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RECENT CASES

COMMUNITY PROPERTY—MERETRICIOUS SPOUSES—FAMILY LAW ACT HAS NO APPLICATION TO MERETRICIOUS COUPLES—IMPLIED AGREEMENTS MAY BE FOUND TO DIVIDE PROPERTY ACQUIRED WHILE A MERETRICIOUS COUPLE COHABITATES—Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 813 (1976).

Lee Marvin and his companion Michelle lived together from October 1964 through May of 1970, pursuant to an oral agreement whereby Michelle was to devote all of her time to being a homemaker, housekeeper, cook and companion to Lee, and in return he was to support her for the rest of her life. In May of 1970, Lee requested that Michelle move out of his household, while allegedly continuing to support her until November of 1971.

Michelle brought suit against him, requesting a declaratory judgment and seeking a determination of her contractual and property rights pursuant to the “oral agreement.” The complaint alternatively sought the imposition of a constructive trust on one half of the property earned by the defendant during the period of their cohabitation. The trial court granted the

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1. Michelle alleged that she and Lee originally agreed to live together, combine efforts, share earnings and hold themselves out to the general public as husband and wife. Shortly thereafter, they allegedly modified their agreement so that Michelle would give up her career as an entertainer and singer and devote her full time to Lee, while he would provide for her for the rest of her life. See Marvin v. Marvin, 50 Cal. App. 3d 84, 88 (1974), vacated, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 813 (1976). These allegations were accepted as true for purposes of appeal. See note 13 infra.


Lee and Michelle’s living arrangement was a meretricious relationship, one in which both cohabitators know that their relationship is not a legal marriage. Either or both spouses may be meretricious. See Comment, Rights of the Putative and Meretricious Spouse in California, 50 CALIF. L. REV. 866, 873 (1962).

4. Plaintiff alleged that a “confidential and fiduciary relationship” existed between her and the defendant, and that, by virtue of this relationship, defendant Marvin was an “involuntary trustee” of one-half of all “equitable property” in constructive trust for the plaintiff. In addition, she asked that he reconvey this property to her. Marvin v. Marvin, 50 Cal. App. 3d 84, 89 (1974), vacated, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 813 (1976).

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defendant's motion for judgment on the pleadings. The trial court found determinative the stipulation that the defendant was still married to his former wife, Betty Marvin, until 1967 and that this fact was known to the plaintiff at the time of their "agreement." The defendant moved to amend her complaint, praying recovery for the period after 1967. The trial court denied her motion.

The plaintiff appealed, contending that the trial court erred in refusing the plaintiff's motion to amend the complaint. The court of appeal affirmed the lower court's judgment on the pleadings. In doing so, it looked first to prior California authority which denied rights to earnings and accumulations acquired in a meretricious relationship absent a valid agreement. The court then determined that the present agreement was invalid because it was made in contemplation of an adulterous relationship.

On appeal to the California Supreme Court, the court held, with one judge dissenting, that the complaint stated a cause of action and that it could be amended to state a cause of action based upon an implied in fact contract or upon equitable theories. Marvin v. Marvin was then remanded for trial on the merits.

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6. It was stipulated at trial that the plaintiff and defendant began living together before defendant's wife brought an action for dissolution. The stipulation included the fact that the interlocutory decree was entered on January 5, 1967, and the final decree on January 13, 1967, and that defendant and Betty Marvin were still married until the dissolution. Marvin v. Marvin, 50 Cal. App. 3d 84, 90 (1974), vacated, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 813 (1976).
7. Id.
8. The plaintiff originally tried to file an amended complaint on the first day of trial and also made a subsequent motion for leave to amend. The court of appeal found no error in either denial. Id. at 91.
9. Id. at 100.
11. The appellate court agreed with defendant Marvin that the contract necessarily involved an illicit relationship in violation of former California Penal Code sections 269 (a) and (b) (repealed by 1975 Cal. Stats., ch. 71, §§ 5-6, at 146), which prohibited living in a "state of cohabitation and adultery," and concluded that he was not estopped to assert the contract's invalidity.
13. The trial court's judgment on the pleadings bound the upper courts to con-
In finding that the plaintiff’s complaint stated a cause of action, the court had little difficulty with the defendant’s arguments to the contrary. Defendant’s primary contention was that the alleged contract was unenforceable because it was so closely related to the supposed “immoral” character of the relationship. The court reviewed the prior California decisions and determined that the defendant had misconstrued those cases and had attempted to apply an overly broad assertion of the rule with respect to the enforceability of contracts between nonmarried couples living together. The court took the opportunity to reaffirm the principle first articulated in Trutalli v. Meravigla, and proceeded to define the standard by which to consider only the factual allegations of the plaintiff’s complaint. Id. at 665, 557 P.2d at 110, 134 Cal. Rptr. at 820.

14. Id. at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825.
15. Id. at 668, 557 P.2d at 112, 134 Cal. Rptr. at 821. The court also noted the defendant’s contention that the contract was illegal because it contemplated a violation of the adultery laws. See Cal. Penal Code § 269 (West 1970) (repealed by 1975 Cal. Stats., ch. 71, §§ 5-6, at 146). The court found that the defendant alone was guilty of adultery and therefore had questionable standing to raise the issue. The plaintiff was not guilty of adultery because she was unmarried. 18 Cal. 3d at 668 n.4, 557 P.2d at 112 n.4, 134 Cal. Rptr. at 821 n.4.

16. The court found the standards as to whether an agreement is “involved in” or “contemplates” a nonmarital relationship both unworkable and vague. Defendant’s only basis for making the assertion that contracts are unenforceable because they are “involved in” illicit relationships was dicta in Shaw v. Shaw, 227 Cal. App. 2d 159, 38 Cal. Rptr. 520 (1964), which cited Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951), for the proposition that there may be cases in which the illicit relationship was not so involved in the contract as to render it illegal. Shaw dealt with a nonmarried couple who lived together for four years. The defendant placed property in a joint tenancy in contemplation of his marriage to the plaintiff. The plaintiff eventually married someone else and tried to quiet title to the property, claiming she had given consideration in the form of performing normal marital services for him. The court distinguished her authority as involving “putative spouses.” In this case neither spouse considered themselves married, nor did they have any agreement with respect to the property.

The other standard defining a contract made in contemplation of a nonmarital relationship was derived from Hill v. Estate of Westbrook, 39 Cal. 2d 458, 247 P.2d 19 (1952), in which the court refused to enforce an express agreement whereby the plaintiff was to render services (keeping house, living with defendant, performing the usual duties of a housewife) in exchange for the defendant providing for her in his will. The court found that the contribution of services or money by the plaintiff was gratuitous and in contemplation of their reciprocal relationship.

17. 215 Cal. 698, 12 P.2d 430 (1932). Trutalli was the earliest case to establish the rule that nonmarital partners may lawfully contract for the ownership of property acquired during their relationship.

Later cases reiterated the rule enunciated in Trutalli. See Pete v. Henderson, 155 Cal. App. 2d 772, 775, 318 P.2d 720, 722 (1957) (to invalidate contract, must be shown that meretricious acts themselves constituted the consideration for the contract); Crosclin v. Scott, 154 Cal. App. 2d 767, 771, 316 P.2d 755, 758 (1957) (fact that couple lives
evaluate meretricious property settlements. It stated: "[A] contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services." In the instant case, the complaint alleged diverse types of services as consideration, but nowhere stated that sexual activity was used as consideration.

Defendant's second contention was that the alleged 1964 contract violated public policy by obligating the defendant to transfer community property in which his legal wife possessed rights. The court responded by outlining authority which established that such transfers are not void, but voidable. The court concluded that Betty Marvin had the opportunity to assert her vested rights at the time she obtained the divorce decree.

Defendant also argued that the 1964 contract was invalid because it promoted and encouraged divorce. The court left this contention unanswered, instructing the trial court to determine the viability of the marriage at the time of the alleged agreement. In so instructing, the court mentioned factors together meretriciously does not in itself make unenforceable an agreement to dispose of property.

18. 18 Cal. 3d at 669, 557 P.2d at 112, 134 Cal. Rptr. at 821 (emphasis in the original). The court found this standard to be not only a better interpretation of prior California authority, but also a "more precise and workable standard." Id. at 672, 557 P.2d at 114, 134 Cal. Rptr. at 823.

There was a pressing need for a more exact statement of the law. Even Trutalli established what must be considered a "vague and unworkable" standard, holding that the contract was enforceable "so long as such immoral relation [the fact that the two were living together] was not made a consideration of their agreement." 215 Cal. 698, 701-02, 12 P.2d 430, 431 (1932).

19. 18 Cal. 3d at 672-73, 557 P.2d at 115, 134 Cal. Rptr. at 824. Defendant argued that his earnings up until 1967, the time of the final divorce decree, were community property under former CAL. CIV. CODE § 5118 (West 1970) (amended 1971) and that he therefore exceeded his authority in transferring a half interest therein to Michelle.

20. Although the court pointed to only two cases, it has been consistently held that the statutory provisions governing transfers of personal property (CAL. CIV. CODE § 5125 (West 1970)) and real property (id. § 5127) be construed to make gifts, not void, but voidable. 7 B. WINKIN, SUMMARY OF CALIFORNIA LAW § 59, at 5148-50 (8th ed. 1974).

21. 18 Cal. 3d at 673, 557 P.2d at 115, 134 Cal. Rptr. at 824.

22. Id. at 673 n.8, 557 P.2d at 115 n.8, 134 Cal. Rptr. at 824 n.8.

23. Id. The court asserted a new exception to the rule prohibiting contracts which promote dissolution, requiring that the defendant show the marriage was not beyond redemption. The exception is logical from the standpoint of the state's policy of not facilitating or encouraging divorce. It was first stated in a recent supreme court case, Glickman v. Collins, 13 Cal. 3d 852, 858, 533 P.2d 204, 208, 120 Cal. Rptr. 76, 80 (1975).

In Glickman, the court flatly stated the exception without citation of authority. No appellate cases have applied it and only one other supreme court case has alluded to
which might invalidate the contract, but failed to establish a definitive test. 24

The most significant implication of the Marvin decision was the court’s conclusion that the complaint could be amended to state a cause of action founded upon theories of implied contract or equitable relief. 25 The court discussed these theories of recovery, despite recognizing that its resolution of the express contract issue sufficed to compel reversal. The court justified its foray by pointing to the “schizophrenic inconsistency” of pre-Marvin case law. 26

The court began its analysis of the availability of implied contract and equitable remedies by noting the impact of In re Marriage of Cary, 27 the first case to allow meretricious spouses

\[\text{\textit{it. See In re Marriage of Dawley, 17 Cal. 3d 342, 350, 551 P.2d 323, 328, 131 Cal. Rptr. 3, 8 (1976).}}\]

24. The contract might be invalid, according to the court, if conditioned on having the defendant secure a divorce or if it rewarded him for doing so. But, this is not so if the marriage was beyond redemption. 18 Cal. 3d at 637 n.8, 557 P.2d at 115 n.8, 134 Cal. Rptr. at 824 n.8. In setting forth these vague guidelines, the Marvin court apparently offers a number of ways to avoid enforcing the express contract on remand.

Defendant’s final two contentions were based on Civil Code sections 5134 (requiring that contracts for marriage settlements be in writing) and 43.5(d)(providing that no cause of action arises for breach of promise of marriage). The court found both sections inapplicable. 18 Cal.3d at 673-74, 557 P.2d at 115-16, 134 Cal. Rptr. at 824-25. The court categorized the argument based upon § 43.5 as a “strained contention,” finding the section entirely inapplicable to pooling agreements. Id.

25. 18 Cal. 3d at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825.

26. Id. at 678, 557 P.2d at 118, 134 Cal. Rptr. at 827.

A more realistic explanation is the court’s recognition of a substantial change in societal mores and behavior patterns of contemporary couples who are increasingly foregoing marriage while living together, and the consequent need to align legal standards with society’s moral standards. The court mentioned that nearly eight times as many couples lived together outside of wedlock in 1970 as in 1960. Id. at 665 n.1, 557 P.2d at 109 n.1, 134 Cal. Rptr. at 818 n.1. For an interesting article on the recent judicial treatment of the various alternatives to marriage, see Clark, The New Marriage, 12 Williamette L.J. 441 (1976). In this article the author points to statistics that reflect not only an increase in couples living together, but also sharp reduction in the rate of marriage. See generally Folberg & Buren, Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families, 12 Williamette L.J. 455 (1976). The authors state that the trend toward experimentation with alternatives to marriage extends to the elderly, because of their need for companionship and security and because of the fact that the Social Security laws give greater benefits to unmarried than to married couples.

The Marvin court makes it clear, however, that it was not disparaging the institution of marriage. In an effort to perhaps restrict application of its opinion to heterosexual unions, the court emphasized that it viewed marriage as “socially productive and individually rewarding.” 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. The court may have thus sought to limit its decision so as to exclude from its scope other cohabitators: gays, communal families, group marriages or simply roommates. This aspect of the opinion appears to be left open.

to divide accumulated property absent an express agreement. The court found that the parties overstated the impact and rationale of Cary and consequently embarked on its own review of prior authority.

The court began by discussing Vallera v. Vallera, identified by the court as the "classic opinion" on the subject. The court determined that Vallera precluded recovery of property jointly accumulated while a nonmarried couple lived together, if the sole basis for recovery was the fact of cohabitation. But, the Marvin court stated that Vallera did not bar recovery based on an implied-in-fact contract theory, despite later judicial interpretation of that opinion.

An examination of prior case law is necessary to clarify the Marvin court's conclusion. Pre-Cary decisions traditionally approached the question of the division of property between nonmarried couples by determining the status of the relationship. If one or both spouses had possessed a good faith belief

Paul and Janet Cary lived together for over eight years and had four children. In all matters they held themselves out to be husband and wife. Janet worked in the home, and Paul worked to support the family. Id. at 348, 109 Cal. Rptr. at 863. The court determined that their cohabitation constituted a family relationship within the purview of the Family Law Act of 1970. CAL. CIV. CODE §§ 4000-5138 (West 1970). Both parties conceded that if they had been married all of Paul's earnings would have been community property. Paul petitioned for "Nullity of Marriage" and the trial court determined that all property acquired with Paul's earnings should be divided equally.

28. 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 826.
29. Plaintiff understandably argued the correctness of the Cary decision, noting the court's rationale for applying the Family Law Act to meretricious relationships to vindicate property rights which would have otherwise been established if the parties had been married or believed themselves married. Defendant's response was essentially that Cary conflicted with prior decisional law and therefore was incorrect. Id. at 675-76, 557 P.2d at 116-17, 134 Cal. Rptr. at 825-26.
30. 21 Cal. 2d 681, 134 P.2d 761 (1943).
31. 18 Cal. 3d at 676, 557 P.2d at 117, 134 Cal. Rptr. at 826.
32. Id.
33. Id. What the Vallera decision did, in fact, was merely contrast equitable considerations of putative relationships with those arising out of meretricious relationships and conclude that the equitable consideration of the reliance on a good faith belief that the parties were married wasn't present in a meretricious relationship. The Vallera court did not hold that equitable considerations were inapplicable to meretricious spouses. The specific language reads: "Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case." Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943) (emphasis added).
34. See Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943). Curiously, the Marvin court presumed that the claimant in Keene was persuaded by prior cases to forego an argument based upon implied contract theory and that the Keene court did not thereby address that issue. 18 Cal. 3d at 677, 557 P.2d at 117, 134 Cal. Rptr. at 826.
that a valid marriage existed, then the spouse was deemed to be putative and was accorded the same community property rights as those of legal spouses. If, on the other hand, the parties lacked a good faith belief in the existence of a marriage, they were deemed meretricious and were denied relief unless they had made an agreement to pool their property and earnings.\footnote{Vallera and Keene v. Keene\textsuperscript{38} provided that when a couple cohabitated without an agreement to pool assets, no property interest arose in the separate property of the other by virtue of their cohabitation.\textsuperscript{37}}

Only two post-Vallera appellate cases addressed the issue of recovery based on implied contract theory. Both courts denied recovery to the non-income producing partner, citing Vallera to preclude recovery by a plaintiff lacking a good faith belief that a marriage existed.\textsuperscript{38} In re Marriage of Cary\textsuperscript{39} represented the first major break from this misapplication of Vallera. Cary was the first judicial attempt to recognize changing social attitudes by applying the

\textsuperscript{35} See Comment, Rights of Putative and Meretricious Spouses in California, 50 Calif. L. Rev. 866, 873 (1962).

\textsuperscript{36} 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

\textsuperscript{37} The Vallera-Keene doctrine was predicated upon an earlier decision, Flannigan v. Capital Nat'l Bank, 213 Cal. 664, 3 P.2d 307 (1931), in which the court denied a plaintiff-wife property rights in a will contest because of an invalid marriage. See Keene v. Keene, 57 Cal. 2d 657, 662, 371 P.2d 329, 331, 21 Cal. Rptr. 593, 595 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 684, 134 P.2d 761, 762 (1943).

In dicta, the Flannigan court also stated that quasi-contractual recovery for the value of services rendered on the part of the wife would probably fail. 213 Cal. at 667, 3 P.2d at 309.


In Lazzarevich, a couple lived together, first as putative spouses (erroneously believing that remarriage was unnecessary because their final divorce decree had not been entered), and subsequently as meretricious spouses (after the final decree was entered, the parties reconciled, and she moved back in with him without a marriage ceremony). The court permitted quasi-contractual recovery for services the plaintiff rendered while living as a putative spouse, but denied recovery for services rendered during the meretricious period. The only difference between the two periods was that, during the putative period, the parties possessed a mistaken belief that they were married. The court found this belief to be the essence of recovery. 88 Cal. App. 2d at 718, 200 P.2d at 555.

In Oakley, a couple knowingly contracted an invalid marriage in Mexico. The court cited Vallera and held that the plaintiff, who lacked a good faith belief in the validity of the marriage, had no right to share in the earnings and accumulations of the period of cohabitation. 82 Cal. App. 2d at 191-92, 185 P.2d at 850.

Lazzarevich and Oakley correctly distinguished between the equitable considerations of putative and meretricious spouses, but incorrectly denied equitable relief to the latter. The Marvin court attempted to remedy this problem.

\textsuperscript{39} 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).
same principles of property division to all families, legally married or otherwise.

The Cary court determined that prior decisions denying recovery to a non-acquiring spouse were based on a policy of punishing persons who lived together out of wedlock.40 Viewing the Family Law Act of 197041 as a legislative directive to abandon the concept of fault,42 the court saw no reason to differentiate meretricious spouses from putative spouses. Cary formulated a new rule: a party is entitled to half the property accumulated in an “actual family relationship.”43

Subsequent court of appeal decisions were divided on the Cary rule. In re Estate of Atherly,44 the first court presented with a similar issue, accepted Cary’s reasoning and holding. However, the court in Beckman v. Mayhew,45 declined to follow Cary, criticized its reasoning, and stated that it was bound by

40. Id. at 347, 109 Cal. Rptr. at 864. The court noted numerous authorities denying equitable relief and generally leaving the parties “in the position in which they placed themselves.” Id. The Marvin court rejected the reasoning of these cases, noting that, while denial of relief may punish the one “guilty” partner, it also rewarded the other. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.


42. The basic substantive change created by the Family Law Act, said the Cary court, was the “elimination of fault as grounds for . . . making unequal division of community property.” 34 Cal. App. 3d at 347, 109 Cal. Rptr. at 865.

43. The concept of “family” refers to a basic living unit centered around cohabitating adults who accept a mutual responsibility of rights, duties and obligations toward one another. Id. at 353, 109 Cal. Rptr. at 867.

The Cary court viewed the equal division of accumulated property as a means of “advancing [the Family Law Act’s] primary no fault philosophy.” Id. at 137, 109 Cal. Rptr. at 865. The court perceived a parallel between the dissolution of a relationship and the dissolution of a partnership business, in which both partners apportion their respective partnership interests. Id.

44. 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975). In Atherly, the decedent had been married for 14 years to Ruth, when he left her to live with Annette. The decedent received an ex parte divorce in Mexico, and he married Annette in the mistaken belief that he was single. The trial court determined that Ruth was the surviving spouse and awarded Annette a share proportional to the time she had lived with the decedent as a putative spouse. However, she was awarded none of the property acquired during the earlier meretricious relationship. The court of appeal reversed, citing Cary for the proposition that meretricious spouses living in a familial relationship are to be treated as putative spouses would be. Id. at 769, 119 Cal. Rptr. at 48.

45. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975). Plaintiff and defendant lived together for 12 years, knowing they were not married. Marriage would have cost the plaintiff her government pension. The plaintiff performed housework and the defendant contributed his earnings to a joint checking account. There was no agreement with regard to pooling assets or income. The trial court found that certain building materials for a house built on defendant’s land were purchased with money from the joint account. The court of appeal found otherwise, and held that the plaintiff was not entitled to any interest in the property by virtue of her relationship with her partner. Id. at 533-34, 122 Cal. Rptr. at 606-07.
the Vallera-Keene rule as announced by the California Supreme Court. Subsequent decisions have mentioned Cary, but have not had to reach the same issues.

Cary has been widely criticized, primarily as "misguided protectionism." These critics point out that Cary erroneously applied the Family Law Act to meretricious relationships, while the Act was in fact intended to apply only to actual marriages.

The Marvin court, while commending Cary's motives, nevertheless rejected its reasoning. But, in declaring the Family Law Act inapplicable to meretricious spouses, the court also announced that implied or tacit understandings of meretricious couples would now be judicially recognized for purposes of ascertaining the propriety of a property settlement.

The court next considered apportioning property accumulated through the mutual efforts of nonmarried cohabitating couples. Adopting the view that past treatment of nonmarried cohabitating couples was based on a double standard, the

46. Id. at 534, 122 Cal. Rptr. at 607.
47. In Menchaca v. Hiatt, 59 Cal. App. 3d 117, 126, 130 Cal. Rptr. 607, 613 (1976), the court determined that the issue before them did not involve a meretricious relationship, but only the rights of one partner to an insurance policy issued to another. See Powell v. Rogers, 496 F.2d 1248 (9th Cir. 1974) (claim under Federal Longshoreman's and Harbor Worker's Compensation Act). In Powell, the court stated that it would follow Vallera and Keene, and emphasized that Cary should not be construed as a revival of common law marriage in California. See also Estate of Levie, 50 Cal. App. 3d 572, 576, 123 Cal. Rptr. 445, 447 (1975).
50. See note 48 supra. The Marvin court recognized that there was nothing in the legislative history nor in the Act itself to reflect an intention to apply the Family Law Act outside the realm of valid marriages. 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.
51. The Marvin court recognized the need to review the pre-Cary precedents which showed little concern for meretricious spousal interests, but rejected the reasoning of Cary. The court stated: "If Cary is interpreted as holding that the Family Law Act requires an equal division of property accumulated in nonmarital 'actual family relationships,' then we agree with Beckman v. Mayhew that Cary distends the act." Id.
52. Id. at 681, 557 P.2d at 120, 134 Cal. Rptr. at 830.
53. See Keene v. Keene, 57 Cal. 2d 657, 668, 371 P.2d 329, 336, 21 Cal. Rptr. 593, 600 (1960) (Peters, J., dissenting). Justice Peters reflected on the double standard imposed on the woman when the man keeps all accumulated property even though they have both "sinned" in an equal degree. See generally G. CLARK, LAW OF DOMESTIC RELATIONS 52-53 (1968) (application of law "uneven," in operating to deny female
court followed an earlier suggestion by Justice Peters and adopted a presumption "that parties intended to deal fairly with each other."54 The result, according to the court, should be a fair apportionment of property.55 The court stated that it would give legal cognizance to a tacit agreement to "deal fairly;" absent such an agreement, the court will employ equitable principles to fairly apportion property acquired by mutual effort.56 This approach represents a clear break from the court's prior reluctance to recognize implied agreements by meretricious spouses to share acquired property.

Several questions remain unanswered in the wake of Marvin,57 but two major problems appear most glaringly. First, it is unclear what conduct, circumstances, or factors will be regarded as creating an implied agreement to share mutually acquired property. Secondly, Marvin failed to supply the lower courts with specific guidelines to assist them in equitably apportioning property absent an express or implied agreement.

The first unresolved problem is Marvin's lack of guidance as to which factors might imply a tacit understanding to share property. The only direction given the lower courts was that all equitable theories are available to fulfill what the court termed "the reasonable expectations of the parties." With little or no

partner her inheritance, worker's compensation, or social security benefits).

54. 18 Cal. 3d at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830. In Keene, Justice Peters looked to equity and inferred that the male defendant held the joint fund of accumulated property in constructive trust, in part for the plaintiff's benefit. He based this inference, which he termed a "mild presumption," on the intent of the parties and common sense. Keene v. Keene, 57 Cal. 2d 657, 674, 371 P.2d 329, 339, 21 Cal. Rptr. 593, 603 (1962) (Peters, J., dissenting).

55. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

56. Id.

57. Justice Clark noted six questions he felt were left unanswered: (1) Is a court free to create an equal division rule in view of the fact that the legislature has excluded meretricious relationships from the Family Law Act?; (2) Is it fair to impose economic burdens on couples who may have forgone marriage to avoid them?; (3) Does application of equitable principles to meretricious relationships violate the spirit of the Family Law Act?; (4) Will applications of equitable principles impose unmanageable burdens on the trial court?; (5) Will quantum meruit for meretricious spouses put them in a better position than that of lawful spouses?; (6) Shouldn't all services and benefits be valued? 18 Cal. 3d at 685-86, 557 P.2d at 123-24, 134 Cal. Rptr. at 832-33 (Clark, J., concurring & dissenting).

Other unanswered questions relate to possible agreements themselves. Do couples now have to contract before entering any open-ended relationship? Probably so, feel some commentators. See New West, Feb. 28, 1977, at NC-15 (sample contracts given by attorneys).

Additionally, there are questions of potential past and present tax liability. Also open to question are welfare-benefit and survivorship rights.
guidance as to which factors to focus on, future decisions may conceivably entangle unmarried couples in rules of conduct more burdensome than those governing conventional marriage. This is neither desirable nor what the Marvin court would seem to want.

Tacit agreements can be inferred from a variety of factors. When two people live together, numerous cooperative acts take place daily. Which of these will indicate an intent to “apportion fairly”? Future courts undoubtedly will have difficulty defining the conduct which will give rise to an implied agreement.

The second problem, the lack of specific standards to deal with apportionment of property absent an express or implied agreement, stems from the vague standard adopted by the Marvin court. Of the various factors attendant upon a meretricious relationship, the court fails to indicate which should be considered and which should be determinative in shaping a fair property settlement. What weight should be given such factors as length of relationship, existence of children, or existence of a sufficient familial relationship? How should lower courts decide such issues as support and child custody? The answers to these and other questions must be resolved in later decisions.58

By virtue of Marvin, the lower courts now have tremendous leeway to fashion equitable property settlements, but lack specific guidelines to follow in doing so. The courts are now able to pursue not only the parties’ expectations, but also what is fair. Justice Clark, dissenting in part, correctly labelled this approach “judicial overreach.”59 He concurred with the major-

58. The Washington Supreme Court has attempted to deal with these apportionment issues and has arrived at an attractive alternative solution. In a recent case, In re Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1974), the court implied the existence of a business partnership and applied partnership principles to a meretricious couple who had lived and worked together raising cattle for over 16 years. When one spouse died, the court granted the plaintiff a partnership share in the assets and profits of the business. The determinative factors were the duration of the relationship, the existence of a “family” which included four children, and the fact that the plaintiff and the deceased spouse had held themselves out to the public as husband and wife. Id. at 74, 499 P.2d at 865.

Although the Thornton holding was limited to cases where both spouses had contributed to a mutual business, the decision has evoked commentary calling for the application of partnership principles to all meretricious relationships. See Folberg & Buren, Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families, 12 WILLIAMETTE L.J. 453 (1976). The principal advantage of the partnership approach is that it recognizes the meretricious union as an alternative to marriage rather than as a variant form of it.

59. 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832 (Clark, J., concurring & dissenting).
ity in saying that, when an express or implied agreement is present, it should be recognized. However, he argued that the courts should not create economic obligations which may completely contravene the intentions of the parties or of the legislature. The majority itself recognized the panoply of reasons that couples have to live together out of wedlock, including that of “avoiding the strictures of the community property system.”

In general, the courts have been hard pressed to deal effectively with nonmarried families. Past decisions have evinced either refusals to deal with meretricious spouses or attempts to squeeze the factual patterns into inapplicable theories of marital law. The social realities of marital and nonmarital unions differ. Joint living situations, depending on the particular reasons of the parties, can be for short or long periods and may encompass more diverse expectations than those of a married couple. These expectations may change as the relationship continues. By imposing the burdens of implied contracts and equitable remedies on the conduct of meretricious spouses, the court has established standards which may be inconsistent with the expectations and plans of the partners.

Past California decisions dealing with different community property issues have established definitive criteria for resolving particular problems. This is the only effective way to deal with the property rights of separating spouses. Vague, flexible standards may result in unexpected or undesirable results. When future decisions outline specific guidelines for finding tacit agreements to divide property and for apportioning property fairly, then meretricious spouses will be afforded the protection they have so long been without.

Robert L. Schuchard

60. Id.
61. 18 Cal. 3d at 675 n.11, 557 P.2d at 117, n.11, 134 Cal. Rptr. at 826 n.11.

On June 14, 1971, Edward Charles Davis III was arrested in Louisville, Kentucky on a charge of shoplifting. He was arraigned in September, 1971 and pleaded not guilty. The charge became inactive and Davis’ guilt or innocence was not resolved. Late in 1972, the police chiefs of Louisville and Jefferson County, Kentucky, collaborated to produce a flyer intended to alert local merchants to potential shoplifters during the Christmas season. In early December 1972, prior to the disposition of Davis’ case, approximately 800 merchants in the metropolitan area of Louisville received flyers consisting of five pages of mug shots arranged alphabetically. Each page was captioned “ACTIVE SHOPLIFTERS.” The pictures of all persons arrested for shoplifting during 1971 and 1972 were included, regardless of whether or not they had actually been convicted.

Davis was employed as a photographer by the *Louisville Courier-Journal and Times* at the time the flyer was circulated. His supervisor called Davis in after the flyer containing Davis’ name and picture was brought to his attention. After hearing Davis’ version of the events leading up to his appearance in the flyer, he did not fire Davis but warned that “he ‘had best not find himself in a similar situation’ in the future.”

Davis brought a class action suit against the chiefs of police in the United States District Court for the Western District of Kentucky, claiming a violation of his constitutional rights under 42 U.S.C. § 1983. The district court granted the police

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2. Shortly after the flyer was disseminated, a judge of the Louisville Police Court dismissed the charge against Davis. *Id.* at 696.
3. *Id.* at 695. The full caption on each page was: “NOVEMBER 1972 CITY OF LOUISVILLE JEFFERSON COUNTY POLICE DEPARTMENT ACTIVE SHOPLIFTERS.”
4. *Id.* at 718 n.4.
5. *Id.* at 696.
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-
chiefs' motion to dismiss the complaint and was reversed by
the Court of Appeals for the Sixth Circuit. The United States
Supreme Court reversed the court of appeals, holding that
state-caused harm to one's reputation, absent concomitant
harm to a property interest, does not trigger constitutional pro-
tection. 7

Loosely stated, the Court's opinion in Paul is that the
individual's interest in reputation is neither "liberty" nor
"property," hence, defamation alone is not sufficient to invoke
any procedural safeguards. 8 Furthermore, damage to reputa-
tion does not violate any constitutional guarantee of a right to
privacy. 9

The Paul Court arrived at these conclusions by following
two primary avenues of reasoning: first, by determining that
Davis had recourse to an adequate remedy in the state courts,
and second, by finding no liberty or property interest in one's
reputation. This latter conclusion forced the court to distin-
guish and reinterpret Wisconsin v. Constantineau 10 and Goss v.
Lopez. 11

First, Rehnquist, writing for the majority, readily con-
ceded that the "active shoplifter" designation could inhibit
Davis from entering stores for fear of being suspected of shop-
lifting and could impair his future employment opportunities.
Thus, the complaint stated an actionable state claim for defa-
mation because the imputation of criminal behavior is gener-
ally defamatory per se and actionable without proof of special
damages. 12 The Court noted that if the charge of criminal be-

7. In Davis v. Paul, 505 F.2d 1180, 1182 (1974), the court stated: "We are of the
view that appellant has set forth a claim cognizable under § 1983 in that he has alleged
facts that constitute a denial of due process of law. This holding is mandated in view
8. 424 U.S. at 712.
9. Id.
10. Id. at 713.
13. 424 U.S. at 697.
14. Id. at 698.
not an action for deprivation of an individual's constitutional rights, merely because the alleged tortfeasors were public officials.\footnote{15}

The Paul Court supported its rationale that an adequate remedy was available in the state courts by noting that although the due process clause of the fourteenth amendment and section 1983 "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims,"\footnote{16} the courts could not create "a body of general federal tort law" from congressional civil rights statutes.\footnote{17} Rehnquist warned that the fourteenth amendment and section 1983 construed in this manner would result in claims by survivors of an innocent bystander mistakenly shot by a policeman of "deprivation of life . . . without due process of law."\footnote{18}

The Paul Court found that "'liberty' and 'property' as used in the Fourteenth Amendment do not single out reputation as a candidate for special protection over and above other interests that may be protected by state law."\footnote{19} The existence of a constitutionally protected liberty interest in reputation was further vitiated by the Court's contention that recognizing Davis' defamation as a violation of constitutional rights would make all other interests protected by tort law the subject of adjudication in the federal courts.

Second, any liberty interest in reputation that arguably existed in the Constantineau-Goss line of cases was thoroughly eradicated by the Paul decision. In its analysis, the Supreme Court highlighted those aspects of prior cases which support its position that governmental defamation alone, without a property injury such as loss of government employment, is not suffi-

\footnote{15. Justice Brennan stated in his dissent that the existence of a state remedy is not relevant to whether a cause of action exists under § 1983. \textit{Id.} at 715. The federal remedy is supplemental to the state remedy and state judicial remedies need not be exhausted before the federal remedy is invoked. \textit{Id.}, citing \textit{Monroe v. Pape}, 365 U.S. 167, 183 (1961). Brennan further criticized the Court's assertion that if a private individual had made the allegations of criminal behavior, Davis would have had a claim for defamation only under state law. The police chiefs were state officials and the fourteenth amendment is designed to prohibit state officials from abusing their grants of authority by making certain types of state action unconstitutional. 424 U.S. at 715-16.}

\footnote{16. 424 U.S. at 699.}

\footnote{17. \textit{Id.} at 701.}

\footnote{18. \textit{Id.} at 698.}

\footnote{19. \textit{Id.} at 701.}
cient to invoke the protection of the due process clause.\textsuperscript{20} The Supreme Court's theory in examining the line of cases beginning with \textit{United States v. Lovett}\textsuperscript{21} indicates that due process comes into play only when the state withdraws some entitlement from its citizens in addition to defaming them; defamation takes on the appearance of an ephemeral coincidence rather than a grievous wrong deserving of redress.\textsuperscript{22}

In \textit{Lovett}, an act of Congress specifically forbade the payment of any salary or compensation to three named government employees after a House of Representatives subcommittee found them guilty of "subversive activity" and unfit for government service. The purpose of that act was to permanently bar the three employees from government service, and this purpose was held to be unconstitutional.\textsuperscript{23} It was decided that this act was, in effect, a bill of attainder, or legislation which inflicted punishment without a judicial trial. Furthermore, this "[c]ongressional action, aimed at three named individuals . . . stigmatized their reputation and seriously impaired their chance to earn a living . . . ."\textsuperscript{24} The Supreme Court in \textit{Paul} emphasized that although government employ-

\begin{itemize}
  \item \textsuperscript{20} The Court stated: "While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." \textit{Id.} at 702. In a footnote the Court continued:

    If respondent is correct in his contention that defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the cognate Due Process Clause of the Fifth Amendment. Surely the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts.

  \textit{Id.} at 702 n.3.

  \item \textsuperscript{21} 328 U.S. 303 (1946).

  \item \textsuperscript{22} For a discussion of the concept of entitlements as property, see Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733 (1964). Reich states:

    Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. . . . The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." . . .

    The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. . . . Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.

  \textit{Id.} at 785-86 (footnotes omitted).

  \item \textsuperscript{23} 328 U.S. at 313.

  \item \textsuperscript{24} \textit{Id.} at 314.
ees could not be stigmatized without a judicial trial in Lovett, it was the possibility of permanent exclusion from government employment in conjunction with the defamation that invoked due process requirements.26

After Lovett, in Joint Anti-Fascist Refugee Committee v. McGrath,28 the Court struck down an Oklahoma statute requiring state officers and employees to take an oath denying any affiliation with Communist organizations. Mr. Justice Jackson, concurring, found that deprivation of present and future government employment as a result of being branded a Communist was a grave injury, sufficient to invoke procedural safeguards.27 The Paul Court chose to stress the fact that six of the eight justices who participated in McGrath viewed any “stigma” imposed by official action, apart from its effect on the legal status of an organization or a person, such as loss of a tax exemption or government employment, as an insufficient basis for invoking the due process clause of the fifth amendment.28

Similarly, in Wieman v. Updegraff,29 the Supreme Court recognized the potential “badge of infamy” which might arise from being branded disloyal by the government; the petitioners would lose their teaching positions at a state university for failure to execute the state loyalty oath.30 The Paul Court indicated that the defamation alone was not sufficient to invoke the procedural due process guarantees of the fourteenth amendment. The implication of Wieman for the instant case is that procedural due process was not invoked on the basis of a potential defamation alone; there was a possible loss of employment as well as arbitrariness in the state’s actions.

Wisconsin v. Constantineau31 is in accord with its precedents, and the court of appeals in Paul had relied on it in reversing the district court’s dismissal.32 There, the police chief of Hartford, Wisconsin, without notice or hearing to Ms. Constantineau, caused a notice to be posted in all retail liquor outlets in Hartford that sales or gifts or liquor to her were forbidden for one year.33 Ms. Constantineau brought suit in federal

25. 424 U.S. at 706.
27. Id. at 184-85 (Jackson, J., concurring).
28. 424 U.S. at 704-05.
30. Id. at 191.
32. See note 7 supra.
33. 400 U.S. at 434.
district court in Wisconsin to have the applicable statute declared unconstitutional; she claimed damages and asked for injunctive relief. The three-judge court found the act unconstitutional in its face and enjoined its enforcement. In holding that procedural due process is required before a citizen's reputation is injured by governmental action the Supreme Court stated: "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Until Paul, Constantineau had clearly stood for the proposition that harm to reputation, standing alone, was sufficient to trigger procedural due process protection. In Paul, Rehnquist distinguished Constantineau and vitiated its holding without specifically overruling it. The Paul Court interpreted the holding in Constantineau with reference to a property interest—the right to purchase liquor.

We think that the . . . language in the last sentence quoted, "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered his [sic] status as a matter of state law, and it was that alteration of status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

The Court recognized that the alteration of status is a legitimate ground for invoking the procedural due process safeguards. The interests protected by the due process clause "attain . . . constitutional status by virtue of the fact that they

34. Wis. Stat. § 176.26 (1967) provides in pertinent part that designated persons may, in writing, forbid the sale or gift of intoxicating liquors to one who "by excessive drinking" produces described conditions or exhibits specified traits, such as exposing himself or his family "to want" or becoming "dangerous to the peace of the community."
35. 400 U.S. at 435.
36. Id. at 437.
37. 424 U.S. at 708-09.
have been initially recognized and protected by state law and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status.”

Goss v. Lopez reaffirmed Constantineau's holding that there is a liberty interest in reputation and that this interest alone is sufficient to trigger procedural due process protection. Paul limits Goss by stating that although the Goss Court "noted" serious damage to the student’s reputation, it was primarily the harm to the property interest in education which mandated procedural safeguards. Under Paul, an interest in reputation is not a legitimate entitlement comparable to a property interest in government employment or an interest in education. Harm or injury to reputation, then, does not result in deprivation of any "liberty" or "property" recognized by state or federal law, nor does it change the status of a citizen previously recognized under the state's laws. Therefore, a citizen's interest in reputation is not protected against state deprivation without due process of law.

The Supreme Court summarily dismissed Davis' allegations that his "right to privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments" was violated due to the inclusion of his name and picture in the flyer of "active shoplifters." The opinion indicated that the unwarranted branding of a citizen as an active criminal is not in itself objec-

38. Id. at 710-11. Status created by state law is a protected interest. See Bishop v. Wood, 426 U.S. 341 (1976) (police officer does not have protected entitlement to re-employment unless expressly provided for by state law); Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee's status may not be altered without due process); Bell v. Burson, 402 U.S. 535 (1971) (driver's license may not be revoked without due process).

39. 419 U.S. 565 (1975). The Supreme Court held that a student has both a property interest and a liberty interest in education. Id. at 574-75. As a consequence, public high school students may no longer be suspended from school for more than 10 days without a hearing.

40. Id. at 576.

41. Id. at 574-75.

42. 424 U.S. at 710.


45. 424 U.S. at 710-11.

46. Id. at 712.

47. There does appear to be a prima facie case for that form of invasion of privacy consisting of “publicity which places the plaintiff in a false light in the public eye.” W. PROSSER, HANDBOOK OF THE LAW OF TORTS 812 (4th ed. 1971).
tionable. The Supreme Court controverted Davis' privacy claim into "a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." The decision leaves no doubt that the constitutional right to privacy protects a woman's right to an abortion, a person's right to use contraceptives, and to disseminate and receive birth control information, but not the right to be free from unsubstantiated criminal charges.

The exclusion of an interest in reputation from constitutional protection seems to be a feat of juristic sleight of hand. But the Supreme Court reaffirmed Paul in Bishop v. Wood, decided three months after Paul. In Bishop, which involved the discharge of a policeman, the Court reiterated the holding in Paul that reputation is not protected unless a concomitant property interest is injured. But Bishop went beyond Paul and further narrowed the scope of property interest, noting that "the sufficiency of the claim of entitlement must be decided by reference to state law." The implication of Paul and Bishop when read together is that harm to reputation is not actionable in federal court unless there exists concomitant harm to a property interest expressly provided for by state law. The liberty interest in reputation will be afforded constitutional protection only when a state-created claim of entitlement is also infringed. This means that in a Paul type of fact situation, the defamation would be actionable if loss of employment resulted, and only if that employment were governed by a state law which clearly and expressly contained a guarantee of continued employment. The message is quite clear; reputation alone is no longer actionable in federal court as a constitutionally protected interest.

Evelyn T. Furutani


52. 96 S. Ct. 2074 (1976).

53. Id. at 2077-78.
BANKRUPTCY—VOIDABLE PREFERENCES—UNIFORM COMMERCIAL CODE SECTION 9-306(4)(d) OPERATES AS A VOIDABLE PREFERENCE—In re Gibson Products of Arizona, 543 F.2d 652 (9th Cir. 1976).

Arizona Wholesale Supply Co. (Wholesale), was a secured creditor of Gibson Products of Arizona (Gibson), holding a perfected security interest in appliances it had sold to Gibson and in proceeds from the resale of the appliances. On January 13, 1972, Gibson initiated Chapter XI proceedings under the Bankruptcy Act. Within the ten-day period prior to the initiation of those proceedings, Gibson deposited $19,515.27 in its general bank account, $10 of which was from the resale of the collateralized appliances. On the date of the initiation of the Chapter XI proceedings, Gibson owed Wholesale $28,800 for appliances in which Wholesale had a perfected security interest.

The bankruptcy judge ordered that the entire $19,515.27

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1. A secured creditor is a creditor whose extension of credit is protected by a right to foreclose on specific property of the debtor, secured by their agreement. A secured creditor, under Article 9 of the Uniform Commercial Code (U.C.C.), is analogous to a mortgagee in a real estate context.

2. A perfected security interest is an interest in personal property which serves, in most cases, to protect the secured property from the claims of parties other than the security holders, e.g., lien creditors, buyers and the bankruptcy trustee. The method of perfection usually consists of a filing either in the county recorder's office or with the state secretary of state. See U.C.C. § 9-401.

U.C.C. § 9-303, referring to the requirements for the perfection of a security interest, provides:

A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Section[s] 9-302, 9-304, 9-305 and 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

3. U.C.C. § 9-203(3) provides that "[u]nless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by Section 9-306."

U.C.C. § 9-306(1) defines proceeds as "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. . . . Money, checks, deposit accounts, and the like are 'cash proceeds.' All other proceeds are 'non-cash proceeds.'"

4. 11 U.S.C. §§ 701-799 (1970). A Chapter XI arrangement is a proceeding in bankruptcy which allows a debtor to settle, satisfy or extend the time of payment of his debts under a plan submitted by the debtor. An arrangement is an alternative to either straight bankruptcy or reorganization for an insolvent corporation.

which Gibson had received during the ten days prior to bankruptcy be awarded to Wholesale. The district court affirmed. The issue presented to the Ninth Circuit on appeal was whether the security interest created in proceeds in Gibson's bank account, under section 9-306(4)(d) of the Uniform Commercial Code (U.C.C.),
6 constituted a voidable preference under section 60 of the Bankruptcy Act.7 The Ninth Circuit reversed and held that Wholesale's interest in the bank account, under U.C.C. section 9-306(4)(d), was prima facie valid except as to the trustee in bankruptcy who had the presumptive power to set aside that interest as a voidable preference. The court also held that Wholesale could rebut the presumption to the extent that it could trace the funds in the bank account to specific proceeds received from the sale of collateral.

Before considering the court's reasoning, it is important to examine the mechanics of U.C.C. section 9-306(4)(d) and section 60 of the Bankruptcy Act. Section 9-306(4) specifies the rights of a secured creditor to proceeds in an insolvency proceeding.8 Paragraphs (a)-(c) of section 9-306(4) govern a sec-

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6. U.C.C. § 9-306(4) provides:

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

(a) in identifiable non-cash proceeds and in separate deposit accounts containing only proceeds;
(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;
(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and
(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right to set-off; and
(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).


8. "'Insolvency proceedings' includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person

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cured creditor’s rights in proceeds which have not been com-
mingled with funds from other sources. Thus, for instance,
where a debtor deposits $100 of proceeds into a bank account
containing only proceeds, the security interest will continue in
that $100, and the secured creditor’s claim to the money in
the account will defeat any claim to it made by the trustee in
bankruptcy. Similarly, if the debtor segregates the $100 of cash
proceeds in a safe or drawer, the security interest will continue
in that amount under U.C.C. section 9-306(4)(b) or (c) and
again defeat the trustee.

Paragraph (d) of section 9-306(4) applies, as it did in
Gibson, if the cash proceeds have been deposited in an account
containing funds from sources other than the resale of collateral.
Section 9-306(4)(d) provides that the creditor’s perfected
security interest in collateral continues in all funds in the
debtor’s commingled bank accounts but limited to the
amount of “cash proceeds received by the debtor within ten
days before the institution of the insolvency proceedings.”

Therefore, if $5,000 of cash proceeds were received by the
involved.” U.C.C. § 1-201(22). This obviously encompasses the provisions of the Bank-
ruptcy Act.

9. U.C.C. § 9-306(4)(a) governs identifiable non-cash proceeds and non-
commingled deposit account proceeds in bankruptcy.

10. If the identifiable cash proceeds consist of money, then U.C.C. § 9-306(4)(b)
applies. If they consist of “checks and the like which are not deposited in a bank
account” then § 9-306(4) (c) governs.

It is important to note that these provisions are applicable only in the event of
insolvency proceedings. If there are no such proceedings, other provisions of § 9-306,
referring to identifiable proceeds, govern the rights of the secured creditor. See U.C.C.
§ 9-306(2). Under these provisions the secured creditor must trace and identify funds
held by the debtor as proceeds.

11. The precise operation of § 9-306(4)(d) consists of three steps illustrated by
Prof. Gilmore and paraphrased as follows:

Step I: Find the amount of cash proceeds received by the debtor during
the 10 days before the institution of the insolvency proceedings.

Step II: From the amount ascertained in step I, deduct the amount of
any proceeds received and paid over to the secured party during the 10-
day period.

Step III: Deduct from the amount ascertained in step I any amount as
to which the depository bank has a right to set-off.

cited as Gilmore].

12. Commingled account is used in this note to refer to a bank account contain-
ing both secured proceeds from the sale of a secured part’s collateral, and funds from
other sources.


14. It remains uncertain whether the words “any cash proceeds,” in § 9-
306(4)(d)(ii), refer to proceeds from the disposition of collateral or receipts from any
source. A strict construction of the language in § 9-306 would require the former
debtor within the ten-day period before bankruptcy, a creditor with a perfected security interest in proceeds, could recover that amount from the debtor's commingled bank account regardless of what portion of that amount was identifiable as proceeds. The effect of section 9-306(4)(d) is to skirt the "tedious and artificial" procedures of common law tracing by limiting the amount available to the secured creditor to the cash proceeds received by the debtor during the ten-day period.

Despite its admirable purpose, it is precisely the attempted circumvention of common law methods of tracing, in section 9-306(4)(d), that leads to the collision with section 60 of the Bankruptcy Act. Section 60 is designed to prevent creditors from obtaining an advantage over other creditors by receiving, on the eve of bankruptcy, a greater satisfaction of their debt than they would receive in the course of bankruptcy proceedings. Section 60a provides:

interpretation, particularly since cash proceeds is a defined term within that section. See U.C.C. § 9-306(1). In addition, the distinction between "proceeds" and "other funds" in § 9-306(4)(d) further indicates that the draftsmen intended the language in question to refer to proceeds from the sale or disposition of collateral. See U.C.C. § 9-306(4)(d).

The Gibson court, however, rejected that interpretation of the U.C.C. because such a construction would, the court reasoned, destroy the distinction between commingled and identifiable proceeds established by § 9-306(4). In re Gibson Prods., 543 F.2d 652, 656 (9th Cir. 1976). In so doing, however, the court overlooked the difference between identifying funds as proceeds from the sale of collateral as they are received by the debtor, and as they exist once inside a commingled bank account. It is a fairly simple task to determine how much was received by the debtor as proceeds—it is far more difficult to trace and identify those funds once they have been commingled with the other funds of the debtor, a task that § 9-306(4)(d) attempts to avoid.

16. GILMORE, supra note 11, at 1344.
17. There are a variety of methods of tracing funds into a commingled bank account. One common method is known as "first-in, first-out" or FIFO. The operation of the FIFO method can best be illustrated by a situation in which a separate bank account is opened for each deposit, and withdrawals are made by closing down each separate account in the chronological order in which they were opened. Cf. G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 926-927 (2d ed. 1962)(applying to funds held in trust commingled with funds belonging to the trustee).

Another common tracing method, presented in the instant case, presumes that the amounts remaining in the account are those belonging to the secured creditor. Id. See also CALIFORNIA CONTINUING EDUCATION OF THE BAR, 3 CALIFORNIA COMMERCIAL LAW § 3.53, at 146 (1966).
18. GILMORE, supra note 11, at 1340.
19. There are two purposes of § 60 of the Bankruptcy Act: "(1) to prevent an insistent creditor from harvesting more than his fair share of the insolvent's assets by obtaining transfers from the debtor on the eve of bankruptcy, and (2) to discourage extension of credit to debtors under circumstances which concealed from general credi-
A preference is [1] a transfer, as defined in this title, of any property of the debtor, [2] to or for the benefit of a creditor, [3] for or on account of an antecedent debt [4] made or suffered by such debtor while insolvent [5] and within four months before the filing by or against him of the petition initiating a proceeding under this title [6] the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. 20

Under section 60b such a transfer is voidable by the trustee only if the preferred creditor had "reasonable cause to believe that the debtor was insolvent" at the time of the transfer. 21

A transfer, in the Gibson context, is the act by which a debtor gives a creditor an interest in some or all of his property. 22 The date upon which a debtor gives a creditor a property interest, such as a security interest, 23 is one element which determines whether the transfer so made is a voidable preference. Whether the transfer is a voidable preference depends upon the date of the transfer in relation to the date of the creation of the debt and the date of bankruptcy. 24 It is the date


21. Id. § 96b. The reasonableness requirement, however, is not relevant to the discussion here.

22. See generally 1 COLLIER ON BANKRUPTCY ¶ 1.30 (14th ed. 1976) [hereinafter cited as COLLIER].

23. Section 1(30) of the Bankruptcy Act provides:
   "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

24. For example, if a debt is created on January 1, a security interest, on account of that debt, is perfected on February 1, and bankruptcy occurs on August 1 of the same year, the transfer of the security interest is not a voidable preference because the perfection occurred more than four months before bankruptcy. See, e.g., In re Wilko Forest Mach., Inc., 491 F.2d 1041, 1046 (5th Cir. 1974).

If the bankruptcy occurs instead, on May 31, the transfer would be a voidable preference because the transfer occurred, i.e., the interest was perfected, within four months before bankruptcy. See, e.g., Diamond Door Co. v. Lane-Stanton Lumber Co. (In re Diamond Door Co.), 505 F.2d 1199 (5th Cir. 1974).

A further variation is when the security interest is perfected simultaneously with the creation of the debt, and bankruptcy occurs one month later. Although the transfer
of the transfer of the security interest in the commingled bank accounts of the debtor, under U.C.C. section 9-306(4)(d), that determines whether the operation of that provision will be voidable by the trustee in bankruptcy as a preference.

If the transfer creating the security interest in the commingled bank account, under U.C.C. section 9-306(4)(d), occurred more than four months before the initiation of bankruptcy proceedings, or on account of a contemporaneously created debt the transfer is not a voidable preference.25 If, however, the transfer occurred less than four months before the initiation of bankruptcy proceedings, and on account of an antecedent debt, then the security interest created by U.C.C. section 9-306(4)(d) would appear to be a voidable preference.26 Thus, the issue in Gibson was whether the transfer of the security interest in funds, other than identifiable proceeds, in Gibson's commingled bank account occurred at the time of the original perfection of the security interest in the appliances27 or at the time of the initiation of the Chapter XI proceedings.28

Support for the conclusion that the time of the transfer of the security interest created by section 9-306(4)(d) places that provision in conflict with section 60 is found in DuBay v. Williams.29 In DuBay, the Ninth Circuit,30 relying on section 60(a)(2) of the Bankruptcy Act,31 held that the transfer of a security interest in after-acquired property32 occurred at the time of the perfection of the security interest in the original collateral and, since the original perfection occurred more than four months before bankruptcy, that the transfer did not con-
stitute a voidable preference.33
Section 60a(2) of the Bankruptcy Act provides in part that a transfer is deemed to have been made when it becomes so far perfected that no subsequent lien creditor could achieve priority over it.34 In DuBay the secured creditor's interest became so far perfected in the after-acquired property at the time of perfection of the security interest in the original collateral. Although a security interest is not completely perfected until "the debtor has rights in the collateral,"35 a security interest in after-acquired property (e.g., inventory which has yet to be acquired, or accounts receivable which have not yet arisen), is perfected enough to defeat the claims of subsequent lien creditors at the time that the security interest in the original collateral is completely perfected.36

Although DuBay did not involve U.C.C. section 9-306(4)(d), the rationale used by the Ninth Circuit made the result in Gibson inevitable. Prior to the initiation of the Chapter XI insolvency proceedings, Wholesale retained a security interest in identifiable proceeds only. Wholesale's security interest in those identifiable proceeds was so far perfected that no subsequent lien creditor could achieve priority over it at the time of the perfection of the security interest in the original collateral, the appliances. Until the moment of the institution of insolvency proceedings, however, Wholesale did not have a security interest in any funds that were not identifiable as proceeds.38 Section 9-306(4)(d) operated to effect a transfer of a security interest to Wholesale, of the funds in Gibson's commingled bank account whether or not they were identifiable as proceeds. The security interest in the funds which were not identifiable proceeds was not so far perfected until the initiation of the Chapter XI proceedings, clearly within the four-month period, and therefore, under the DuBay rationale, a voidable preference.

Despite the availability of the DuBay theory, most of the cases applying U.C.C. section 9-306(4)(d) have failed to mention any conflict with the Bankruptcy Act.39 Horwath v. Uni-

33. 417 F.2d 1277, 1288 (9th Cir. 1969).
35. U.C.C. § 9-203(1)(c).
36. U.C.C. § 9-301.
37. U.C.C. § 9-306(2).
38. 543 F.2d at 656-57.
versal C.I.T. Credit Corp. raised the issue but simply assumed that section 9-306(4)(d) was valid, and In re Security Aluminum acknowledged a potential conflict but expressly reserved the question. In a set of circumstances similar to those in Gibson, the United States Court of Appeals for the Seventh Circuit, in Fitzpatrick v. Philco Finance Corp., circumvented the issue by construing the words "any cash proceeds," used in section 9-306(4)(d), to mean receipts from the sale of collateral rather than "all receipts from any source deposited in the account."

The impending conflict between section 9-306(4)(d) of the Uniform Commercial Code and section 60 of the Bankruptcy Act has been long awaited and a number of authors have arrived at different conclusions concerning the survival of the security interest granted by section 9-306(4)(d) after the inevitable collision occurred, as it now has in Gibson. The leading treatise on bankruptcy states that there is nothing "to prevent [the transfer] from being declared a voidable preference." Professor Gilmore, a leading authority on Article Nine of the Uniform Commercial Code, however, indicates that section 9-306(4)(d) should not fall prey to section 60 because "the possibility that the bank account will be made up of anything but the deposits and collections of proceeds is small."

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42. Id. at 49.
43. 491 F.2d 1288 (7th Cir. 1974). The bankrupt made payments to Philco Finance Corporation, totalling $44,766.84, out of a commingled account within 10 days prior to the initiation of bankruptcy proceedings, despite the fact that proceeds from the sale of secured inventory during that period were only $4,513.44. The trustee sued to recover the difference between the payments to Philco and the proceeds, identifiable from the sale of collateral, received and deposited by the debtor within the last 10 days prior to bankruptcy. Id.
44. Id. at 1291; see note 14 supra.
46. 4A COLLIER, supra note 22, ¶ 4.3, at 710; see also Countryman, Code Security Interests in Bankruptcy, 4 U.C.C. L.J. 35 (1971).
47. GILMORE, supra note 12, at 1344. Professor Gilmore apparently overlooked the fact that prior to the initiation of an insolvency proceeding a creditor's security interest continues in identifiable proceeds only. U.C.C. § 9-306(2). Therefore, insofar as § 9-306(4)(d) gives the secured creditor an interest in proceeds that are not identifiable, it is, as Gilmore puts it elsewhere in his work, "a provision of state law which purport[s] to give a secured creditor greater rights . . . in bankruptcy than he would have apart
Against this background the Ninth Circuit after rejecting the construction placed upon the language of section 9-306(4)(d) in Fitzpatrick, applied the rationale of DuBay and found that the transfer of the security interest in the nonidentifiable-as-proceeds portion of Gibson's bank account was a voidable preference. The Gibson opinion, quoting DuBay, stated that a transfer is "equated with the act by which priority over later creditors is achieved," and noted that prior to bankruptcy Wholesale had no priority over later lien creditors with respect to funds which were not identifiable as proceeds because U.C.C. section 9-306(4)(d) does not come into effect except upon the initiation of bankruptcy or other insolvency proceedings. The court found that the transfer of the commingled account, at the time of bankruptcy, was a voidable preference rebuttable by Wholesale only to the extent that Wholesale could trace and identify its proceeds in the account. On remand, Wholesale will face the difficult task of tracing the proceeds via one of the common law methods and therefore stands a lesser chance of recovery.

The apparent consequences of the Gibson decision are that secured creditors will find themselves limited, not only to those funds which they are able to trace and identify as proceeds, but also to those proceeds received by the debtor during the last ten days prior to bankruptcy.

The result in Gibson places a secured creditor in the worst possible situation; he is limited by the rigors of common law from bankruptcy, and is therefore invalid as against the trustee. Gilmore, supra note 11, at 1337.


Henson, in "Proceeds" Under the Uniform Commercial Code, 65 Colum. L. Rev. 232, 247 (1965), supports the contention that § 9-306(4)(d) "does not offend section 60." His argument, however, is diluted by the authority he cites. Both of the cases he relies on refer to attacks upon a provision, similar to § 9-306(4)(d) of the U.C.C., which appeared in § 10b of the old Uniform Trust Receipts Act (U.T.R.A.). Those attacks, however, were based on other sections of the Bankruptcy Act. See In re Harpeth Motors Inc., 135 F. Supp. 86 (D. Tenn. 1965); Commerce Union Bank v. Alexander, 44 Tenn. App. 104, 312 S.W.2d 611 (1957). Commerce Union Bank, a state case, categorized the interest created by U.T.R.A. § 10b as a statutory lien rather than as a security interest.

50. 491 F.2d 1288, 1291 (7th Cir. 1974). See notes 14 & 44 and text accompanying note 44 supra.

51. See note 17 supra.
tracing and by the ten-day period of section 9-306(4)(d). Faced with these dual restrictions it may be appropriate for a secured creditor in Wholesale’s position to claim that the ten day limitation should not apply in light of the forced return to the common law methods of tracing which section 9-306(4)(d) was designed to avoid. Otherwise, as the Gibson opinion suggests,52 the only way for a secured creditor to protect itself is to scrupulously police its collateral, preventing the debtor, through a default clause,53 from commingling proceeds from the sale of collateral with funds from other sources.54

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52. 543 F.2d at 657.
53. Such a clause would make commingling of proceeds with funds from other sources a default under the terms of the security agreement.
54. This apparent consequence of the Gibson decision echoes a return to the rule of Benedict v. Ratner (In re Hub Carpet Co.), 268 U.S. 353 (1925), which held that a secured creditor who did not restrict the debtor’s use of proceeds would lose his secured status under state law existing at that time. The U.C.C. rejected that principle, but if Gibson’s double limitation is followed by other courts, a secured creditor is likely to lose the benefits of his secured status if he fails to keep a close eye on the debtor’s use of secured proceeds.