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The Putative Marriage Doctrine

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THE PUTATIVE MARRIAGE DOCTRINE*

CHRISTOPHER L. BLAKESLEY**

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I. INTRODUCTION: HISTORY, CONCEPTUALIZATION AND DEFINITION

The classic putative^1 marriage doctrine is substantive, ame-
liorative or corrective; it is designed to allow all the civil
effects—rights, privileges, and benefits—which obtain in a legal
marriage to flow to parties to a null marriage who had a good
faith belief that their “marriage” was legal and valid.^2 Most ju-
risdictional in the United States have developed equitable ana-
logues to the putative spouse doctrine that provide all or part of
the relief afforded by the classic doctrine.^3

If a marriage is declared to be null or void, that declaration
is retroactive to the day that the null marriage was contracted.^4

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1. Putative has been defined as: “Reputed to be that which is not,” J. BOUVIER’S
   LAW DICTIONARY (8th ed. 1914); “Reputed; Supposed; commonly esteemed,” BLACK’S
   LAW DICTIONARY 1113 (5th ed. 1979); “Reputed; Supposed; Assumed; believed,” BALLEN-
   TINE’S LAW DICTIONARY 1039 (3d ed. 1969). Annotations which were helpful in finding
cases and developing ideas in this section include: Annot., 31 A.L.R.2d 1258 (1953); 52

defined in more detail throughout this section.

3. These are presented in section II, infra.

decree . . . rendered the marriage utterly void ab initio”); Wigder v. Wigder, 14 N.J.
MISC. 880, 881, 188 A. 235, 236 (Ch. 1936) (“a decree of nullity refers back to the time of
contracting and . . . renders the marriage utterly void ab initio”); Aldrich v. Aldrich, 156
N.Y.S.2d 719, 721 (Sup. Ct. 1956) (“defendant’s first marriage having become non-exis-
tent by the final decree of annulment, it could not be a legal impediment to the validity
of the marriage into which the parties to this action entered”); Williams v. State, 175
MISC. 972, 974, 25 N.Y.S.2d 968, 971 (Ct. Cl. 1941) (“It is settled law in this State that
the entry of the decree of annulment had the effect of voiding the marriage from its very
(“a decree of annulment . . . merely declares . . . the marriage . . . void from the very
beginning”); Southern Ry. Co. v. Baskette, 175 Tenn. 253, 262-63, 133 S.W.2d 498, 502
(1939) (“The legal effect of the judgment in the annulment suit was to render this void-
able marriage a nullity—that is, judicially declare that it never had been a legal and law-
ful marriage.”).

If the marriage is merely voidable, or relatively null, it is challengeable only by the
parties to it, in a direct proceeding during their lifetime. Such a marriage will not be
PUTATIVE MARRIAGE DOCTRINE

It could be said that the action in nullity does not produce a null marriage, but merely declares that the marriage has never existed. However, many jurisdictions only apply the relation-back doctrine when it will substantially fulfill justice and equity. Thus, generally, a marriage declared null produces no effects of marriage whatsoever. Unless some protective or corrective

voided unless and until such proceeding is completed. A void, or absolutely null, "marriage" may be attacked by any interested party, at any time, and in a collateral or indirect action. The effects of the putative marriage doctrine apply to both void marriages and voidable marriages. See Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 99, 69 P.2d 845, 847 (1937); Schneider v. Schneider, 183 Cal. 335, 341, 191 P. 533, 536 (1920), noted in Note, Husband and Wife: Rights of Bigamous Wife in Community Property, 9 Calif. L. Rev. 68 (1920).

5. R. Pascal & K. Spaht, Textbook in Louisiana Family Law 195 (2d ed. 1979); Yeager v. Flemming, 282 F.2d 779, 782 (5th Cir. 1960) (marriage was erased by nullity action, and thus had no status, as if it had never existed); Holland v. Ribicoff, 219 F. Supp. 274, 277 (D. Or. 1962) ("This declaration and decree of the Oregon court fixes plaintiff's status as having never been married to Thompson and is binding upon the Secretary and this Court."); Held, void marriage does not terminate a party's Social Security benefits based on previous marriage.;); Sparks v. United States, 153 F. Supp. 909, 911 (D. Vt. 1957) (annulment proclaimed that this second marriage never existed); Lubbers v. Reimer, 22 F. Supp. 573, 575 (S.D.N.Y. 1938); Coats v. Coats, 160 Cal. 671, 675, 118 P. 441, 443 (1911); Kirkland v. Kirkland, 6 Ill. App. 2d 280, 186 N.E.2d 794 (1962); Minder v. Minder, 83 N.J. Super. 159, 199 A.2d 69, 73 (Ch. Div. 1964) ("in New Jersey, a void marriage does not give rise to any status or rights on the part of either of the spouses"); Commonwealth v. Knodle, 149 Pa. Super. 563, 567, 27 A.2d 536, 538 (1942) ("A decree of annulment in reality does not annul the marriage, for it does not speak only from its date; it merely declares that the marriage was void from the very beginning. It does not create a new status, but, on the contrary, affirms that there has been no change in status. A nullity in law . . . is absolute, implying that the thing has no legal existence.").


Cases denying relief to a party to a null marriage include: Warrenberger v. Polsom, 140 F. Supp. 610, 613 (M.D. Pa. 1956) ("the said [party] had no capacity to enter into a marriage . . . the attempted common-law marriage . . . was void . . . [she] did not acquire any marital rights by virtue of said attempted . . . marriage, . . . accordingly the claimants . . . do not have the status of 'widow' and 'child,' respectively . . . under the terms of the Social Security Act"); Curlew v. Jones, 146 Ga. 367, 91 S.E. 115 (1917) ("wife was not allowed to inherit decedent's real property because she was already married before she married him. Consequently, her subsequent conveyance of the property was void."); Ex Parte Bowen, 247 S.W.2d 379 (Ky. 1952) (denial of dower); Moore v. Moore,
measure intercedes, the normal civil effects of marriage simply

30 Ky. 383, 98 S.W. 1027 (1907) (wife was not allowed to inherit land because the marriage was in violation of the anti-miscegenation law); Eggers v. Olsen, 104 Okla. 297, 231 P. 483 (1924) (Decedent's marriage was void under the (now unconstitutional) anti-miscegenation law. Consequently, her putative husband acquired no interest in her land when she died intestate, so he could not convey title.).

Cases finding no right to dower include: Bonham v. Badgley, 2 Ill. 622 (2 Gilm. 1845); Adkins v. Holmes, 2 Ind. 197 (1850); McAulley v. Scheibley, 109 Ky. 455, 59 S.W.2d 498 (1900); Donnelly v. Donnelly's Heirs, 47 Ky. (3 B. Mon.) 113 (1847).

Cases holding that where a marriage is merely voidable, dower exists until the marriage is annulled include: De France v. Johnson, 26 F. 891 (C.C.D. Minn. 1886); Higgins v. Breen, 9 Mo. 497 (1845); Bell v. Littlep, 189 N.Y.S. 935 (Sup. Ct. 1921), modified on other grounds, 204 A.D. 235, 197 N.Y.S. 674 (1922).


Cases disallowing alimony include: Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937) (putative spouse has no right to an allowance of alimony); Millar v. Millar, 175 Cal. 797, 167 P. 394 (1917); Taylor v. Taylor, 7 Colo. App. 549, 44 P. 675 (1896) (plaintiff wife not entitled to alimony, suit costs, or counsel fees because she contended that there was no valid marriage; marriage is a prerequisite to such an award); Methvin v. Methvin, 15 Ga. 97 (1854) (alimony allowed only when the husband was estopped to deny the validity of the marriage); Fuller v. Fuller, 33 Kan. 582, 7 P. 241 (1885); Strode v. Strode, 66 Ky. (3 Bush) 227 (1867) (no alimony unless husband is estopped to deny the validity of the marriage); Sinclair v. Sinclair, 57 N.J. Eq. 222, 40 A. 679 (1893); Stewart v. Vandervort, 34 W. Va. 524, 12 S.E. 736 (1890). In England, alimony has long been allowed after nullity if the marriage is voidable, but not if it is void. Brown v. Brown, 13 B.C. 73 (1907).


Cases disallowing division of property accumulated during the null marriage include: Uhl v. Uhl, 52 Cal. 250 (1877) (no property rights founded on or growing out of an illegal marriage); Taylor v. Taylor, 7 Colo. App. 549, 44 P. 675 (1896); Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900); Adams v. Holt, 214 Mass. 77, 100 N.E. 1088 (1913) (denying putative wife compensation for services rendered); Sortore v. Sortore, 70 Wash. 410, 126 P. 915 (1912) (denial of right to community property); see also sections V-VI infra. But see Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898) (quasi-partnership theory used to allow a division of property).

Cases disallowing legitimization of children include: People v. Meredith, 272 A.D. 79, 69 N.Y.S.2d 462, aff’d, 297 N.Y. 692, 77 N.E.2d 8 (1947) (child born out of wedlock is not
do not flow from a marriage which is null. Thus, for example, if the results are consistent with the concept of nullity, a minor party to the null marriage would not be emancipated; no marital property regime would ever exist; all donations in contemplation of marriage should be null, as well as all donations in or since the marriage contract that were made to the party as spouse; children of the couple born during the null marriage would be illegitimate; children of the couple who would have been legitimated by the marriage have not been legitimated; neither “spouse” has a right to workers’ compensation or a wrongful death action through the other; and neither spouse would have a right to the marital portion of the other’s estate.\(^8\)

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legitized by a subsequent marriage under the New York statute because the statute contemplates a valid marriage).


Cases finding no termination of rights when a valid remarriage would terminate those rights include: Folsom v. Pearsall, 245 F.2d 562 (9th Cir. 1957); Cottam v. City of Los Angeles, 184 Cal. App. 2d 523, 7 Cal. Rptr. 734 (1960) (remarriage terminates police widow’s pension rights, but a void remarriage does not terminate those rights); Reese v. Reese, 192 So. 2d 1 (Fla. 1966) (bigamous second marriage was void and had no effect on pre-existing alimony rights); Johnson County Nat’l Bank & Trust Co. v. Bach, 189 Kan. 291, 369 F.2d 231 (1962) (void remarriage did not affect trust arrangement made pursuant to wife’s previous divorce).

Cases disallowing social security benefits include: Woodson v. Schweiker, 656 F.2d 1169 (5th Cir. 1981) (“deemed” widow may receive benefits only after the legal widow has become ineligible); Burnette v. Schweiker, 643 F.2d 1168 (5th Cir. 1981) (“deemed” or putative widow’s benefits would be allowed, but would terminate once the legal widow applies for them); Yeager v. Flemming, 282 F.2d 779 (5th Cir. 1960) (marriage erased and had no status, as if it had never been); Lugot v. Harris, 499 F. Supp. 1118 (D. Nev. 1980); Carter v. Califano, 473 F. Supp. 517 (W.D. Pa. 1979); Woodson v. Califano, 455 F. Supp. 457 (S.D. Tex. 1978); Visconti v. Secretary of HEW, 374 F. Supp. 1272, 1275 (W.D. Pa. 1974) (social security benefits awarded to the legal widow of decedent rather than to his second good faith wife when decedent’s first marriage had never been dissolved, because Pennsylvania law did not make the second (putative) wife decedent’s heir); Cammerota v. Secretary of HEW, 329 F. Supp. 1087 (N.D.N.Y. 1971) (first wife (legal wife) became the “widow” for social security benefits when she applied, outranking the putative spouse); Holland v. Ribicoff, 219 F. Supp. 274, 277 (D. Or. 1962) (“This declaration and decree of the Oregon court fixes plaintiff’s status as having never been married to Thompson [second marriage] and is binding upon the Secretary and this Court.” Void marriage does not terminate party’s social security benefits based on previous marriage.); Sparks v. United States, 153 F. Supp. 909, 911 (D. Vt. 1957) (annulment establishes that second marriage never existed). See generally R. PASCAL & K. SPARTH, supra note 5, at 251-59; Note, Marriage—Putative Wife’s Property Rights on Annulment, 17 GEO. L.J. 60 (1928).

8. R. PASCAL & K. SPARTH, supra note 5, at 251-52; see also cases cited supra note 6. These and other civil effects as well as their availability under the putative spouse doc-
The putative marriage doctrine is a device developed to ameliorate or correct the injustice which would occur if civil effects were not allowed to flow to a party to a null marriage who believes in good faith that he or she is validly married. A putative marriage, therefore, is a marriage which is in reality null, but which allows the civil effects of a valid marriage to flow to the party or parties who contracted it in good faith. Its marriage which has been solemnized in proper form and celebrated in good faith by one or both parties, but which, by reason of some legal infirmity, is either void or voidable. The doctrine developed as a canon law palliative to protect those persons who went through a marriage ceremony in the good faith belief that the marriage was valid and proper, when it was actually null due to some impediment. It provides that, notwithstanding its nullity, the civil effects of a legal marriage flow to the parties who, in good faith, contract an invalid marriage.

The French scholar and jurist Marcel Planiol thus defined
the putative marriage doctrine and described its purpose:

[It is] recognized that the null marriage, contracted in good faith, produces its effects, as if it had been valid until the judicial sentence declares it to be null. The sentence terminates the marriage, as would a divorce. The marriage henceforth produces no effect. But those it had produced subsist [...] In other words, on account of the good faith of the parties, the nullity takes place without retroactivity. Such a marriage is called a putative marriage (putativus, deemed to be what it is not). 14

In 1978, a federal district court in Louisiana similarly defined the doctrine and expressed its purpose and underlying rationale:

A marriage contracted when one spouse is a party to a previously undissolved marriage is absolutely null; however, equity demands that innocent persons not be injured through an innocent relationship. Natural law and reason will protect innocent persons so long as they deserve or need the protection of the law. Once the need or the reason for a protection ceases to exist, natural law no longer should extend its shield. 15

The classic putative marriage doctrine derives from canon law and has no Roman source. It is generally considered to have developed solely in so-called “civilian” or civil code jurisdictions (France and Spain, for example). However, in reality, the doctrine existed, at least with regard to the issue of legitimacy, in early English family law as well. There is therefore an historical basis for its adoption in common-law jurisdictions. 16 During the twelfth, thirteenth, and fourteenth centuries, canon law and the law of the land in England held that some civil effects of a marriage obtained, even though a marriage was null due to impedi-

ments such as consanguinity or a preexistent valid marriage. If the parents of a child had entered into a marital union which was null for some reason, although solemnized with the rites of the church, and if, at the time of the child’s conception, one or both of the parents had a good faith belief that there was no impediment to the marriage, the child was considered legitimate. Even though there was no legally valid marriage, at least that civil effect of a valid marriage flowed to the good faith party or parties and their children. Pollock and Maitland report Bracton’s knowledge of this principle:

[He] wrote it down as an indubitable part of English law. In a passage which he borrowed from the canonist Tancred, he holds that there can be a putative marriage and legitimate offspring even when the union is invalid owing to the existence of a previous marriage. “If a woman in good faith marries a man who is already married, believing him to be unmarried, and has children by him, such children will be adjudged legitimate and capable of inheriting.”

This is precisely what the classic putative marriage theory provides. Unfortunately, this ameliorative doctrine was lost in later English history.

Generally today, and historically in Spanish, French, and English canon law, the putative marriage doctrine only applies if some sort of attempt at a proper ceremony is undertaken by the parties and one or both “spouses” has a good faith belief that there is no impediment to the marriage. The putative marriage doctrine has been part of the family law of Louisiana from the beginning of western occupation and has been codified in the Louisiana Civil Code since 1808. Articles 117 and 118 of the

17. 2 F. Pollock & F. Maitland, supra note 16, at 375-77.
18. Id.
20. Id. at 377.
22. Succession of Marinoni, 183 La. 776, 164 So. 797 (1935); 1 L. Josserand, Cours de droit positif français n° 858 (1930); 2 M. Planiol & G. Ripert, Traité pratique de droit civil français n° 316 (1926); 1 D. Manresa, Comentarios al Código civil español art. 69 (5th ed. 1924); French and Spanish sources cited in Comment, The Necessity of Ceremony in a Putative Marriage, 10 Tul. L. Rev. 435, 437 nn.11-12 (1936). A detailed discussion of this requirement is presented in section III, infra.
Louisiana Civil Code have provided since that time:

Art. 117. The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith. 23

Art. 118. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage. 24

The French Civil Code more articulately presents the policy which motivates the application of the classic putative spouse doctrine and the equitable analogues which have been developed by states that have not formally adopted the doctrine. Articles 201 and 202 of the French Civil Code provide:

Article 201. The marriage which has been declared null nonetheless produces its effects in relation to the spouses when it has been contracted in good faith. If good faith exists only on the part of one of the spouses, the marriage only produces its effects in relation to this spouse. 25

Article 202. The marriage also produces its effects in relation to the children despite the fact that neither spouse was in good faith. Questions of their custody are ruled upon as in matters of divorce. 26

From as early as 1820, the Louisiana courts, in keeping with the codal requirement, have held that a woman who has had a good faith belief that she was legally married to her “spouse,” although in reality she was not, is entitled to the “civil effects” of that marriage. The civil effects were deemed to include all the advantages and benefits allowed by law to a lawful wife. 27

The Spanish civil-law rule governing putative marriage also had an impact on Louisiana judicial interpretation of code articles, as well as on the law in other jurisdictions, including Texas and California. In Louisiana, the impact of Spanish doctrine is seen, for example, in relation to termination of the civil effects

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23. LA. CIV. CODE art. 117.
24. Id. art. 118.
25. CODE CIVIL [C. Civ.] art. 201 (France) (author’s translation).
27. Patton v. Cities of Philadelphia & New Orleans, 1 La. Ann. 98 (1846); Clendenning v. Clendenning, 3 Mart. (n.s.) 438 (1825); Fox v. Dawson’s Curator, 8 Mart. 94 (1820). A detailed analysis of the civil effects of a putative marriage will follow in section V, infra.
of a putative marriage. Louisiana jurisprudence provides that
the civil effects cease when good faith ends, in accordance with
Spanish doctrine, rather than at the time the marriage is de-
clared null, as adherence to French doctrine would require.\footnote{28}

Although the Texas legislature abolished Spanish civil law
in 1840,\footnote{29} and although family law (including the putative
marriage doctrine) in Texas had been based upon Spanish-Mexican
law up to that time,\footnote{30} Texas cases after 1840 have continued to
recognize the putative marriage doctrine. The decisions, how-
ever, have not been consistent in their rationale. Although there
has never been any doubt that Texas law provides relief for the
good faith putative spouse, some decisions suggest a continu-
ation of the classic Spanish doctrine\footnote{31} while others reject the clas-
dic doctrine and adopt an equitable equivalent.\footnote{32} Prior to 1840,
and in several later decisions, Texas courts recognized the put-
tative spouse doctrine as fundamental law\footnote{33} born of the Spanish
\textit{Siete Partidas}, which applied throughout Spanish America.\footnote{34}
These courts, applying the classic putative marriage doctrine,
held that the putative spouse is entitled to \textit{all} the incidents and

\footnote{28. R. Pascal \& K. Spaht, supra note 5, at 256. For the French rule, see 1 M.
Planiol, \textit{supra} note 11, n\textsuperscript{0} 110.}

(Gammel 1898).}

\footnote{30. Barkley v. Dumke, 99 Tex. 150, 87 S.W. 1147 (1905).}

\footnote{31. \textit{See} Smith v. Smith, 1 Tex. 621 (1847); Barkley v. Dumke, 99 Tex. 150, 87 S.W.
1147 (1905) (dictum); cases cited \textit{infra} notes 34-35.}

\footnote{32. \textit{E.g.}, Routh v. Routh, 57 Tex. 589 (1882) (partnership theory applied to allow
relief); \textit{see also} Note, \textit{The Rights of Parties to a Putative Marriage in Property Ac-
quired by Their Joint Efforts}, 1 Tex. L. Rsv. 469 (1928).}

\footnote{33. \textit{See} Carroll v. Carroll, 20 Tex. 732 (1858); Lee v. Smith, 18 Tex. 142 (1856);
Smith v. Smith, 1 Tex. 621 (1847); cf. Lee v. Lee, 112 Tex. 392, 247 S.W. 828 (1923);
Barkley v. Dumke, 99 Tex. 150, 87 S.W. 1147 (1905); Routh v. Routh, 57 Tex. 589 (1882)
(partnership theory applied in dictum); Davis v. Davis, 507 S.W.2d 841, 844 (Tex. Civ.
App. 1974), \textit{rev'd on other grounds}, 521 S.W.2d 603 (Tex. 1975); Rey v. Rey, 487 S.W.2d
245 (Tex. Civ. App. 1972); \textit{see also} Tex. Prob. Code Ann. \S\ 42(c) (Verdon 1980); Tex.
Fam. Code Ann. \S\ 2.01 (Vernon 1975); 1 Speer's Marital Rights in Texas \S\ 56 (E.
Oakes 4th ed. 1961); Note, \textit{supra} note 32.}

\footnote{34. 1 \textit{The Laws of Las Siete Partidas Which are Still in Force in the State of
Louisiana} partida 4, tit. XIII, law 1 (L. Moreau Lislet \& H. Carleton trans. 1820). \textit{Las
Siete Partidas} were long in effect in Mexico and what is now Louisiana, Florida and
Texas, as well as much of the southwestern United States. For a discussion of the impact
of Spanish law on law in the United States, see Schlesinger, \textit{Comparative Law} 11
nn.31-36 (3d ed. 1970); E. Van Kleffens, \textit{Hispanic Law Until the End of the Middle
Ages} 266-77 (1963); Basde, \textit{The Form of Marriage in Spanish North America}, 61 Cor-
nell L. Rev. 1 (1975).}
privileges pertaining to a lawful marriage.\textsuperscript{35} Certainly, \textit{Las Siete Partidas} provided that the putative spouse is so entitled. Three decisions made subsequent to the Act of 1840,\textsuperscript{36} held that the putative spouse doctrine of \textit{Las Siete Partidas} was the applicable law. These decisions, however, related to marriages which had occurred prior to 1840, when Texas abolished the Spanish-Mexican law. The Act of January 20, 1840,\textsuperscript{37} which adopted the common law for Texas, stated that the rights of parties married in Texas prior to its passage "shall be regulated by the law as it aforesaid was."\textsuperscript{38} Thus, although the Spanish-Mexican law was the appropriate law to apply in those cases, the decisions do not answer the question of whether the complete classic putative spouse doctrine should apply to null marriages contracted after 1840. Some subsequent Texas decisions held that, after 1840, equity was necessary to provide the putative spouse with the incidents of marriage; the putative spouse doctrine was no longer a matter of substantive law, but a remedy in equity. Furthermore, the courts reasoned that since the putative marriage doctrine was now an equitable matter, all of the court effects of marriage no longer automatically flow, but the courts can equitably pick and choose.\textsuperscript{39} However, the syllabus to a 1905 decision of the Texas Supreme Court states:

\begin{itemize}
\end{itemize}


36. Carroll v. Carroll, 20 Tex. 732 (1858); Lee v. Smith, 18 Tex. 142 (1856); Smith v. Smith, 1 Tex. 621 (1847).


38. \textit{Id.; see also} Note, supra note 32, at 469-71.

Under the act of January 20, 1840, entitled “An act to adopt the common law of England, to repeal certain Mexican laws, and to regulate the marital rights of parties,” the body of which is, with reference to married persons, inconsistent with the rules of common law, and conformable in the main to the Spanish law, the common-law rule declaring void the marriage of a woman to a man who is under the impediment of a prior existing marriage does not apply to a woman who contracts the marriage in good faith and without knowledge of the impediment, but so long as she continues to act innocently she has as to property aquired during that time, the rights of a lawful wife, and the corresponding obligations, and power to convey, with the consent of her supposed husband, and notwithstanding her infancy, her separate property.\textsuperscript{40}

Finally, in 1975, the Texas Supreme Court definitively ruled that a putative spouse has the right to all the incidents of a legal marriage, at least insofar as property division is concerned.\textsuperscript{41} Thus, although the Act of 1840 abolished Spanish law in Texas to follow the common law of England, it may not have abrogated the doctrine of putative marriage, which continued in the Spanish civil-law tradition. Nevertheless, certain benefits, such as workers’ compensation benefits, do not flow to the putative spouse in Texas.\textsuperscript{42}

In California, putative marriage has also been preserved in the law, although the cases refer to equity and fundamental fairness as their foundation, rather than to California’s Spanish legal heritage.\textsuperscript{43} While not acknowledging the impact of California’s Spanish heritage on the doctrine, the decisions which establish the effects of putative marriage clearly reflect Spanish

\textsuperscript{40} Barkley v. Dumke, 99 Tex. 150, 87 S.W. 1147, 1147 (1905).

\textsuperscript{41} Davis v. Davis, 521 S.W.2d 603 (Tex. 1975), rev’d 507 S.W.2d 841 (Tex. Civ. App. 1974). See section V infra for a more detailed analysis of the civil effects of the putative marriage laws of Texas and other states.

\textsuperscript{42} See supra note 39.

influence. The California Civil Code has recognized the doctrine since 1969. Code sections 4452 and 4800 provide for equal division of property, and California case law allows all the other incidents of marriage available under the Spanish putative marriage rule.

II. RECOGNITION OF THE DOCTRINE OF PUTATIVE MARRIAGE OR AN ANALOGUE

Historically, the courts of many states in the United States have recognized the putative marriage doctrine or an analogue thereof. Several other states have explicitly adopted all or part

44. CAL. CIV. CODE §§ 4452, 4800 (West 1984); see, e.g., cases cited supra note 43. The California putative spouse doctrine and its civil effects will be discussed in detail in sections V and VI, infra.

45. These sections provide:

§ 4452. Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed “quasi-marital property.” If the court expressly reserves jurisdiction, it may make the property division at a time subsequent to the judgment.

§ 4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally.


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of the doctrine by statute.\textsuperscript{47}

The approach and rationale in adopting the putative spouse doctrine has usually been similar to that taken by the State of Washington.\textsuperscript{48} In the early twentieth century, the Supreme Court of Washington stated:

Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marriage state pursuant to any ceremony or agreement recognized by the law of the place, which marriage would be legal except for the incompetency of the man which he conceals from the woman, a

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status is created which will justify a court in rendering a decree of annulment . . . and . . . awarding to the innocent, injured woman such proportion of the property as, under all the circumstances, would be just and equitable.49

Subsequent cases further defined this doctrine to allow the innocent party to retain one-half the property acquired through the joint efforts of the parties during the invalid marriage.50 The Washington courts supported these holdings by applying a partnership theory to property acquired during a putative marriage.51 The “partnership—joint effort” theory, however, was not expanded to include all community property, so Washington has not adopted the “pure” or “classic” putative spouse doctrine which would divide the property and provide other civil effects of marriage in precisely the same manner as a legal marriage.52 The Washington Supreme Court has specifically stated that “property acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and, in the absence of some trust relation, belongs to the one in whose name the legal title to the property stands.”53 However, in the same case the court recognized in dictum an equitable “joint-effort” theory which would allow an innocent good faith spouse to recover certain property acquired during the “marriage.” Indeed, subsequent cases have recognized a broad range of equitable principles available to provide equitable distribution of property.54

Oklahoma, a non-community property state, provides another example of an analogue to the putative spouse doctrine established through case law. In 1920, the Supreme Court of

50. Knoll v. Knoll, 104 Wash. 110, 176 P. 22 (1918); In re Estate of Brenchley, 96 Wash. 223, 164 P. 913 (1917).
52. For a discussion of the impact of the putative marriage doctrine and equitable analogues on property acquired during the putative marriage, see section V, infra.
53. Creasman v. Boyle, 31 Wash. 2d 345, 351, 196 P.2d 835, 838 (1948), In re Marriage of Lindsey, 101 Wash. 2d 299, 678 P.2d 326 (1984) (rejecting “Creasman presumption” and adopting a rule of just and equitable division of the property for parties to the so-called “meretricious” relationship, but continuing the refusal to consider the property as community property).
Oklahoma stated that where a “marriage” entered by a party who had a good faith belief that it was valid was found to be void, the court had the power to make an equitable division of the property jointly accumulated by the parties while they lived together as supposed husband and wife.\textsuperscript{55} A more recent Oklahoma decision awarded a good faith spouse in a void marriage a one-half interest in property acquired, partially with her own funds, during the course of the “marriage.”\textsuperscript{56}

Recently, several states have adopted the notion of putative marriage by statute. Perhaps the most striking example is section 305 of the Illinois Marriage and Dissolution of Marriage Act, which provides:

Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited, under Section 212, or declared invalid, under Section 301. If there is a legal spouse or other putative spouse, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance and support rights among the claimants as appropriate in the circumstances and in the interests of justice. This Section shall not apply to common law marriages contracted in the State after June 30, 1905.\textsuperscript{57}

The Illinois act is derived from the Uniform Marriage and Divorce Act section 209, which adopts, and in its comments enthusiastically recommends, adoption of the putative marriage doctrine.\textsuperscript{58} Illinois’ adoption of the putative spouse doctrine abrogated prior Illinois case law which conferred no rights of marriage on any parties to a null marriage, even if they were in good

\textsuperscript{55} Krauter v. Krauter, 79 Okla. 30, 31, 190 P. 1088, 1089 (1920).
\textsuperscript{56} King v. Jackson, 196 Okla. 327, 164 P.2d 974 (1945).
\textsuperscript{57} ILL. ANN. STAT. ch. 40, § 305 (Smith-Hurd 1980) (emphasis added) (footnotes omitted). This section became effective Oct. 1, 1977.
\textsuperscript{58} UNIF. MARRIAGE AND DIVORCE ACT § 209, 9A U.L.A. 116 (1979) commissioners’ note.
faith. The Illinois act has been upheld against the charge that it is unconstitutionally vague.

Similarly, Colorado, Minnesota, and Montana are among the states which have recently adopted the putative marriage doctrine by legislation. The Minnesota statute reads:

Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited or declared a nullity. If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interest of justice.

This statute reversed the long-established case-law rule in Minnesota. The Montana statute is essentially identical to that of Minnesota.

These adoptions of the putative marriage doctrine appar-

59. E.g., Kirkland v. Kirkland, 38 Ill. App. 2d 280, 186 N.E.2d 794 (1962); see also ILL. ANN. STAT. ch. 40, § 305 historical and practical note (Smith-Hurd 1980).
60. In re Estate of Schisler, 81 Ill. App. 3d 280, 401 N.E.2d 301 (1980).
63. E.g., De France v. Johnson, 26 F. 891 (C.C.D. Minn. 1886).
64. The Montana provision reads:
40-1-404. Putative spouse. Any person who has cohabited with another to whom he is not legally married in the good-faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited (40-1-401) or declared invalid (40-1-402). If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.
ently concur with the ancient canon law ethic, repeated by the
European civil codes, by old English family law, by the Louisi-
ana Civil Code, and recently by the Uniform Marriage and Di-

vorce Act, that fairness and equity require that a good faith put-
tative spouse receive the same rights, benefits and prerogatives
as a legal spouse. Specifically, the commissioners' note to the
Uniform Act supports the recommendation to adopt the doc-
trine with a list of purposes and advantages afforded to the
adopting state. Some of the benefits noted are:

(1) to provide legislative foundation for achieving the obviously
just results provided by the putative spouse doctrine; (2) to
spell out specifically the rights conferred upon a putative
spouse; (3) to state specifically when the status of putative
spouse terminates; (4) to eliminate any distinction which some
courts might attempt between prohibited marriages and those
which merely are subject to declaration of invalidity; (5) to
provide specifically for equitable apportionment, . . . either
where there are a legal spouse and a putative spouse, or where
there are several putative spouses.

The primary purpose of the putative spouse doctrine and
its analogues is to aid those persons who have a good faith belief
that they are married, and who, in the absence of a putative
spouse statute, may be denied both the economic and status-re-
lated incidents of marriage.

III. REQUIREMENT OF GOOD FAITH

Good faith is the central element of the putative marriage
document and its common-law counterparts. Good faith consists

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65. This ethic, and its development in the named jurisdictions, is discussed in sec-
tion I, supra.

note; see also Ill. Ann. STAT. ch. 40, § 305 comment, at 98 (Smith-Hurd 1980).

67. A good faith belief that one's void marriage is valid is a prerequisite to receiv-
ing relief via the putative marriage doctrine or to receiving the equitable relief provided
by states that do not recognize the doctrine. The cases cited elsewhere that provide relief
require good faith. See sections I and II, supra, and V, infra; e.g., Powell v. Rogers, 496
F.2d 1248 (9th Cir.) (California and Nevada law), cert. denied, 419 U.S. 1032 (1974); 
Spearman v. Spearman, 482 F.2d 1203 (5th Cir. 1973) (interpreting California law; the 
California test for good faith is an objective one); Fung Dai Kim Ah Leong v. Lau Ah 
Leong, 27 F.2d 582 (9th Cir.) (Hawaii law), cert. denied, 278 U.S. 636 (1928); Holland 
Am. Ins. Co. v. Rogers, 313 F. Supp. 314 (N.D. Cal. 1979) (presumption of good faith); 
Metropolitan Life Ins. Co. v. Spearman, 344 F. Supp. 665, 668 (M.D. Ala. 1972); McPher-
of being “ignorant of the cause which prevents the formation of the marriage or the defects in its celebration which caused its nullity.” It is “an honest and reasonable belief that the marriage is valid and that no legal impediment exists thereto.”

Recent statutes adopting the putative spouse doctrine make the requirement of a good faith belief in the validity of one’s “marriage” abundantly clear. For example, Minnesota’s statute

P.2d 919 (Alaska 1976); Vanover v. Vanover, 496 P.2d 644 (Alaska 1972); Brown v. Brown, 274 Cal. 2d 178, 79 Cal. Rptr. 257 (1969) (good faith is an essential ingredient of the putative marriage); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943); Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 99, 69 P.2d 845, 847 (1937); Flanagan v. Capital Nat'l Bank, 213 Cal. 664, 3 P.2d 307 (1931) (the very basis of a putative marriage is the good faith belief in the validity of the “marriage”); Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911); Marriage of Recknor, 138 Cal. App. 3d 53, 187 Cal. Rptr. 887 (1982); Neureither v. Workmen's Compensation Appeals Bd., 15 Cal. App. 3d 429, 93 Cal. Rptr. 162 (1971) (a putative spouse is one who believes in good faith that she is a party to a valid marriage, even though that marriage is null); Addy 2d v. Board of Admin., Pub. Employees' Retirement Sys., 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970); Brennleck v. Workmen's Compensation Appeals Bd., 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970) (a putative spouse is one who believes in good faith that she is a party to a valid marriage, although it is invalid); Sancha v. Arnold, 114 Cal. App. 2d 772, 777, 251 P.2d 67, 70 (1952); Daniels v. Retirement Bd. of Policeman's Annuity & Benefits Fund, 106 Ill. App. 3d 412, 345 N.E.2d 1276 (1982) (the second “wife” of a deceased policeman was not entitled to receive the policeman's annuity as a putative wife when she knew that the policeman had not divorced his first wife); Sostock v. Reiss, 92 Ill. App. 3d 200, 415 N.E.2d 1094 (1980); In re Schisler's Estate, 81 Ill. App. 3d 280, 401 N.E.2d 301 (1980); Gaithright v. Smith, 368 So. 2d 679 (La. 1979); Succession of Fields, 222 La. 310, 62 So. 2d 495 (1952); Succession of Marinoni, 183 La. 776, 164 So. 797 (1938); Galbraith v. Galbraith, 396 So. 2d 1364 (La. Ct. App. 2d Cir.), writ denied, 401 So. 2d 974 (La. 1981); Schaefer v. Schaefer, 379 So. 2d 884 (La. Ct. App. 4th Cir.), writ denied, 383 So. 2d 13 (La. 1980); In re Koonce, 380 So. 2d 140 (La. Ct. App. 1st Cir. 1979), writ denied, 383 So. 2d 23 (La. 1980); Succession of Zinsel, 360 So. 2d 587 (La. Ct. App. 4th Cir. 1978); Walker v. Walker, 330 Mich. 332, 47 N.W.2d 633 (1951); In re Marriage of Adams, 604 P.2d 332 (Mont. 1979) (good faith did not exist when the spouse in question knew that there was a problem regarding the validity of marriages between first cousins and had means to inquire and discover the law); In re Hall, 61 A.D. 266, 70 N.Y.S. 406 (1901); Cropsey v. Sweeney, 27 Barb. 310 (N.Y. 1858); Dean v. Goldwire, 480 S.W.2d 494 (Tex. Civ. App. 1972) (good faith is essential); Buck v. Buck, 19 Utah 2d 161, 427 P.2d 454 (1967).

68. Succession of Marinoni, 183 La. 776, 798, 164 So. 797, 804 (1935) (quoting 1 M. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, n° 1096 (3d ed.)).

69. Succession of Fields, 222 La. 310, 322, 62 So. 2d 495, 498 (1952); Galbraith v. Galbraith, 396 So. 2d 1364 (La. Ct. App. 2d Cir. 1981) (A marriage which occurs after the oral declaration of one of the “spouse’s” divorce from his prior wife, but before the signing of the judgment is a null marriage. If parties have a good faith belief that their “marriage” is valid, however, it is a putative marriage); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943) (the very basis of a putative marriage is the good faith belief in the validity of the null marriage); Neureither v. Workmen's Compensation Appeals Bd., 15 Cal. App. 3d 429, 93 Cal. Rptr. 162 (1971).
reads:

Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse . . . .

Other putative spouse statutes have the same requirement.

The good faith belief that there is no impediment to one's marriage can be based on either a mistake of fact or of law. The question of the good faith of the belief that the marriage is valid is an issue for the trier of fact, and the fact finder's decision is given great deference. The Louisiana Supreme Court has noted that "what constitutes 'good faith' . . . is not an absolute quality but is relative, and depends ultimately upon the facts and circumstances in each individual case." Intelligence, experience, education, maturity, and linguistic capability are among the characteristics which are important to the issue of whether a person does or does not have a good faith belief that a void marriage is valid. Thus, if the putative spouse is young, naive, and unsophisticated, mere rumor of an impediment may not be sufficient to trigger a duty to investigate or to place that per-

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72. E.g., Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974) (mistake of fact: The parties' marriage was void as bigamous but the claimant did not know of the other wife's existence), noted in Laughran & Laughran, Rights of Putative Spouses in California, 11 Loy. L.A.L. Rev. 45, 49 (1977); Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975) (mistake of law: marriage between first cousins celebrated in Nevada was void as incestuous under Nevada law; there was no indication that the "wife" did not know of the consanguinity); Sancha v. Arnold, 114 Cal. App. 2d 772, 251 P.2d 67 (1952) (common-law marriage did not arise from relationship between parties); see also Kimball v. Folsom, 160 F. Supp. 482, 484 (W.D. La. 1947); Succession of Marinoni, 183 La. 776, 164 So. 797 (1935) (citing French sources); Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S.W. 246 (1902).
son in the status of bad faith. The Louisiana Supreme Court has explained:

It may well be that unconfirmed rumors or mere suspicions may reach a party and such as may even cause some question or doubt to arise as to the validity of a marriage, yet it would appear under our jurisprudence that under certain conditions a party may be in "good faith" so long as no certain or authoritative knowledge of some legal impediment comes to him or her, but to just what extent a party is called upon to make an investigation to ascertain whether there exists any legal impediment to his or her marriage in order to establish his or her status as a putative spouse, will depend ultimately upon the facts and circumstances in each individual case. Our courts have simply said that "a party alleging good faith can not close her ears to information or her eyes to suspicious circumstances. She must not act blindly or without reasonable precautions."

Of course, absence of good faith will preclude enforcement of any of the civil effects of marriage. Thus, when a man and a woman are aware that no legal marriage between them is possible, and enter into a "marriage" ceremony anyway, there is no putative marriage. When the evidence indicates that the consort perceived his or her relationship with the deceased partner in life, not as a marriage but as a satisfactory substitute for marriage, he or she is not a "good faith putative spouse" and has no


76. Succession of Chavis, 211 La. 313, 319-20, 29 So. 2d 860, 862-63 (1947).

77. See section V, infra; see also, e.g., Flanagan v. Capital Nat'l Bank, 213 Cal. 664, 3 P.2d 307 (1931); In re Marriage of Recknor, 138 Cal. App. 3d 539, 187 Cal. Rptr. 887 (1982); Baskett v. Crook, 66 Cal. App. 2d 355, 195 P.2d 39 (1948); Gathright v. Smith, 368 So. 2d 679 (La. 1979); Schaeffer v. Schaeffer, 379 So. 2d 864 (La. Ct. App. 4th Cir.), writ denied, 383 So. 2d 13 (La. 1980) (wife's understanding that her husband's Dominican divorce from his first wife was "clouded" was sufficient to indicate that the second wife did not have good faith belief in the validity of her marriage); Baker v. Baker, 222 Minn. 169, 23 N.W.2d 582 (1946); In re Marriage of Adams, 604 P.2d 332 (Mont. 1979); In re Estate of Sloan, 50 Wash. 86, 96 P. 684 (1909).

valid claim to community property rights. Thus, a person claiming putative spouse status who was aware that her "husband's" foreign divorce from his first wife was "clouded," but who, nevertheless, married him before he obtained a valid Louisiana divorce, was held not to have a good faith belief in the validity of the marriage.

A party claiming a good faith belief that his or her null marriage is valid must not have closed his or her eyes or mind to suspicious circumstances. If such circumstances have come to the innocent spouse's attention, he or she must have made a reasonable investigation, or have taken reasonable precautions to determine the validity of the marriage, or he or she will be deemed to have lost the good faith belief. All United States jurisdictions which recognize the putative marriage doctrine or an analogue have adopted the Spanish view of the doctrine which provides that civil effects cease to flow to the good faith putative spouse once he or she has acquired knowledge of the cause of nullity or obtained enough evidence to require investigation and has failed to investigate.

On the other hand, courts often appear to go to great lengths to find good faith. For example, good faith was found to exist when the woman claiming putative spouse status relied on a divorce judgment that her husband had obtained fraudulently, as long as she "had no personal knowledge" that it had been procured through fraud. The Louisiana Supreme Court has refused to impute knowledge of divorce law to the "spouse" claim-

83. Succession of Pigg, 228 La. 799, 806, 84 So. 2d 196, 198 (1955) (wife knew that husband had been married to a woman who was institutionalized in a mental hospital, and she may have been aware that divorce was not possible).
ing good faith. 84

Any doubts on the issue of good faith are to be resolved in favor of good faith. 85 "[G]ood faith is presumed to exist in favor of a party claiming to be a putative spouse who, free of [his or] her own impediment, enters into the marriage and the burden of proving the lack of good faith is upon the party attacking the marriage." 86 The presumption of good faith, however, is generally denied to the party who has the impediment of a pre-existing valid marriage in his or her background. 87 Thus, once a prior marriage is shown, and the party claiming the existence of a putative marriage is aware of the previous marriage, the burden of proving good faith shifts. 88

IV. REQUIREMENT OF A CEREMONY

A. Putative Ceremonial Marriage

The traditional notions of protecting the putative spouse require that some sort of ceremony take place in order for a putative marriage to exist. 89 An exception to this general rule is

86. Succession of Zinsel, 360 So. 2d 587, 592 (La. Ct. App. 4th Cir. 1978).
88. Id. at 683; Lands v. Equitable Life Assur. Soc'y, 239 La. 782, 120 So. 2d 74 (1960).
89. For the civilian doctrine, see 1 M. PLANIOL, supra note 11, n° 1107; Succession of Rossi, 214 So. 2d 223 (La. Ct. App. 4th Cir.), writ refused, 253 La. 66, 216 So. 2d 309 (1968).

Non-civilian jurisdictions also generally require a ceremony before the putative spouse is protected. See, e.g., Hager v. Hager, 553 P.2d 919 (Alaska 1976); Vanover v. Vanover, 436 P.2d 644 (Alaska 1972); Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (1920); Poole v. Wilber, 95 Cal. 339, 30 P. 548 (1892) (alimony provided by analogizing to divorce proceedings); Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); Estate of Long, 198 Cal. App. 2d 732, 733, 18 Cal. Rptr. 105 (1961) (must be solemnized in due form and celebrated in good faith); Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624, cert. denied, 342 U.S. 878 (1951); see also cases and discussion supra note 46. But see Sancha v. Arnold, 114 Cal. App. 2d 772, 251 P.2d 67 (1952) (The court recog-
found in those states which recognize common-law marriage.⁹⁰ The European sources of the doctrine clearly require a ceremony,⁹¹ and the Louisiana Civil Code also appears to require one:

Art. 117. The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.⁹²

Art. 118. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.⁹³

In 1935, the Louisiana Supreme Court seemingly abolished the traditional requirement of a ceremony in Succession of Marinoni.⁹⁴ There was no doubt that the wife in the Marinoni case had a good faith belief that she was married to Mr. Marinoni, a prominent member of the New Orleans Bar. Mrs. Marinoni was a minor and an orphan at the time of her “marriage” to Mr. Marinoni. She was also a recent immigrant from Italy who was unable to read English. She understood very little spoken English and was unfamiliar with American culture, custom, and law. Thus, when Mr. Marinoni advised her that their having obtained a marriage license in Biloxi, Mississippi was sufficient to render them husband and wife in the United States, she did not doubt him. The Louisiana Supreme Court held that these facts established a putative marriage, although clearly no marriage ceremony of any kind ever took place. A vigorous dissent argued that relevant legal tradition⁹⁵ as well as the use of the term “contracted” in Civil Code article 117, interpreted in light of the terms “celebrated” in article 110 (relating to nullity) and “con-

⁹¹ See C. Civ. arts. 63-65, 70-76, 165-171 (France).
⁹³ Id. art. 118.
⁹⁴ 183 La. 776, 164 So. 797 (1935).
⁹⁵ See C. Civ. arts. 201-202 (France); 1 M. Plainol, supra note 11, n°8 1096, 1100, 1101.
tracted” in article 112 (concerning the marriage of minors), makes it clear that a ceremony is required for a putative marriage to be recognized.86 Nevertheless, the “marriage” was held to be putative by the majority and the civil effects (here, legitimacy of the child and its right to inherit as a legitimate child) obtained.87 In 1968, the Louisiana Fourth Circuit Court of Appeals limited the Marinoni decision to its facts and held that, in any other fact situation, “there can be no putative marriage in the absence of a marriage actually contracted but illegal or null.”88 The requirement has not since been challenged.

Some jurisdictions which have promulgated new putative marriage statutes have not required a ceremony.89 In addition, some courts have softened the requirement in order to protect the reasonable expectations of the parties.

B. Putative Common-Law Marriage

Obviously, civil law systems such as Spain, France, Quebec, and Louisiana (in so far as its private civil law is concerned) do not recognize common-law marriage.100 The requirement of a ceremony for a putative marriage is consistent with this refusal to recognize common-law marriage. Thus, most states that do not recognize common-law marriage require a marriage ceremony as a prerequisite to a putative marriage.101

96. Marinoni, 183 La. at 817-19, 164 So. at 811 (Odom, J., dissenting).
97. Id. at 806, 164 So. at 807.
101. This is true, even though the so-called common-law marriage actually derived from canon law informal marriage per verba de praesenti and per verba de futuro. See P. Bromley, Family Law 26-29 (4th ed. 1971).
102. See, e.g., cases cited supra note 46. Some states have rejected common-law marriage but nevertheless recognize a given common-law marriage (or, presumably, a putative common-law marriage) if it has been contracted in a state which recognizes common-law marriage. E.g., Dennis v. Railroad Retirement Bd., 585 F.2d 151 (6th Cir. 1978); Delaney v. Delaney, 35 Conn. Supp. 230, 405 A.2d 91 (1979); Enis v. State, 408 So. 2d 486 (Miss. 1981); In re Estate of Lamb, 99 N.M. 157, 655 P.2d 1001 (Sup. Ct. 1982); Estate of Bivians, 98 N.M. 722, 652 P.2d 744, 748 (Ct. App. 1982); Mott v. Duncan Pe-
When Illinois statutorily adopted the putative marriage doctrine, it provided that it apply only to persons “having gone through a marriage ceremony . . . in the good faith belief that [they were] married.”102 The Illinois legislature included the requirement of a ceremony to promote the public policy of “not recognizing common law marriage and of strengthening and preserving the integrity of marriage.”103 The Uniform Marriage and Divorce Act, however, does not call for a ceremony,104 and neither do the Minnesota and Montana statutes.105

Texas provides an interesting example of a state with a Spanish heritage which, since 1840, has also recognized common-law marriage and for that reason equivocated for a time on the issue of the requirement of a ceremony. In 1840, after the independence of Texas from Mexico, the Texas legislature promulgated “An Act to Adopt the Common law of England, to Repeal Certain Mexican Laws and to Regulate Certain Marital Rights . . . .”106 Since that time, Texas has recognized com-
mon-law marriage,\textsuperscript{107} which by definition requires no ceremony. If common-law marriage is recognized and people are legally married without a ceremony, one would think that, if the putative marriage doctrine were recognized at all, it would apply to good faith (but defective) common-law marriages. Nevertheless, for a time there was confusion in Texas jurisprudence as to whether or not a ceremony should be required for a putative marriage. This confusion apparently arose from the Spanish heritage of Texas and its partial repudiation of that heritage in 1840.

The Spanish putative marriage rule requires a ceremony, and the Texas notion of putative marriage evolved from that rule.\textsuperscript{108} Thus, in the 1942 case of \textit{Papoutsis v. Trevino},\textsuperscript{109} it was held that Texas law required a ceremony in order to trigger the putative marriage doctrine even though Texas also recognized common-law marriage. Eight years later, however, this requirement was repudiated,\textsuperscript{110} and it is now clear that a putative marriage in Texas may be of either the ceremonial or common-law type.\textsuperscript{111} \textit{Papoutsis v. Trevino} was based on an 1846 decision\textsuperscript{112} that referred to a pre-1840 "marriage," and was decided under the Spanish/Mexican rule of \textit{Las Siete Partidas} requiring a ceremony, because the Act of 1840 provided that marriages which had taken place prior to its promulgation would be governed by the law which obtained at the time of the marriage.\textsuperscript{113} Thus, the pure civilian or Spanish/Mexican putative spouse doctrine (without the common-law marriage overlay) was correctly applied in the 1846 decision, but incorrectly relied upon in 1942.\textsuperscript{114}

The general rule in the United States today appears to be that the putative spouse doctrine and its common-law counterparts require a ceremony if common-law marriage is not recog-

\begin{itemize}
\item \textsuperscript{108} See, e.g., Barkley v. Dumke, 99 Tex. 150, 87 S.W. 1147 (1905); Davis v. Davis, 521 S.W.2d 603 (Tex. 1975); see also sections I, supra, and V, infra.
\item \textsuperscript{109} 167 S.W.2d 777 (Tex. Civ. App. 1942).
\item \textsuperscript{110} Hupp v. Hupp, 235 S.W.2d 753 (Tex. Civ. App. 1953).
\item \textsuperscript{111} Davis v. Davis, 521 S.W.2d 603 (Tex. 1975); Rey v. Rey, 487 S.W.2d 245 (Tex. Civ. App. 1972); Whaley v. Pest, 377 S.W.2d 855 (Tex. Civ. App. 1964).
\item \textsuperscript{112} Smith v. Smith, 1 Tex. 621 (1846), discussed in section I, supra notes 31-36 and accompanying text, and section VI, infra.
\item \textsuperscript{113} Act of Jan. 20, 1840, supra note 29; see also sections I, supra, and VI, infra.
\item \textsuperscript{114} See Hupp v. Hupp, 235 S.W.2d 753 (Tex. Civ. App. 1953) (referring to earlier decisions).
\end{itemize}
nized either in the state's substantive marriage law or its conflicts of law rule. If, on the other hand, common-law marriage is recognized, the putative spouse doctrine or its equivalent will not require a ceremony. There are exceptions to this rule and the majority view may change as states begin to adopt the putative marriage doctrine as articulated in the Uniform Marriage and Divorce Act. Some states have abrogated the requirement of a ceremony without adopting the putative marriage portion of the Uniform Marriage and Divorce Act. For example, although New Jersey does not recognize common-law marriage, workers' compensation benefits have been approved for a good faith putative spouse even though no actual ceremony ever occurred. The New Jersey Supreme Court held that a devout, but perhaps somewhat naive, Catholic woman had a right to receive workers' compensation benefits because she believed she was married after her priest told her that she and her "husband" were "already married in the eyes of God." This woman had once been married to the husband in question, but had been divorced from him for several years by the time of the action. When the couple decided to re-marry, they went to their parish priest, who gave them the above-noted advice. The court held:

Solemity, publicity, and deliberation distinguish a legitimate marriage ceremony from an illegitimate common law union. Inherent in the common law marriage are a non-recognition of the legal process, and a lack of commitment which often gives rise to an impermanent and ephemeral arrangement, such that economic support, let alone dependency, may be withheld randomly. The union, which in the eyes of the public remains an uncertainty, may dissolve at any time. Such a couple may not both use an identical surname, file joint tax returns, or be deemed an entity for census-taking, welfare or social security eligibility. . . . The Legislature and this Court have both declared that common law marriages are prohibited.

. . . She had sufficient knowledge that the first ceremony performed by the priest was legally sanctioned. She had little reason to believe differently this time when informed that her

118. Id. at 160, 313 A.2d at 609.
marriage was still recognized "in the eyes of God." . . . To all parties concerned, it was tantamount in both tenor and spirit to a veritable ceremony. Hence a re-affirmance of the earlier marriage was effectuated.\footnote{119}

V. CIVIL EFFECTS

A null marriage produces no civil effects. It is as if no marriage at all has taken place.\footnote{120} In contrast, a good faith putative marriage or equitable analogue produces, depending on the law of the state involved, all or some of the civil effects of a legal marriage.

Louisiana Civil Code articles 117 and 118 are an example of the classic civil-law putative marriage doctrine. These articles provide that a marriage which has been declared null nevertheless produces its civil effects for the good faith party or parties and for their children.\footnote{121}

In 1973, the Louisiana Supreme Court listed civil effects which flow from a classic civil code putative marriage:\footnote{122}

The jurisprudence has declared the following to be civil effects

\footnote{119. Id. at 163-64, 313 A.2d at 611-12 (citations omitted).}
\footnote{120. E.g., Kirkland v. Kirkland, 38 Ill. App. 2d 380, 186 N.E.2d 794 (1962); Succession of Barth, 178 La. 847, 852, 152 So. 2d 543, 544 (1934); Cortes v. Fleming, 307 So. 2d 611, 613 (La. 1973). The Louisiana civil law makes absolutely no provision for recognizing or enforcing the normal effects of a "marriage" when that marriage is null except pursuant to La. Civ. Code arts. 117 and 118, the articles relating to putative marriage. See R. PASCAL & K. SPAHT, supra note 5, at 251-52; see also supra note 4.}
\footnote{121. Theoretically, the finding of nullity relates back to the date that the null marriage was entered. However, courts have sometimes refused to apply the "relation back" fiction when it would not fulfill substantial justice. If the relation back fiction would harm a party without benefitting some other substantial interest, such as protecting children of a marriage, the courts may not apply it. See, e.g., Sefton v. Sefton, 45 Cal. 2d 872, 291 P.2d 439 (1955); Kelly v. Kelly, 350 So. 2d 11 (Fla. Dist. Ct. App. 1977); Flaxman v. Flaxman, 67 N.J. 458, 273 A.2d 567 (1971); Gaines v. Jacobson, 308 N.Y. 218, 124 N.E.2d 290 (1954).

Courts similarly allow a presumption of the validity of the second (possibly bigamous) marriage in order to fulfill substantial justice. E.g., Yarbrough v. United States, 341 F.2d 621 (Ct. Cl. 1965); Wilson v. Wilson, 1 Ariz. App. 77, 399 P.2d 698 (1965); Parker v. American Lumber Corp., 190 Va. 181, 56 S.E.2d 214 (1949).

122. Cortes v. Fleming, 307 So. 2d 611, 613 (La. 1973).}
which flow from putative marriage: the legitimacy of the children\textsuperscript{123} . . . ; the right of the putative wife to claim workmen’s compensation from her husband’s employer\textsuperscript{124} . . . ; the right of the putative wife to her proportionate share of the community property\textsuperscript{125} . . . ; the right of the putative wife to inherit as a wife in the succession of the husband\textsuperscript{126} . . . ; the right of the putative wife to be considered as the “widow” under her husband’s insurance policy\textsuperscript{127} . . . ; the right of the putative wife to the marital portion, when she is otherwise qualified.\textsuperscript{128}

This section will consider these civil effects and how they apply in the various jurisdictions of the United States.

A. *Legitimacy of Children*

Virtually all jurisdictions that recognize the putative spouse doctrine or an analogue to it provide that children of the putative marriage are legitimate.\textsuperscript{129} Some states, due to the constitutionally questionable nature of discrimination against illegitimate children, have eliminated the status of illegitimacy or provided that civil effects such as support and right to inherit flow from the parent-child relationship, whether or not the child is legitimate.\textsuperscript{130}

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\begin{enumerate}
\item \textsuperscript{123} See Succession of Chavis, 211 La. 313, 29 So. 2d 860 (1947); Succession of Gibson, 186 La. 723, 173 So. 185 (1937); Miller v. Wiggins, 149 La. 720, 90 So. 109 (1921); Texas Co. v. Stewart, 101 So. 2d 222 (La. Ct. App. Orl. 1958).
\item \textsuperscript{126} See Kimball v. Folsom, 150 F. Supp. 482 (W.D. La. 1957); Succession of Navarre, 24 La. Ann. 298 (1872).
\item \textsuperscript{128} Cortes v. Fleming, 307 So. 2d 611, 613 (La. 1973) (citations omitted); see also Smith v. Smith, 43 La. Ann. 1440, 10 So. 248 (1891).
\item \textsuperscript{130} It was also recognized as the law in England at least during the 12th, 13th and 14th centuries. See supra notes 16-19 and accompanying text.
\item \textsuperscript{130} For example, the notion of illegitimacy was abolished in California, effective in
B. Division of Property Acquired During the "Marriage"

The overwhelming weight of authority in the United States provides that a party who believed in good faith that his null marriage was valid has a right to some portion of the property accumulated during the relationship.\textsuperscript{131} This is generally an equal share\textsuperscript{132} or an undivided one-half interest,\textsuperscript{133} although those states which apply an equitable remedy reserve the right to change the formula when equity requires.\textsuperscript{134}

One might expect that the classic putative marriage doctrine would apply in states that, due to their civil-law antecedents, are community property jurisdictions. In reality, Louisiana is the only state that applies the pure or classic putative marriage doctrine, that is, it establishes the same community property regime that exists in a valid marriage rather than an equivalent or analogue. Details of the community property regime vary from state to state. Generally, however, one may say that it provides that all marital property, the acquets and gains acquired during the marriage by the husband and wife and not the separate property of either, is owned in community by both of them. The spouses each have a right to an undivided one-half interest in this community of acquets and gains.\textsuperscript{135}

\textsuperscript{131} A broad spectrum of cases that so hold is presented in section II, supra.

\textsuperscript{132} E.g., CAL. CIV. CODE §§ 4452, 4800 (Deering 1984); In re Marriage of Jafemon, 29 Cal. App. 3d 244, 267-68, 105 Cal. Rptr. 483 (1972).


\textsuperscript{134} Decisions in every jurisdiction except Louisiana and California appear to reserve this right to the courts. See supra note 46 and infra notes 143-53 and accompanying text.

In the classic system, a putative spouse is entitled to the same rights in the community of acquets and gains as a legal spouse; an actual community property regime, not some equivalent or analogue, exists for the putative spouse.\textsuperscript{136} Thus, Louisiana law provides that a putative spouse is a party to the community property regime, just as a legal spouse is. Other community property jurisdictions in the United States which have a very strong Spanish legal heritage, including California and Texas, use equitable notions to divide property after the "dissolution" of a putative marriage. Louisiana, California, and Texas provide a laboratory for study of the confluence of civil and common law. The approach in those states to the division of property provides interesting and practical material for consideration by practicing attorneys, scholars, and legislators faced with the problem in any jurisdiction.

1. California

Notwithstanding its Spanish heritage, no California judicial decision has explicitly embraced the civilian putative spouse doctrine. That is, none has considered it a substantive rather than an equitable doctrine and provided the good faith party with actual community property, rather than "quasi-marital" property.\textsuperscript{137} Of course, the Family Law Act promulgated in 1969\textsuperscript{138} explicitly provides for the putative spouse to have quasi-marital property.\textsuperscript{139} Nevertheless, California's Civil Code and


\textsuperscript{138} Ch. 1608, § 8, 1969 Cal. Stat. 3314 (codified as amended at \textsc{Cal. CIV. Code} §§ 4000-5174 (Deering 1984 & Supp. 1985)).

\textsuperscript{139} \textsc{Cal. CIV. Code} §§ 4452, 4800 (Deering 1974 & Supp. 1985).
case law give precisely the same relief to the putative spouse that the classic doctrine provides.\textsuperscript{140}

California’s putative spouse statute was not promulgated until 1969 and contemplates quasi-marital property, an analogue of community property in a legal marriage, rather than actual community property, as the remedy for the putative spouse.\textsuperscript{141} Nevertheless, a putative spouse, at the annulment of the “marriage,” has a right to the quasi-marital property, which is an equal share or undivided one-half interest of what would have been community property had the marriage been valid.\textsuperscript{142} Under California law, true community property can only exist when there is a legal marriage, so the California courts and legislature analogize to the community property laws to obtain the same result.\textsuperscript{143}

\textsuperscript{140} \textit{Id.} In addition, the California courts and legislation have provided the putative spouse with most, if not all, of the incidents or civil effects of a traditional marriage. For example, it has been held that the putative spouse can sue in quantum meruit for services rendered during the putative marriage, if there is insufficient quasi-marital property to divide. \textit{Lazzarevich v. Lazzarevich}, 88 Cal. App. 2d 708, 200 P.2d 49 (1949); \textit{see also W. Reppy & C. Samuel, supra} note 137, at 336. The putative spouse has the right to alimony, \textit{Cal. Civ. Code} § 4455 (Deering 1984), and to receive workers’ compensation benefits, \textit{Neureither v. Workmen’s Compensation Appeals Bd.}, 15 Cal. App. 3d 429, 433, 93 Cal. Rptr. 162, 165 (1971); \textit{Addudell v. Board of Admin., Pub. Employees’ Retirement Sys.}, 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970); \textit{Brennfeck v. Workmen’s Compensation Appeals Bd.}, 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970). The right to sue for wrongful death obtains for the putative spouse. \textit{Cal. Civ. Proc. Code} § 377 (Deering Supp. 1985); \textit{Kunakoff v. Woods}, 166 Cal. App. 2d 59, 332 P.2d 773 (1958).


It appears clear, however, that the quasi-marital property that is divided at the annulment as if it were community property is not community property during the ongoing putative marriage.\textsuperscript{144} This distinction indicates that, conceptually, California’s system is not the classic or pure civilian putative marriage doctrine, although essentially the same civil effects may flow to the good faith spouse.\textsuperscript{145}

2. Texas

Early Texas law was Spanish, and thus incorporated the classic putative spouse doctrine along with its community property implications. In 1840, much of the Spanish law applicable in Texas was abrogated and the common law of England adopted.\textsuperscript{146} Texas decisions have been inconsistent regarding the extent and nature of the continuation of the putative marriage doctrine. It has been indicated that under the classic doctrine, putative spouses have an undivided one-half interest in the community of acquits and gains acquired during the relationship. There are Texas decisions which so hold for both void and voidable putative marriages.\textsuperscript{147} In 1975, the Texas Supreme Court

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\footnotemark[145] The spouse can even sue in quantum meruit for services rendered during the "marriage" if there is insufficient quasi-marital property to divide. Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 715, 200 P.2d 49, 53 (1948). This is also true in other jurisdictions that have community property systems. See, e.g., W. Reppy & C. Samuel, supra note 137, at 336.

\footnotemark[146] Act of Jan. 20, 1840, supra note 29; see section I, supra.

\footnotemark[147] Lee v. Lee, 112 Tex. 393, 247 S.W. 828 (1923); Barkley v. Dumke, 99 Tex. 150, 87 S.W. 1147 (1905); Carroll v. Carroll, 20 Tex. 731 (1858) (correctly applying Spanish law); Lee v. Smith, 18 Tex. 141 (1858) (correctly applying Spanish law); Smith v. Smith, 1 Tex. 621 (1847) (correctly applying Spanish law); Dean v. Goldwire, 480 S.W.2d 494 (Tex. Civ. App. 1972 writ refused n.r.e.); De Grummond v. Smith, 168 S.W.2d 899 (Tex. Civ. App. 1943); Portwood v. Portwood, 109 S.W.2d 515 (Tex. Civ. App. 1937) (voidable marriage). Lee v. Lee, Carroll, and Lee v. Smith, however, related to marriages that occurred prior to 1840, when Texas abolished the Spanish/Mexican law. Act of Jan. 20, 1840, supra note 29. This Act, which adopted the common law for Texas, stated that the rights of parties married in Texas prior to its passage "shall be regulated by the law as it aforesaid was." Id. at 6, cited in Note, supra note 32, at 470-71. Thus, the Spanish/
held that a putative spouse is entitled to all the incidents and privileges pertaining to a division of property that would flow to parties to a legal marriage.\textsuperscript{148}

On the other hand, several Texas decisions have held that the earnings of a putative spouse are not community property.\textsuperscript{149} These decisions reasoned that because the property acquired during the putative marriage was not true community property, equitable principles would be required to provide relief to the putative spouse(s). A noted judge, lecturing at the University of Texas, stated: "The rights of the putative wife are, in my opinion, correctly made to rest upon the recognition in equity of the results of her labor as contributing to the acquisition of the property."\textsuperscript{150} The courts that rejected the application of community property theory to putative marriage nevertheless gave relief (often the same undivided one-half interest) on the basis of various equitable theories such as implied partnership,\textsuperscript{151} implied joint venture,\textsuperscript{152} or implied tenancy in common.\textsuperscript{153} This is not the approach prescribed by the classic putative marriage doctrine; instead, it is based on thinking stemming from the Anglo-American, rather than the Spanish, legal tradition. Following this equitable approach, Texas courts have not allowed the putative spouse to receive all the rights and benefits that a legal spouse receives. For example, they have refused to allow a putative wife to inherit as heir to her deceased putative husband when his legal wife was still alive.\textsuperscript{154} They have also refused to

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\item Mexican law was the appropriate law to apply. See Davis v. Davis, 521 S.W.2d 603 (Tex. 1975) (discussing the adoption of the common law by statute in Texas).
\item Davis v. Davis, 521 S.W.2d 603, 606 (Tex. 1975).
\item Note, supra note 32, at 471 (quoting B. Tarlton, supra note 39, at 63).
\item Fort Worth & R.G. Ry. Co. v. Robertson, 55 Tex. Civ. App. 309, 121 S.W. 202 (1909). This, in turn, prevents the putative spouse from receiving federal social security benefits.
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approve the right to bring wrongful death actions.\textsuperscript{155}

In 1975, however, the Texas Supreme Court emphatically declared that a putative spouse has the right to \textit{all} the property-related incidents and privileges pertaining to a legal marriage.\textsuperscript{156} Although the court was only considering property division, it suggested the embrace of an equivalent to the classic putative marriage doctrine. Perhaps one can now argue that the classic civilian putative marriage doctrine applies in Texas insofar as marital property is concerned, and thus should be extended to the other rights and benefits that flow from a marriage.

Even in states such as Texas and California that have developed the putative marriage doctrine from their Spanish heritage, and certainly in those states without that heritage, judges trained only in the common law have applied equitable theories to reach a fair result rather than straightforwardly adopting the entirety of the substantive classic putative marriage doctrine.\textsuperscript{157} The results are not necessarily the same, at least with regard to benefits such as social security, wrongful death, and workers’ compensation, which are seen as purely statutory.\textsuperscript{158} The straightforward adoption of the classic doctrine would be better.

3. Other States of Spanish Legal Heritage

In addition to Texas and California, other states of Spanish heritage that have community property systems reject the formal or classic putative marriage doctrine but utilize equitable principles to provide substantially similar relief. The State of Washington, for example, considers property acquired during a relationship that meets the criteria for a putative marriage\textsuperscript{159} to belong at law separately and independently to the party or parties in accordance with the terms of the title document, if there is one, or to the party who paid for or earned it, unless there is

\textsuperscript{155} Id.; see also Texas Employers Ins. Ass’n v. Grimes, 153 Tex. 357, 269 S.W.2d 332 (1954 writ dismissed n.r.e.).

\textsuperscript{156} Davis v. Davis, 521 S.W.2d 603, 606 (Tex. 1975).

\textsuperscript{157} The equitable theories frequently applied include partnership, quasi-partnership, quasi-contract, tenancy in common, and other generally equitable notions. See supra notes 46, 137-42 & 147.

\textsuperscript{158} These benefits and their relationship to the putative spouse doctrine are discussed infra at notes 187-233 and accompanying text.

\textsuperscript{159} I.e., when there is a good faith belief that the marriage is valid. See supra sections I, III.
an actual partnership agreement. However, a Washington court’s inherent powers in equity will allow it, in a putative marriage situation, to make a fair and equitable division and distribution of the couple’s acquisitions in a manner which conforms to what would have been community property had the marriage been legal. Washington decisions have divided the property equally, but the courts reserve their equitable power to do otherwise if required by fairness and justice.

Arizona courts appear to reject any notion that would provide actual community property rights to a good faith party to a null marriage, but apply the equitable remedy of constructive trust to produce similar results. New Mexico law is unclear on this point, but would probably reach the same result.

4. Non-Community Property States

Certainly, states that do not have community property systems cannot adopt the pure or classic civilian putative spouse doctrine, as the latter affords community property rights to the good faith putative spouse. Nevertheless, several states have adopted putative marriage via statutes that provide the good faith party to a null marriage the same “rights conferred upon a legal spouse,” including the apportionment of property. This is the putative marriage doctrine in the common-law setting. In addition, even without a statute, most states apply principles of equity to ensure the fair and equitable distribution of property

162. E.g., cases cited supra note 163; see also W. Reppy & C. Samuel, supra note 137, at 336.
acquired during a relationship to the party or parties having a
good faith belief that their null marriage is valid.\textsuperscript{167}

C. What is Equitable Distribution of Property?

The issue of how to divide marital property poses a problem
when both the good faith putative spouse and a legal spouse are
alive at the time the property must be divided. In community
property states in which the putative spouse has a right to his or
her interest in the community property or an equivalent undi-
vided one-half interest in the same property (quasi-marital
property), difficult questions arise regarding distribution. For
example, are there two communities of acquests and gains, one
belonging to the common spouse and the legal spouse and one
belonging to the common spouse and the putative spouse, or
only one community which must be divided two or more ways?
In which community does the legal spouse have an interest? Has
he or she been married to the common spouse the entire time?
In which community does the putative spouse have an interest?
What if the common spouse only lived with the legal spouse for
a year, and then lived with the putative spouse, albeit in a null
marriage, for thirty years? It has been held that where only one
of the two parties has a good faith belief in the validity of the
putative marriage, that spouse is entitled to an undivided one-
half interest in the property acquired by the joint labor of the
couple during the putative marriage.\textsuperscript{168}

If the legal spouse is still alive, some scholars theorize that
where a putative marriage produces actual community property,
the legal spouse's community property regime has continued
(along with that of the putative spouse) despite the common
spouse's null "marriage" to the putative spouse. In other words,
the legal spouse has an interest in the community property ac-
quired by the putative consort of their common spouse during
the simultaneous existence of the putative and legal mar-
rriages.\textsuperscript{169} However, a strong argument can also be made that in
such a case there are actually two separate communities: one be-

\textsuperscript{167} E.g., cases cited supra note 46.
\textsuperscript{169} Prince v. Hopson, 230 La. 575, 89 So. 2d 128 (1956); Jermann v. Tenness, 39
La. Ann. 1021, 3 So. 229 (1887); R. Pascal & K. Spahn, supra note 5, at 282; Pascal,
tween the legal spouse and the common mate, and one between the putative spouse and the common mate. In this arrangement, each of the separate communities consists of the community property acquired during the terms of one of the respective marriages. The legal spouse and the putative spouse would each receive his or her share of the community property accumulated during their respective marriages.\textsuperscript{170} The determination of which community property belongs to which spouse may have to be decided, not on the basis of the moment of purchase, but on a pro-rata basis of when and how it was paid for. Thus, if a good faith common spouse is the one who actually acquired the property, that property would perhaps rest in both communities. This would require resort to equitable division in every jurisdiction in the United States, as even Louisiana legislation does not contemplate this problem.\textsuperscript{171} Pursuant to this approach, the good faith common spouse could receive one-half of the community acquired during both marriages, with the legal spouse and the putative spouse dividing the other half, or each of the three “spouses” could be given one-third of the whole, or any other equitable distribution could be made.\textsuperscript{172} This problem will not arise in California and other community property states which follow the modern rule that community property does not accumulate when spouses are living separate and apart.\textsuperscript{173}

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\item \textsuperscript{170} See R. Pascal & K. Spahy, supra note 5, at 252-53.
\item \textsuperscript{171} Pascal, Putative Marriage and Community Property, supra note 169, at 303. In Louisiana, La. Civ. Code art. 21 would apply because this circumstance is not contemplated by the legislation. Article 21 reads: “In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.” See also La. Civ. Code arts. 117, 118.
\item \textsuperscript{172} See Prince v. Hopson, 230 La. 575, 89 So. 2d 178 (1956); Poole v. Schrichte, 39 Wash. 2d 558, 236 P.2d 1044 (1951); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908) (analogizing to the community property system, as a true community of acquits and gains does not arise from a putative marriage; thus, the putative spouse does not receive community property but an equitable equivalent). This approach has been applied in California as well. Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). See generally Pascal, Putative Marriage and Community Property, supra note 169, at 304; W. Reppy & C. Samuel, supra note 137, at 339 n.2.
\item \textsuperscript{173} Cal. Civ. Code § 5118 (Deering 1984) provides: “The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.” See also In re Marriage of Baragry, 73 Cal. App. 3d 444, 449, 140 Cal. Rptr. 779, 782 (1977) (“During the period that spouses preserve the appearance of marriage, . . . their earnings remain community property.”); In re Marriage of Fong, 121 Ariz. 298, 304, 589 P.2d 1330, 1336 (Ct. App. 1978) (spouses’ earnings are separate property after the
If the common spouse is not in good faith, it could be argued that he cannot receive the interest in the community property of the marriage which flows to a good faith putative spouse. Thus, property acquired by the bad faith common spouse would be used to satisfy the community property (or equitable equivalent) interests of the legal and putative spouses. Another solution would allow the lawful spouse to receive one-fourth, the putative spouse one-half, and the common spouse one-fourth of the entire community or quasi-marital property.

The very difficult decision of how to distribute property among three (or more) "spouses" is, obviously, best resolved on an ad hoc basis using principles of equity. This is the approach used by the states which have adopted analogues to the putative marriage doctrines. Even Louisiana, the only state which follows the classic civil law putative spouse doctrine, must use this approach when it comes to difficult situations not contemplated by legislation.


174. Pascal, Putative Marriage and Community Property, supra note 169, at 304. This is the Spanish solution, which has been followed in Louisiana. Waterhouse v. Star Land Co., 139 La. 177, 71 So. 358 (1916).

This solution has been contemplated as a possibility in California, to be used depending on the requirements of equity. Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). On the other hand, the California Supreme Court, in Marvin v. Marvin, 18 Cal. 3d 660, 680 n.18, 557 P.2d 106, 120 n.18, 134 Cal. Rptr. 815, 829 n.18 (1976), noted that a bad faith spouse could receive his or her equal share of the quasi-marital property and, in most cases, still not violate the reasonable expectations of the good faith spouse. This suggestion has been criticized in commentary. E.g., Kay & Amyx, Marvin v. Marvin, Preserving the Options, 65 Calif. L. Rev. 937, 949-51 (1977); see also W. Reppy & C. Samuel, supra note 137, at 339.


176. Equity is part of Louisiana's substantive civil law, and is not based upon a separate body of equity law emanating anciently from the Courts of Chancery as in common-law jurisdictions. La. Civ. Code art. 21. For a list of equitable approaches taken by community property and non-community property common-law states, as well as relevant cases, see sections I & II, supra, and section VI, infra.
D. Alimony

There is as yet no definitive answer to the question of whether a putative spouse will receive support after the marriage is determined to be null. Although many states still do not allow an award of support to the good faith putative spouse, the trend in the United States appears to be to allow support when equity requires it in order to enforce the reasonable expectations of the parties.\(^{177}\) Recently, Colorado, Illinois, Minnesota, and Montana legislatively provided the putative spouse with the right to "maintenance following termination of his [putative spouse] status."\(^{178}\) California Civil Code section 4455 provides for payment of support to a good faith putative spouse in the same manner as if the marriage were not null.\(^{179}\) Thus, since the promulgation of the California putative spouse sections in 1969,\(^{180}\) the putative spouse has had the same rights to temporary support or alimony as a legal spouse. The California Supreme Court has even approved permanent support for a good faith putative spouse when there was a suggestion of fraud on the part of the consort in convincing the good faith party to marry him during the interlocutory period when the marriage could not be valid.\(^{181}\) Prior to the promulgation of the putative marriage sections, a good faith putative spouse generally was not entitled to support but was given some protection by the equitable right to recover the reasonable value of services.\(^{182}\) The ra-
tionale for allowing this recovery was that justice and equity would allow the courts to imply a promise on the part of the other consort to provide the good faith spouse with just compensation for his services (quantum meruit).^{183}

Early Louisiana cases provided that alimony was not actually a civil effect of marriage, but was rather a pension arising after dissolution. Thus, it would not flow to a putative spouse.^{184} The Louisiana Supreme Court specifically overruled these cases in 1973, allowing an award of alimony to the good faith putative spouse, at least when the other spouse is in bad faith.^{185} This 1973 Louisiana Supreme Court decision relied on the rationale of an 1891 decision, which had stated:

The words "civil effects" are used without restriction, and necessarily embrace all civil effects given to marriage by the law;

word "support" is now generally used to refer to support of both spouse and children. Cal. Civ. Code §§ 4351, 4357, 4801 (Deering 1984 & Supp. 1985); Luther & Luther, supra, at 322 n.62. Of course, California case law had long recognized the right of the putative spouse to an equitable division of property. For cases in other jurisdictions that also recognize such a right, see Fuller v. Fuller, 33 Kan. 552, 7 P. 241 (1885) (no alimony but division of property); Sanders v. Ragan, 172 N.C. 612, 90 S.E. 777 (1916); Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920); Davis v. Davis, 521 S.W.2d 603, 606-07 (Tex. 1975); see also supra note 46. But see Cooper v. Cooper, 147 Mass. 370, 17 N.E. 892 (1888) (non-marital cohabitant, even having good faith belief that marriage was valid, could not receive pay for services because her intent was to act as wife, not a paid servant; this was not so, however, if fraud on the other party's part was proved); Morin v. Kirkland, 226 Mass. 345, 115 N.E. 414 (1917); Batty v. Greene, 206 Mass. 561, 92 N.E. 715 (1910); Higgins v. Breen, 9 Mo. 293 (1845); Cropsey v. Sweeney, 27 Barb. 310 (N.Y. Sup. Ct. 1858) (same theory as in Cooper, supra).


French law traditionally did not allow alimony to a putative spouse. 1 M. Planhol, supra note 5, n.5^ 1111. This was because, theoretically, the obligation of support is found never to have existed when a marriage is found to be null. Id. There has been debate over the years in France and Louisiana as to whether alimony is a pension, an indemnity, or damages. Cortes and Galbraith discuss these points in detail. The dissent in Cortes argued vigorously that alimony is a pension which never arises in an absolutely null marriage. 307 So. 2d at 317 (Sanders, C.J., dissenting). Presumably, in a putative marriage in which both parties were in good faith and neither was at fault (in terms of one of the types of fault which will prevent the award of alimony, La. Civ. Code arts. 138, 160), alimony would also be allowed in Louisiana.
or, in the language of Marcadé in commenting on the identical article in the French Code, such a marriage, "although actually null, has the same effects as if it were not null,—the ordinary effects of a valid marriage. . . . Every marriage, though invalid, if contracted in good faith, produces the effects of a valid marriage in the interval between the celebration and the judicial declaration of nullity. When once such declaration intervenes, the marriage produces no further effect; but, be it understood, the effects produced remain forever."^{186}

In either the classic civilian system or the other legal systems in the United States, the better approach is to allow alimony or spousal support in the putative spouse setting. Certainly, this approach enforces the reasonable expectations of the parties, and if a legal spouse ought to receive support after dissolution of the marriage, so should the putative spouse.

E. Wrongful Death

Most United States jurisdictions limit the right to bring a wrongful death action to surviving spouses, next of kin, or heirs at law.^{187} Generally, states do not allow actions in wrongful death to accrue to putative spouses. The rationale for not allowing a putative spouse to recover is that the action and remedy are strictly statutory and in derogation of the common law. Thus, they must be strictly limited to listed statutory beneficiaries.^{188}

The current trend, however, may be to allow such actions. California courts have long held that a putative spouse is enti-

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186. Smith v. Smith, 43 La. Ann. 1140, 1149, 10 So. 248, 250 (1891) (quoting 1 V. Marcadé, Explication théorique et pratique du code civil 525 (1884)).


188. E.g., Texas Employers Ins. Ass'n v. Grimes, 153 Tex. 357, 269 S.W.2d 332 (1954). See also the excellent analysis of the wrongful death rationale and of its derogation from the common law, along with the reasons strict construction and limitation are not required by Louisiana law, in Johnson, Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions, 37 La. L. Rev. 1 (1976).
tled to maintain a wrongful death action, because he or she inherits as an heir of the supposed spouse. 189 Indeed, since 1975, California’s wrongful death statute has specifically provided for the putative spouse’s right to recover. 190 Also, several states have passed legislation allowing wrongful death actions to be brought by a putative spouse. 191

Illinois law gives a putative spouse the right to recover in wrongful death only if he or she is “dependent,” or currently in need of support or reasonable necessities. 192 If both the legal and putative spouse are dependent, they should both recover and divide the award equitably. 193 Colorado, Minnesota, and Montana, by legislatively adopting the putative spouse doctrine and providing the putative spouse with all the rights of a legal spouse, allow the wrongful death action. 194 The Louisiana Supreme Court has held that the right to bring a wrongful death action is a civil effect or incident of marriage which flows to a putative spouse. 195 Like a legal spouse, a good faith putative spouse has a right to bring such an action and to recover for the wrongful death of his or her supposed spouse.

It is suggested that the right to bring a wrongful death action ought to be available to putative as well as legal spouses.


If two persons have lived together as husband and wife, and a legal impediment existed to the marriage of either of the persons, their issue and the person that entered the relation in good faith belief that the marriage was lawful are entitled to the same damages in a civil action as though no such impediment existed, when the other of such persons or their issue is injured or dies as a result of the negligent act or omission of another.

The policy consideration of favoring traditional marriage certainly is not promoted by denying this right to putative spouses. Immorality is not promoted by providing protection to tortfeasors who fortuitously kill parties to a null marriage.

The trend extending wrongful death actions to putative marriages clearly has not encompassed parties to a nonmarital relationship where neither party has a good faith belief that they are married. Since the famous California decision of Marvin v. Marvin, however, this expansion is also possible.

F. Workers’ Compensation

States are divided as to whether or not they will allow a putative spouse to recover workers’ compensation. An actually dependent good faith putative spouse will generally receive workers’ compensation for injury to his or her consort without great controversy. In a 1919 decision, California became one of the first states to recognize the right of a good faith putative spouse to recover accident compensation under the Workmen’s Compensation Act of 1917. The California Supreme Court reasoned that the woman was wholly dependent on her “spouse” for support and she had maintained a good faith belief that she was validly married until his demise, thus she had a right to receive the benefits. Today, the California workers’ compensation statute allows recovery for any “dependent good faith member” of the covered person’s “household.”

199. 2 A. Larson, The Law of Workmen’s Compensation § 63.40 (1983); Ritchie v. Katy Coal Co., 313 Ky. 310, 213 S.W.2d 57 (1950); Dawson v. Hatfield Wire & Cable Co., 59 N.J. 190, 280 A.2d 173 (1971). The issue, of course, becomes much more controversial when the party seeking compensation does not have a good faith belief that there was a valid marriage. 2 A. Larson, supra, § 63.40, at 11-20.
provides the putative spouse with the right to recover under its workers' compensation law.203

In Illinois, prior to the 1978 enactment of the putative spouse statute, the right to recover under the workers’ compensation statute depended on “widowhood.” To recover, a person had to prove that a valid marriage existed between her and the covered party. Compensation was based on a husband’s legal obligation to support his wife at the time of the injury which caused his death or incapacity.204 Because recovery was considered a purely statutory remedy, only the legal wife had the right to recover, even if she was not dependent on her spouse at the time of his death.205 Since the promulgation of the putative spouse law in Illinois, a party to a good faith putative marriage has a legal obligation to support his putative spouse as well. Thus, a putative spouse should be able to recover workers’ compensation benefits in the same manner as a legal spouse. If both a legal and a putative spouse are living they should recover according to the degree of their dependency.206 Note that the Illinois statute provides benefits only to the “widow,” although the putative marriage statute is gender-neutral.207 The Illinois Supreme Court has also held that a non-marital cohabitant, as opposed to a putative spouse, has no right to support or even to property division,208 and thus presumably is not covered by the workers’ compensation statute.

Several jurisdictions that do not formally recognize the putative spouse doctrine apply equitable principles to approve workers’ compensation benefits to spouses having a good faith belief that their null marriage is valid. The New Jersey Supreme Court, for example, reversed lower court decisions which had denied benefits to a putative wife.209 The woman in question was once married to the subject decedent, but had also been di-

205. Id.
206. See Comment, supra note 192, at 446.
vored from him. Several years after their divorce, the parties decided to remarry. Since they were devout Catholics, they went to their parish priest for advice. Their priest told them that they were "already married in the eyes of God." Hence, they immediately recommenced their "marital" bliss, without further ado. Although they clearly were not married in the eyes of the law, the New Jersey Supreme Court held that for workers' compensation purposes, "the terms 'wife' and 'widow' as used in the statute include de facto widows where good faith coalesces with . . . a de facto relationship."  

210. Id. at 160, 313 A.2d at 609.

211. Id. at 162, 313 A.2d at 611 (citing Dawson v. Hatfield Wire & Cable Co., 59 N.J. 190, 192, 280 A.2d 173, 176 (1971)). Many other jurisdictions provide similarly. E.g., Burgess Constr. Co. v. Lindley, 504 P.2d 1023 (Alaska 1972); Davis v. Industrial Comm'n, 88 Ariz. 117, 353 P.2d 627 (1960) (Benefits were granted to wife where the marriage was voidable because it occurred within a statutory time limit prohibiting remarriage after divorce. The rationale is that a voidable marriage is not subject to a collateral attack after the death of one spouse.); Hodges v. Industrial Comm'n, 73 Ariz. 326, 328, 241 P.2d 431, 432 (1952) ("The evidence clearly shows petitioner considered herself to be the lawfully wedded wife of the deceased and entitled to death benefits as a widow. The parties lived together for eleven years as husband and wife in the belief that they were legally husband and wife. There has been no showing to the contrary. We do not believe petitioner's claim for death benefits as a widow was such wilful misrepresentation of facts as to preclude the right to death benefits as a dependent within the provisions of Section 56-977, A.C.A. 1939."); Combs v. Elk Horn Coal Corp., 281 S.W.2d 424, 426 (Ky. 1955) ("It is well settled in Kentucky that an award of compensation to a bigamous widow is authorized if she entered into the marriage relation in good faith, believing the employee had been divorced from his wife, and if she lived in his household as a dependent."); Summers v. Tennessee Eastman Corp., 169 Tenn. 335, 341-42, 87 S.W.2d 1005, 1007 (1935) ("In harmony with what has been said, we are of the opinion that this widow claimant, Mrs. Summers, is within the terms of our compensation statutes; it appearing (1) that she was an actual dependent of the deceased workman, and (2) that her good-faith marriage to him and long living with him entitle her to recognition as a 'wife' within the intent and purpose of the Compensation Law.").

Some jurisdictions allow or have in the past allowed compensation to "spouses" where the marriage was void because of the statutory prohibition against remarriage for a certain period of time after a divorce from a previous marriage. The rationale is that the employee and "spouse" entered into a void marriage but that, since they continued to live together after the time limit had expired in the belief that they were husband and wife, a common law marriage was formed. Of course, these cases only occur where common-law marriage is recognized, or was recognized when the case was decided. E.g., Morrison v. Sunshine Mining Co., 64 Idaho 6, 127 P.2d 766 (1942) (consent marriage); Freeman v. Fowler Packing Co., 135 Kan. 378, 11 P.2d 276 (1932); West v. Barton-Malow Co., 394 Mich. 334, 290 N.W.2d 545 (1975) (Benefits were granted despite lack of ceremony or good faith because of the longstanding, reputable character of the relation. The definition of "family" as used in the workers' compensation statute was construed to accommodate the claimant who had been separated from her first husband for 30 years and living with employee as his wife for 13 years prior to the accident.). But see Copple v. Bowlin, 172 Neb. 467, 110 N.W.2d 117 (1961) (benefits denied to a woman who had
Other states have denied the putative spouse recovery under workers' compensation statutes, on the theory that the remedy is purely statutory. Texas, for example, does not allow a putative spouse to recover under its workers' compensation laws when there is a living legal wife. The Texas workers' compensation statute provides only for recovery for the "sole and exclusive benefit of the surviving husband . . . and . . . wife." Thus, the courts have concluded that this statute provides benefits only to a legal spouse. In 1975, however, the Texas Supreme Court held that the putative spouse is entitled to the same right in the property acquired during her marital relationship . . . as if she were a lawful wife. In her case it will be half of the wages owed by the employer at the date of his death as well as half of the proceeds from the insurance policy which was furnished by the employer as an incident of the employment.

Although this case related to property dispersion after death, perhaps the decision will change the Texas rule preventing the putative spouse from recovering under the workers' compensation statute or in cases of wrongful death.

G. Inheritance and Social Security Benefits

Some states allow the putative spouse to inherit the estate of the supposed spouse, or a substantial portion of it, if he dies intestate.

In 1960, the Social Security Act was amended to allow coverage of the good faith putative spouse. However, this amend-

married a man in good faith just one day before the end of the time period during which employee was forbidden from remarrying after his divorce because the marriage was "void"); Meade v. State Compensation Comm'r, 147 W. Va. 72, 125 S.E.2d 771 (1962) (where the marriage is void, no benefits may be granted even though the wife was in good faith).

216. E.g., Estate of Krone, 83 Cal. App. 2d 766, 770, 189 P.2d 741, 743 (1948); see also Comment, supra note 192, at 436-40, 444.
ment only relates to impediments in the ceremony itself or those which result from a prior marriage which has continued due to a defective divorce. The federal courts have tended to deny recovery under other federal compensatory statutes in the absence of specific statutory language benefiting a putative spouse. The federal courts have held that a party to an invalid marriage who nevertheless has had a good faith belief in the validity of the marriage shall receive social security benefits as widow or "deemed widow" if the putative spouse is entitled to inherit under the intestacy laws of the state of the decedent's domicile at the time of his death. The Fourth Circuit Court of Appeals has explained this rule as follows:

Under the state marital status test, a claimant is entitled to benefits if the courts of the state of the wage earner's domici-

218. In pertinent part, the Social Security Act provides:

In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, . . . but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual. . . . For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

42 U.S.C. § 416(h)(1)(B) (1982); see also Comment, supra note 192, at 447.


220. Cunningham v. Harris, 658 F.2d 239, 241 (4th Cir. 1981); Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976); Black v. Weinberger, 415 F. Supp. 742 (S.D.N.Y. 1976) (where decedent husband's Mexican divorce from his first wife was invalid, his second "wife" was entitled to the entire "widow's" benefit for which decedent had paid during their 36 year supposed marriage); Hunter v. Richardson, 346 F. Supp. 123 (M.D. La. 1972) (woman lacking good faith was not a putative wife and therefore could not collect widow's benefits); Aubrey v. Folsom, 151 F. Supp. 836 (N.D. Cal. 1957); cf. Woodson v. Schweiker, 656 F.2d 1169 (5th Cir. 1981) (putative or "deemed" widow may receive benefits only after the legal widow has become ineligible); Burnett v. Schweiker, 643 F.2d 1168 (5th Cir. 1981) (the "deemed" or putative widow's benefits would be allowed, but would terminate once the legal widow applies for them); Carter v. Califano, 473 F. Supp. 517 (W.D. Pa. 1979).
cile at the time of his death would find either that the marriage was valid or that the survivor was entitled to intestate succession of personal property. 42 U.S.C. § 416(h)(1)(A). . . .

If a marriage is invalid under the applicable state law, a claimant may still receive widow's benefits under the "purely federal marital status test." . . . Section 416(h)(1)(B) of Title 42 U.S.C., generally known as the "deemed spouse" provision, provides that when (1) the claimant married the wage earner in good faith, without knowledge that a legal impediment existed under state law, and (2) the claimant and the wage earner were living in the same household at the time of the wage earner's death, the marriage will be deemed valid.\textsuperscript{221}

A California putative spouse's right to receive benefits under the Social Security Act is well established.\textsuperscript{222} In California, the right of the putative spouse to inherit is considered a matter of substantive succession law rather than equity.\textsuperscript{223} Even though the California Probate Code\textsuperscript{224} does not provide for the putative spouse, the courts have analogized to section 4452 of the California Civil Code (the putative marriage doctrine) to allow distribution to the putative spouse upon the death of his or her partner.\textsuperscript{225} Prior to the enactment of Civil Code section 4452 in 1970, California courts used equitable principles to accomplish the same purpose—by equating the putative spouse with the legal spouse.\textsuperscript{226} Thus, when one of the spouses in a putative marriage dies, the other inherits at least one-half of the quasi-marital property\textsuperscript{227} and, if the decedent dies intestate, the puta-
tive spouse inherits the entire quasi-marital mass.\textsuperscript{228}

On the other hand, Nevada and Pennsylvania, and to some degree New York and Texas, are states which do not consider a good faith party to a null marriage an heir to the supposed or putative spouse under their intestate inheritance laws. The laws of these states therefore allow the Social Security Administration to deny a putative spouse social security benefits under certain circumstances.\textsuperscript{229} Although Texas law allows a good faith putative spouse the same rights and benefits as a legal spouse in relation to property division, apparently it is not as amenable to successful recovery of social security claims.\textsuperscript{230} If both the legal and the putative spouse seek benefits, the legal spouse will receive them to the exclusion of the putative spouse. If no legal spouse exists, or if he or she does not apply for benefits, it appears that the putative spouse is eligible.\textsuperscript{231} New York law is similar in this regard.\textsuperscript{232}

When the relevant state inheritance law affords no avenue for relief, courts sometimes apply estoppel or laches to bar the legal spouse from asserting the invalidity of the common spouse's null "marriage" to the claimant putative spouse. Al-

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  \item \textsuperscript{228} Estate of Krone, 83 Cal. App. 2d 776, 189 P.2d 741 (1948); cf. Estate of Levie, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975) (a surviving putative spouse is not an heir to his or her deceased "spouse's" separate property, pursuant to Cal. Prob. Code § 221 (Deering 1974) (repealed 1983)); Laughton & Laughton, supra note 142, at 53.
  \item \textsuperscript{229} Lugot v. Harris, 499 F. Supp. 1118 (D. Nev. 1980) (putative spouses denied benefits); Visconti v. Secretary of HEW, 374 F. Supp. 1272 (W.D. Pa. 1974) (42 U.S.C. § 416 (h)(1)(A)-(B) provides for social security benefits to be awarded to the "legal widow" of decedent, rather than his second and good faith putative wife. Decedent's first marriage had never been dissolved. Thus, because Pennsylvania law does not make the second "wife," under these circumstances, heir to decedent, she has no right to social security benefits.); Cammarota v. Secretary of HEW, 329 F. Supp. 1087 (N.D.N.Y. 1971), (first (legal) wife became the beneficiary "widow" under the Social Security Act, 42 U.S.C. § 416, when she applied for benefits, thus ousting the putative spouse from her position as beneficiary).
  \item \textsuperscript{230} Woodson v. Schweiker, 656 F.2d 1169 (5th Cir. 1981) (putative or "deemed" widow may receive benefits only after the legal widow has become ineligible); Burnett v. Schweiker, 643 F.2d 1168 (5th Cir. 1981) (the "deemed" or putative widow's benefits would be allowed, but would terminate once the legal widow applied for them); Trivanovich v. Hobby, 219 F.2d 782 (D.C. Cir. 1955); Carter v. Califano, 473 F. Supp. 517 (W.D. Pa. 1979); Woodson v. Califano, 455 F. Supp. 457 (S.D. Tex. 1978); McKnight, Family Law: Husband and Wife, 35 Sw. L.J. 93, 95 (1981) (commentator overstated the case against the putative spouse receiving social security benefits in Texas).
  \item \textsuperscript{231} Woodson v. Schweiker, 656 F.2d 1169 (5th Cir. 1981); Burnett v. Schweiker, 643 F.2d 1168 (5th Cir. 1981); Carter v. Califano, 473 F. Supp. 517 (W.D. Pa. 1979).
  \item \textsuperscript{232} Cammarota v. Secretary of HEW, 329 F. Supp. 1087 (N.D.N.Y. 1971).
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though this is not the putative spouse doctrine, these decisions create the same effect by protecting the putative spouse and providing that spouse with the same social security benefits as a legal spouse.\textsuperscript{233}

VI. RELIEF AFFORDED TO THE PARTIES

State law in the United States has not universally allowed the good faith party to a null marriage to receive all of the benefits or rights which flow to a party to a valid marriage.\textsuperscript{234} Some have denied alimony.\textsuperscript{235} Some have not allowed equal division of property.\textsuperscript{236} Some have denied the right to dower.\textsuperscript{237} Nevertheless, most United States jurisdictions, whether they have evolved from the civil-law tradition and apply the classic putative spouse doctrine or apply an equitable analogue, recognize that a party to an invalid marriage who has a good faith belief that his or her marriage is valid is entitled either to alimony\textsuperscript{238} or at least to some portion of the property accumulated during the supposed

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\textsuperscript{234} See, e.g., Severa v. Beranak, 138 Wis. 144, 119 N.W. 814 (1909) (where marriage was void because husband had not been divorced for a year, statute forbade remarriage within a year of divorce, and wife did not know of this legal impediment, she was not entitled to life insurance benefits normally given to the wife).

\textsuperscript{235} E.g., Taylor v. Taylor, 7 Colo. App. 549, 44 P. 675 (1896).

\textsuperscript{236} E.g., Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900) (Court denied relief because (1) it refused to stretch the idea of quasi-partnership to the point of accommodating the putative spouse, and (2) the addition of a plea for general relief to a plea for specific relief entitles a plaintiff to recover only damages of a type prayed for in the plea for specific relief, but not specifically mentioned. The court did state that a suit for damages would be the proper relief for the party injured by the fraud of another. However, the court had no power to decide whether such damages were appropriate in the instant case.).

\textsuperscript{237} E.g., McIlvain v. Scheibley, 109 Ky. 455, 59 S.W. 498 (1900) (Putative spouse denied right to renounce will and take her dower and distributable share of her “husband’s” estate. The “wife” contended that she held a good faith belief in the validity of her marriage. The decision, however, was based upon the distinction between void and voidable marriage. Since the marriage was void, the wife was not allowed to be considered a widow and, therefore, was not entitled to renounce the will and take her intestate share (the will did make provision for support of the wife.).); De France v. Johnson, 26 F. 891 (C.C.D. Minn. 1886) (now abrogated by statute); Higgins v. Breen, 9 Mo. 497 (1845) (damages for husband's fraud in concealing impediment were allowed, however); Price v. Price, 124 N.Y. 589, 27 N.E. 383 (1891).

\textsuperscript{238} E.g., Poole v. Wilber, 95 Cal. 339, 30 P. 548 (1892); Brown v. Brown, 18 Ill. App. 445 (1885); Strode v. Strode, 66 Ky. (3 Bush) 227 (1867). These cases all provided alimony by analogizing to divorce proceedings.
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marriage.\textsuperscript{239}

In a 1928 case relating to a thirty-five year marriage, null under Hawaiian law but performed pursuant to Chinese custom and with the good faith belief by both parties that it was valid, the Ninth Circuit Court of Appeals explained the rationale for allowing recovery in the following way:

Conceding that "there is great inherent justice in the complainant's claim," the Supreme Court was nevertheless of the opinion that the legal obstacles to its recognition are insurmountable. Under the civil law it was thought little difficulty would be encountered, but under the common law, which prevails in Hawaii, no basis for relief was found. There are but few reported decisions involving questions of the property rights of a putative wife, where for one reason or another the supposed marriage turns out to be void, but in the majority of those which have come to our attention relief of some character has been granted. . . .

In these cases the principles invoked are not always the same, and, it may be conceded, in finding a basis for relief, some of them have put a strain upon statutory provisions the relevancy of which is not entirely obvious. But in all of them there is evinced a purpose to prevent a result so inherently wrong as to shock our common conception of fundamental justice.\textsuperscript{240}

From an early date, virtually all states have afforded some form of relief to the good faith spouse if his or her partner in the null marriage fraudulently induced the innocent party to enter

\textsuperscript{239} E.g., Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582 (9th Cir.) (listing decisions in several states which afford relief), cert. denied, 278 U.S. 636 (1928); see also cases cited supra note 45. But see Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900) (a putative spouse was not allowed a division of property, but the court, in dictum, suggested that she would have a cause of action for damages in fraud). See generally Evans, Property Interests Arising from Quasi-marital Relations, 9 Cornell L.Q. 246 (1923-1924); Harlan & Butler, supra note 46; Note, supra note 46.

\textsuperscript{240} Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582, 582-83 (9th Cir.), cert denied, 278 U.S. 636 (1928) (citing Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (1920)); Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911); Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898); Fuller v. Fuller, 33 Kan. 582, 7 P. 241 (1885); Strode v. Strode, 66 Ky. (3 Bush) 227 (1867); Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920); Bracken v. Bracken, 45 S.D. 430, 188 N.W. 46 (1927); Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S.W. 664, writ refused, 88 Tex. 641, 32 S.W. 871 (1895); Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S.W. 154 (1892); Powers v. Powers, 117 Wash. 248, 200 P. 1080 (1921); Knoll v. Knoll, 104 Wash. 110, 176 P. 22 (1918); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908)).
into that relationship by knowingly concealing an impediment to the marriage. This common-law remedy, however, is often woefully inadequate and, of course, is unavailable when both parties have a good faith belief that there is no impediment to their "marriage."

Because of this limitation, and because a null marriage produces no civil effects, it was necessary to develop new avenues of relief. The canon law and civil law systems developed the putative spouse doctrine. Similarly, states which did not recognize the putative spouse doctrine per se applied basic notions of equity, fairness, and justice to justify remedies for the good faith spouse to a null marriage. Many of these jurisdictions have developed and applied specific equitable theories of relief for the innocent good faith party to a null marriage. These equitable theories underlie the putative spouse doctrine and provide relief to good faith putative spouses even in such jurisdictions as California and Texas, which have evolved their private law most directly from Spanish sources. This genealogy is conceptually inaccurate, as the putative marriage doctrine is a matter of substantive law rather than an equitable remedy. The states whose Hispanic heritage includes this substantive legal doctrine appear to have forgotten the distinction between law and equity.

241. Batty v. Greene, 206 Mass. 561, 92 N.E. 715 (1910); Higgins v. Breen, 9 Mo. 497 (1845); Blossom v. Barrett, 37 N.Y. 434 (1868); Larson v. McMillan, 99 Wash. 626, 170 P. 324 (1918); see also Evans, supra note 239; cf. McKinney v. McKinney, 242 Ga. 607, 609, 250 S.E.2d 470, 473 (1978) (Where a "wife" sought annulment because the husband had a pre-existing marriage, she was awarded a property settlement and her attorney's fees. The court stated: "Equity will not permit a husband to rely on his own wrong so as to preclude the wife from being restored to the status quo without legal expense to herself."); Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900) (court refused to stretch the idea of quasi-partnership to the point of accommodating the putative spouse, but stated that a suit for damages would be the proper relief for the party injured by the fraud of another).

242. Szlauzis v. Szlauzis, 255 Ill. 314, 99 N.E. 640 (1912) (If both parties know of impediments neither can recover. This result has been abrogated by statute. ILL. ANN. STAT. ch. 40, § 305 (Smith-Hurd 1980)); Deeds v. Strode, 6 Idaho 317, 55 P. 656 (1898).

243. See supra section I.

244. The classic putative spouse doctrine is presented and discussed in section I, supra.

245. See, e.g., Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974) (basic notions of fairness, justice and equity also underlie the classic putative spouse doctrine); Lee v. Hunt, 483 F. Supp. 826, 841 (W.D. La. 1979) ("The [putative marriage] doctrine clearly is a matter of natural law and reason."), aff'd, 631 F.2d 1171 (5th Cir. 1980), cert. denied, 454 U.S. 834 (1981); see also supra notes 239-41 and accompanying text.
in this regard; cases treat the doctrine as if it were part of the law of equity. Louisiana, with its more consistent deference and adherence to its French and Spanish heritage, has retained recognition of the substantive nature of the doctrine.

All states except Louisiana apply theories of recovery which include the court’s inherent power to do equity and to find implied partnership or quasi-partnership. In this most commonly applied approach, if a party to a null marriage innocently and in good faith believed that he or she was the lawful spouse of his or her partner, that good faith party is entitled to an equitable apportionment of the personal and real property accumulated by the couple’s joint “partnership” or quasi-partnership efforts. The rationale behind the “partnership” and quasi-


247. See, e.g., Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911); Macchi v. La Rocca, 54 Cal. App. 98, 201 P. 143 (1921); Werner v. Werner, 69 Kan. 399, 53 P.2d 127 (1898); King v. Jackson, 196 Okla. 327, 164 P.2d 974 (1945) (allowing division of property on a substantive partnership theory, disregarding equity altogether); Whitney v. Whitney, 192 Okla. 174, 134 P.2d 357 (1943); Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920) (the court suggested that the same result could be obtained, applying its inherent power in equity, whether or not it used a partnership theory); Routh v. Routh, 57 Tex. 589 (1882); Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S.W. 594, writ refused, 88 Tex. 641, 32 S.W. 871 (1895); Morgan v. Morgan, 1 Tex. Civ. App. 315, 2 S.W. 154 (1892); Poole v. Schrichte, 39 Wash. 2d 558, 236 P.2d 1044 (1951); Knoll v. Knoll, 104 Wash. 110, 176 P. 22 (1918); In re Estate of Brenchley, 96 Wash. 223, 164 P. 913 (1917).

In the partnership or quasi-partnership theory cases, the courts analogize the remedies allowed to innocent partners when the partnership is dissolved. Implied partnership or quasi-partnership theories have been rejected in some states. E.g., Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900) (but wife would have an action for deceit, if her husband induced her to “marry” him by fraudulently concealing the impediment). In Louisiana the partnership or quasi-partnership theory is not necessary, since the classic putative marriage doctrine in La. Civ. Code arts. 117-118 provides relief as a matter of substantive law. See also Bartoli v. Huguenard, 39 La. Ann. 411, 2 So. 196 (1887).

248. E.g., Feig v. Bank of Italy Nat’l Trust & Savings Ass’n, 218 Cal. 54, 21 P.2d 421 (1933); see also supra note 247.

249. E.g., Werner v. Werner, 69 Kan. 399, 53 P. 127 (1898).
partnership theories is that the putative spouse ought to recover his or her fair share of the fruits of the skill, industry and toil which that spouse contributed to the marriage or "partnership."  

Another theory applied to provide equitable relief is that of quasi-contract. Under the theory of quasi-contract the supposed spouse of a good faith putative spouse should not be allowed to benefit from the skill, industry, toil and service his putative spouse provided during the putative marriage. The supposed spouse should be bound, at least, to divide the property accumulated during the relationship. Some jurisdictions have rejected the quasi-contract theory on the reasoning that a de facto or putative spouse cannot recover for services as a housekeeper or homemaker because he or she did not perform those duties with the idea of remuneration. This conclusion illustrates a weakness in the equitable quasi-contract approach. It is more straightforward and avoids conceptual problems to adopt a substantive rule favoring and protecting the putative spouse.

A constructive or resulting trust and equitable


251. E.g., Werner v. Werner, 69 Kan. 399, 53 P. 127 (1899).


253. E.g., Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582 (9th Cir.), cert. denied, 278 U.S. 636 (1928).


A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. Restatement of Restitution § 160 (1937). Our court has noted that constructive trusts are those which arise purely by construction of equity and are entirely independent of any actual or presumed intention of the parties and are often directly contrary to such intention. They are entirely in invitum and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud. 

See also Humphries v. Riveland, 67 Wash. 2d 376, 407 P.2d 967 (1965) (holding that a
mortgage\textsuperscript{256} are additional equitable theories sometimes articulated as the basis for relief. The application of these equitable notions to the putative spouse situation is usually a fictional expansion of the traditional idea in order to impose a “trust” when the title holder has persuaded the other to act to his detriment upon a reasonably induced belief that he or she was acquiring an interest in the property.\textsuperscript{257} Again, the problem with the constructive trust approach is that it requires fraud or overreaching. It does not adroitly address the problem of protecting an innocent party to a null marriage. In addition, alimony, support, or property division are sometimes provided to the good faith putative spouse by legislative\textsuperscript{258} or case law\textsuperscript{259} analogy to divorce

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\textsuperscript{256} construct trust theory actually requires the existence of fraud, overreaching, or inequitable conduct on the part of the party upon whom the “trust” is imposed); Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948) (a resulting trust theory requires that the parties intend that one of the parties to the putative marriage hold the property in trust for the other, who furnished the consideration for its purchase); Walberg v. Mattson, 38 Wash. 2d 808, 222 P.2d 827 (1951). But see In re Marriage of Lindsey, 101 Wash. 2d 299, 678 P.2d 328 (1984) (rejecting presumption against equitable distribution of property for non-good faith, non-marital cohabitants). For examples of constructive or resulting trust, see Schwarz v. United States, 191 F.2d 618 (4th Cir. 1951); Sugg v. Morris, 392 P.2d 313 (Alaska 1964) (dictum) (woman failed to recover because she failed to prove any contribution); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Smith v. Smith, 108 So. 2d 761 (Fla. 1959); Titus v. Titus, 151 Kan. 824, 101 P.2d 372 (1940); Morin v. Kirkland, 226 Mass. 345, 115 N.E. 414 (1917) (fraud); Batty v. Greene, 206 Mass. 551, 29 N.E. 715 (1910) (fraud); Randolph v. Randolph, 28 Misc. 2d 66, 212 N.Y.S.2d 468 (Sup. Ct. 1961); Rose v. Sampson, 4 N.C. App. 164, 166 S.E.2d 499 (1969). But see Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900); De France v. Johnson, 26 F. 891 (C.C.D. Minn. 1886) (both cases reject the idea of a resulting or constructive trust being impressed on the putative spouse relationship because that would stretch the notion too far).


\textsuperscript{259} From at least as far back as 1902, states promulgated statutes which provide a de facto (putative) spouse either a right to division of property or other relief. E.g., CAL. CIV. CODE §§ 4455 (attorney’s fees and costs), 4452 (division of property), 4455 (support) (Deering 1984 & Supp. 1985); CONN. GEN. STAT. ANN. § 46b-82 (West Supp. 1985) (general alimony section); ILL. ANN. STAT. ch. 40, § 305 (Smith-Hurd 1980) (maintenance, support, division of property); IOWA CODE ANN. § 558.32 (West 1981) (alimony); MICH. STAT. ANN. § 552.19 (Callaghan 1984) (restoration of real or personal property or the value thereof upon annulment, separate maintenance or divorce); MINN. STAT. ANN. § 518.055 (West Supp. 1985) (support, maintenance, division of property); MONT. CODE ANN. §§ 40-1-402(5) (restoration of the wife’s personal estate), 40-1-404 (division of property) (1985); TEX. FAM. CODE ANN. §§ 3.58 (temporary protective orders, litigation costs and attorney fees, support), 3.59 (temporary support), 3.63 (division of property)
proceedings.

In situations where partners who live together without a good faith belief that they are married have an actual agreement to share assets or property acquired during their relationship, or where the cohabitant who does not have his or her name on the title has contributed materially toward the acquisition of the property, the nonexistence of the good faith belief that they are married may not entirely preclude relief in some states. In


259. Poole v. Wilber, 95 Cal. 339, 30 P. 548 (1892); Brown v. Brown, 18 Ill. App. 455 (1886); Strode v. Strode, 66 Ky. (3 Bush) 227 (1867); Vanvalley v. Vanvalley, 19 Ohio St. 588 (1869). If a statute, such as those listed supra note 258, does not authorize alimony for a putative spouse, the court’s rationale for doing so is generally to prevent extreme injustice.

260. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), on remand, 5 Fam. L. Rep. 3077 (Super. Ct. 1979), appeal after remand, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943) (dictum); Shore v. Shore, 43 Cal. 2d 677, 277 P.2d 4 (1954) (dictum) (lack of good faith does not preclude the court from protecting respective property interests in jointly acquired property); Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43 (1909) (The invalid marriage would be disregarded and the cohabiting partner given relief in the form of an interest in the property acquired during the relationship to the extent that he or she can prove her contribution. Hayworth was superseded by statute. Batchelor v. Batchelor, 634 S.W.2d 71 (Tex. Civ. App. 1982); Bracken v. Bracken, 52 S.D. 252, 217 N.W. 192 (1927) (awarding the cohabitant a general accounting without regard to the period of cohabitation); Lawrence v. Lawrence, 47 Misc. 2d 10, 261 N.Y.S.2d 805 (Sup. Ct. 1965) (court has equity jurisdiction over the property rights of the parties to an annulment; “wife,” by counterclaim, sought partition of real property in an annulment action brought by her husband because she had a pre-existing marriage); see also Albay v. Harbin, 249 Ala. 201, 30 So. 2d 459 (1947); Fernandez v. Garza, 88 Ariz. 214, 354 P.2d 260 (1960); In re Estate of Thornton, 51 Wash. 2d 72, 499 P.2d 864 (1972) (a partnership agreement separate from agreement to cohabit was found to exist and held valid); Poe v. Estate of Levy, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); Williams v. Bullington, 159 Fla. 618, 32 So. 2d 273 (1947); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Brooks v. Kunz, 597 S.W.2d 183 (Mo. Ct. App. 1980); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Kinkenon v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981); Crowe v. De Gioia, 179 N.J. Super. 36, 430 A.2d 251 (1981), rev'd on other grounds, 80 N.J. 126, 447 A.2d 173 (1982); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Dominguez v. Cruz, 95 N.M. 1, 617 P.2d 1322 (Cl. App. 1980); Muller v. Sobol, 277 App. Div. 884, 97 N.Y.S.2d 905 (1950); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976), aff'd, 281 Or. 303, 574 P.2d 644 (1978); Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974) (no community property for “meretricious spouse,” but there was evidence to indicate an implied partnership or joint venture); In re Estate of Steffes, 95 Wis. 2d 490, 290 N.W.2d 697 (1980); cf. Morone v. Morone, 50 N.Y.2d 481, 484, 407 N.E.2d 438, 439, 429 N.Y.S.2d 592, 593 (1980) (“Finding an implied contract such as was recognized in Marvin v. Marvin . . . to be conceptually so amorphous as practically to defy equitable enforcement, and inconsistent with the legislative policy enunciated in 1933 when common-law marriages were abolished in New York, we decline
California, for example, well before *Marvin v. Marvin*, courts had indicated that they would allow a division of property incident to an annulment, even when the parties had no good faith belief that they were validly married, if the parties could prove an agreement to divide the property or that they both participated in the purchase. Of course, in *Marvin v. Marvin*, the California Supreme Court held that implied contract is also an appropriate theory for relief and that equity will operate to provide relief in a manner similar to the putative spouse doctrine, via a rationale of constructive or resulting trust, implied or quasi-partnership, quantum meruit, or other broad equitable remedy, even if the parties did not have a good faith belief that they were married. Some states have followed *Marvin*, at least as far as the application of contractual principles is concerned. Other states have refused to allow equitable relief in the absence to follow the *Marvin* lead. Consistent with our decision in *Matter of Gorden . . . , however, we conclude that the express contract of such a couple is enforceable." (citations omitted)). Contra Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); Guerin v. Bonaventure, 190 So. 2d 476 (La. Ct. App. 1st Cir. 1966), rev'd, 212 So. 2d 459, 465 (La. Ct. App. 1st Cir. 1968) (relief denied because "the services rendered by plaintiff are so completely intertwined with her illegal cohabitation with Bonaventure as to be utterly indistinguishable therefrom;" for relief, contribution, in the business sense, is required); Carnes v. Sheldon, 109 Mich. App. 204, 311 N.W.2d 747 (1981) (where woman sued for equitable division of property and custody of a child, relief was denied because: (1) woman failed to prove express agreement, and (2) such property rights are those usually given to a married couple, and the legislature has refused to recognize common-law marriage); Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973).


of good faith.\footnote{265} The law and its impact on people would have been much more consistent and just if the classic putative marriage doctrine had been incorporated into the law and legal consciousness of all the states of the Union. The civilian a priori determination that it is proper to provide the incidents or civil effects of a marriage to those who have a good faith belief that they are married works well. The common-law states have arrived at an approximation of this beneficial doctrine through piecemeal judicial decisions based on equity. This study has shown that states have tried to do equity and justice, but have done so in an incoherent and inconsistent fashion. With the current rethinking of property division policy and the adoption by non-community property states of property division schemes which incorporate much or all of the community property approach, it is an opportune time to consider the putative marriage doctrine and to adopt substantive legislation. It would be wise for states to adopt the full-blown putative marriage doctrine.