THE PROPERTY RIGHTS OF SPOUSES COHABITING WITHOUT MARRIAGE IN ISRAEL—A COMPARATIVE COMMENTARY

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I. INTRODUCTION

The phenomenon of a man and a woman living together without marriage has in recent years taken on considerable proportions in many parts of the globe. The spread of the phenomenon inevitably has begun to leave its impression on the courts of law, leading them on more than one occasion to depart from the established course and settled rules on the related issue of property rights. For instance, the Supreme Court of California in *Marvin v. Marvin* decided that it was possible, in the absence of an express agreement between the couple and contrary to the rule existing until then, to found the distribution of property between unmarried parties living together on an implied contract inferable from their conduct or on various equitable remedies. The proliferation of the phenomenon in the United States and the changing attitude of

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the public to such unwedded couples greatly influenced the decision in *Marvin*.

On the matter of the property rights of unwed couples, the legal situation in California under the Family Law Act of 1970 is similar to that in Israel under the Spouses (Property Relations) Law, 1973, inasmuch as both enactments apply only to married couples and consequently leave the question of the property rights of unmarried couples to be determined exclusively according to the case law. Moreover, the Israeli courts have more than once sought guidance from American rules in the absence of a local statutory arrangement on the subject. This Article will consider the development that has taken place in California law with the reasoning of *Marvin v. Marvin* and will reflect on the extent, if any, to which that rule is likely to influence the property rights of unmarried partners living together in Israel.

This Article will trace the following aspects: the background of the phenomenon of unmarried couples in Israel and the factors motivating the parties to live together on such footing; the wide recognition given by the Israeli legislature to the institution known as the "commonly reputed wife" in extending various rights and benefits to a woman living with her partner in a nonmarital relationship; the expansive interpretation given in the case law to this institution; the question of the reputed wife's right to maintenance from her partner; and finally, the rights between unmarried parties to the property acquired by them while living together, in analogy with the legal situation resulting from *Marvin*.

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*"The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."* Marvin v. Marvin, 18 Cal.3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976). On the reasons for the spread of the phenomenon, see Kay & Amyx, *supra* note 3, at 962-63; Lorio, *Concubinage and Its Alternatives: A Proposal For a More Perfect Union*, 26 Loy. L. Rev. 1, 3-5 (1980).

* CAL. CIV. CODE §§ 4800-4812 (West 1970).


* This is done on the presumption of the similarity of laws, when no evidence as to the foreign law has been offered. The Supreme Court of Israel cited Holmes' judgment in Cuba Railroad Co. v. Crosby, 222 U.S. 473, 478 (1912), and adopted the rule determined therein. *See Yazdi v. Yazdi, Civ. App. No. 151, 4 P.D. 762, 767 (1949); Marur v. Zorduk, Civ. App. No. 109, 11 P.D. 904, 905 (1956) ("P.D." refers to Piskei Din which are the reports of the Supreme Court of Israel). See also M. SHAVA, *THE PERSONAL LAW IN ISRAEL* 308-25 (1976).
II. THE FACTORS MOTIVATING COUPLES IN ISRAEL TO LIVE TOGETHER OUT OF WEDLOCK

Israeli case law indicates that in practice various reasons influence a couple to live together without going through a recognized wedding ceremony. This phenomenon has created the institution, recognized by Israeli law, of the "unmarried wife," also known as the "commonly reputed wife" or, generally, "reputed spouse." These reasons may be divided into two main categories.

Since matters of marriage and divorce in Israel are governed by religious law, the first category refers to the preclusion of a marriage between the parties because of a prohibition in the applicable religious law. This category includes not only "mixed" couples, such as a Jew and a Catholic woman, but also cases of Jewish parties whose marriage is impeded by Jewish religious law, such as: a Kohen (a Jew of priestly descent) and a divorced woman; a woman whose former marriage, in a religious ceremony, was dissolved abroad by way of a civil divorce alone; cases of a woman whose husband suffers from mental illness, whose whereabouts cannot be ascertained, the fact of whose death cannot be established, or who unjustifiably refuses to grant her a divorce. In all these cases a couple may, for lack of other alternative, choose to live together in a common household without the bond of a legally recognized marriage ceremony.

The second category involves those who, despite the absence of any impediment to marriage, nevertheless choose to live together out of wedlock for different personal reasons. Sometimes these may be reasons of principle, such as the couple's objection to the religious ceremony that their marriage in Israel entails, or their desire to live together in a free relationship, in whatever form and without the marriage tie. Sometimes the eschewal of the marriage tie is founded on economic considerations and reluctance to forego certain material rights, such as pension or provident fund benefits which are payable to the widow but cease upon her remarriage.

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* See Habib v. Kardosh, Civ. App. No. 536, 52 P.M. 213 (1965) ("P.M." refers to Pesakim Mehzo'itim which are the reports of the Israeli District Courts).
In discussing the implications of the reputed spouse institution, the Israeli courts have sought to fathom the legislature's considerations in lending this novel status legal recognition in a long series of enactments. Three main lines of approach emerge. First, according to the view expressed by Judge Cohn, the legislature's motivation is found in elementary notions of equity and fairness, i.e. preservation of the rights of a woman who, although unmarried, has in fact fulfilled all the duties of a lawfully wedded wife, regardless of her reasons for deciding to take this path. Another explanation given in the case law is the legislature's desire to come to the aid of couples who, although permitted by law to marry, will not do so for different reasons, including their objection to participating in a religious marriage ceremony as required under the law in Israel or their wish to live together in a nonmarital relationship of whatever form. A third explanation, more common and accepted than the former two, is the legislature's wish to ease the situation for couples who live together out of wedlock because marriage between them is impeded under the religious law. This factor has been emphasized in the case law, judges often having noted that the exclusive sway of the religious law in matters of marriage and divorce sometimes renders the institution of the reputed spouse a "practical necessity in our country."

III. THE "REPUTED SPOUSE" ENACTMENTS

Israel has witnessed, since the State's establishment, the legislature's increasing recognition of the institution of the reputed spouse, with particular reference to the extension of various social rights and benefits. Whenever Israeli enactments use the terms "spouse," "wife," or "husband," they mean a spouse by virtue of lawful marriage alone unless the enactments expressly mention that they include the reputed spouse. The number of enactments

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15 See supra notes 8-13 and accompanying text.
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The social and material rights and benefits conferred by these enactments relate, inter alia, to pensions, provident funds, and tenants' protection. An exception is the Succession Law, 1965, because it confers on the surviving reputed spouse rights of succession and maintenance out of the deceased partner's estate. In conferring these rights, the legislature exceeded the normal reach in enactments of this character by making available most substantial rights of a kind otherwise stemming only from a legally recognized personal and familial status.

IV. THE DEFINITION OF "REPUTED SPOUSES" IN THE CASE LAW

The next issue is what a party must prove to be in the category of "reputed spouse" in order to receive its resultant benefits. This question was for many years a source of conflicting judicial opinion. Some judges chose a restrictive interpretation, requiring that the woman seeking recognition as a reputed wife show not only cohabitation as husband and wife, including the running of a common household, but also that the public believed, albeit mistakenly, that she was lawfully married to that person. The judges of this view accordingly held that if the public knew the woman to be unmarried to the man whose reputed wife she claimed to be, she

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20 Succession Law, § 55 (1965), provides:

Where a man and woman though not being married to one another, have lived together as husband and wife in a common household, then, upon the death of one of them, neither being then married to another person, the deceased is deemed, subject to any contrary direction expressed or implied in the will of the deceased, to have bequeathed to the survivor what the survivor would have inherited on intestacy if they had been married to one another.

21 Id. § 57(c) provides:

Where a man and woman, though not being married to one another, have lived together as husband and wife in a common household, then, upon the death of one of them, neither being then married to another person, the survivor is entitled to maintenance out of the estate as if they had been married to each other.


could not succeed to such title and its resultant benefits. Other judges inclined toward an expansive interpretation, holding it sufficient for the woman to prove cohabitation and the running of a common household with her reputed husband and that it made no difference whether the public thought them to be married to each other or knew them to be unmarried.4

The issue was determined in 1973 when the Supreme Court of Israel, sitting in a special composition of five justices in the case of Rosenberg v. Stessel, decided three to two for the expansive approach. The majority reasoned that the restrictive interpretation had to be rejected since it promised a reward for those who might succeed in deceiving or misleading others as to the true situation.

A related issue discussed in the case law is whether a lawfully married woman may, at the same time, be considered the reputed wife of another so as to enjoy the concomitant benefits under the reputed spouse enactments. The issue came before the Israeli Supreme Court in 1962 in the case of Israel v. Pasler. Respondent, a married woman, began residing with another man, a civil servant with whom she lived for many years in a common household until the latter's death. Her claim for benefits as the reputed wife of the deceased was resisted by the civil service commissioner. The matter reached the Supreme Court, where the State argued that a married woman could not conceivably be regarded as the reputed wife of another since this entailed an undermining of the foundations of morality. The Supreme Court rejected this argument, holding that it was possible for a woman to be considered someone's reputed wife, whether or not she was lawfully wedded to another man at the same time.

This decision was strongly criticized by judges and writers. For instance, Justice Kister remarked that the decision amounted to "an encouragement of those who would break the bond of their marriage." Criticism of the wide recognition of the "reputed

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5 The Supreme Court Bench is usually composed of three Justices.

6 29(1) P.D. 505 (1973).

7 Id. (Etzioni, Sussman, and Witkon, JJ.; against the dissenting opinions of Kahn and Many, JJ.).

8 16 P.D. 102 (1962).

9 See, e.g., M. Elon, supra note 16, at 122-27.

spouse” institution and its benefits is justified when the parties reputed to be husband and wife are at the same time, either or both, lawfully married to another, particularly when this is the case with the reputed wife. Such criticism can be substantiated on three main grounds. First, unduly wide recognition of the institution serves to prejudice the purity and stability of family life by encouraging acts of marital infidelity and adultery. It may proliferate mamzerut (bastardy), particularly when the reputed wife is already married, with all the resultant hardships for the children born of the union between herself and her reputed spouse.81

Second, recognition of the institution may result in great hardship for the lawful wife and the children of the marriage. When a husband abandons his wife to live with another woman now reputed to be his spouse, usually with little consideration shown for the wifely and household services given to him and the maternal services given to the children of their marriage, the lawful wife is not only bereft of any remedy under Israeli law, whether civil or criminal,3 but also finds various pecuniary and material benefits conferred on the reputed spouse, who may well have been responsible for the breakup of the family in the first place. A greater injury to the abandoned wife and children can hardly be imagined, especially since this may drive her to divorce her husband. Therefore, the lawful wife needs legislation to protect her against her husband’s reputed spouse.88

Third, the recognition given the reputed spouse is inconsistent with the monogamous marriage regime in Israel, a regime accepted in the civilized world as the foundation for a sound and progressive society. The Israeli legislature has declared bigamy an offence in the Penal Law, 1977, section 176 of which provides: “A married man who marries another woman, or a married woman who marries another man, is liable to imprisonment for a term of five years.” Thus there is created a most anomalous situation. On the

81 According to Jewish law, a child born to a married Jewess of a Jewish father other than her husband is considered a bastard (mamzer), who may not marry a Jew. Since matters of marriage in Israel are governed exclusively by the personal law, which is Jewish law in the case of Jews who are citizens of Israel, the situation of a bastard child in Israel becomes an unenviable one if he should wish to marry.

88 Adultery constitutes neither a crime nor a civil wrong in Israel.

88 It is interesting to note that a bill to amend the Women’s Equal Rights Law, introduced by Knesset Member Ben Meir in 1958 and aimed at ensuring that the reputed spouses laws would not prejudice the lawful wife’s interests, was not adopted. See 23 DIVREI KNESSET 1187 (1958).
one hand, a married person who merely goes through a second marriage ceremony, without actually cohabitating with the new partner, commits an offence defined as a felony entailing a five year term of imprisonment. On the other hand, the same person may actually live together in a common household with his or her reputed spouse, though carefully refraining from a second marriage ceremony, and not only escape criminal liability but also receive the benefits rewarded by the reputed spouse enactments. Accordingly, the Israeli legislature, in the interests of healthy family life, should address the undesirable effects on the reputed spouse institution caused when one of the partners is already married. Admittedly, the legislature has not been entirely indifferent to the problem because, following Passler, two enactments expressly provided that the rights conferred on reputed spouses were conditional on neither spouse's being married to another at the time. Yet, the other enactments concerned have remained unchanged, and the rule in Passler continues to avail the reputed spouse who is already married to another.

V. THE UNWEDDED WIFE AND THE RIGHT TO MAINTENANCE

In Israeli law the unwedded wife has no right to maintenance from her reputed spouse. The matter is governed by the personal law, which is the religious law applicable to the parties. For Jews, who form the majority of the population in Israel, this means Jewish religious law, which denies the unwedded wife a right to maintenance. Moreover, all previous proposals submitted to the Knesset to confer on the unwedded wife a right to maintenance from her reputed husband have been unsuccessful.

The question arises whether the unwedded wife can establish a claim for maintenance against her reputed husband by inter vivos contract whereunder the latter has agreed to be liable for maintenance. The Supreme Court discussed the legality and morality of such an agreement in Yeger v. Palevitz, in which the majority upheld the validity of the agreement. Justice Berinson, pronounce-
ing the majority judgment, held it to be undisputed that in law the unwedded wife lacked the right to maintenance from her reputed husband "in the absence of any agreement between them to the contrary, express or implied." Addressing the morality of such an agreement, i.e. the public policy issue, Berinson continued: "An agreement of the kind contended for, contains nothing that is prohibited, immoral or contrary to public policy even though it be accompanied by cohabitation between the parties and a promise of future marriage if and when the circumstances so permit . . . ."

VI. COMMUNITY PROPERTY—THE REPUTED WIFE'S RIGHTS CONTRASTED WITH THOSE OF THE MARRIED WIFE

When considering property relations between spouses, it is necessary to distinguish between the legal situation existing in Israel prior to the effective date of the Spouses Law (and still prevailing in relation to parties married to each other before January 1, 1974, in the absence of a property agreement between them) and the legal situation under the Spouses Law which applies only to couples married after January 1, 1974, the effective date of the Law.

A. The Legal Situation Prior to the Spouses Law

Prior to the effective date of the Spouses Law, no statutory arrangement existed to govern pecuniary relations between spouses and the property acquired by them during marriage. The case law controlling the matter relied on principles of the secular law rather than on the personal-religious law of the parties. Thus, the rules of community property between spouses evolved from a series of judgments. The law evolving from these cases

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will be summarized briefly. First, since the issue of common marital property falls under the law of property, the general rule of property law that looks to the parties’ intention to resolve the ownership question must be applied. This is essentially a factual issue. Second, unless a contrary intention appears from the mode of the parties’ married life and from their general conduct in pecuniary and property matters, the presumed intention of a couple living together amicably for a lengthy period is an equal partnership regarding property acquired during marriage. Hence, when no evidence of a contrary intention exists, property acquired by the joint effort of the parties will belong to both in equal shares. Harmonious relations between the couple is a precondition to operation of the partnership presumption. Yet, decisions have qualified this requirement by holding “harmonious relations” to mean the absence of a split or separation between the parties, as distinct from the absence of quarrels, however frequent. Only a true estrangement or separation between them would terminate the partnership presumption. In such an event, the community property presumption ceases to operate only from the date of the estrangement or separation, so that all property held in common until such time remains so thereafter. Third, the wife’s efforts in running the common household and attending to the welfare of the family, including the children’s education, may be regarded as a contribution no less than the husband’s efforts, even if unlike the husband she does not work outside the home and earn an income. The husband’s income may accordingly be deemed the fruit of the couple’s joint efforts. Fourth, a corollary of the general partnership of property presumption is the presumed joint liability of the parties for debts incurred by either during the normal course of the partnership. This situation exists as long as the parties continue to lead a normal family life and have made no contrary agreement.

schrift für auslandisches und internationales privatrecht 112 (1977); a. rosen-zvi, the law of matrimonial property 212-86 (1982).

48 see, e.g., panouno v. panouno, civ. app. no. 66, 29(2) p.d. 181, 186-87 (1973).
46 see david v. david, civ. app. no. 677, 26(2) p.d. 457, 464 (1971).
between themselves. Fifth, the equitable title retained by one spouse to property within the other's legal ownership is valid and operative against all others. Sixth, for any immovable property acquired after January 1, 1970 (which is the effective date of the Land Law, 1969), the application of the rules of community property will be subject to section 161 of the Land Law which abolishes any right, including equitable rights, in immovable property except under statutory law.

The following analysis is made on the basis of these six case law rules on community property between spouses.

1. **Exercise of the Co-ownership Right**

Since the right to co-ownership of property between spouses is a proprietary one, a spouse may approach the court for realization of the right in all its implications at any time during the course of the marriage. It is not necessary to wait until divorce. In many cases of estranged spouses without divorce, the district court has declared the wife half-owner of the property acquired by the joint efforts of the parties during the marriage.

2. **Application of Community Property Rules to Reputed Spouses**

The central question is whether the community property rules applicable to spouses, as locally evolved, are also applicable to reputed spouses. Writers on the subject have reached different conclusions.

The answer to the question is in the affirmative, provided the factual circumstances so warrant. That is to say, there must be evi-
dence both of cohabitation between the parties as husband and wife in a common household for a prolonged period of time and of income earned by their joint efforts and of expenses paid out of a joint fund, though the measure of proof required may possibly be greater than in the case of lawfully wedded spouses. The reasons to support this view are several.

First, the rules of marital community property are the product not of statutory law, which confers the co-ownership right on wedded couples only, but of local case law.\textsuperscript{68} Thus, the Spouses Law grants the right to a balancing of resources only to married partners\textsuperscript{64} regardless of their way of married life or respective efforts in acquiring their property. In contrast, the presumption of partnership property, as locally evolved, is conditional not on the formal act of marriage itself, but on the couple’s factual cohabitation and conduct in the manner already indicated. Hence, if the elements required to apply the partnership presumption to married partners exist equally when the parties are reputed spouses, there is no reason not to apply the same presumption to reputed spouses as well.\textsuperscript{65}

Second, these community property rules are based on the intent of the parties.\textsuperscript{66} Most precedents held that these rules were founded on an implied agreement between the parties.\textsuperscript{67}

Respondent’s claim does not stem from the marriage tie, nor is it founded on the act of divorce, but is based on the rule of community of property between the couple, as evolved in this court. The community of property rule is founded on the existence of an implied agreement between two parties who are living together and flows from a pooling of their resources. The fact of a tie of marriage between the two is but a part of the overall complex of


\textsuperscript{64} See infra note 95.

\textsuperscript{65} Indeed, in Alovitz v. Karmi, Civ. App. No. 429 (1967) (unpublished opinion), the Supreme Court expressed its willingness, in principle, to apply the rules of co-ownership of property as developed in the local case law to couples who are commonly reputed to be spouses.


Therefore, if the community property rules are founded on an implied agreement between married parties living together, equal recognition should be given to such an agreement in the case of reputed spouses living together in the same way.

Third, the Supreme Court of Israel has consulted American case law on a number of occasions in the absence of local statutory guidance on a particular issue. The Court is likely, therefore, to be influenced by the recent development in California law in the area of property distribution between parties living together without marriage, an area governed solely by the case law in both Israel and California. This particular development was expressed in Marvin v. Marvin which has already left an impression on the applicable United States case law and literature.

The case involved a couple who had lived together without marriage for a period of six years in a common household. Upon estrangement between them, the woman sued the man in the Los Angeles court for enforcement of an alleged oral contract under which she was entitled to one-half the property acquired during the time they lived together and which had been registered in his name. Plaintiff claimed that in October 1964 she and defendant had entered into an oral agreement to live together. The agreement provided that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." The parties further agreed to "hold themselves out to the general public as husband and wife" and that she would render her services as "a companion, homemaker, housekeeper and cook to defendant." Plaintiff added that shortly thereafter she agreed to "give up her lucrative career as an entertainer [and] singer" in order to devote her full time to defendant in rendering him the stated services, in return for which defendant agreed to "provide for all of plaintiff's financial support and needs for the rest of her life." Plaintiff contended that during the period she lived with defendant, she fulfilled her obligations under the agreement and that they acquired, by their joint efforts and earnings

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69 See supra note 7.
71 See infra notes 76-77.
but in defendant’s name, various assets, including motion picture rights worth over one million dollars. Then, in May 1970, defendant compelled her to leave his household, continuing to support her for a short while and later refusing to do so any further.

Plaintiff’s claim for assertion of her rights to community property between the parties was dismissed by the Superior Court, Los Angeles County, as disclosing no cause of action since the alleged contract was contrary to public policy and illegal. Plaintiff appealed to the Supreme Court of California, and the trial court’s judgment was reversed.

In delivering the majority opinion of the California Supreme Court, Justice Tobriner noted a significant increase in the last decade in the number of couples living together without marriage. He accordingly considered it opportune, in view of the conflicting opinions in the case law on the subject, to examine closely the principles that guided the distribution of property acquired by an unwed couple while living together.

In rejecting the argument that the agreement was immoral, the Court remarked:

> The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services.⁴²

The Court added that, in laying down the rule that an agreement between nonmarital partners was enforceable unless explicitly and inseverably based on the consideration of meretricious sexual services, it was providing the parties, as well as the courts, with a practical yardstick for determining when an agreement between unwed couples of the kind in question is enforceable. Hence, by this test, the agreement was undoubtedly enforceable since it was not founded on any illegal consideration. Justice Tobriner summarized the Court’s view on this point as follows:

> In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are

nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.\footnote{Id. at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.}

Justice Tobriner likewise reviewed the case law concerning the situation in which no express agreement between nonmarital partners exists. Comparing the cases up to 1973,\footnote{See, e.g., Valleria v. Valleria, 21 Cal.2d 681, 134 P.2d 761 (1943); Keene v. Keene, 57 Cal.2d 657, 731 P.2d 329, 21 Cal. Rptr. 593 (1962). On the attitude reflected in the case law until 1973, see Bruch, \textit{Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services}, 10 Fam. L.Q. 101, 106-14; Kay \& Amyx, \textit{supra} note 3, at 938-45; Larson, \textit{Disposition of Property Upon Termination of Nonmarital Cohabitation}, 53 Wash. L. Rev. 145, 146-52 (1977).} the date of the Cary decision,\footnote{In re Marriage of Cary, 34 Cal. App.3d 110, 109 Cal. Rptr. 862 (1973).} with those decided later, Justice Tobriner noted a lack of consistent approach in the earlier decisions.\footnote{"Thus in summary, the cases prior to Cary exhibited a schizophrenic inconsistency." Marvin v. Marvin, 18 Cal.3d at 678, 557 P.2d at 118, 134 Cal. Rptr. at 827.} Two rules nevertheless remained common to, and were applied in, all of these cases. The first rule was a refusal by the courts to infer an implied agreement from the conduct of the parties. The second rule was a determination by the courts that in the absence of an express agreement between the parties, the services and contribution of one of them toward the running of the joint household and the raising and education of their children did not serve to confer on such party any right to property acquired by the other while they lived together.\footnote{"[T]he cases apparently held that a nonmarital partner who rendered services in the absence of express contract could assert no right to property acquired during the relationship." Id. at 679, 557 P.2d at 119, 134 Cal. Rptr. at 828.} Neither of these rules, however, escaped strong criticism by writers\footnote{See, e.g., Bruch, \textit{supra} note 64, at 106-14; Kay \& Amyx, \textit{supra} note 3, at 938-45; Nielson, \textit{supra} note 3, at 1239-46; Larson, \textit{supra} note 64, at 146-52.} as well as judges.\footnote{See Valleria v. Valleria, 21 Cal.2d 681, 686-87, 134 P.2d 761, 764 (1943) (Curtis, J.); Keene v. Keene, 57 Cal.2d 657, 672, 731 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962) (Peters,}
In 1973, the Cary decision changed this situation. The case involved an unmarried couple who lived together in a common household for a period of eight years. They held themselves out to their friends and acquaintances as husband and wife, raised four children, bought a house and other property, and generally acted as a married couple for all intents and purposes, with the man working outside the home and the woman taking care of the home and children. Upon the man's application for a declaration as to the "nullity of the marriage" in 1971, the court awarded the woman one-half of the property which was acquired while they lived together and which was paid for entirely out of the man's earnings. The judgment was affirmed on appeal. The court ascribed its departure from the existing rule to the influence of the Family Law Act of 1970, since this Act indicated a legislative policy entitling a party living together with another in a common household without marriage to one-half of the assets acquired during their relationship. Subsequent decisions of the court of appeals on this aspect have lacked uniformity, some following the stated precedent, others expressing reservations.

In Marvin, Justice Tobriner dealt with this difference in opinion by disavowing Cary's imputation of legislative policy from the Family Law Act. Justice Tobriner held that this Act had no bearing on the issue because the question of property rights between unmarried partners had to be determined solely according to judicial decision, just as before enactment of the Family Law Act, since the latter introduced no change on this matter. The judge did, however, accept on its merits the criticism of the earlier precedents expressed in Cary, according to which the distribution of property between nonmarital partners was an inequitable one. In his view, the court, when dealing with the property rights of unmarried partners, should be guided by the presumption that "the parties intend to deal fairly with each other."
We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations. The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture . . . or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust . . . or resulting trust . . . . Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.74

The supreme court's decision was widely reported in the press.75 It also had an immediate impact on subsequent cases,76 became the subject of lively discussion in law journals,77 and may well influ-

which would permit recovery whenever it can be established that the de facto spouse was treated unfairly." Id.

74 Marvin v. Marvin, 557 P.2d 106, 122-23, 18 Cal.3d 660, 684, 134 Cal. Rptr. 815, 831-32 (1976). Chief Justice Wright and Justices McComb, Mosk, Sullivan, and Richardson concurred in the judgment of Tobriner. Justice Clark agreed with the result, holding that the appeal was to be upheld and that the plaintiff was permitted to prove her claim on the basis of an agreement, express or implied. Justice Clark believed, however, that the opinion should have stopped at that point:

When the parties to a meretricious relationship show by express or implied in fact agreement they intend to create mutual obligations, the courts should enforce the agreement. However, in the absence of agreement, we should stop and consider the ramifications before creating economic obligations which may violate legislative intent, contravene the intention of the parties, and surely generate undue burdens on our trial courts.

Id. at 123-24. For further results of the case, see Marvin v. Marvin, 122 Cal. App.3d 871, 176 Cal. Rptr. 555 (1981).

75 See, e.g., 50-50 Rights for Unwed Couples, Big Ruling on Unmarried Couples, etc., Time, Oct. 1, 1977, at 39. "The landmark decision, handed down last week, states that cohabitation without marriage gives both parties the right to share property if they separate." Id. See also Kay & Amyx, supra note 3, at 954 n.104.


77 See, e.g., Kay & Amyx, supra note 3, at 954-73; Comment, supra note 73; Larson, supra note 64, at 186-69; Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?, 77 Mich. L. Rev. 47, 62 n.56 (1979); Oldham, supra note 3, at 288-72; Lesnek, Property Rights of Unmarried Cohabitants, 23 Wayne L. Rev. 1305 (1977); Ward, In a Suit For Settlement of Property Rights Upon Termination of a Cohabitation Arrangement, 48 U. Cin. L. Rev. 924 (1977); Comment, Property Rights of Unmarried Cohabitators on Dissolution of the Relationship, 30 Okla. L. Rev. 494 (1977); Reggie, Un-
ence the Supreme Court of Israel in its treatment of the question of partnership property between reputed spouses. For all of the reasons indicated above, there would seem to be no obstacle to applying the rules which have evolved in Israel concerning community property between husband and wife to parties living together as reputed spouses.78

B. The Legal Situation in Israel under the Spouses Law

As already indicated, property relations between spouses now are governed in Israel by the Spouses Law, which came into force on January 1, 1974.79 This law restricts the application of a resources-balancing arrangement, provided for in sections 3-10 of its second chapter, to couples who married after the effective date. This resources-balancing arrangement supercedes the case law rules of community property with respect to spouses.80 For couples who married prior to the effective date of the law, the aforesaid community property rules continue to apply in the absence of a valid property agreement between the couple (confirmed by the District Court or the competent religious court).81 The law provides civil-territorial directives which are applicable to all parties, irrespective of religion or nationality, provided they are domiciled in Israel at the time of celebration of their marriage.82

Pursuant to section 3 of the Spouses Law, where the spouses have not made a property agreement regulating property relations between them or

where they have made such an agreement, in so far as it does not otherwise provide, they shall be regarded as having agreed to a


78 See supra notes 22-40 and accompanying text.
79 See Spouses Law, supra note 6, § 19.
80 See Friedmann, supra note 42, at 124, 142; A. Rosen-Zvi, supra note 42, at 286-94. But see Shifman, supra note 52, at 98; Proccaccia, supra note 42, at 298-301.
82 This valid agreement is defined in accordance with Spouses Law, supra note 6, §§ 1-2.
83 Spouses Law, supra note 6, § 15. For comments on this section, see Shava, Marital Property in Conflict of Laws, 6 Lyuneh Mishpat 247, 268-88 (1978).
resources-balancing arrangement in accordance with this chapter [chapter two of the Spouses Law], and this arrangement shall be regarded as having been agreed upon by a valid property agreement conforming to the provision of section 2.64

A "resources-balancing agreement" means that each of the spouses is entitled to one-half of the value of the aggregate property of the spouses,65 except property the value of which shall not be balanced between the spouses.66

The crucial question is the stage at which a spouse may exercise the right to a balancing of resources. Under the community property rules it is possible, as already indicated, for a spouse to apply to court at any time during the existence of the marriage for a declaration as to his half-ownership of the property acquired by the joint efforts of the parties.67

The Spouses Law gives an unequivocal answer to this question. Section 5(a) provides that the resources-balancing arrangement may be implemented68 only upon dissolution of the marriage by divorce or by the death of one of the spouses.69 Until such event, completely separate ownership of property between the spouses will be observed, in that each spouse is capable of exclusive acquisition and full retention of separate proprietary rights.70

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64 Spouses Law, supra note 6, § 3. According to §1 of the Spouses Law, "[a]n agreement between spouses regulating property relations between them . . . and any variation of such an agreement shall be in writing." Section 2(a) requires "confirmation by the District Court . . . or the religious court which has jurisdiction in matters of marriage and divorce of the spouses . . . ." "Where a property agreement is made before the marriage or at the time of solemnization thereof, authentication by the marriage registrar may take the place of confirmation by the civil or religious court." Id. § 2(c).

65 See id. §§ 5-6. But see id. §8 which grants the court special powers to distribute the property differently in certain circumstances. On the problem of resources-balancing between the spouses, see Tedeschi, Resources Balancing Arrangement Between Spouses, 30 HAPRAKLIK 76 (1975).

66 This is specified in Spouses Law, supra note 6, § 5(a), as follows:

   (1) property which they had immediately before the marriage or received by way of gift or inheritance during the marriage;

   (2) rights which by virtue of the law are not transferable;

   (3) property in respect of which the spouses have agreed in writing that its value shall not be balanced between them.

67 See supra note 51 and accompanying text.


69 Spouses Law, supra note 6, § 5(a). In the case of a termination of the marriage in consequence of the death of one of the spouses, "his place shall for the purposes of the balancing of resources be taken by his heirs." Id. § 5(b).

70 Spouses Law, supra note 6, § 4 provides that "[t]he contraction or existence of the marriage shall not by itself affect any ownership rights of the spouses, confer on one of them
more, until termination of the marriage for reasons of divorce or death alone, the right to a balancing of resources is not only kept in abeyance between the parties, but also placed beyond transaction with third parties or the reach of creditors.91

This seems to be the main shortcoming of the Spouses Law. Section 5 precludes the right to a balancing of resources in many situations, including cases of separation between the parties, even if prolonged and even if by agreement or by a separation order, and cases of annulment of marriage, whether the marriage be void ab initio or merely voidable. Therefore, it is questionable whether a resources-balancing arrangement will apply to members of the Catholic Christian community whose faith does not recognize the possibility of divorce since they would be unable to make a property agreement as defined in the Spouses Law.

Moreover, even the Jewish law of divorce renders practical exercise of the right to a balancing of resources between Jewish spouses problematic since it holds divorce to be an act of mutual consent between husband and wife.92 Unlike other legal systems, Jewish law does not recognize divorce as being constituted by a judicial decision putting an end to the marriage tie. Thus a “judgment for divorce” given by the Rabbinical Court at the wife’s instance, binding or even coercing the husband to give her a get (bill of divorce), is not a constitutive judgment dissolving the marriage, but is merely intended to put pressure on the husband to give the divorce to his wife. As long as the husband has not given the get of

rights in property of the other or impose on one of them liability for debts of the other.”

91 Id. § 10 stipulates that “[s]o long as the marriage has not terminated, the right of a spouse to the balancing of resources cannot be transferred, charged or attached.”


[divorce under Jewish Law is an act of mutual consent contracted between husband and wife and supervised by Rabbinical authorities only so far as necessary to secure that all requirements of Jewish Law in this respect have been fully observed. In any dispute between husband and wife as regards a divorce the Rabbinical Court can only decide whether or not the husband is bound to divorce his wife and whether or not the wife is bound to accept a divorce from her husband. With the issue of an order to that effect, the jurisdiction of the Rabbinical Court as such ceases . . . There is no divorce and no dissolution of marriage unless and until the husband has by his own will granted the divorce in the form prescribed by religious authorities (a form which has practically not changed for the last 2,000 years), and . . .the wife has by her own will accepted such divorce.
his free will, or the wife received the same of her free will, the couple will be deemed still married. The customary practice among Jews is for the party seeking a divorce to persuade his spouse to consent thereto, and this is sometimes achieved by the grant of pecuniary and property rights to the latter. Such mutual consent will be followed by and expressed in a divorce agreement regulating all outstanding issues between the parties, such as custody of the minor children, maintenance, and distribution of the common property between them. This practice is recognized and approved in the Spouses Law, section 2(d) of which provides: "An agreement between spouses confirmed by a judgment for divorce of a religious court shall be treated as a property agreement confirmed under this section."

It may therefore be asked how the wife seeking a divorce from her husband is to secure her right to a balancing of resources when the latter can frustrate this right by his refusal to give her a divorce, without which the right does not come into play. It would seem that the wife whose husband conditions his willingness to give her a divorce on a waiver of her right to a balancing of resources and perhaps on other pecuniary concessions on her part will have little choice but to accede to her husband’s demands.

Therefore, it is clear that the situation of a married woman under the Spouses Law is worse than it was under the rules of community property between spouses. Moreover, because the Spouses Law is applicable only to lawfully wedded parties, the distribution of property between reputed spouses remains governed by the locally evolved community property rules, which formerly applied to wedded and unwedded couples alike. The astonishing result is that the reputed wife is in a better situation regarding the distribution of property than is a married woman under the Spouses Law.

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**See M. Shava, supra note 7, at 188-89.**


**This conclusion may be drawn both from the fact that the legislature employs the term "spouses" without stating that it includes commonly reputed spouses (see supra note 18 and accompanying text) and from the fact that language used in many sections of the same law explicitly shows that the term applies solely to couples married according to law. E.g., Spouses Law, supra note 6, §§ 2(c), 4, 5(a), 10, 14, 15. See also Zur v. Attorney-General, 2 P.M. 400 (1975) (Harish, J., judgment on Motion 2180/75).**

**See supra notes 41-51 and accompanying text.**
VII. Conclusion

The question of the property rights of unmarried parties living together in Israel has yet to be decided by the Supreme Court of Israel. In this connection the important decision of the Supreme Court of California in *Marvin v. Marvin*, as yet undiscussed and unmentioned in the Israeli case law, is likely to exert considerable influence. The Spouses Law, which regulates the property relations between spouses in Israel, applies only to married couples, leaving the similar relations between unmarried couples who are known in Israel as "reputed spouses" governed by the case law. In this respect the legal situation in Israel is comparable to that which prevails in California, where the provisions of the Family Law Act of 1970 govern the property relations between married couples alone, such relations between unmarried couples remaining under the control of the case law, as was held in the *Marvin* case.

This article has shown that there is no obstacle in Israel to applying the rules of community property between spouses, as developed in the local case law, to reputed spouses, provided that the circumstances so warrant. Israeli courts should apply community property rules when the parties have cohabited with each other for a prolonged period, have run a common household, and have pooled their earnings and expenditures, even though the measure of proof required for the operation of these rules may be greater than in the case of lawfully wedded couples. It is submitted that a claim brought by a woman and based on community property between herself and her reputed spouse with whom she has lived under such circumstances as mentioned above will be entertained by the Israeli court to the extent of one-half of the property jointly acquired by the couple during the period of their cohabitation. This result is dictated by the fact that the case law holds the rules of community property between spouses to be founded on an implied contract between the parties, from which contract there is no reason to exclude unmarried partners who are "reputed" spouses who have been living together in harmony for an extended period of time.

The decision in *Marvin v. Marvin* may influence the Israeli courts and guide them in the direction of a similar extension of the community property doctrine to unmarried couples who live together in the manner indicated. The detailed reasoning of the California Supreme Court in *Marvin*, in relation to the situation of unmarried couples, has equal validity in the Israeli context where the phenomenon of the unwedded couple is just as widespread. The
Israeli case law, moreover, has more than once been influenced and guided by important American legal decisions on issues not covered by any local statutory arrangement. In addition, the Israeli Supreme Court has already held that a maintenance agreement between reputed spouses “contains nothing that is prohibited, immoral or contrary to public policy even though it be accompanied by cohabitation between the parties . . . .”

A comparison between the property rights of a married woman under the Spouses Law, 1973, with those of a reputed wife under the rules of the community property reveals that the reputed wife is in a better legal situation in Israel today regarding the community of property than is her wedded counterpart. This is submitted to be an intolerable result, one which the Israeli legislature would do well to correct by amendment of the Spouses Law.
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