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# COMPETITIVE RIGHTS OF THE LEGAL AND PUTATIVE WIVES

*by Robert DeWitte Chatterton*

A putative marriage is a matrimonial union of two people who, in good faith, believe and repute themselves to be husband and wife; it is, however, either void or voidable at law because of some legal impediment which existed at its inception. When a putative marriage has been avoided, the putative spouses have no community property rights in their joint acquisitions.<sup>1</sup> Since it is ordinarily the husband who is responsible for the bulk of the putative accumulations, and since the property is legally characterized as his separate property, a potential hardship on the putative wife could result. In order to protect the putative wife, the courts of California have provided her with an equitable remedy. The scope of the "equity" is still somewhat uncertain, but it has been analogized to the statutory rights of a legal wife upon dissolution of a valid marriage. When a legal wife sues for divorce or separate maintenance, she is entitled to a share of the community property; in the absence of adultery, incurable insanity, or extreme cruelty, her share is one-half the marital acquisitions.<sup>2</sup> Upon annulment, and in the absence of these same elements, a putative wife is entitled to one-half the putative accumulations.<sup>3</sup> When a marriage is dissolved by the death of her husband, the legal wife receives all the community property if her husband died intestate, and one-half the community property if he died testate.<sup>4</sup> If her husband has died, the putative wife succeeds to the putative community<sup>5</sup> just as the legal wife succeeds to the legal community.<sup>6</sup> In short, the putative wife has an equity by analogy to the statutory rights of a legal wife.

In the vast majority of putative marriages, there is little doubt as to the justice of the putative wife's equity. However, suppose the putative marriage is invalid because it is bigamous. Should the "equity" continue to compel no less than one-half the putative accumulations? Under such circumstances, the husband's accumulations are the community property of a valid marriage.<sup>7</sup> To the legal wife,

<sup>1</sup>Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911).

<sup>2</sup>CAL. CIV. CODE § 146 (West 1957).

<sup>3</sup>Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911); Jackson v. Jackson, 94 Cal. 446, 29 P. 957 (1892).

<sup>4</sup>CAL. PROB. CODE § 201 (West 1956).

<sup>5</sup>The term "putative community" will be used in this paper to refer to those accumulations of a putative marriage that would be community property had the putative wife and her husband been legally married.

<sup>6</sup>Estate of Krone, 83 Cal. App. 2d 766, 189 P. 2d 741 (1948).

<sup>7</sup>California Civil Code section 164 defines community property as "all property acquired after marriage other than separate property." CAL. CIV. CODE § 164 (West 1957).

California Civil Code section 162 defines the separate property of a wife: "all property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. . . ." CAL. CIV. CODE § 162 (West 1957).

California Civil Code section 163 defines the husband's separate property just as section 162 defines the legal wife's separate property. CAL. CIV. CODE § 163 (West 1957).

the accumulations are community property. To the putative wife, they should be designated "putative community property." Does the putative community include the interest of the legal community, or does the legal community include the interest of the putative community?<sup>8</sup> Is the statutory right superior to the equitable right? These questions are far from academic and will be determinative of the share, if any, either wife will receive from a distribution of the legal-putative community property. For example, when the husband dies testate survived by both his legal and putative wives, neither of whom are beneficiaries under his will, one of the wives could be completely excluded from a share of the property. Or, if the legal wife seeks to dissolve the legal community while her husband is alive, the wife with the better right will take the greater share, and the other will be obliged to share with the husband.<sup>9</sup>

The California Supreme Court has never been confronted with the competing claims of the legal and putative wives. Indeed, the problem has arisen only on two occasions at the appellate court level. In one, *Blache v. Blache*,<sup>10</sup> the court awarded the putative wife one-half the putative accumulations and directed that the remainder be divided equally between the husband and legal wife. In the other, *Estate of Ricci*,<sup>11</sup> the court ruled that when a husband dies intestate, the putative wife succeeds as a matter of right to one-half the accumulations of

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<sup>8</sup>See 17 LA. L. REV. 489 (1957). The author of this case note suggests that Louisiana law is explainable on a dual community concept. Under this theory, both communities have two participants: the legal community is composed of the legal husband and legal wife; the putative community is composed of the putative husband and putative wife. Upon dissolution of either community, the respective shares of each party will depend on the husband's conduct: if he married his putative wife in good faith and did not desert his legal wife, he is entitled to one-half of each community, while each wife is entitled to the other half of her community; if he was meretricious, he forfeits any and all rights to the accumulations and each wife takes one-half of the whole. In Louisiana, the putative wife has a statutory right to community property; therefore, the rights of the legal and putative wives are said to be of equal dignity and rank. Unlike Louisiana, the putative wife has no statutory right in California. Consequently, it is improbable that the California courts would support the dual community concept. See LA. CIV. CODE, arts. 117, 118 (1952).

Louisiana's forfeiture rule is described in the following cases: *Waterhouse v. Star Land Co.*, 139 La. 177, 71 So. 358 (1916); *Abston v. Abston*, 15 La. Ann. 137 (1860); *Hubbel v. Inkstein*, 7 La. Ann. 252 (1852); *Patton v. Cities of Philadelphia & New Orleans*, 1 La. Ann. 98 (1846). See also, *Prince v. Hopson*, 230 La. 575, 89 So. 2d 128 (1956), where husband was in good faith.

<sup>9</sup>This comment will not be concerned with the good or bad faith of the husband. Generally, the meretricious husband in California receives the same treatment as a good faith husband. If he is living, both the putative and legal wives must show adultery, extreme cruelty, or incurable insanity if they are to receive more than one-half of the marital property; thus, a showing of the husband's bad faith is irrelevant to their success. When he has died intestate, his bad faith is immaterial because the two wives will take all the property anyway. *Estate of Ricci*, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962). However, if the husband dies testate, his bad faith could be in issue. No California court has been presented with this problem. There appears to be no reason why his will could not be set aside on the grounds of fraud.

<sup>10</sup>69 Cal. App. 2d 616, 160 P.2d 136 (1945).

<sup>11</sup>201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962).

the putative marriage, while the legal wife takes the remainder. Thus, both cases recognized the priority of the putative wife's equity and the inferiority of the legal wife's statutory right.

The purpose of this comment is to investigate the validity of those cases. Concomitantly, it must be asked whether the putative wife should have "community rights" in the property of a bigamous marriage. The California Supreme Court has ruled that a putative wife's right to property in a *non-bigamous*, putative marriage is an equitable, not a community, right.<sup>12</sup> However, there is an important difference between a bigamous and a non-bigamous marriage: in the former, the property acquired by the husband is community property, while in the latter, it is separate property. Consequently, it must be determined whether the putative wife's equity attaches to the community property, or whether it awaits a dissolution of the community before attaching to the husband's interest which becomes his separate property. The scope of this comment will include: 1) a review of California law; 2) the effect of the putative wife's equity in bigamous marriages; 3) the propriety of recognizing a community right in the putative wife; 4) the nature of the putative interest; and, 5) the possibility of an "equity" in the legal wife.

#### I. EQUITY BY STATUTORY ANALOGY

The basic California approach to the *non-bigamous*, putative marriage was pro-pounded in *Coats v. Coats*.<sup>13</sup> In that case, the marriage was annulled because of the wife's physical incapacity. In a suit by her to obtain a division of the property accumulated during the putative marriage, the California Supreme Court ruled:

The apportionment of such property between the parties is not provided by any statute.

It must therefore be made upon equitable principles. In the absence of special circumstances such as might arise through intervening claims of third persons, we can conceive of no more equitable basis of apportionment than an equal division.<sup>14</sup>

According to the Court, the equal division is justified by analogizing the putative wife's equity to the statutory rights of a legal wife when the legal community is dissolved. California Civil Code section 146(b) provides:

If a decree [of divorce] be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property . . . shall be equally divided between the parties.

Thus, dissolution of a putative marriage by a decree of annulment should also result in an equal division of the putative property. Later cases perpetuate this analogy even when there is an "intervening claim" by the legal wife.

The rule of equity by statutory analogy was used in *Blache v. Blache*<sup>15</sup>—a case involving both the legal wife and the putative wife. In the *Blache* case, the husband and legal wife were married in 1912 and separated in 1914. The husband (Maurice) moved to California and in 1916 sued for divorce. After being per-

<sup>12</sup>*Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 678, 118 P. at 444.

<sup>15</sup>69 Cal. App. 2d 616, 160 P.2d 136 (1945).

sonally served in New York, the legal wife (Anna) wrote her husband's attorney, informing him she would not contest the divorce. Because of a lack of corroboration, however, the divorce was denied. Thereafter, Maurice married Jeanne (good faith, putative wife), and together they accumulated an estate in excess of \$150,000.00. In 1932, Anna and Maurice discovered they were still married, and in 1938, Anna brought suit for separate maintenance. The trial court awarded Anna her attorney's fees and one-half of the proceeds of a joint bank account in the names of Maurice and Jeanne, \$7,978.00, satisfaction of which would entitle Anna to "no further claim, right, title, or interest . . . against any of the remaining real or personal property . . . or any of the community property."<sup>16</sup> Except for attorney's fees, the appellate court reversed and remanded: "the accumulations of Maurice and Jeanne (putative wife) belonged to (them) in equal shares."<sup>17</sup> According to *Coats*, the court reasoned, the division of property of a voidable marriage is the same as division of property of a valid marriage; hence, the property accumulated during the putative marriage was equally divisible between Jeanne (putative wife) and Maurice. Collaterally, in describing the share to which the legal wife would be entitled, the court concluded:

. . . Maurice's share of the property acquired during his association with Jeanne may be the community property of himself and Anna . . . unless Anna waived, abandoned, or is estopped to assert her claim to such community interest.<sup>18</sup>

Therefore, in the absence of an estoppel, the legal wife is entitled to one-half the husband's interest; *i.e.*, the putative wife is entitled to one-half the property; the legal wife and husband share the other half. Thus, the legal community represents only an interest in the predominant putative community.

Certainly, the facts in the above case warranted a greater award to the putative wife than the legal wife. However, this could have been accomplished without implying that the putative community is superior to the legal community. That is, the court could have disposed of the case on the grounds of estoppel without deciding that the putative wife's interest should take precedence over the legal wife's interest. Anna (legal wife) consented to a divorce. Had the divorce become final, her right to share in the future accumulations of her husband would have been extinguished. Even though the marriage continued, she had expressed an intent not to be a party to it nor to contribute to it. In short, she had voluntarily abandoned her role as wife and should have been estopped from asserting her statutory right to the future accumulations. Nevertheless, the *Blache* case does stand as a precedent favoring the putative community over the legal community. It would be error, however, to interpret *Coats* as authority for the same proposition. There was no legal community interest present in the *Coats* decision, and the Court specifically indicated that "intervening claims of third persons" could cause a different result.

A few years later, in *Estate of Krone*,<sup>19</sup> the putative wife's equity was again

<sup>16</sup>*Id.* at 620, 160 P.2d at 139.

<sup>17</sup>*Id.* at 624, 160 P.2d at 140.

<sup>18</sup>*Id.* at 624, 160 P.2d 140-41.

<sup>19</sup>83 Cal. App. 2d 766, 189 P.2d 741 (1948).

analogized to the legal wife's statutory right. In that case, the husband died intestate survived by a putative wife and his children of a previous marriage. Both the deceased and his putative wife had been married previously; however, the husband's divorce had become final, while his putative wife's had not. Since she didn't know there was an interlocutory waiting period, she was "putative." Plaintiffs, the children of the deceased's first marriage, argued that, in the absence of a valid marriage between the defendant and their father, the accumulations were separate property—if not to all the property, at least to the excess over the one-half normally granted to a putative wife in compensation for her equity. Defendant, putative wife, insisted all the property was hers by analogy to California Probate Code section 201, which provides:

Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse. . . .

Agreeing with the putative wife, the court stated:

If according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all.<sup>20</sup>

It should be noted that the *Krone* decision does not say the children will never be entitled to share in the distribution of putative property. The children were asserting their own right to the separate property of their father. The second marriage was invalid because of an impediment to the putative wife's capacity. Therefore, no claim was made by or through the legal wife. The decision could be different where a representative of the legal wife claims the right to share in the putative accumulations. The *Krone* case merely provides, in the absence of a legal wife, the putative wife is the "surviving spouse" described in Probate Code section 201 for the purposes of succession.

The most recent case concerned with the bigamous, putative marriage is *Estate of Ricci*.<sup>21</sup> As in the *Krone* case, the husband died intestate. This time, however, he was survived by his legal and putative wives. The legal wife had been deserted in Italy for more than forty years. The putative wife had lived with her husband for more than thirty years. All the property of deceased had been accumulated during the putative marriage. The putative wife argued that according to the *Krone* case she was entitled to all the property. The court reasoned that to exclude the legal wife, in the absence of an estoppel, would be contrary to Probate Code section 201. Clearly, the legal wife was entitled to one-half. But which half—the half passing in the absence of a will or the half passing as a matter of right? The court chose the former, citing as persuasive authority two major text authorities of California law:<sup>22</sup>

In conclusion we agree with the following statement of the learned trial judge in his memorandum opinion: "Yet under the case law of this state it seems clear that each of

<sup>20</sup>*Id.* at 769-70, 189 P.2d at 743.

<sup>21</sup>201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962).

<sup>22</sup>BURBY, FAMILY LAW FOR CALIFORNIA LAWYERS 359-60 (1956); I ARMSTRONG, CALIFORNIA FAMILY LAW 870 (1953).

the two widows absent of the other is entitled to the whole estate. Thus, in a contest between them it would seem both logical and equitable to divide the property equally, *awarding the putative wife the half to which she contributed and giving to the legal but deserted wife the half over which the husband normally has testamentary control.*<sup>23</sup> (emphasis supplied).

That a court should award the legal wife the one-half over which the husband has failed to exercise his testamentary power shows a considerable lack of foresight. Suppose in the exercise of his testamentary right, the husband had left his putative wife all the accumulations of the putative marriage? Under the approach taken by the *Ricci* case, the putative wife would be entitled to all the property, while the deserted, legal wife would receive none. And even if the theory of the *Blache* case were accepted—that the husband's share of the putative accumulations is community property—the putative wife would receive three-fourths, while the legal wife would be entitled to only one-fourth. Since it is more probable a husband will choose to benefit the woman he lives with rather than the woman he has deserted, the potential inequities of the *Ricci* case are obvious.

As the law in California presently stands, the putative wife is entitled, as a matter of right, to one-half the accumulations of the putative marriage; the legal wife is entitled to one-fourth; and the husband, if he is alive, is entitled to one-fourth. If the husband dies intestate, the putative wife takes one-half, and the legal wife takes one-half. If the husband dies testate, *a fortiori*, it would follow that the putative wife could have his will set aside to the extent it defeats her interest. On the other hand, the legal wife apparently would have no comparable right. Since her interest, under *Ricci*, is not statutory but is dependent on her husband's testamentary generosity, she would have no way to protect her interest in the community property and could be completely excluded. The legal wife's rights could be improved slightly by adopting the *Blache* theory. If the husband's share of the putative property were designated community property, then the legal wife could claim one-half of his share as a matter of statutory right by Probate Code section 201.

The *Blache* and *Ricci* cases are historical accidents that should not be followed. Their respective predecessors, *Coats* and *Krone*, had propounded equitable doctrines. These cases held that if a man and woman share property equally when a valid marriage is dissolved, an honest mistake as to the marriage's validity should not cause a different result. The anticipation of the putative wife is the same as that of a legal wife. Since a legal wife would be entitled to one-half by statute, a putative wife should be entitled, by analogy, to the same in equity. Hence, an equitable right is provided to supplant the omission of a statutory right. As long as no intervening claim is made by a third person, such a division is proper. When the successors, *Blache* and *Ricci*, were confronted by third-party claimants (legal wives), the above doctrine was adjusted to accommodate them. Since the predecessor cases had already established the respective rights of the husband and

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<sup>23</sup>Estate of Ricci, 201 Cal. App. 2d 146, 151-52, 19 Cal. Rptr. 739, 742 (1962).

putative wife, the legal wife's right had to encroach upon either the right of the husband or of the putative wife. As it was the husband who caused the mistake, it was his interest that had to be diminished. However, there is a fundamental error in this approach. The existence of a legal wife does not call for an exception to the putative marriage doctrine; rather, the existence of a putative wife calls for an exception to the normal disposition of the legal community. It is inherently wrong to determine the distribution of putative property before a disposition of community property has been made. The consequences become absurd. The putative wife's equity is dependent on an analogy to the legal wife's right. To determine the putative community first is to prefer an analogy to a legal right; to give priority to a fiction while denying its foundation. It is incongruous to analogize a putative wife's right as though she were the legal wife and to treat the legal wife as though she were a stranger. The *Coats* and *Krone* cases had converted the *separate property* of the husband into putative property impressed with the incidents of community property; they did not authorize the conversion of community property into putative property to be described as putative community property. The accumulations of a husband are *community property* when he is married, and it is the legal wife who has the right to claim one-half. Where strict adherence to the Code works an injustice, a remedy can be devised, but it must not be forgotten that it is the putative wife, not the legal wife, who is a third person seeking to circumvent the Code. She should not be permitted to avail herself of the legal wife's right by analogy and relegate the legal wife to the rights of a secondary, less favored claimant.

The *Blache* and *Ricci* cases purported to protect the legal wife's statutory rights by dividing the community property equally. But what was the community property under *Blache* and *Ricci*? It was one-half the accumulations of the husband, *i.e.*, one-half the putative community. As Civil Code sections 163 and 164 define community property,<sup>24</sup> all the accumulations of the husband are community property. Unless the wife has abandoned the husband, his earnings remain community property until the legal marriage is properly dissolved. There is no statutory authority that would permit the courts to redefine or reduce the size of the legal community.

## II. THE PARTNERSHIP THEORY

A result similar to California's is reached by the Texas courts on the theory of partnership. It is argued that the accumulations of the putative marriage arise from a joint venture between the community interest and the putative wife. The husband, representing the community, contracts with the putative wife, representing herself, and they agree to accumulate property through their joint efforts. Never are the accumulations more than the respective interests of the co-partners. If the husband dies intestate, his share in the partnership passes to his legal wife

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<sup>24</sup>See CAL. CIV. CODE §§ 163, 164 (West 1957).



and children,<sup>25</sup> and the putative wife retains her share. If he dies testate, one-half remains with his putative wife, one-fourth goes to his legal wife, and one-fourth passes by testamentary disposition. The legal wife can recover her interest in the community by divorcing the husband.

The nature of the partnership is described in *Morgan v. Morgan*.<sup>26</sup> In that case, John and Susan (legal wife) were married in 1848 and separated in 1870. In 1876, having been refused a divorce in Texas, and without ever acquiring a domicile in Utah, John obtained a Utah divorce over Susan's objection that the court lacked jurisdiction. Thereafter, John married Laura (putative wife) and through their joint efforts property was accumulated. After John's death, Susan sued to quiet title to certain real property acquired by John and Laura. The trial court awarded the property to the legal wife on the grounds that an invalid marriage could vest no rights against the legal wife. The appellate court reversed and remanded, stating that the property acquired during the relationship was equally divisible between Susan and Laura. The case was one of first impression, but the Court noted there was some precedent:

. . . the fact that [a] . . . woman was living in open adultery with a man did not deprive her of the right to claim a community interest. . . . *Babb v. Carroll*, 21 Tex. 766; *Lewis v. Ames*, 44 Tex. 345; *Yates v. Houston*, 3 Tex. 433.<sup>27</sup>

Justice Bonner, in a separate opinion in *Routh v. Routh*,<sup>28</sup> said:

. . . Nancy Thompson, in right of her putative marriage . . . was entitled to one half of the property acquired during that marriage *in the nature of a partnership of acquests and gains*. I am further of the opinion that only the remainder of the property of that marriage, or one half of the whole, could constitute the net community property of Jonathan Routh and his legal wife . . . and that all to which the latter should in any event be entitled, would be one fourth the whole, or one half of the net community property of herself and Jonathan Routh.<sup>29</sup> (emphasis supplied).

Thus, the Court noted, the right of the parties to contract a partnership in their accumulations was well recognized. The proceeds of the partnership become "community property." The basis of the partnership is the mutual consent of the parties:

In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all the property that they might thereafter acquire should be community property, and belong to them in equal portions.<sup>30</sup>

<sup>25</sup>TEX. PROB. CODE, art. 45 (1956). This section provides that all property belonging to the estate of the husband and wife goes to the survivor unless there are children or their descendants, in which event one-half goes to them in the absence of a will.

<sup>26</sup>1 Tex. Civ. App. 315, 21 S.W. 154 (1892). See *Lawson v. Lawson*, 30 Tex. Civ. App. 43, 69 S.W. 246 (1902). See also *Chapman v. Chapman*, 16 Tex. Civ. App. 382, 41 S.W. 533 (1897), where partner's interest was not defeated even though arising from a meretricious relationship.

<sup>27</sup>*Morgan v. Morgan*, 1 Tex. Civ. App. 315, 317, 21 S.W. 154, 155 (1892).

<sup>28</sup>57 Tex. 589 (1882). In this case, the husband died testate, leaving all his property to his children and putative wife. The legal wife (Elizabeth) sued to obtain one-half the property. The question of her legal right was not determined—the case being decided on other grounds.

<sup>29</sup>*Morgan v. Morgan*, 1 Tex. Civ. App. 315, 318, 21 S.W. 154, 155 (1892).

<sup>30</sup>*Id.* at 318, 21 S.W. at 156.

In answer to the charge that the relationship was adulterous and illegal, the *Morgan* Court concluded:

Applying these principles to the case at bar, if it be conceded that the relations of John . . . [and Laura] were illegal, and that their contract to live together and divide the property they might accumulate would not sustain an action on behalf of either, if brought thereon, yet still we believe it cannot be said that after the contract has been voluntarily executed by both, and the property has been acquired, the court will refuse to recognize their respective interests therein.<sup>31</sup>

While the *Morgan* case has been cited with approval in California,<sup>32</sup> the partnership theory does not appear to have been accepted.

Although the partnership theory is tainted by an apparent willingness to permit the relationship to be meretricious—a position untenable in California<sup>33</sup>—is it otherwise valid? Such a contract between the putative spouses would be a fiction. It is unlikely any agreement between them concerning their property rights was ever contemplated. Moreover, California confers a right on the putative spouse by virtue of her status rather than by virtue of a contract. Nevertheless, could a husband, who was already married, enter into a contract with his putative wife and confer upon her a right to community property under California law?

Certainly, the husband has management and control of the community property,<sup>34</sup> and this includes the right to commit it by contract. Under the present California law, such a contract would, however, be invalid. The respective interests of the husband and wife in community property are defined by California Civil Code section 161a:

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband. . . .

Since the community property includes all the accumulations of the husband, a contract by him to divide them with the putative wife would, in effect, divest the legal wife of one-half her community interest. Such a contract would be beyond the husband's power. The management and control of community property is not without its limitations. Frequently, it is analogized to the duty of a trustee;<sup>35</sup> *i.e.*, the management and control of the community property must be exercised in good faith and with due regard for the interest of the wife. When the husband and wife are separated, the duty continues.<sup>36</sup> If he makes a gift of community property without the consent of the wife, she may set it aside by one-half if her husband is deceased,<sup>37</sup> and in toto if he is living.<sup>38</sup> This is true whether she is

<sup>31</sup>*Id.* at 319, 21 S.W. at 156.

<sup>32</sup>*Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920); *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911); *Estate of Ricci*, 201 Cal. App. 2d 146, 19 Cal. Rptr. 739 (1962).

<sup>33</sup>*Shore v. Shore*, 43 Cal. 2d 677, 277 P.2d 4 (1954); *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943); *Flanagan v. Capital Nat'l Bank*, 213 Cal. 664, 3 P.2d 307 (1931); *Latronica v. Gennoni*, 205 Cal. 559, 271 P. 1054 (1928).

<sup>34</sup>CAL. CIV. CODE § 172 (West 1957).

<sup>35</sup>*People v. Schlette*, 139 Cal. App. 2d 165, 293 P.2d 79 (1956).

<sup>36</sup>*Sapp v. Superior Court*, 119 Cal. App. 2d 645, 260 P.2d 119 (1953).

<sup>37</sup>*Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933).

<sup>38</sup>*Britton v. Hammell*, 4 Cal. 2d 690, 52 P.2d 221 (1935).

living with him or not.<sup>39</sup> Therefore, it would violate the fiduciary principle to permit the husband-putative wife contract to divest the legal wife of any part of her community interest. She receives no benefit from the contract. Moreover, it is generally held that when a trustee uses trust property to benefit himself, he breaches his duty to the beneficiary.<sup>40</sup> By analogy, a husband who, in order to gain her services, confers upon the putative wife the legal wife's community interest misuses his power and misappropriates the trust property for his own benefit. Such conduct would be in derogation of the fiduciary duty he owes his legal wife. Thus, the husband cannot make a gift of the legal wife's interest, nor may he commit it to an illegal contract.

Clearly, the partnership theory recognized in Texas cannot be used in California. The right of the putative wife devolves from her status, not from a contract. Concomitantly, the subject matter of the contract cannot be community property because this would violate the husband's fiduciary duty to his wife.

### III. THE NATURE OF THE PUTATIVE INTEREST

It is often assumed that the putative wife's right to share the accumulations of her husband derives from her contributions to their acquisition:

The quasi-community property system is an equitable doctrine [that] . . . stresses the fact that a putative spouse makes the same indirect contributions to the acquisitions as does a legal spouse and equitably is entitled to property interests to the same extent.<sup>41</sup>

When no legal community exists, the acquisitions of a putative marriage comprise the "putative community," and are subject, by analogy, to the same disposition as the legal community. But when the two co-exist, the legal community is all pervasive. Since the putative wife has contributed to the community property, she is equitably entitled to share in its distribution. The question is whether the putative wife's equity should attach to the husband's share of the community property or the legal wife's share.

The putative wife contributes to the growth of community property by performing the duties of the legal wife. If the legal wife knows of the contributions and the circumstances under which they are rendered, she will be estopped to claim her community interest.<sup>42</sup> But in the absence of estoppel, the putative wife cannot, by her voluntary conduct, succeed to the legal wife's interest in the community. It is a well established maxim in restitution that "a person who officiously confers a benefit upon another is not entitled to restitution therefor."<sup>43</sup>

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<sup>39</sup>*Id.*

<sup>40</sup>CAL. CIV. CODE § 2229 (West 1957).

<sup>41</sup>VERRALL, CALIFORNIA COMMUNITY PROPERTY 40 (1960).

<sup>42</sup>Succession of Chavis, 211 La. 313, 29 So. 2d 864 (1947). *Cf.* Union Bank & Trust Co. v. Gordon, 116 Cal. App. 2d 681, 254 P.2d 644 (1953), where wife was estopped from claiming her succession right under California Probate Code section 201 because she had remarried in reliance on her husband's invalid divorce decree.

<sup>43</sup>RESTATEMENT OF RESTITUTION § 2 (1936).

In *McMillan v. O'Brian*,<sup>44</sup> the California Supreme Court held that one who paid the property taxes of another under the mistaken belief he was the owner had no right of recovery against the owner. Also, one who improved another's property acquired neither the owner's title nor a right of reimbursement.<sup>45</sup> By analogy, a putative wife who performs the marital duties of the legal wife without her solicitation or consent ought not to succeed to the latter's interest in the community. Suppose, in a contract, *A* promises to render services to *B* for a one-half interest in *B*'s property. If *C* renders the same services with the consent of *B*, *C* does not succeed to *A*'s contractual rights. *C*'s right is against *B*, not *A*. By analogy, when a husband and wife marry, their relationship assumes the wife will perform services and receive an equal share of the husband's accumulations. If the putative wife performs the legal wife's duties with the consent of the husband, she should not succeed to the legal wife's rights. Yet, the California courts have given the putative wife the interest of the legal wife. It is the legal wife who first enters into a marriage with the husband. The fact he chooses another to perform the legal wife's duties should not defeat her rights. In the absence of abandonment, waiver, or estoppel, her rights continue until the marriage is lawfully dissolved, regardless of the voluntary contributions of the putative wife. Therefore, it is error to award the putative wife her interest before the legal community has been dissolved. To do so would permit the putative wife's contributions to defeat the legal wife's statutory share of the community.

There is still another more fundamental reason for determining the legal community prior to the putative community. In a non-bigamous, putative marriage, the putative wife's "equity" seeks to simulate between the putative spouses the same relationship shared by legal spouses vis à vis the legal community. When the putative marriage is bigamous, however, the interest of the legal wife must also be considered. She is not a party to the putative marriage. It seems inappropriate, when the marriage is bigamous, to determine the putative interests before the legal community has been distributed. To do so is to permit the equity to diminish the legal wife's interest; yet, the purpose of the equity was to establish a personal relationship between the husband and putative wife. But, on the other hand, if the legal community were first dissolved, the husband could hold his interest as separate property and subject to the equity. Once again, there would be consistency between bigamous and non-bigamous marriages, for the equity would attach to the separate property of the husband. The putative wife's equity should not be enforceable against the legal wife, nor should it operate in derogation of the legal wife's interest in the community. It is the husband who mistakes or misrepresents his capacity to remarry. It is he who impliedly offers to share his accumulations with the putative wife. Where the legal wife is without fault, the putative wife's equity should be enforceable only against her husband. To accomplish this, it is necessary to divide the legal community property before awarding the putative wife her interest in the putative marriage.

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<sup>44</sup>219 Cal. 775, 29 P.2d 183 (1934).

<sup>45</sup>*McNulty v. Copp*, 125 Cal. App. 2d 697, 271 P.2d 90 (1954).

## IV. THE LEGAL WIFE'S EQUITY

The division of property accumulated during the putative marriage is often justified on the theory that the putative wife has contributed to its accumulation while the legal wife has not.<sup>46</sup> It must be remembered, however, when the subject property is community property, the legal wife is not required to contribute to its accumulation. When the husband deserts her but doesn't remarry, the legal wife is entitled to a one-half share. It should make no difference that he compounds his wrong by remarrying. Nevertheless, the legal wife does contribute indirectly to the putative marriage accumulations. It is the duty of the husband to support his legal wife,<sup>47</sup> and he does not escape that duty by deserting her<sup>48</sup> since the obligation is a continuing one.<sup>49</sup> During the years of desertion, the legal wife provides for her own support. To the extent she does so provide, the putative community is enriched. Assume the putative accumulations total \$20,000.00. If the putative marriage has existed for ten years, and the legal wife's support was only \$2,000.00 a year, there should have been no putative accumulations; that is, if the husband had met his obligation to the legal wife, he would have been unable to save \$20,000.00. Thus, the putative property represents, in part, the failure of the husband to support his legal wife.

Many states permit the wife to be reimbursed for the money she expends for her own support:<sup>50</sup>

. . . [W]here a husband wrongfully abandons a wife who is without adequate means of support and is without fault on her part, she may recover from him money subsequently expended by her for her support while living apart from him, in the absence of a decree of divorce or separation, provided she has not waived the right by some conduct on her part. . . .<sup>51</sup>

No California case has permitted reimbursement to the deserted wife. California Civil Code section 174 permits a third person to recover from a husband who fails to support his wife, but no provision of the Code permits a legal wife to recover the expense of supporting herself. A wife may sue for support in the future, but in the absence of a "distinct agreement," she is not entitled to reimbursement.<sup>52</sup> Consequently, the putative property represents, in part, a postponed but unenforceable obligation of the husband to support his wife. To determine the putative community before awarding to the legal wife her community property

<sup>46</sup>*Blache v. Blache*, 69 Cal. App. 2d 616, 160 P.2d 136 (1945).

<sup>47</sup>CAL. CIV. CODE § 174 (West 1957).

<sup>48</sup>*St. Vincent's Instit. for Insane v. Davis*, 129 Cal. 20, 61 P. 477 (1900).

<sup>49</sup>*Clark v. Clark*, 203 Cal. 441, 264 P. 761 (1928).

<sup>50</sup>*Levine v. Levine*, 48 Misc. 2d 15, 263 N.Y.S. 2d 997 (N.Y. City Civ. Ct. 1965); *Smith v. Smith*, 300 S.W.2d 275 (Mo. App. 1957); *Edson v. Edson*, 138 Conn. 701, 88 A. 2d 371 (1952); *Manufacturers Trust Co. v. Gray*, 278 N.Y. 380, 16 N.E. 2d 373 (1938); *Vickers v. Vickers*, 89 W. Va. 236, 109 S.E. 234 (1921); *Sodowsky v. Sodowsky*, 51 Okla. 689, 152 P. 390 (1915).

<sup>51</sup>Annot., 117 A.L.R. 1181 (1938).

<sup>52</sup>*Mergenthaler v. Mergenthaler*, 69 Cal. App. 2d 525, 160 P.2d 121 (1945). See *Blackburn v. Blackburn*, 160 Cal. App. 2d 301, 324 P.2d 971 (1958).

interest perpetuates the wrong. The husband and putative wife have been supported from the putative accumulations; therefore, the putative property (which is also community property) represents the excess over that which has been used by the husband and putative wife for their benefits. If the legal wife were a creditor with an enforceable claim, distribution of the property would be determined after the debt was paid. While the legal wife cannot be reimbursed in California, she should at least have a preferential right to accumulations.

#### V. CONCLUSION

In conclusion, it is suggested that the legal wife is entitled to one-half the community property upon dissolution of a bigamous marriage. The law of California provides that the accumulations of the husband remain community property whether he lives with his wife or whether he has abandoned her and illegally married another. When the marriage is dissolved during the life of the husband, the legal wife should be awarded one-half the community; thereafter, the remainder may be divided between the putative wife and husband by utilization of the equitable analogy. If the husband has died, then the legal wife is the "surviving spouse" of right described in Probate Code section 201. For the court, in *Estate of Ricci*, to have awarded the legal wife the one-half of the community "over which the husband normally has testamentary control" was contrary to the language and purpose of the Code provision. The purpose of Probate Code section 201 was to protect the legal wife from the testamentary inclinations of her husband. The effect of the *Ricci* case is to render nugatory the legislative intent.

Equitable concepts should be developed to protect the putative wife, but not at the expense of the legal wife. The fact that the putative wife has contributed to the community property acquisitions should not entitle her to preference over the legal wife. The legal wife neither solicits nor consents to the contributions. If a husband abandons his wife and enters into an openly adulterous relationship with a meretricious wife, the latter's contributions would not divest the legal wife of her interest in the community. From the standpoint of the legal wife, the fact that the husband's paramour thinks she is a legal wife should not cause a contrary result. The onus of the wrong to the putative wife should be placed on the husband who has caused the wrong.

The putative wife's equity is but a shadow of the legal wife's statutory right. While all would agree that the putative wife's rights are analogous to the legal wife's, the fact remains that she is not the legal wife. She should not, therefore, be given the legal wife's right by analogy when the result would be to deny the foundation upon which the analogy rests; that is, to award the putative wife one-half of the community before granting the legal wife her statutory interest is to prefer a fiction to the law.

Under the theories offered by the *Blache* and *Ricci* cases, the legal wife, in effect, is made a co-insurer of the putative wife's welfare even though she is innocent of any wrongdoing and despite the fact that the putative wife has benefited most from the illegal marriage. It is the putative wife, not the legal wife, who

has enjoyed the comfort and security of marriage. It is the putative wife who has been supported by the community. Indeed, not only has the legal wife not been supported by the community, but she is not entitled to reimbursement for supporting herself. Clearly, the legal wife, not the putative wife, is entitled to preference when the bigamous marriage is dissolved and the community property is divided.