2d 864 (1972) (en banc) (court held that one of the parties could prove that a partnership agreement had been entered into).

courts litigating the property rights of unmarried cohabitants.¹⁶

16. This Comment will deal with heterosexual unmarried cohabitants, but there have also been some recent New York cases dealing with the issue of defining the property rights of homosexual couples. A New York court suggested a few ways in which homosexual couples might create a legal relationship including: reciprocal wills, naming each other beneficiaries of insurance policies, and executing powers of attorney to one another. *In re Adoption of Adult Anonymous*, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (Fam. Ct. Kings County 1981). Gay couples have tried to create a legal family relationship in other ways. It became necessary to develop novel approaches to the creation of a family relationship so as to overcome the fact that same-sex couples have no right to marry. *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. Queens County 1971). One such novel approach toward creating a family relationship, so that property rights could vest in both partners, was adoption. There were three important same-sex adoption cases decided in New York, the first two upholding the right of adoption, while the last found the process to be inappropriate.

In *In re Adoption of Adult Anonymous*, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (Fam. Ct. Kings County 1981) (*Anonymous I*), a twenty-two year old male petitioned the court to adopt a twenty-six year old male, contending that the parties wished to establish a "more permanent legal bond" that would provide some security in their relationship. Property concerns were a major issue. For the Family Court of Kings County, this was a matter of first impression. The court reasoned that the consensual homosexual relationship of the petitioner and adoptee was not illegal in New York State since the New York Court of Appeals had ruled an anti-sodomy statute unconstitutional in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980). The court went on to grant the adoption petition, relying on the *Onofre* decision to reason that "judicial interference with statutory rights of adult adoption, because of the sexual preferences of the parties . . . will not advance the cause of public morality." *Anonymous I*, 106 Misc. 2d at 799, 435 N.Y.S.2d at 531.

In re Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1st Dep't 1982) (*Anonymous II*), was decided one year after *Anonymous I* and here, the court permitted the adoption of a forty-three year old man by a thirty-two year old man, his homosexual partner. The court relied heavily upon the couple's practical need to obtain secure housing, looking to the lease held in the name of the adopter. The lease provided that immediate family members of the lessee could occupy the apartment. The court found nothing improper about the parties' reasons for the adoption, especially their property concerns. *Id.* at 34-35, 452 N.Y.S.2d at 201. But one of the more important elements of the court's holding was its approach to what constitutes a family:

The "nuclear family" family arrangement is no longer the only model of family life in America. The realities of present day urban life allow many different types of non-traditional families In any event, the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person.

Id. at 35, 452 N.Y.S.2d at 201.

But the New York Court of Appeals held that adoption "is plainly not a quasi-marital vehicle to provide nonmarried partners with a legal imprimatur for their

The second section will outline the state's interest in the institution of marriage and argue that this interest may be satisfied by unmarried cohabitants as well. Finally, this Comment will explore some guidelines for a legislative solution to providing fair and equitable distributions of property when unmarried cohabitants end their relationship.

I. THEORIES OF RECOVERY AND NEW YORK COURTS

Traditionally, any property agreements made between unmarried cohabitants were unenforceable because of the illicit nature of the cohabitation relationship.¹⁷ Courts generally left

sexual relationship." *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233, 236, 471 N.E.2d 424, 425, 481 N.Y.S.2d 652, 653 (1984). This case involved the proposed adoption of a fifty year old male by his fifty-seven year old lover. The two had lived together for over twenty-five years and wished to codify their property rights as well as publicly acknowledge their emotional bond. The court found that the purpose of adoption was only for the legitimization of a parent-child relationship. If the adoption laws were to be "changed" (the dissent points out that the New York adoption statute makes no mention of sexual preferences so that "change" would not be necessary) to allow sexual lovers to adopt, "it is for the Legislature, as a matter of State public policy, to do so." *Id.* at 239, 471 N.E.2d at 427, 481 N.Y.S.2d at 655.

Judge Meyer, in his dissent, strongly argued that New York's adoption law required no sexual evaluation (or any other evaluation) of the relationship of the adopting parties. The judge took the position that the majority relied upon the fact that many found homosexual relationships "morally offensive." But he contended that this was not sufficient to justify reading into the statute a limitation that had not been intended by the legislature. *Id.* at 242, 471 N.E.2d at 452, 481 N.Y.S.2d at 657 (Meyer, J., dissenting).

The New York Court of Appeals, in *In re Adoption of Robert Paul P.*, completely ignored the reality that many homosexual couples seek to create a legal family relationship through these adoption procedures. Instead, the court views these adoptions only in terms of their sexuality element. The appellate division in *Anonymous II*, recognized the practical realities facing homosexuals and permitted homosexual adoptions, relying heavily on the need for these couples to provide some security in their relationships. The court of appeals' inability to acknowledge this need places the burden upon the legislature to provide a means of creating a legal bond between homosexual partners. The legislature could easily follow the same guidelines set forth in this Comment establishing a solution for the distribution of property between unmarried cohabitants who end their relationship.

17. The enforcement of agreements where illicit conduct formed any part of the consideration was contrary to public policy. See *McCall v. Frampton*, 99 Misc. 2d 159, 166, 415 N.Y.S.2d 752, 757 (Sup. Ct. Westchester County 1979); *In re Gordon's Estate*, 8 N.Y.2d 71, 75, 168 N.E.2d 239, 240, 202 N.Y.S.2d 1, 3 (1960).

ownership of property in the name of the cohabitant holding title while refusing to recognize any agreement between the couple.¹⁸ But courts have begun to reconsider this strict position, partly because of the social recognition that unmarried cohabitation has increased dramatically in recent years¹⁹ and because continued refusal to recognize an agreement made between unmarried cohabitants would be unfair to the parties involved.²⁰ Some states recognize only express agreements. Absent an express agreement or where an illegal or sexual relationship has served as the consideration, the courts have relied upon equitable property or partnership theories to provide a solution for property distribution.

While courts have not accepted all theories of recovery as a basis for asserting the property rights of unmarried cohabitants, many courts now enforce express agreements between unmarried cohabitants under certain circumstances.²¹ Also, some jurisdictions have upheld implied agreements between unmarried cohabitants.²² No majority position has surfaced as to the application of equitable property or partnership solutions because these theories tend to be applied on a case-by-case basis.

In accordance with the many courts that enforce express agreements, New York courts have upheld, as a basis of recovery in property disputes between unmarried cohabitants, the theories of express agreements,²³ trust principles,²⁴ and co-own-

18. Many courts relied upon the "meretricious spouse rule." Under this rule, a court will assume that illicit sexual relations constitute part of the consideration for the agreement. The contract will therefore be void and unenforceable because of the illegality of the consideration. Hunter, *An Essay on Contract and Status: Race, Marriage and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1091 (1978).

19. See *supra* note 1.

20. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815, 557 P.2d 106 (1976); *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979).

21. See Oldham and Caudell, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 110 (1984). See *infra* notes 28-47 and accompanying text.

22. Oldham and Caudell, *supra* note 21, at 111.

23. In *Morone v. Morone*, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980), the court held that express agreements between unmarried cohabitants would be upheld as long as sexual services did not serve as the consideration. See *infra* notes 28-47 and accompanying text.

ership principles, including tenancy in common²⁶ and joint tenancy.²⁶ However, New York will not, as of this time, recognize an implied-in-fact theory of property recovery for unmarried cohabitants.²⁷

A. *Express Agreements*

The New York Court of Appeals recognized that New York courts had at one time accepted the enforceability of an express agreement between unmarried cohabitants as long as it was not based upon an illicit agreement to provide sexual services.²⁸ This recognition of an express agreement between unmarried cohabitants is based upon contract law and is accepted even when personal services, including domestic services, account for the consideration.²⁹

24. In *Muller v. Sobol*, 277 A.D. 884, 97 N.Y.S.2d 905 (2d Dep't), *reh'g and appeal denied*, 277 A.D. 951, 99 N.Y.S.2d 757 (2d Dep't 1950), the court held that as long as the necessary elements are established, a constructive trust will be found in order to prevent unjust enrichment. *Id.* See *infra* notes 64-81 and accompanying text.

25. Where a disposition of properties is made to grantees not legally married, but referred to as husband and wife in the deed, a joint tenancy will be created and not a tenancy in common. A tenancy in common will only be created under these circumstances by express language in the deed. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(c) (McKinney 1967 & Supp. 1990). See *infra* notes 82-101 and accompanying text.

26. See N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(c) (McKinney 1967 & Supp. 1990). See *infra* notes 102-17 and accompanying text.

27. See *infra* notes 59-63 and accompanying text. Some states have recognized an implied-in-fact theory of property recovery for unmarried cohabitants. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (court provided for a number of legal and equitable bases for recovery in the absence of an express agreement); *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. App. 1980) (court held that the evidence was sufficient to imply that property acquired during cohabitation would be shared); *Beal v. Beal*, 282 Or. 115, 577 P.2d 507 (1978) (court relied on intent of parties as its primary consideration in distributing property between unmarried cohabitants); *In re Estate of Steffes*, 95 Wis. 2d 490, 290 N.W.2d 697 (1980) (court used theory of quantum meruit to support division of property when express agreement was not present).

28. *Morone v. Morone*, 50 N.Y.2d 481, 486, 413 N.E.2d 1154, 1156, 429 N.Y.S.2d 592, 594 (1980).

29. *Id.* at 486-87, 413 N.E.2d at 1156, 429 N.Y.S.2d at 594.

In *Marum v. Marum*,³⁰ the court held that Emilie Marum, the defendant, was entitled to an equitable lien on real property that had been purchased by Ferdinand Marum, the plaintiff.³¹ Emilie and Ferdinand lived as unmarried cohabitants for twelve years, and during this time, each of them worked and contributed to a common savings.³² Nine years into the relationship, Ferdinand used the common savings to purchase the property in dispute, taking title in his own name.³³ Ferdinand informed Emilie that the property purchased was for the two of them to live in for the rest of their lives and that, as soon as they were married, he would place her name on the deed.³⁴ Ferdinand and Emilie did in fact marry, but the deed was never changed. When the couple separated because of marital difficulties, Ferdinand brought this action for declaratory judgment that he was the owner in fee of the property.³⁵ The court found for Ferdinand, stating that Emilie had no interest in the fee.³⁶ However, the court entered partial judgment in favor of Emilie based upon her contribution to the consideration for the house and her reliance on Ferdinand's express promise to convey to her one-half of the property.³⁷ Emilie was entitled to a trial on the issue of whether or not she had an equitable lien on Ferdinand's property. The court stated that her conduct in living with Ferdinand without benefit of clergy was "not so 'strongly reprehensible'[]" as to foreclose all remedy."³⁸

In *Wade v. Porreca*,³⁹ the court awarded Dawn Wade, the plaintiff, one-half value of a car, which Dennis Porreca, the defendant, drove,⁴⁰ one-half value of a joint savings account,⁴¹

30. 21 Misc. 2d 474, 194 N.Y.S.2d 327 (Sup. Ct. Nassau County), *modified on other grounds*, 8 A.D.2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959).

31. *Id.* at 476-77, 194 N.Y.S.2d at 329-30.

32. *Id.* at 475, 194 N.Y.S.2d at 328.

33. *Id.*

34. *Id.*

35. *Id.* The plaintiff in the instant action sought declaratory judgment after the dismissal of the separation action filed by his wife. *Id.*

36. *Id.* at 476, 194 N.Y.S.2d at 329.

37. *Id.* at 475-77, 194 N.Y.S.2d at 328-30.

38. *Id.* at 476-77, 194 N.Y.S.2d at 329-30 (citation omitted).

39. 99 A.D.2d 888, 472 N.Y.S.2d 482 (3d Dep't 1984).

40. *Id.* at 889, 472 N.Y.S.2d at 484.

41. *Id.*

and one-half value of their joint belongings after their unmarried cohabitation ended.⁴² Dawn and Dennis had agreed to share expenses and earnings, and had purchased the car during their cohabitation.⁴³ The court found this sufficient to establish an enforceable express agreement between the couple.⁴⁴

Reiterating the notion that the consideration could not be illicit in nature, a New York court refused to uphold a plaintiff's action based on an oral agreement in *McCall v. Frampton*.⁴⁵ The court held that the contract between the parties, where Peter Frampton, the defendant, promised to share his income with Penelope McCall, the plaintiff, while they cohabited without marriage was void and unenforceable as a matter of public policy.⁴⁶ Penelope had pleaded, as consideration for the contract, that she left her husband to live with Peter.⁴⁷ The court concluded that the contract was void based upon the defense of illegality, the commission of adultery being a crime of the state.⁴⁸

Thus today, New York courts will enforce an express agreement made by unmarried cohabitants, as long as there is sufficient evidence to support the finding of an agreement and the consideration is not found to be illicit. Where the express agreement cannot be recognized upon a contract theory, the courts will find an equitable solution, such as the one in *Marum*. However, this does not hold true when the agreement is implied rather than expressed.

B. Implied-in-Fact Agreements

The California Supreme Court, in *Marvin v. Marvin*,⁴⁹ recognized a cause of action in favor of an unmarried cohabitant

42. *Id.*

43. *Id.* at 889, 472 N.Y.S.2d at 483.

44. *Id.* at 890, 472, N.Y.S.2d at 484.

45. 99 Misc. 2d 159, 415 N.Y.S.2d 752 (Sup. Ct. Westchester County 1979).

46. *Id.* at 166, 415 N.Y.S.2d at 759.

47. *Id.* at 161, 415 N.Y.S.2d at 754.

48. *Id.* at 166-67, 415 N.Y.S.2d at 759; N.Y. PENAL LAW § 255.17 (McKinney 1989 & Supp. 1990).

49. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

based upon a theory of implied contract.⁵⁰ In the absence of an express agreement, the court found that other remedies should be recognized to protect the parties' reasonable expectations.⁵¹ Courts should therefore look to the conduct of the parties to determine whether an implied contract can be found.⁵²

The *Marvin* court noted several reasons why an equitable contract should be found: 1) the concept of "guilt" cannot be used to justify invalidating plaintiff's claim because both parties are equally guilty;⁵³ 2) parties in an unmarried cohabitation relationship may reasonably expect that property will be divided fairly and in conjunction with any tacit agreement between the two;⁵⁴ 3) there is no reason to presume that any services rendered in the relationship were a gift;⁵⁵ and, 4) denying a remedy to the nonmarital partner would not serve to carry out a public policy of fostering marriage.⁵⁶

An implied-in-fact contract for services based upon the conduct of unmarried cohabiting parties was found by the New York supreme court in *McCullon v. McCullon*.⁵⁷ The plaintiff and defendant cohabited for twenty-eight years, during which time the defendant provided economic support while the plaintiff performed household services and raised the couple's three children.⁵⁸ The court found that the conduct of the plaintiff constituted an implied promise to forbear employment and provide household services for the defendant over twenty-eight years in consideration for his implied conduct and promise to provide a home and future support.⁵⁹

Although New York seemed to be moving in the direction of accepting the *Marvin* court's holding, a more recent New York Court of Appeals decision, based upon similar questions,

50. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

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

52. *Id.*

53. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

54. *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

55. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

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

57. 96 Misc. 2d 962, 410 N.Y.S.2d 226 (Sup. Ct. Erie County 1978).

58. *Id.* at 963, 410 N.Y.S.2d at 227.

59. *Id.* at 974, 410 N.Y.S.2d at 233.

proved otherwise. In *Morone v. Morone*,⁶⁰ the court recognized that an express agreement between unmarried cohabitants would be upheld under proper circumstances⁶¹ but refused to imply a contract.⁶² Plaintiff and defendant had lived as unmarried cohabitants for twenty-three years; they held themselves out as husband and wife, raised two children, filed joint tax returns, and pooled economic resources. Plaintiff alleged in her complaint that she expected to be compensated and that defendant was aware of this.⁶³ The court refused to find a basis for relief, “[f]inding an implied contract such as was recognized in *Marvin v. Marvin* . . . to be conceptually so amorphous as practically to defy equitable enforcement.”⁶⁴ In light of the court of appeals’ decision in *Morone*, it seems that New York courts will no longer imply a contract to provide equitable relief to unmarried cohabiting parties.

C. Constructive Trust

Justice, then judge, Cardozo, in a 1919 opinion stated that the constructive trust is “the formula through which the conscience of equity finds expression.”⁶⁵ The essential elements that must be shown to establish a constructive trust are: 1) a confidential or fiduciary relationship;⁶⁶ 2) a promise;⁶⁷ 3) a transfer in reliance thereon;⁶⁸ 4) breach of the promise; and 5) unjust enrichment.⁶⁹ The theory underlying this remedy is that where property is acquired in a way that would make it unjust

60. 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980).

61. See *supra* notes 28-29 and accompanying text.

62. *Morone v. Morone*, 50 N.Y.2d 481, 484, 413 N.E.2d 1154, 1158, 429 N.Y.S.2d 592, 596 (1980).

63. *Id.* at 481, 413 N.E.2d at 1155, 429 N.Y.S.2d at 593-94.

64. *Id.* (citation omitted).

65. *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919).

66. *Djamos v. Djamos*, 153 A.D.2d 871, 872, 545 N.Y.S.2d 596, 597 (2d Dep’t 1989); *McCall v. Frampton*, 99 Misc. 2d 159, 168, 415 N.Y.S.2d 752, 759 (Sup. Ct. Westchester County 1979).

67. *McCall v. Frampton*, 99 Misc. 2d 159, 168, 415 N.Y.S.2d 752, 759 (Sup. Ct. Westchester County 1979).

68. *Id.*

69. *Id.*

for the holder of the legal title to retain the beneficial interest, equity converts him into a trustee.⁷⁰ Recovery is based upon principles of justice as they relate to the circumstances of the case rather than the intent of the parties. Unjust enrichment, therefore, becomes the focal point of the court's inquiry.

New York courts have willingly imposed constructive trusts under the proper circumstances. In *Muller v. Sobol*,⁷¹ the court held that, although a joint venture in which assets and earnings were to be shared was not found, the evidence was sufficient to establish that an oral agreement to own the property jointly had been reached.⁷² The court found that the plaintiff had made cash contributions toward the purchase price and maintenance of the property in dispute and was entitled to a one-half interest in the fee.⁷³ The court further found that the plaintiff had contributed his own labor to improvements made on the property and that this was sufficient to constitute part performance on the agreement.⁷⁴ The court stated that the only method available to prevent defendant's unjust enrichment was to impress a trust on the real property purchased while Ferdinand and Emma cohabited without marriage.⁷⁵ The court paid little attention to whether the agreement was express or implied, yet the elements of a constructive trust seemed to be present. Where a property relationship and a confidence exists between parties, unjust enrichment will be prevented by an equitable solution, even if an agreement between the parties can only be implied.

In a more recent case, with a different type of fact situation, a New York court again imposed a constructive trust in favor of an unmarried cohabitant. In *Neal v. Neal*,⁷⁶ a former husband and wife living as unmarried cohabitants following their divorce, acquired property together as joint tenants.⁷⁷ The

70. *Id.*

71. 277 A.D. 884, 97 N.Y.S.2d 905 (2d Dep't), *reh'g and appeal denied*, 277 A.D. 951, 99 N.Y.S.2d 757 (2d Dep't 1950).

72. *Id.* at 885, 97 N.Y.S.2d at 906.

73. *Id.*

74. *Id.*

75. *Id.*

76. 92 A.D.2d 633, 459 N.Y.S.2d 944 (3d Dep't 1983).

77. *Id.* at 633, 459 N.Y.S.2d at 944-45.

plaintiff conveyed her interest in the property to the defendant so that the defendant could obtain a mortgage on the property.⁷⁸ The court found that the plaintiff clearly relied upon the defendant's promises that the co-ownership of the property would be restored after the mortgage had been obtained and that any other result would lead to the defendant's unjust enrichment.⁷⁹

Finally, in *McCall v. Frampton*,⁸⁰ the court held that the cause of action was defective because the elements necessary to establish a constructive trust were not established.⁸¹ The court found that the plaintiff never had any legal interest in the property involved nor did she contribute any money toward its purchase; therefore, the element of unjust enrichment was not proved.⁸²

Thus, an unmarried cohabitant must establish a confidential relationship, a promise, reliance, a breach of the promise, and unjust enrichment for the New York courts to find that an interest in the property has been created. Upon such proof, a constructive trust will be imposed to prevent unjust enrichment.

D. Co-Ownership Principles

Co-ownership principles recognize that two or more persons may own concurrent interests in the same property. The principles can be classified under three headings: tenancy in common, joint tenancy, and tenancy by the entirety.

1. Tenancy in common

New York courts have held that where property was conveyed to or acquired by unmarried cohabitants, the parties

78. *Id.*

79. *Id.* at 633, 459 N.Y.S.2d at 945.

80. 99 Misc. 2d 159, 415 N.Y.S.2d 752 (Sup. Ct. Westchester County 1979). See *supra* notes 44-47 and accompanying text for a discussion of the contract theory.

81. *McCall v. Frampton*, 99 Misc. 2d 159, 168, 415 N.Y.S.2d 752, 759 (Sup. Ct. Westchester County 1979).

82. *Id.* at 169, 415 N.Y.S.2d at 759.

held title to the property as tenants in common.⁸³ A tenancy in common is a form of concurrent ownership in which each of the cotenants has a "distinct and separate interest in the property but the right to possession and enjoyment is common to all of the cotenants."⁸⁴ There is no right of survivorship in a tenancy in common. Therefore, the share of the property held by the tenant in common will pass under his will or to his heirs rather than pass to the other cotenant(s).⁸⁵

The court in *Texido v. Merical*,⁸⁶ held that plaintiff was entitled to a partition of certain real estate.⁸⁷ The property had been conveyed to the plaintiff and defendant as husband and wife but, in actuality, the parties were living as unmarried cohabitants.⁸⁸ The plaintiff and defendant were to take title as tenants in common and, as the court pointed out, the deed ran to both parties by mutual consent.⁸⁹ The defendant was estopped from claiming that a tenancy in common did not exist, and the plaintiff was entitled to partition.⁹⁰

In *Petchanuk v. Mohlsick*,⁹¹ the plaintiff, Dinah Petchanuk, sought full title to certain property by right of survivorship under a joint tenancy.⁹² The property had been conveyed to Oscar Petchanuk and Dinah Petchanuk as husband and wife while the two were living as unmarried cohabitants.⁹³ Oscar died intestate, leaving two children, the defendants in this ac-

83. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 214 (2d ed. 1988).

84. *Id.*

85. *Id.*

86. 132 Misc. 764, 230 N.Y.S. 605 (Sup. Ct. Erie County 1928).

87. Any tenant in common or joint tenant has the right to bring an action in partition. This is an equitable proceeding in which the court either divides or sells the property, thereby adjusting the claims of the parties. *See O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. Westchester County), *modified on other grounds*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (2d Dep't), *aff'd as modified*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

88. *Texido v. Merical*, 132 Misc. 764, 765, 230 N.Y.S. 605, 606 (Sup. Ct. Erie County 1928).

89. *Id.* at 766, 230 N.Y.S. at 607.

90. *Id.* at 767, 230 N.Y.S. at 608-09.

91. 123 N.Y.S.2d 382 (Sup. Ct. Kings County 1953).

92. *Id.* at 386.

93. *Id.*

tion, as sole surviving heirs.⁹⁴ The court held that, since a joint tenancy can only be created by clear language in the deed, and none was found here, the presumption was that Dinah and Oscar took the property as tenants in common with no right of survivorship.⁹⁵ The property passed to the defendants as Oscar's heirs.

The court, in *Turchiano v. Woods*,⁹⁶ dealt with the same type of fact situation as did the court in *Petchanuk*. Beatrice Woods, the defendant, and Joseph Turchiano lived as unmarried cohabitants even though Joseph was still legally married to Rose Mary Turchiano, the plaintiff.⁹⁷ Joseph and Beatrice took title to certain property during their cohabitation, with the deed naming them as husband and wife.⁹⁸ When Joseph died intestate, Rose Mary brought an action for partition of the property. The court found that Joseph and Beatrice took title as tenants in common since the deed contained no words of survivorship.⁹⁹ Accordingly, Joseph's interest in the property passed to Rose Mary and their children as his heirs, and the action for partition was granted.¹⁰⁰

The courts in *Texido*, *Petchanuk*, and *Turchiano* relied upon section 6-2.2(a) of the Estates Powers and Trusts Law (EPTL), providing that a conveyance of property to grantees improperly described as husband and wife could only create a joint tenancy by the use of express language of survivorship.¹⁰¹ A subsequent amendment to this statute provides that a joint tenancy, not a tenancy in common, is created when property is conveyed to grantees not legally married but who are described

94. *Id.*

95. *Id.* at 385.

96. 85 Misc. 2d 991, 381 N.Y.S.2d 775 (Sup. Ct. Queens County 1976).

97. *Id.* at 992, 381 N.Y.S.2d at 776.

98. *Id.*

99. *Id.* at 993, 381 N.Y.S.2d at 777. The court also found that Section 6-2.2(c) of the Estates, Powers and Trusts Law (EPTL), providing that a disposition of real property to persons not legally married but who are described as husband and wife in the deed creates in them a joint tenancy, would not apply retroactively to this case. The statute was enacted subsequent to the time when decedent's share in the property vested in his heirs. *Id.* at 992, 381 N.Y.S.2d at 777.

100. *Id.* at 992, 381 N.Y.S.2d at 777.

101. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(a) (McKinney 1967 & Supp. 1990).

as husband and wife in the deed.¹⁰² Pursuant to this section, a tenancy in common can now only be created by express declaration in this type of situation. The New York Legislature, in this one small area, has recognized that it is fair and equitable to enforce the intended property interests of unmarried cohabitants as they were provided for during the time of their cohabitation.

2. Joint Tenancy

New York courts, prior to the change in the EPTL, looked to the intent expressed in deeds or other documents, to find a right of survivorship creating a joint tenancy between unmarried cohabitants. The most important characteristic of a joint tenancy is the right of survivorship. Upon the death of one of the joint tenants, his or her interest passes to the remaining joint tenants — it does not pass through intestacy or under a will.¹⁰³

It was held, in *Crawley v. Shelby*,¹⁰⁴ that the intent of the parties was to create a right of survivorship. Thomas Shelby, the defendant, and Helen Shelby lived as unmarried cohabitants.¹⁰⁵ Thomas and Helen held title to certain property, the deed naming them as husband and wife, as tenants by the entirety.¹⁰⁶ After Helen's death, Crawley, as administratrix of the estate, brought an action for partition. Crawley claimed that the words "tenants by the entirety" had been improperly placed in the deed, thus creating only a tenancy in common.¹⁰⁷ The court rejected this claim and found that no specific placement of words was necessary to rebut the statutory presumption of a tenancy in common, a joint tenancy could be found in

102. *Id.* § 6-2.2(c).

103. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 210-211 (2d ed. 1988). The notion of survivorship that attaches to a joint tenancy is very popular and is used by a property owner as a substitute to a will in many circumstances. By creating a joint tenancy, the property owner is certain that the survivor will gain title to the property. *Id.* at 211.

104. 37 A.D.2d 673, 323 N.Y.S.2d 222 (3d Dep't 1971).

105. *Id.* at 673, 323 N.Y.S.2d at 223.

106. *Id.* See *supra* note 97 and accompanying text.

107. *Crawley v. Shelby*, 37 A.D.2d 673, 673, 323 N.Y.S.2d 222, 223 (3d Dep't 1971).

the intent as gathered from the whole instrument.¹⁰⁸ Helen's interest in the property passed to Thomas under the right of survivorship.

The court, in *Guidici v. LoFaso*,¹⁰⁹ found express language in the deed to create an estate in which the survivor took the whole.¹¹⁰ Even though the couple lived without benefit of marriage, their intent to create a joint tenancy was acknowledged by the court.¹¹¹

In *In re Estate of Paul Imp*,¹¹² there were claims by the estates of both the man and the woman who had lived as unmarried cohabitants.¹¹³ The woman died prior to the man. The issue was whether the real property was vested in the woman's estate or in the man's, by virtue of his right of survivorship.¹¹⁴ The language of the deed created a tenancy by the entirety.¹¹⁵ The court found this language sufficient to create a joint tenancy with a right of survivorship.¹¹⁶ The court further held that a joint bank account payable to either the man or the woman created a right of survivorship in favor of the man, since there was no evidence to overcome this presumption.¹¹⁷

The courts in *Crawley*, *Guidici*, and *Imp* would have reached the same conclusions had section 6-2.2(c) of the EPTL been applicable.¹¹⁸ The dispositions of property in each of the deeds had been made to unmarried cohabitants as husband and wife. Section 6-2.2(c) is nothing more than a reiteration of the court holdings in these cases, where an intent to create a joint tenancy was implied from the language in the deed. Although section 6-2.2(c) affords protection for those cohabitants holding joint title to property as husband and wife, thus avoiding

108. *Id.* at 673-74, 323 N.Y.S.2d at 223.

109. 199 Misc. 401, 103 N.Y.S.2d 335 (Sup. Ct. Queens County 1951).

110. *Id.* at 403, 103 N.Y.S.2d at 337.

111. *Id.*

112. 68 Misc. 2d 911, 328 N.Y.S.2d 595 (Sur. Ct. Delaware County 1972).

113. *Id.*

114. *Id.* at 913, 328 N.Y.S.2d at 597.

115. *Id.* at 912, 328 N.Y.S.2d at 596.

116. *Id.* at 915, 328 N.Y.S.2d at 599.

117. *Id.* at 917, 328 N.Y.S.2d at 600-01.

118. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 1967 & Supp. 1990).

the inconsistent holdings of the courts, its application is limited to the small number of cases where these facts are present.

Although some protections for the property rights of cohabitants have been provided by New York's courts and the legislature, these are not enough. In cases where an express agreement or a constructive trust cannot be found, or where property has not been conveyed to unmarried cohabitants as husband and wife, no fair remedy exists for the cohabitant as to property division. The courts and the legislature have rationalized their refusal to provide further protections for unmarried cohabitants, relying upon a mistaken view of public policy and an antiquated devotion to the state's role in promoting marriage.

II. STATE'S INTEREST IN PROMOTING MARRIAGE

Not unlike their married counterparts, many unmarried cohabitants are unable to settle their property disputes when their relationships end. New York's courts and legislature have provided comprehensive solutions for determining the property settlement of married couples but are not offering remedies for unmarried cohabitants.¹¹⁹ Courts are reluctant to resolve the property disputes of unmarried cohabitants because it involves extending principles of equity to situations which have traditionally been considered taboo by the legislature and contrary to an alleged "state interest" in "family." The state's interest in protecting the marriage relationship as the only source of preserving the family is wrong. Marriage is not the only context in which to create a family, nor is it the only context for preserving it. An unmarried cohabitation relationship can serve these interests as effectively as a marriage, therefore, the state

119. On June 19, 1980, the New York Legislature passed the Equitable Distribution Law, Act of June 19, 1980, ch. 281, 1980 N.Y. Laws 448 (McKinney). The major purposes for the law were: 1) to eliminate sex discrimination from the Domestic Relations Law, Family Court Act, and related statutes; and 2) to reform New York's alimony and marital property law prospectively; *See O'Brien v. O'Brien*, 114 Misc. 2d 223, 485 N.Y.S.2d 801 (Sup. Ct. Westchester County 1982), *modified on other grounds*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (2d Dep't), *aff'd as modified*, 66 N.Y.2d 576, 489 N.E.2d 548, 498 N.Y.S.2d 743 (1985); *Kruger v. Kruger*, 115 Misc. 2d 595, 454 N.Y.S.2d 500 (Sup. Ct. New York County 1982).

should also be promoting cohabitation and protecting the interests of cohabitants.

The state derives its power to regulate the family and marriage from its *parens patriae* and police powers.¹²⁰ Under its *parens patriae* power, the state regulates pursuant to its concerns of preserving the welfare of individuals, such as children, who cannot protect their own interests.¹²¹ The police power enables the state to promote the public welfare and to protect its citizens.¹²² The state exercises these powers to promote and strengthen the "traditional" family unit as opposed to the "non-traditional" family unit.¹²³

One major reason for this dichotomy is the state's interest in furthering its view of morality. A view that has as its core the notion that only a "traditional" family unit can provide a moral environment. It has been strongly argued that the state's reliance upon these powers to foster its notions of morality bears "a less substantial relationship to the public welfare than do laws protecting security and safety."¹²⁴ Therefore, the state should not deny recognition of the "non-traditional" family unit based upon out-moded notions of morality, but should look to the "non-traditional" family as additional support of its interests.

The state's interest in promoting marriage has been justified for several reasons: 1) licensing of marriages facilitates keeping records and promoting health, 2) marriage provides for a stable family, and 3) marriage ensures that children will be cared for, educated, and given emotional support.¹²⁵ Each of these

120. Symposium, *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198 (1980).

121. *Id.* at 1200-08.

122. *Id.* at 1198-99.

123. *Id.* at 1213. A "traditional family" unit consists of mother, father and their children. A "non-traditional" family unit is something other than that, including, but not limited to, unmarried cohabitants. *Id.* at 1270.

124. *Id.* at 1200.

125. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1242-43 (1974).

Certain additional justifications have been presented for the state's interest in denying homosexuals the right to marry. The most frequent of these is the state's interest in promoting procreation. See *Gerwitz v. Gerwitz*, 66 N.Y.S.2d 327, 329 (Sup. Ct. Kings County 1945); *Mirizio v. Mirizio*, 242 N.Y. 74, 150 N.E. 605

interests seem to be justified and rationally based, but there is no reason why they cannot be served through promotion of unmarried cohabitation relationships as well.

The state's interest in promoting marriage based upon record keeping and health promotion is currently being served by many unmarried cohabitants. Traditional census reports, as well as reliable studies concerning the family, provide more than adequate record keeping devices for the state's use in keeping track of unmarried cohabitants.¹²⁶ The state's health interest, which is tied to the spread of sexually transmitted diseases, is furthered by unmarried cohabitants because of their commitment to the relationship. The stability of most cohabitation relationships results in monogamous behavior, thereby removing the threat of disease.

The state's interest in marriage, as the sole guarantor of a stable family, is equally flawed. Marriage by the nineteenth century had evolved into "the foundation of the family and of society"¹²⁷ in the eyes of the law. However, the latter half of the twentieth century has been notable for its ever-increasing divorce rate, leading one to question whether "marriage" can be thought of as providing the basis of a stable family. One of every two marriages ends in divorce; of those marriages ending in divorce, the average length of the marriage is about five

(1928). Procreation has been enmeshed with the concept of marriage throughout time; the avoidance of procreation is grounds for annulment of marriage, *Gerwitz*, 66 N.Y.S.2d at 329. Courts hold that marriage implies a willingness and ability to have children because procreation is "the foundation upon which must rest the perpetuation of society and civilization." *Mirizio*, 242 N.Y. at 81, 150 N.E. at 612. But society and civilization will not be threatened by allowing homosexuals to marry since the very nature of their sexual preferences will prevent them from engaging in the heterosexual relations necessary for procreation. Not every heterosexual marriage results in procreation nor is the physical ability to procreate a requirement for marriage. See *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, *cert. denied*, 71 N.J. 345 (1976) (the state court upheld a marriage even though transsexuals are sterile). It seems more likely that a state's prohibition on homosexual marriage is a product of irrational prejudice rather than a rational state interest.

The state's interest in preventing the spread of disease is another justification for not allowing homosexual marriages. This seems totally irrational since monogamy between homosexual partners would probably increase given their ability to marry.

126. This article relies upon the very reports and studies discussed. See *supra* note 1.

127. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

years.¹²⁸ On the other hand, an increasing number of unmarried cohabitation relationships exist and function as stable marriages. It is no longer uncommon for unmarried cohabitants to live together for long periods of time and to bear children.¹²⁹ Since many cohabitation relationships are becoming more secure than marriages, it seems unreasonable for the state to foster marriage as the sole foundation of family life.

Finally, the state's interest in promoting marriage so that children can be cared for, educated and given emotional support can be served as easily by unmarried cohabitants. Historically, the state's goal has been to promote and strengthen the traditional nuclear family,¹³⁰ supporting parental control over children.¹³¹ The family unit is ideal as a means of providing for the health, welfare, and some educational needs of its members.¹³² The United States Supreme Court has noted that the family unit potentially ensures intimacy, stability and emotional support for both parents and children.¹³³ The Court has further explained that the importance of the family stems from the emotional relationships involved, relationships that clearly do *not* require a biological bond.¹³⁴ It follows that these emotional relationships need *not* be borne of a marriage, but of any relationship that can provide intimacy, stability and emotional support.

128. J. WEED, NATIONAL ESTIMATES OF MARRIAGE DISSOLUTION AND SURVIVORSHIP, DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. 81-1403 (Nov. 1980).

129. See Folberg & Buren, *Domestic Partnership: Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453 (1976). In a study of cohabiting couples, it was found that almost two-thirds of the subjects planned for their relationship to continue indefinitely (possibly including marriage), and expected to have children. Catlin, Croake & Keller, *Commitment and Relationship Factors in Consensual Cohabitation*, 8 INT'L J. SOC. OF THE FAM. 185, 189-90 (1978).

130. Generally, the term "nuclear family" means: the mother, father and their children as a family unit; see *Moore v. City of East Cleveland*, 431 U.S. 494, 495 (1977).

131. Symposium, *Developments in the Law - The Constitution and the Family*, 93 HARV. L. REV. 1156, 1213 (1980).

132. *Moore*, 431 U.S. at 505.

133. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977).

134. *Id.*

Accordingly, there can be no sound argument to dispute the notion that unmarried cohabitants can foster the type of emotional relationships necessary to form a stable, healthy family. Therefore, it is incumbent upon the New York Legislature to provide appropriate guidelines to protect the interests of unmarried cohabitants.

III. SUGGESTED GUIDELINES FOR A LEGISLATIVE SOLUTION

The New York Court of Appeals has clearly stated that "[u]ntil the Legislature determines otherwise, . . . we decline to recognize an action based upon an implied contract . . . between unmarried persons living together."¹³⁵ The court reached this conclusion after determining that the idea of an implied contract between unmarried cohabitants was "contrary to both New York decisional law and the implication arising from our Legislature's abolition of common-law marriage."¹³⁶ The court admitted that common-law marriage could provide substantial justice in some situations, but since there was no "built in" method for determining when a claim was fraudulent, the doctrine "served the State poorly."¹³⁷

The court is correct in looking to legislative action to resolve the problems surrounding the property rights of unmarried cohabitants. But a legislative solution need not require a return to common-law marriage.¹³⁸ The recognition of a "constructive family," as defined by this author, would serve the reasonable expectations of those involved while allowing the legislature to clearly define the attributes necessary to meet the definition of "constructive family."¹³⁹

135. *Morone v. Morone*, 50 N.Y.2d 481, 489, 413 N.E.2d 1154, 1158, 429 N.Y.S.2d 592, 596 (1980).

136. *Id.*

137. *Id.* at 489, 413 N.E.2d at 1157-58, 429 N.Y.S.2d at 596.

138. In *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979), Justice Underwood advocated the return to some form of common-law marriage: "[I]t would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity." *Id.* at 60, 394 N.E.2d 1209.

139. See *infra* notes 140-142 and accompanying text.

Indeed, the New York Court of Appeals had cause to reexamine its definition of "family" in *Braschi v. Stahl Associates*.¹⁴⁰ Although the court's definition of "family" was applicable to a very narrow area of the law,¹⁴¹ it was a strong first step towards the recognition of a "constructive family." In the court's view, a family is defined as a unity that "includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."¹⁴²

The court's decision in *Braschi* can easily be seen as a gentle nod towards future legislation defining "family" more broadly. Certainly, the court's acceptance of a cohabitation relationship as the basis of forming a family unit, albeit in a narrow area, is a resounding proclamation that the state's interest in the "family" need not be served solely through the marriage relationship.

Further, it can be seen that the state's interest in promoting marriage can be served by recognition of cohabitation relationships that function as a family unit. Conversely, the state's non-recognition of cohabitation relationships may serve to harm those interests the state seeks to protect, such as the interests in the care of children and family stability. At one time, the family was seen as functioning as an economic unit, but this is no longer true.¹⁴³ Today, the family is perceived as being also a psychological unit.¹⁴⁴ Clearly, a non-traditional family unit is just as able to provide for the economic and psychologi-

140. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

141. See *id.* The definition of family adopted by the court of appeals applied for the "purposes of the noneviction protection of the rent-control laws." *Id.* at 212 n.3, 543 N.E. at 64-65 n.3, 544 N.Y.S.2d at 789 n.3.

142. *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

143. Gutis, *What is a Family? Traditional Limits are Being Drawn*, N.Y. Times, Aug. 31, 1989, at C1, col. 6 (quoting Dr. Pat Voydanoff, professor of sociology at the University of Dayton and chairwoman of the family section of the American Sociological Association). In quoting Judge Titone in *Braschi*, Mr. Gutis stated that "[i]t is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." *Id.* Clearly, these are some of the ingredients that have contributed to the current change in the perception of the family that has led many to view the family as both an economic and psychological unit.

144. *Id.*

cal needs of its members as is the traditional family unit. Therefore, it would be in the best interests of the state for the New York Legislature to adopt legislation recognizing those cohabitation relationships that are determined to be "constructive families."

The notion of a "constructive¹⁴⁵ family" is difficult, but not legally impossible to describe. A good place to start in determining the definition of a family is with the Appellate Division, First Department's holding in *In re Adult Anonymous II*.¹⁴⁶ The court found that "the best description of a family is a continuing relationship of love and care and an assumption of responsibility for some other person."¹⁴⁷

A legislative determination of a "continuing relationship" could be established through consideration of testimony by sociologists and family information data provided by federal and state agencies. As an example, the United States Department of Health and Human Services has established that the average length of a marriage that ends in divorce is five years.¹⁴⁸ Accordingly, five years should be the *maximum* time requirement used to define a "continuing relationship." A time greater than five years would defeat the equitable basis of the legislation because unmarried cohabitants would be forced to remain together longer than an average married couple before they could establish a necessary element of a "constructive family."

Certainly, there are other considerations that should not be ignored in defining "continuing." These factors would include any reasonable indices of commitment, such as having children; jointly owning property; and the existence of reciprocal

145. Constructive is defined as:

That which is established by the mind of the law in its acts of *construing* facts, conduct, circumstances or instruments. That which has not the character assigned to it in its own essential nature, but acquired such character in consequence of the way in which it is regarded by a rule or policy of law; hence inferred, implied, or made out by legal interpretation.

BLACKS LAW DICTIONARY 283 (5th ed. 1979) (emphasis added).

146. 88 A.D.2d 30, 452 N.Y.S.2d 198 (1st Dep't 1982); *see supra* note 16.

147. 88 A.D.2d at 35, 452 N.Y.S.2d at 201.

148. J. WEED, NATIONAL ESTIMATES OF MARRIAGE DISSOLUTION AND SURVIVORSHIP, DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. 81-1403 (Nov. 1980).

wills.¹⁴⁹ Each of these factors would serve to decrease the required time a relationship must last to be “continuing.” A minimum time would be unnecessary because a court would apply these, and other considerations, on a case-by-case basis, to establish the point where a “continuous relationship” began.

Next to be determined is what constitutes an “assumption of responsibility for some other person.”¹⁵⁰ Once again, certain factors could be established by the legislature for judicial use in determining whether there has been an “assumption of responsibility.” Some of these factors are: mothering/fathering a child and providing for its care; contributing services or money to household care and maintenance, and jointly owning property or any document under which one partner would be the beneficiary in the event of the other’s death.¹⁵¹

Thus, a tentative definition and set of criteria for determining the existence of a “constructive family” are as follows: an unmarried cohabitation relationship will be deemed to be a “constructive family” when a continuing relationship and an assumption of responsibility by each cohabitant for the other is found to exist by the court.

As stated earlier, a legislative solution need not mean a return to common-law marriage. The proposed legislation for creating a “constructive family” is different from traditional common-law marriage in two ways.¹⁵² First, a “constructive family” relationship would not require the express agreement to be married that is a prerequisite to a valid common-law marriage. Second, unmarried cohabitants need not hold themselves out as married, whereas common-law spouses had to show a reputation of marriage in the community.¹⁵³ However, the proposed legislation is similar to common-law marriage because the couple, in each case, must be cohabiting.

149. Although not an exhaustive list, these factors show an intent by the parties to form a lasting arrangement.

150. See *In re Adult Anonymous II*, 88 A.D.2d 30, 35, 453 N.Y.S.2d 198, 201 (1st Dep’t 1982).

151. Some examples would be wills, insurance policies, joint bank accounts and holding property as joint tenants with the right of survivorship.

152. See *supra* note 6.

153. *Id.*

Adoption of such legislation would provide for state sanction of cohabiting couples. A policy of distributing "constructive family" property could be developed. One source for consideration is New York's Equitable Distribution Law.¹⁵⁴

Under the equitable distribution doctrine, each partner is seen as contributing to the marital estate in the manner that each partner alone chooses.¹⁵⁵ The notion that a "homemaker" contributes as much to a marriage as a "breadwinner" no longer permits the breadwinner's sole claim for property titled in his name to be upheld. Also, equitable distribution no longer permits the presumption that homemaking services are offered gratuitously in a marital situation.¹⁵⁶ Even though New York's Equitable Distribution Law is addressed to marital dissolutions, the validity and value of any services rendered or property held by couples could be recognized, regardless of the marital status of the parties.

New York courts have expressly held that, under an equitable distribution theory, a marriage is viewed as a partnership in which each partner is entitled to a share in the property.¹⁵⁷ Although equitable distribution need not be equal distribution,¹⁵⁸ the distribution must be made flexibly, relying upon eq-

154. Act of June 19, 1980, ch. 281, § 9, 1980 N.Y. Laws 448 (codified as amended at N.Y. DOM. REL. LAW § 236 (McKinney 1986 & Supp. 1990) by the addition of paragraph (B)(1)(c)). Equitable distribution is defined as: "[t]he power to distribute equitably upon divorce all property legally and beneficially acquired during marriage by husband and wife, or either of them, whether legal title lies in their joint or individual names." BLACK'S LAW DICTIONARY 483 (5th ed. 1979).

155. *Bisca v. Bisca*, 180 A.D.2d 773, 485 N.Y.S.2d 302 (2d Dep't 1985); *Kobylack v. Kobylack*, 110 Misc. 2d 402, 442 N.Y.S.2d 392 (Sup. Ct. Westchester County 1982) (court found that parties treated their marriage as an economic partnership).

156. *Bisca*, 180 A.D.2d at 773, 485 N.Y.S.2d at 303.

157. *Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2d Dep't 1986), *remittitur amended*, 123 A.D.2d 238, 512 N.Y.S.2d 410 (2d Dep't 1987). The court found that the legislature, in adopting the Equitable Distribution Law, had rejected traditional property definitions, expanding them to recognize marriage as an economic partnership in which spouses have a claim in equity to assets of that partnership. *Id.* at 225, 509 N.Y.S.2d at 347; *Forcucci v. Forcucci*, 83 A.D.2d 169, 443 N.Y.S.2d 1013 (4th Dep't 1981).

158. *Rodgers v. Rodgers*, 98 A.D.2d 386, 391, 470 N.Y.S.2d 401, 405 (2d Dep't 1983).

uitable concepts and fairness.¹⁵⁹ The courts have further held that equitable distribution has created a species of property right that comes into being with the marriage and the acquisition of the first asset.¹⁶⁰ There would be little difficulty in applying these same principles to an unmarried cohabitation relationship that has achieved the standing of "constructive family." Once the court has established that a "constructive family" exists, it would apply the same equitable concerns of fairness to determine the property dissolution of unmarried cohabitants. Accordingly, trial courts upon application of the "constructive family" criteria, will reach more equitable conclusions, a result that should be desired by all.

The application of the "constructive family" legislation to the *Morone*¹⁶¹ decision is illustrative of the equitable results that courts will achieve. Clearly, the unmarried co-habitants in *Morone* would have met the definition of "constructive family." First, since the Morones cohabited for twenty-three years, they satisfied the "continuing relationship" requirement.¹⁶² Second, the Morones each assumed responsibility for the other, as well as their two children.¹⁶³ The court would have reached this conclusion by applying the "criteria for consideration" as outlined in the suggested legislation. The result would have been a factual finding that they were cohabitants, raised their two children together, filed joint tax returns, and pooled their economic resources. The court could reach no other conclusion than that the Morones, as unmarried cohabitants, had created a "constructive family."

The court would have then applied the Equitable Distribution Law as if the Morones had, in fact, been married. The application of this law would have resulted in the court awarding "Mrs." Morone a share of the couple's assets, a result con-

159. *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. Westchester County 1982), *modified on other grounds*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (2d Dep't), *aff'd as modified*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

160. *Kruger v. Kruger*, 115 Misc. 2d 595, 454 N.Y.S.2d 500 (Sup. Ct. New York County 1982).

161. 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980).

162. *Id.* at 484, 413 N.E.2d at 1155, 429 N.Y.S.2d at 593-94.

163. *Id.*

trary to that reached by the court of appeals. Clearly, when considering the length and extent of the relationship shared by the Morones, the "constructive family" outcome is one that is not only more fair and equitable, but more realistic in light of society's changing views.

If the Equitable Distribution Law is applied to unmarried cohabitants as "constructive families," the New York Court of Appeals would no longer find an implied promise to "equally distribute property so conceptually amorphous as to practically defy equitable enforcement."¹⁶⁴ Since the distribution of marital or separate property is a matter of fact to be resolved by the trial court in exercising its broad discretion, it seems clear that the same factual evidence can be provided whether there has been a marriage or a "constructive family."

CONCLUSION

Recent societal trends, resulting in an ever larger segment of our population choosing to live as unmarried cohabitants, have led to some trepidation on the part of New York courts to fully recognize the property rights of these cohabitants. It is apparent after the court of appeals' decision in *Morone* that it is up to the legislature to provide a remedy for the property dissolution disputes of unmarried cohabitants. Remedies are needed to go beyond those limited remedies already accepted by the courts such as trust principles, tenancy principles, express contract theory and partnership agreements.

The New York Legislature already has a law at its disposal to serve as a guide to the formulation of a remedy for unmarried cohabitants who must divide property: the Equitable Distribution Law. The law could easily be applied to unmarried cohabitants whose relationship has met the standard for achieving a "constructive family." If the legislature seeks to

164. *Id.* at 484, 413 N.E.2d at 1155, 429 N.Y.S.2d at 593 (1980). See *supra* notes 28, 29, 59-63 and the discussion of *Morone* in the accompanying text.

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meet its obligation of recognizing the voices of a pluralistic electorate, it will determine that the reliance interests of unmarried cohabitants can no longer be met by half measures.

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