In Re Marriage of Carey: The End of the Putative-Meretricious Spouse Distinction in California

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INTRODUCTION

California’s Family Law Act1 defines marriage as follows:

Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by this code, except as provided by Section 4213.2

In cases where the parties to a “marriage” have failed to satisfy the statute, the courts have adopted the civil law theory of the putative marriage.

The essential basis of a putative marriage is a belief in the existence of a valid marriage. Thus some courts define a putative spouse as one who in “good faith believes he or she is married.”3 Other courts expand this definition to include a requirement of an objective indication of this good faith; a marriage sufficient in form. These courts define a putative spouse as one party to “a matrimonial union which has been solemnized in due form and celebrated in good faith . . . but which by reason of some legal infirmity is either void or voidable.”4 In any event, it is the belief of the parties, not their capabilities to enter a valid marriage, that is determinative. In the usual situation, the “good faith” requirement is satisfied if there is an attempt to comply with the marriage regulations.5 The extent of the attempt may vary with the education, intelligence and experience of the one claiming putative status.6 No case has

2. CAL. CIV. CODE § 4100 (West 1970).
In re Estate of Krone, 83 Cal. App. 2d 766, 768, 189 P.2d 741, 742 (1948); CLARK, LAW OF DOMESTIC RELATIONS 54 (1968) [hereinafter cited as Clark].
6. See Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307 (1931);
been found where the putative spouse status rested solely on the belief in common law marriage in California.\(^7\)

On the other hand a meretricious spouse, one who cohabits with another knowing that the relation is illicit,\(^8\) is not entitled, in the absence of agreement, to a share in the accumulated property.\(^9\) The parties in effect will be left where they are found.\(^10\)

Until the Family Law Act, effective January 1, 1970, there was no statutory provision for the disposition of property accumulated during a void\(^11\) or voidable\(^12\) marriage. The statutes governing the characterization of the accumulated property as community property\(^13\) and its subsequent distribution upon divorce\(^14\) were predicated on the existence of a valid legal marriage. If the parties failed to fulfill the requirements for marriage, or if the marriage was void or voidable, there was no community property to be distributed. In the typical situation this would leave an unemployed spouse with no rights to the marital property, despite the fact that he or she may have entered the marriage believing it to be valid and free from any impediments. To help remedy this situation, the courts have implemented the putative spouse theory.

If one or both of the parties to a void or voidable marriage were putative, the courts would resort to one of several theories to permit an equitable division of the property accumulated during the marriage. Some would "look to the statutes dealing with divorces, annulment or separate maintenance . . . as furnishing a standard

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7. But cf. Sancha v. Arnold, 114 Cal. App. 2d 772, 251 P.2d 67 (1952) (a good faith belief that the party or parties, as residents of a state recognizing common law marriages, fulfilled the requirements for such a marriage, will support a finding of a putative spouse status in California).


9. Id.


11. An incestuous or knowingly bigamous marriage is void from the beginning. CAL. CIV. CODE §§ 4400-4401 (West 1970).

12. A marriage in which one or both of the parties were under the age of consent, or where consent was obtained by fraud or force, or where either party was of unsound mind, or was physically incapable of entering into marriage, or was guilty of innocent bigamy is voidable. A voidable marriage is valid until adjudged a nullity. CAL. CIV. CODE § 4425 (West 1970).


to be used by way of analogy.”15 The theory of partnership or quasi-partnership might be referred to,16 or simply the inherent equitable powers of the court to protect the innocent party.17 In any case the result was not unlike that which would have resulted had the marriage been valid.

The Family Law Act gave statutory recognition to the property rights of a putative spouse. Section 4452 defines a putative spouse and the property to which this spouse has an interest.18 It further provides that this “quasi-marital” property shall be divided in accordance with section 4800 which is the section on division of community and quasi-community property upon divorce.19 Until In re Marriage of Carey20 this was generally presumed to have merely codified existing case law on the subject.

**In Re Marriage Of Carey**

Paul Carey and Janet Forbes lived together for eight years during which time they had four children. Although they never married, they held themselves out as a married couple, transacted all business as husband and wife, and Paul at all times recognized the children as his own. Paul worked to support the family while Janet generally stayed at home to care for the home and children. Each spoke at one time or another of a marriage ceremony but no steps were ever taken in this direction.21 In 1971, Paul filed a petition under the Family Law statutes asking the court to find a nullity as to any purported marriage.22

The narrow issue presented to the court was whether an attempt

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18. CAL. CIV. CODE § 4452 (West 1974):
Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed “quasi-marital property”. If the court expressly reserves jurisdiction, it may make the property division at a time subsequent to the judgment.
21. Id.
22. Brief for Appellant at 1,
at solemnization was necessary for one to qualify as a putative spouse or whether a belief that a "common law" marriage was valid was sufficient. The court, however, felt the "principle issue" concerned the Family Law Act "which provides among other things that the concept of individual 'fault' or 'guilt' or 'punishment' for such human error, shall not be considered in determining family property rights." Although never articulated as such the court seemed to address the question of whether or not the putative-meretricious spouse distinction was consistent with the Family Law Act. In other words, instead of addressing the question, "What is a putative spouse?" the court asked "Is the putative spouse theory consistent with the "no fault" concept expressed in the Family Law Act?"

After reviewing the community property theory, especially that applicable to the putative and meretricious spouses, the court examined the Family Law Act. It found the most significant change in the law to be the elimination of fault or guilt in the division of community property upon divorce. This concept might also apply to a declaration of a judgment of nullity of a void or voidable marriage. However, in examining the section which makes the

23. The trial court found that there was no legal marriage, but ruled that the property accumulated during the marriage was quasi-community property and accordingly awarded Janet a one half share. Paul appealed this determination of the status of the property.

The issue framed by the briefs presented the appellate court with the question of whether Janet could be classified as a putative spouse. Paul argued that section 4452 contemplated at least an attempted compliance with the requirements of marriage and that no such attempt had been made in this case. Brief for Appellant at 9. He also pointed out that the court in its memorandum decision at no time referred to Janet as a putative spouse and made no findings of fact on this point. Brief for Appellant at 10. Paul argued that since Janet failed to qualify under section 4452 as a putative spouse, she acquired no right, by mere cohabitation alone, to the property accumulated during their relationship.

Janet proceeded on the theory that she was in fact a putative spouse. Janet had testified that she believed that "common law" marriages were valid. This belief was "apparently shared by petitioner . . . since he signed a declaration under penalty of perjury prepared by his counsel." Brief for Respondent at 3. She also argued that their conduct during the marriage was consistent with the belief that they were married. Brief for Respondent at 3. Since section 4452 does not mention an attempt at solemnization, the findings of fact were not inconsistent with a good faith belief by both parties that there was a marriage; therefore, the property should be divided as community property. Brief for Respondent at 3.

latter provision, the court discovered a discrepancy. The application of this section is conditioned upon a finding that "either party or both parties believed in good faith that the marriage was valid." The court found that where only one party had the requisite good faith the "guilty" party had not been penalized. Therefore, to maintain that where both parties were equally guilty, they shall be left where found by the court, would be to "infer an inconsistent legislative intent." To avoid this inconsistency the court held that the legislative declaration of a "no fault" policy was paramount and "supersedes contrary pre-1970 judicial authority." This, in effect, meant ignoring section 4452 of the Family Law Act. Left with the problem of when the community property theory applies to a void or voidable marriage, the court rather summarily established a criterion similar to a common law marriage:

[A]n ostensible marital relationship . . . with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage.

Thus, to replace the putative spouse doctrine the court supplied a new definition of marriage—at least for purposes of dividing “community property” upon the termination of a marriage. Since the court buttressed this conclusion on the legislative intent as expressed in the Family Law Act, it is necessary to examine the Act to ascertain if it sustains this conclusion.

THE FAMILY LAW ACT: LEGISLATIVE HISTORY

The Family Law Act had its origins in the Governor’s Commission on the Family. Prompted by a recognition that “our present social and legal procedures for dealing with divorce are no longer adequate,” Governor Brown directed the commission in May 1966 to “begin a concerted assault on the high incidence of divorce in our society and its often tragic consequences.” Among other things, the Governor specifically requested that the commission suggest revisions of California’s family law statutes, to study the feasibility of establishing Family Courts and to suggest the most effective way such courts could operate. The commission’s report, issued in

27. Id.
28. Id.
29. Id.
31. Id.
32. ASSEMBLY COMM. REPORT ON ASSEMBLY BILL NO. 530 & SENATE BILL
December 1966, limited itself to these requests.

The Governor's Commission postulated that the goal of every dissolution proceeding should be to effect a reconciliation if possible. This could only be accomplished if there was an in-depth study of the marriage to determine the reasons for its apparent breakdown. Such a realistic appraisal of the marriage was quite impossible, the commission reasoned, under the existing divorce procedure.

Former Civil Code section 92 contained seven grounds for divorce: adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony and incurable insanity. These had to be "proven" in the normal adversary setting. Furthermore, when a divorce decree was based on adultery, incurable insanity, or extreme cruelty, the trial court was required to award more than fifty percent of the community property to the innocent party. The result was usually one of two equally undesirable situations. At one extreme was the sharply adversary proceeding with each party endeavoring to prove the "guilt" of the other, thereby adding to the emotional trauma of all involved. In their enthusiasm, the parties would not infrequently resort to "questionable methods of gathering effective but lurid and ludicrous testimony." At the other extreme were the "sham procedures" which merely reflected the unrealistic nature of a "fault" centered proceeding.

The commission's solution to this antagonism between a fault based divorce and a realistic appraisal of the marriage with a view towards reconciliation was as follows:

We recommend that the existing fault grounds of divorce and the concept of technical fault as determinant in the division of community property, support and alimony be eliminated, and that marital dissolution be permitted only upon a finding that the marriage has irreparably failed after a penetrating scrutiny and after

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No. 252 in 1969 JOURNAL OF THE CALIFORNIA ASSEMBLY 8053, 8054 [hereinafter cited as ASSEMBLY REPORT].
33. CAL. CIV. CODE § 92 (West 1954).
34. CAL. CIV. CODE § 130 (West 1954).
35. CAL. CIV. CODE § 146(a) (West 1970); See ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE § 5.7 (2d ed. California Continuing Education of the Bar 1972) [hereinafter cited as ATTORNEY'S GUIDE].
36. ASSEMBLY REPORT at 8056-8057; 23 ASSEMBLY INTERIM COMMITTEE REPORT, FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON THE JUDICIARY, RELATING TO DOMESTIC RELATIONS, 62-63 (1965).
37. ASSEMBLY REPORT at 8057.
the parties have been given by the judicial process every resource in aid of reconciliation. Acting on this advice, the legislature reduced the grounds of divorce from seven to two: "irreconciliable differences" and "incurable insanity," both of which were to be pleaded generally. Of even greater significance was section 4800 which eliminates fault as a basis for dividing property, requiring the court to divide the community property and the quasi-community property of the parties equally.

What becomes apparent then, even from a cursory investigation, is that the Governor's Commission, and subsequently the legislature, were concerned almost exclusively with divorce or dissolution. The fault or guilt with which they were concerned was that which occurred during the marriage. A dissolution necessarily presumes the existence of a valid marriage. As to the division of community property, the Act again reflects an interest in this area only to the degree that it involves a dissolution. There was no change in the substantive law requiring the existence of a valid marriage. In short, the Governor's Commission and the legislature premised their work on the existence of a marriage. Their concept of "no fault" was strictly limited to conduct occurring during marriage. To the degree therefore, that the court based its rule of no fault for conduct occurring prior to or contemporaneous with the marriage, on "the general tenor and scope of the entire scheme," it is without support.

Section 4452: Legislative History

A study of the legislative history of section 4452 also fails to support the belief that the legislature intended to expand the no-fault concept to void and voidable marriages. In fact, it is reasonable to infer that the legislature intended just the opposite: the creation of a fault standard. This can be illustrated by comparing some of the commission's suggestions with what the legislature actually passed. A comparison of the new sections 4400 and 4401 with the old Civil Code sections 59 and 61 and section 4425 with Civil Code section 82 evidences no change in the grounds for declaring a marriage void or voidable. A further comparison of the two statutes indicates that aside from section 4452 (Putative Marriage-
Division of Property) and two other sections not applicable to this discussion, the entire treatment of void and voidable marriages, except for nomenclature, is substantially the same. Instead of an “annulment,” the Family Law Act substituted the “judgment of nullity.”

The Governor’s Commission, however, had suggested something radically different. They were prepared to extend the no-fault concept to conduct occurring prior to marriage at least with regard to voidable marriages. The commission reasoned that since a voidable marriage is good until annulled, the problems presented by a request for an annulment of such a marriage were no different than those presented by dissolution. If the parties could live together as a married couple there was no need for an annulment. If they could not, a dissolution was in order. Accordingly, the commission recommended

... the elimination of the specific fault annulment grounds; the removal of the annulment of voidable marriages as a separate form of action; and the coalescence of all dissolution proceedings (save for declarations of nullity in the case of void marriages) into a single form of action governed by a single standard.

The legislature declined to accept the “no fault” voidable marriage concept, however. Their reasons were threefold: (1) the legislature felt that “it was not certain” that the grounds for annulment would be included under the “irreconcilable differences” test; (2) an annulment might be less offensive to some than a dissolution; and (3) an annulment relates back.

As to the first reason, the legislature could be quite certain that the grounds for annulment would not be included under the “irreconcilable differences” test. But this avoids the thrust of the no-fault divorce theory “making the possibility of reconciliation the important issue.” The legislature seems to be indicating that although fault during the marriage will not be considered, fault...
before the marriage will be considered and is, of itself, enough to
terminate the relationship.

The second and third reasons given seem to be directed, in part,
at the religious differences between a judgment of nullity and a
divorce. Those with religious scruples against remarriage after a
divorce do not have this problem upon a judgment of nullity
because there never was a marriage.

It has also been suggested that the ab initio aspect of a judgment
of nullity allows the parties a certain degree of vindication from
the element of failure associated with a broken marriage. It is not
that the parties failed in this relationship but that there never was
a relationship.\textsuperscript{50} If this was the legislature's intention, it further
illustrates their concern with "fault" in void or voidable marriages.

Under section 4452 the lack of knowledge of the impediment
makes the putative spouse's conduct less opprobrious. That a party
was responsible for the defective condition of the marriage is
immaterial. For example, if the marriage is voidable because of the
"innocent bigamy"\textsuperscript{51} of one party, such party would be the cause
of the annulment and thus the one at fault. The other spouse
would be the innocent victim even if he or she was aware of the
impediment. Section 4452, however, reverses the roles and furnishes
the party causing the annulment with the vindicating element of
a putative spouse status while the party with knowledge of the
situation becomes the guilty one. Thus, what provides the element
of exoneration in section 4452 is not the same mitigating element
available without this section. The legislature is providing less
stigma to the party who has no knowledge of the impediment.

\textbf{SECTION 4452}

The reason the court turned to an examination of the general
legislative intent was that it found section 4452 to be internally
inconsistent. The court believed:

\begin{quote}
that where one party to a nonmarital family relationship in bad
faith knew of the marriage's infirmity or nonexistence, and the
other did not, the Act neither penalizes nor rewards the respective
parties upon a judicial division of the accumulated property. The
party who in bad faith brought about the pseudo marriage is not,
for that reason, left where found by the court. . . . A person who
by deceit leads another to believe a valid marriage exists between
them shall be legally guaranteed half of the property they acquired
\end{quote}

\footnotesize
\begin{itemize}
  \item \textsuperscript{50} Comment, Dissolution and Voidable Marriage Under the California Family Law Act, 4 Loyola L.A. L. Rev. 331, 336 (1971).
  \item \textsuperscript{51} CAL. CIV. CODE § 4401 (West 1970).
\end{itemize}
even though most, or all, may have resulted from the earnings of the blameless partner.\textsuperscript{52}

If this section functioned in the manner suggested by the \textit{Carey} court, it would indeed embody “inconsistent provisions on the same subject”. However, an examination of the statute itself, as well as the case history which it codifies, reveals that the court misinterpreted the application of section 4452.

An understanding of the workings of section 4452 may be had by examining the pre-Family Law case law on the subject of a putative spouse. The Commission felt that their recommended statute for void marriages,\textsuperscript{53} which is virtually identical to section 4451, “essentially codifies existing case law”.\textsuperscript{54} The commentators in general have also treated it as such.\textsuperscript{55}

The case law on meretricious spouses unequivocally states that a meretricious spouse is to be left where found by the court,\textsuperscript{56} and he or she does not, by reason of such cohabitation, attain an interest in the property.\textsuperscript{57} That the “guilty spouse” is not “punished” but instead “legally guaranteed half of the property” is only because of the usual posture of the parties. In the situation normally presented to the court, the husband has been the wage-earner and thus has all the property. If the wife is a putative spouse, she will be awarded a one-half interest in the property, leaving the husband with the other half.\textsuperscript{58} If she is not a putative spouse, he may retain all the property. The husband’s status in this situation is immaterial as far as the division of the accumulated property is con-

\textsuperscript{52} Carey, 34 Cal. App. 3d at 352, 109 Cal. Rptr. at 865-67; Report at 75.
\textsuperscript{53} Section 014b. Whenever a determination is made under this Chapter that a marriage is void or otherwise invalid and the court finds that either party or parties to the union believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and thereupon may divide equitably, by analogy to the laws respecting community property, that property acquired during the union which would have been community property or quasi-community property if the union had been legally valid. Such property shall be termed ‘quasi-marital property’.
\textsuperscript{54} Report at 75.
\textsuperscript{55} \textit{LuTher} & \textit{LuTher}, \textit{Support and Property Rights of the Putative Spouse}, 24 Hastings L.J. 311, 317 (1973); \textit{Attorney’s Guide} at 272.
\textsuperscript{56} Oakley v. Oakley, 82 Cal. App. 2d 188, 185 P.2d 848 (1947).
and thus, obviously, he is not penalized for his bad faith. However, the fact that he will, in either case, be awarded at least one-half of the property should not be interpreted as a “legal guarantee” of the same. This can be illustrated by viewing the situation from the wife’s or non-wage earning spouse’s side. The property is all in her husband’s name and she therefore has none. The only circumstance under which she will be “legally guaranteed” half of the property is if she is found to be a putative spouse. Otherwise the court will leave her where found—with nothing. Contrary to what the court said, “a person who by deceit leads another to believe a valid marriage exists,” is not, “legally guaranteed half of the property.”

The confusion seems to stem from an attempt to apply a guilt-punishment, innocent-reward analogy. Such an analogy is inapplicable because normally only one spouse, the wage-earner, has something to lose, and only the non-wage earning spouse has something to gain. Thus, the guilt or innocence of the party with the property is always immaterial. The distribution of the property depends solely on the status of the nonpropertied spouse. The putative spouse, however, is always awarded at least a one-half interest in the property. The non-putative spouse either is left where found by the court, or loses a one-half interest in the property.

An analysis of section 4452 discloses that it is in fact consistent with the case law. By limiting its application to the situation where “either party or both parties” are in good faith, the section codifies the above theory of a property right to the putative spouse. It does not purport to award a property right to the non-putative spouse, as the court suggests. To interpret the section otherwise would be to make the state a party to the unjust enrichment of a meretricious spouse. This interpretation is further bolstered, by the legislature’s limitation on the application of this section. The quasi-marital property must be divided only “if the division of property is in issue.” The putative spouse would only put the property in issue if he or she did not already have it. The non-putative spouse presumably would not be allowed to raise the issue having failed to qualify under the statute.

**Common Law Marriage**

Upon finding section 4452 inconsistent both internally and with

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the general legislative intent of "no fault", the Carey court disregarded it entirely. With no explanation as to how it came to this conclusion, the court confidently states:

The Family Law Act obviously requires that there be established . . . an actual family relationship with cohabitation and mutual assumption of the usual rights, duties, and obligations attending marriage.63

The family relationship defined by the court is descriptive of the traditional common law marriage. Common law marriage has two requirements: the mutual expression of the parties of a present consent to marry, and the mutual assumption of the marriage relation.64 Evidentiary rules have generally replaced the substantive ones, however, so that an agreement will generally be inferred from the fact that the parties hold themselves out as a married couple even in cases where the evidence indicates there was no such agreement.65 The court's definition of marriage clearly incorporates the evidentiary requirements for a common law marriage. However, neither the Family Law Act, nor the case law, supports a finding of common law marriages in California.

Section 4100 of the Act, entitled "Requirements for Marriage," is identical with the section that has been in existence since 1895.66 It specifically states that "consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by this code . . . ."67 This section has been uniformly interpreted as being not just directory but mandatory, thereby precluding common law marriages in California.68 Such an interpretation is based partly on section 4200, entitled "Requirements for Authentication of Marriage," which provides that "non-compliance with its provisions by others than a party to a marriage does not invalidate it."69 This has been held to imply that non-compliance by parties would invalidate the marriage.70

63. Carey, 34 Cal. App. 3d at 354, 109 Cal. Rptr. at 867.
64. U.S. Fidelity & Guarantee Co. v. Britton, 269 F.2d 249 (D.C. Cir. 1959); CLARK at 49.
65. CLARK at 49.
67. Id.
68. 6 WITKEN, SUMMARY OF CALIFORNIA LAW § 20 (8th ed. 1974) (emphasis added) [hereinafter cited as WITKEN].
69. CAL. CIV. CODE § 4200 (West 1970) (emphasis added).
70. Norman v. Thomson, 121 Cal. 621 (1898).
Whether the court intended this definition of marriage to apply only to the distribution of property accumulated during a void or voidable marriage or in all situations is not specifically stated. In either case, the use of a common law marriage is without support. As to the requirements of marriage in general, the Act makes no substantive changes at all. As to the distribution of accumulated property of a void or voidable marriages in particular, neither the general tenor nor the specific statutory changes indicate that anything less than a valid marriage or a good faith belief that such a marriage exists will suffice.

COMMUNITY PROPERTY THEORY

The court in Carey is not alone in chafing against the result required by the application of the traditional rules regarding meretricious marriages. The dissents in several landmark cases on the subject have expressed their displeasure with the results. Justice Curtis, in his dissenting opinion in Vallera v. Vallera, summed up the general feeling as follows:

Just because the man, who in the instant case was equally guilty, earned the money to buy the property, 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 burden.

The result, Justice Curtis continued, is unreasonable "[u]nless the underlying purpose be to punish the woman for participating in the illicit relationship . . . ."

Aside from the fact that the rule regarding meretricious relationships punishes only the non-wage earner, and rewards only the employed spouse, the rule is also open to the criticism that it ignores the relationship of the parties. If there has been an agreement the court will treat it as a business relation. If there is no agreement, the only remedy available is in the law of trusts. These remedies are, in effect, applied despite the existence of an ostensible marriage relation. For example, services rendered during the relationship are not considered as funds for the purposes of a resulting or constructive trust, nor is there any right in the absence of agreement to compensation for such services. Furthermore, it has been held that the meretricious relation alone does not give rise to a

73. Id.

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confidential relationship for the purpose of establishing a constructive trust.\textsuperscript{74}

In pointing out that a valid marriage is not always required, the Carey court in citing Coats v. Coats\textsuperscript{76} seems to appreciate that it is the nature of the relationship between the parties that should govern. Speaking of a putative wife's right to a share in the accumulated property, that court said:

What she did, \textit{she did as a wife}, and her share of the joint accumulations must be measured by what a wife would receive out of community property on the termination of the marriage.\textsuperscript{76}

Prior to the Carey case, however, this principle had only been applied to a spouse who passed the "good faith" test. It had been denied to other de facto marriages on the basis that "equitable considerations" were not present.\textsuperscript{77} That the presence or absence of a ceremony need not necessarily be the conclusive factor in determining the application of the community property doctrine has long been recognized. The next question, and the question raised by the Carey court, is whether the test of "good faith" is any better a criterion or, for that matter, whether it is even consistent with the community property rationale.

The concept of community property is based on the theory of the equality of the spouses. Unlike the common law notion in which "the husband and wife are one," and that one is the husband,\textsuperscript{78} the community property rationale recognizes the wife as being more than just a chattel. She is an equal partner in the joint enterprise of the marital relation.\textsuperscript{79} A study of the history of community property reveals that this theory is based on economic factors.

\begin{quote}
[T]he community system is most frequently found to exist among the common masses of the people, those who do not own great worldly possessions, those who must labor from day to day to maintain themselves and their children, those among whom the
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\textsuperscript{75} 160 Cal. 671, 118 P. 441 (1911).
\textsuperscript{76} Id. at 678 and 444 (emphasis added).
\textsuperscript{77} Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).
\textsuperscript{78} 1 BLACKSTONE, \textit{COMMENTARIES ON THE LAWS OF ENGLAND} 430 (1866).
\textsuperscript{79} de Funiak & Vaughan, \textit{PRINCIPLES OF COMMUNITY PROPERTY} 2 (2d ed. 1971) [hereinafter cited as \textit{de Funiak & Vaughan}].
husband and wife work equally together in one capacity or another

. . . . [T]he United States is primarily of this . . . type.\textsuperscript{80}

An analysis of the current economic situation supports this conclusion. According to the 1970 Census, 42.2 percent of women over 16 years of age are in the labor force as compared to 77.6 percent of the men.\textsuperscript{81} Thirty-seven percent of these women have children under the age of eighteen.\textsuperscript{82} Thus a considerable portion of women provide a paycheck to their family. Many, in addition, maintain the traditional mother role. Furthermore, these statistics do not reflect the "labor" involved in domestic chores, nor do they account for such intangibles as love, devotion, affection and moral support that sustain a marital relation.

Do any of these factors change because the parties through ignorance, lifestyle, or just plain apathy fail to legalize their "marriage" through the prescribed ritual? Manifestly, they do not. It is true that the community property concept, as it came to us from Spanish law, was premised upon a marriage ceremony and that absent this ceremony a party must qualify as a putative spouse in order to receive a share of the marital acquisitions. But, "[i]n Spain, of course, the requirements as to a religious ceremony were due to the influence of the Roman Catholic Church."\textsuperscript{83} Presumably this is not the basis for current law focusing on the marriage ceremony to the exclusion of the marriage relation. What reasons then can be offered in its support and do they justify the harsh results that may befall one who violates them?

**Presumptions**

Preliminary to a discussion of the rationale behind the various requirements of marriage is an appreciation of the significance of the various presumptions available to one endeavoring to prove a valid marriage. Even jurisdictions not recognizing common law marriages provide a measure of protection to de facto marriages by means of rebuttable presumptions. Premised on the fact that the law presumes morality and not immorality,\textsuperscript{84} and that the good faith expectations of the parties should be honored,\textsuperscript{85} the law in general will presume that the purported marriage is valid and puts the burden of proof on the party attacking its validity.\textsuperscript{86} In Cali-
California this general presumption can take several forms: a presumption of a valid marriage from "habit and repute;" a presumption of a valid marriage from proof of solemnization; and a presumption that the second marriage is valid.

"[I]t has been universally conceded that reputation in the community is always admissible to evidence the fact of marriage; there does not seem to have been a time when this was disputed."87 This first presumption from "habit and repute" is given statutory recognition in California. The former Civil Code of Procedure expressed the rule as a presumption,88 while currently it is stated as an exception to the hearsay rule.89 Proof of habit and repute is generally stated to require a showing of a common, uniform and undivided repute to the world.90 This, of course, is no different from the evidentiary requirements for proof of a common law marriage. In fact, it has been stated that the statute permits proof of a common law marriage.91 It has been recognized, however, that in view of the statutory requirement of license and solemnization, this presumption is not as strong as it otherwise might be.92

A presumption of a valid marriage is also available upon proof of solemnization. This strong presumption places a heavy burden on the party who seeks to attack it.93 Evidence Code section 663 codifies this common law rule.94

Finally, there is a presumption that a second marriage is valid. This is premised upon the assumption that "it would be anomalous and contrary to common experience to presume that persons married more than once are bigamists."95 This presumption is normally limited to situations where one spouse to the first marriage is dead or otherwise absent.96

With the help of these presumptions, the parties to an unlicensed and unsolemnized "marriage" can prove a "valid marriage" for a

87. 5 Wigmore on Evidence 466 (3d ed. 1940).
91. Id.
92. Id.; Witkin at 4903.
95. In re Estate of Smith, 9 Cal. 3d 74, 80, 507 P.2d 78, 82, 106 Cal. Rptr. 774, 778 (1973).
96. Witkin at 4904.
wide variety of purposes. It is significant to note, however, that in all these situations, one party to the purported marriage must be absent, or if both parties are present, they must both desire a finding of marriage. If one party is adverse to a finding of a marriage, his or her testimony as to the absence of the requirements is, of course, admissible and will probably, in the absence of other circumstances, be enough to rebut the presumption. Although consistent with the rules of evidence, this result ignores the reasons for creating the presumptions in the first place. There is no less reason to presume the immorality of one applying for “widow's” benefits for example, than for one requesting a dissolution. If the parties originally contemplated that their relationship had all the incidents of a valid marriage, these good faith expectations should not be denied merely because the relation is no longer viable. Since the presumptions protect de facto marriages when neither party objects perhaps there is an element of punishment or fault involved in the termination of a meretricious relation.

**Presumptions Of Marriage**

The reasons generally espoused for the requirements of a license and solemnization are the public health, the accuracy of vital statistics and other records and finally the cautionary effect of these requirements. However, the efficacy of these statutes is seriously undermined by the lack of effective sanctions for their violation, the various exceptions provided by the statutes themselves and the existence of various presumptions which can effectively circumvent all of the requirements.

The licensing requirement for example has several purposes. Not only does the record of a license provide objective proof of the marriage and make for accurate records and statistics, but it also helps to ensure that the other requirements of marriage have been fulfilled (age for consent, pre-marital exam, absence of existing marriage). However, a license is not required at all when two unmarried persons living together as husband and wife wish to legitimize their relation. Furthermore, the ability of the license to ensure the fulfillment of the other requirements is seriously hampered by the fact that a defective license or one obtained by

97. See Clark at 68.
98. People v. Anderson, 26 Cal. 129 (1864); But see Pulos v. Pulos, 140 Cal. App. 2d 913, 295 P.2d 907 (1956) (marriage sufficiently proven despite husband's testimony that no ceremony had been performed).
99. Clark at 36.
perjury is nonetheless valid.\textsuperscript{101}

Another interest the state seeks to protect by its requirements for marriage is the public health. A prerequisite to the issuance of a license is a showing that a test for syphilis is negative for both parties.\textsuperscript{102} Again, however, misrepresentation of facts essential to the enforcement of this requirement does not invalidate the license.\textsuperscript{103} Furthermore, a superior court judge may waive the examination or permit the license to issue in spite of the existence of syphilis "if the judge is satisfied . . . that an emergency or other sufficient cause for such order exists and the public health and welfare will not be injuriously affected thereby."\textsuperscript{104}

Finally, it has been advanced that the various requirements, the public notice and the formality of solemnization, will have a cautionary effect and thus prevent hasty or ill-avoided marriages. It is submitted that this proposition is far from axiomatic, and that the ease with which a divorce may be had more than offsets any efficacy it may once have had. Finally, these requirements induce caution only with regard to the choice of the marriage site since when the parties cross the state border to contract their marriage and then return to California, the marriage is valid notwithstanding that the move was made solely to avoid these statutory requirements.\textsuperscript{105}

\textbf{Conclusion}

When the Governor and the legislature set about to remedy California's marital problems, they curiously failed to study the root of these problems—marriage. Herein lies the problem of predetermining a solution for the problem of the division of property upon the termination of a void or voidable marriage on the Family Law Act. This Act concerned itself with divorce and not with the threshold problem of creating the marriage relation. An examination of the problem of marriage, however, does reveal a basis for altering the rules regarding the meretricious-putative spouse dis-

\begin{itemize}
\item \textsuperscript{102} Cal. Civ. Code § 4309 (West 1970).
\item \textsuperscript{103} Cal. Civ. Code § 4308 (West 1970).
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Cal. Civ. Code § 4104 (West 1970); WITHIN at 4901.
\end{itemize}
tinction. First of all, the community property rationale does not dictate a requirement of a license and solemnization. But even if it did, a consideration of the laws surrounding the creation and proof of the existence of a marriage reveals that they do not provide an adequate rationale for the court’s closing its doors to a meretricious spouse. Instead it reveals that in numerous instances, a strict adherence to the requirements of marriage must yield to what is considered more important policy considerations. This approach reflects an appreciation of the fact that:

The one term “marriage” may be used in the law to mean several different things . . . . The decisive question becomes, what is the meaning of “marriage” for purposes of the particular law under which rights are being claimed? By the same token, in a purely domestic case, the fact that a person is held “married” for one purpose does not necessarily conclude the issue whether he is “married” for some other purpose. 106

The “purposes of the particular law under which the rights are being claimed” in this case are to ensure that the property accumulated during the marriage relation is divided in a manner consistent with the partnership nature of the relation. For this purpose, the definition of marriage provided by the Carey court is sufficient. However section 4452 of the Family Law Act precludes a statutory remedy for the meretricious party to such a marriage. Instead, the court should resort to the same theories that furnished relief to a putative spouse prior to the Act: the equitable powers of the court, an analogy to the statute, or a partnership or quasi-partnership theory.

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