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De Facto Marriage in West Virginia: If the Court Recognizes the Relationship for Alimony, Why Not for Probate?

Lisa M. Gunno
West Virginia University College of Law

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DE FACTO MARRIAGE IN WEST VIRGINIA: IF THE COURT RECOGNIZES THE RELATIONSHIP FOR ALIMONY, WHY NOT FOR PROBATE?

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I. INTRODUCTION

Did you ever think that under the law of one state you could be considered both married and not married at the same time? While this may seem illogical, it is exactly how an individual could be viewed under the current law of West Virginia. Consider the following scenario: John and Mary have been living together for quite some time in a committed relationship; they both contribute to the household expenses and support each other in every way. The couple
has decided not to pursue a formal marriage ceremony, but feel their relationship is more stable than most married couples in their community. Mary is still receiving alimony from her ex-husband Dave. Dave, who is obviously upset with the relationship, goes to court and requests that his alimony payments be terminated because of the existence of a de facto marriage1 between John and Mary. The court, after looking at the circumstances of the situation, holds that John and Mary are de facto married and terminates Dave’s alimony payments. A few months after this court order, John dies in a tragic accident. Mary realizes the couple had not yet completed their wills, and that John’s property will pass through intestate succession. According to the laws of the state, Mary will not receive any portion of the property when it passes by intestate succession because she was not “legally” married to John at the time of his death. This Note will discuss the possibility that Mary has a right to inherit from John.

John could have protected Mary’s right to his property by executing a will; and it is true that if John had executed a will providing that upon his death his estate go to Mary, the above problem could have been avoided. The easiest way to ensure that the distribution of a decedent’s estate follows the decedent’s wishes is to follow the guidelines in his or her will. When a will is in existence and has been properly executed, the probate courts will adhere as closely as possible to the distribution ordered by the will.2 Problems with distribution arise when an individual dies intestate.3 To deal with the daunting problem of the distribution of an intestate estate, many states have adopted a modified form of the Uniform Probate Code.4 The states that do not follow those statutory provisions are typically community property states.5

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1 A de facto marriage is a relationship created by the Legislature. See W. VA. CODE § 48-5-707 (2006). In the Code, the Legislature lists numerous factors to be considered by the courts when determining if this relationship exists. Id. If the court finds that this relationship exists, then the court can reduce or terminate alimony previously ordered. Id.


4 CLARK, supra note 2. “Each of the fifty states has its own separate probate statutes governing matters of intestate succession, wills, and administration of the decedents’ estates. The statutes vary from state to state . . . .” Id. at 11-12. “One of the most significant influences for reforming and simplifying the probate process in recent years has been the Uniform Probate Code. Since its original promulgation in 1969 the UPC has been adopted, in whole or in part, by a number of states.” Id. at 12. The Uniform Probate Code “modernizes the rules and doctrines governing intestate succession, probate, and the administration of estates.” BLACKS LAW DICTIONARY 1567 (8th ed. 2004). “The Uniform Probate Code, prepared and adopted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association, is based
In West Virginia, the descent and distribution statutes are codified in Chapter 42 of the West Virginia Code and are patterned after the Revised Uniform Probate Code. The West Virginia Code provides that “[a]ny part of the decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this code, except as modified by the decedent’s will.” A surviving spouse of the deceased is entitled to distribution of a significant portion of the estate. The Code defines a surviving spouse as “the person to whom the decedent was married to at the time of the decedent’s death.”

Generally, the descent and distribution statutes in West Virginia are rigidly followed by the courts. The West Virginia Supreme Court of Appeals has made somewhat of an exception to this rigid application when dealing with adopted children. The Court developed the doctrine of equitable adoption in 1978. After the Court developed the doctrine of equitable adoption, the implications spread to other areas of the law, such as intestate succession. The doctrine, when applied in connection with the intestacy statutes, affords equitable relief exclusively to the child in the form of a share of the intestate parent’s estate. Once the court found the doctrine of equitable adoption to exist, the individual was viewed as an adopted child of the parent and, as a result, could be viewed as a child of the deceased for the purposes of intestate succession.

on the premise that laws relating to decedents should be modernized and made uniform.” 31 Am. Jur. 2d Executors and Administrators §130 (citing U.P.C. § 1-102).

5 There are nine community property states. Those states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Richard A. Leiter, Marital Property, State Stat. Surveys Mar. Prop. at 1 (Westlaw 2007). In a community property state, all property and income obtained by the parties during marriage “is considered equally owned by both spouses for purposes of the division of the property upon death or divorce or for purposes of business transacted by either spouse.” Id. In non-community property states statute and/or common law apply to determine the nature of property obtained during marriage. Id.

6 See W. VA. CODE §§ 42-1-1 to 6-19 (2006). The original Uniform Probate Code was promulgated in 1969. The following fifteen states have adopted the UPC in whole or in part: “Alaska (1972); Arizona (1973); Colorado (1973); Florida (1974); Hawaii (1976); Idaho (1971); Kentucky (1976); Maine (1979); Michigan (1978); Minnesota (1974); Montana (1974); Nebraska (1974); Mexico (1975); Dakota (1973); Utah (1975). John W. Fisher, II & Scott Curnutte Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems, 93 W. Va. L. Rev. 61, 99 (1990) [hereinafter Fisher & Curnutte]. The Uniform Probate Code was later revised by the Commissioners on Uniform State Laws. Id. “This Revised Uniform Probate Code (RUPC) reflects an effort by its drafters to provide a reasonable compromise for the distribution of the assets of one who dies intestate.” Id. “The drafters based their decisions on the empirical data and the experience gained under the Uniform Probate Code.” Id.

7 W. VA. CODE § 42-1-2.

8 Id. § 42-1-3.

9 Id. § 42-1-1. W. VA. CODE § 48-2-101 (2006) states that “[e]very marriage in this State must be solemnized under a marriage license issued by a clerk of the county commission in accordance with the provisions of this article.”


11 CLARK, supra note 2, at 82.
This Note will discuss the option of a less rigid application of the descent and distribution statutes with regard to those individuals who meet the de facto marriage requirements as set forth in the West Virginia Code. The West Virginia State Legislature and the West Virginia Supreme Court of Appeals have previously recognized de facto marriages in regards to domestic issues. This Note will argue that because the courts recognize a de facto marriage in domestic matters, it would be inequitable not to allow recognition of this relationship in the probate court as well. Therefore, the Legislature should broaden the scope of the de facto marriage statute by providing that the relationship of a de facto marriage be recognized in relation to the descent and distribution statutes as well as in domestic alimony contests. If the Legislature chooses not to expand the de facto marriage statute, it would be supporting the inequities of this situation and promoting a double standard. The de facto marriage statute, as it is currently written, allows a family court to find that a couple is de facto married. This statute, however, does not require a probate court to recognize that same relationship for the purposes of descent and distribution.

This Note will also discuss the doctrine of equitable distribution, its important role in distribution of property, and how this doctrine supports allowing an individual who holds his or herself out to be married and meets other specific requirements to inherit from his or her “spouse.” If the Legislature chooses not to expand the de facto marriage statute, making it applicable in areas of probate as well as for alimony, the West Virginia Supreme Court of Appeals should allow distribution of the deceased’s property through an extension of Goode v. Goode, using the doctrine of equitable distribution.

Part II of this Note will discuss the history of intestate succession, equitable adoption, and de facto marriage in West Virginia. Part III will discuss how West Virginia has dealt with de facto marriage, equitable adoption, and the doctrine of equitable distribution through case law. In Part IV, this Note will discuss how these areas can be combined to persuade either the Legislature to broaden the definition and application of the de facto marriage statute, or if the Legislature is unwilling to do so, to persuade the Court to expand the definition of equitable adoption to provide remedy for those individuals who live together in a relationship, holding themselves out to be married while satisfying criteria similar or equal to the requirements previously listed by the Legislature for a de facto marriage. Lastly, in Part V, this Note will discuss the possible opposition to the expansion of the use of a de facto marriage, or similar type relationship, for inheritance and why the fears of allowing the expansion are misplaced.

II. HISTORY OF THE LAW IN WEST VIRGINIA

A. Intestate Succession and the Intestacy Statutes

The purpose of the descent and distribution statutes is to provide for a
distribution of a decedent’s intestate estate that approximates what the decedent
would have done with a will. West Virginia’s descent and distribution statutes
are contained in Chapter 42 of the West Virginia Code. These statutes pro-
vide for the distribution of an estate when an individual dies intestate and
include generous provisions for the spouse of the decedent. Over the years,
the intestacy statutes have undergone revisions that have changed the particular
order by which individuals inherit. In 1957, the spouse was elevated to second
place, behind only the children or their descendants. The 1992 revisions con-
tinued to recognize preference for the surviving spouse.

West Virginia’s first descent and distribution statutes originated from
the pattern established when Virginia severed its ties from England. “The
general principle of succession established ... and adopted by the Virginia leg-
islature in 1785 was: ‘that the first of all the land of decedent shall go to his chil-
dren, if any, or their descendants; and if there be no children or descendants of
the decedent, then to his nearest lineal ancestors.’”

In 1992, the West Virginia Legislature made numerous changes to
Chapter 42, Descent and Distribution, to provide for the needs of a changing society. Many studies were done in the years prior to those changes, and those studies represented that “the societal needs of Thomas Jefferson’s agrarian society simply do not reflect the economic reality nor the social needs of today.”

Prior to the 1992 amendments, the statutes favored the children of the deceased instead of the surviving spouse. The amendments by the Legislature demon-

\[\text{\footnotesize 16 W. VA. CODE §§ 42-1-1 to 6-19 (2006).}
\[\text{\footnotesize 17 Id.}
\[\text{\footnotesize 19 W. VA. CODE §§ 42-1-1 to 6-19.}
\[\text{\footnotesize 20 Fisher at 1170. The statute used by West Virginia was taken from Virginia when West Virginia became a state. Id.}
\[\text{\footnotesize 21 Id. at 1171 (citing 2 F. RIBBLE, MINOR ON REAL PROPERTY § 922 (2d ed. 1928)).}
\[\text{\footnotesize 22 W. VA. CODE §§ 42-1-1 to 6-19.}
\[\text{\footnotesize 23 Fisher & Curnette, supra note 6 at 63; See also Fisher, supra note 18, at 1170-72.}
\[\text{\footnotesize 24 W. VA. CODE § 42-1-1. Section 42-1-1, prior to the amendments, provided that if a de-
cendent died survived by a spouse and children or descendants of their children, the children or de-}

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tated its willingness to amend and alter the statutes when necessary to reflect the changing desires of the society.\textsuperscript{25}

Over the past half a century, West Virginia has made changes to its intestate statutes recognizing the importance of a surviving spouse's entitlement to benefits. The first significant change in West Virginia was in 1957, when the surviving spouse was moved from below parents, children, and others to the second in line for distribution, allowing the children to inherit before the surviving spouse.\textsuperscript{26} In the mid 1950's, studies were done to determine if the laws of intestate succession reflected what people were actually doing with their property in their wills.\textsuperscript{27} These studies found that people who left a will almost

scendants would take subject to the wife's dower interest. West Virginia had previously moved the wife to second position, with only the children taking over her. See \textit{Id}.

\textsuperscript{25} "It is not difficult to demonstrate that the existing West Virginia intestate succession statutes do not comport with the 'average persons' wishes for the distribution of his or her property at death." Fisher & Curnutte, \textit{supra} note 6, at 65.

\textsuperscript{26} Prior to the 1957 amendment, the statute read as follows:

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcnary to his kindred, male and female, in the following course:

(a) To his children and their descendants;

(b) If there be no child, nor descendant of any child, then moiety each to his father and mother;

(c) If there be no child nor descendant of any child, nor mother, then one moiety to the father; or if there be no child, nor descendant of any child; nor father, then one moiety to the mother; and in either case the other moiety, or if there be no child, nor descendant of any child, nor father, nor mother, the while, shall go to the wife or husband of the intestate and to the intestate's brothers and sisters and the descendants of brothers and sisters.

\textbf{W. VA. CODE} § 42-1-4080 (1949).

\textbf{W. VA. CODE} § 42-1-4080 (1961) provided:

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcnary to his kindred, male and female, in the following course:

(a) To his children and their descendants;

(b) If there be no child, nor descendant of any child, then the whole shall go to the wife or husband, as the case may be;

(c) If there be no child nor descendant of any child, nor wife, nor husband, then one moiety each to the mother and father; or if there be no child, nor descendant of any child, nor wife, nor husband, nor mother, then the whole shall go to the father: or if there be no child, nor descendant of any child, nor wife, nor husband, nor mother, then the whole shall go to the mother;

If there be no child, nor descendant of any child, nor wife, nor husband, nor mother, nor father, the whole shall go to the intestate's brothers and sisters and the descendants of brothers and sisters.

\textit{See also} Fisher, \textit{supra} note 18, at 1173 n. 14 (citing \textit{Legislation}, 60. W. VA. L. REV. 201 (1958)).

\textsuperscript{27} See Allison Dunham, The \textit{Method, Process and Frequency of Wealth Transmission at Death}, 30 U. CHI. L. REV. 241 (1963); Olin R. Browden, \textit{Recent Patterns of Testate Succession in
never duplicated the pattern found in the codes and that the statutes were not meeting the desires of individuals. In 1969, the National Conference of Commissioners on Uniform State Laws responded to a nationwide effort to reform intestate statutes by developing the Uniform Probate Code. A revised version of the Uniform Probate Code was drafted in 1990. The Revised Uniform Probate Code "reflects an effort by its drafters to provide a reasonable compromise for the distribution of the assets of one who dies intestate." Those drafting the Code relied on the empirical data as well as their experience they gained from the Uniform Probate Code.

In 1988, the West Virginia Law Institute was created by the Legislature "as an official advisory law revision and law reform agency of the State of West Virginia." The first project selected by the group was revising West Virginia's laws regarding intestate succession and elective share. In 1990 the group reported to the West Virginia Law Institute Council and "[w]ith only a few minor exceptions the Advisory Committee endorsed in concept the provisions set forth in the relevant portions of the [Revised Uniform Probate Code]." By patterning its descent and distribution statutes after the Revised Uniform Probate Code, the West Virginia Legislature demonstrated its desire that the laws pattern as closely as possible how individuals would choose to distribute their assets. In West Virginia, the Legislature was not the only branch of government concerned with the descent and distribution statutes. The West Virginia Supreme Court of Appeals became involved through the doctrine of equitable adoption.

B. Introduction and Expansion of the Doctrine of Equitable Adoption

Many children are raised in the home of a foster parent, usually a friend or relative of a natural parent. This arrangement is typically pursuant to an

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28 When a surviving spouse is involved, the wills analyzed indicate much more of a pattern of expectations as to an appropriate share for the surviving spouse. This pattern, capable of being reduced to statutory language, deviates sharply from the distribution provided by the intestate laws.” Dunham Study, supra note 27, at 254-55.

29 Fisher & Curnutte, supra note 6, at 63.

30 Id.

31 Id.

32 See W. VA. CODE § 4-12-1 (1988).

33 Fisher & Curnutte, supra note 6, at 65.

34 Id.

35 “Situations often arise in which a couple takes a child into their home and treats it as one of their own but for one reason or another the child is never legally adopted.” Tracey Bateman Farrell, Annotation, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 122 A.L.R. 5th 205 (2004) [hereinafter Farrell]. See also CLARK, supra note 2, at 82.
informal agreement, without any official proceedings.\textsuperscript{36} If the foster parent dies intestate, the child may be able to participate in the distribution of the parent's estate under the doctrine of equitable adoption.\textsuperscript{37} The doctrine affords equitable relief exclusively to the child in the form of a share of the intestate parent's estate.\textsuperscript{38}

Generally, there are four elements required to establish equitable adoption, and if these elements are proven by clear and convincing evidence, a court will likely find that a child has been equitably adopted.\textsuperscript{39} First, the proponent must establish an agreement between natural parents of the child and the foster parents.\textsuperscript{40} Second, the proponent must establish performance on the part of the parents by giving up custody.\textsuperscript{41} Third, the proponent of the equitable adoption must establish performance on the part of the child by living with foster parents.\textsuperscript{42} Lastly, the proponent must establish partial performance by the foster parent in treating the child as an adopted child.\textsuperscript{43}

West Virginia recognized the doctrine of equitable adoption in 1978.\textsuperscript{44} West Virginia has taken the doctrine of equitable adoption one step further than the general doctrine applied by most other states.\textsuperscript{45} The West Virginia Supreme Court of Appeals developed its own test and "explicitly abandoned the requirement of a prior agreement for adoption" and "emphasiz[ed] that the child's status must be identical to that of a formally adopted child, except only for the absence of a formal order of adoption."\textsuperscript{46} The Court even further expanded the doctrine to allow a child to inherit through the equitable parent's other children.\textsuperscript{47} Through making these changes, West Virginia has extended its law fur-

\textsuperscript{36} Id.

\textsuperscript{37} Id. See also Farrell, supra note 35 ("In some circumstances, courts have employed the doctrine of 'equitable adoption' to allow the child or another party the same rights the party would have had if a legal adoption had taken place.").

\textsuperscript{38} CLARK, supra note 2, at 82. The majority of the states only allow the adopted child to take from the adoptive parent. See Bd. of Educ. v. Browning, 635 A.2d 373 (Md. 1994) (child not entitled to inherit from foster parent’s relatives); In re Estate of Riggs, 440 N.Y.S.2d 450 (Surr. 1981) (foster parent’s relatives not entitled to inherit from equitably adopted child). See also Farrell, supra note 35.


\textsuperscript{40} CLARK, supra note 2, at 82.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369, 373 (1978).

\textsuperscript{45} See infra note 77-84 and the accompanying text.

\textsuperscript{46} Singer, 250 S.E.2d at 373.

\textsuperscript{47} First Nat’l Bank v. Phillips, 344 S.E.2d 201 (W. Va. 1985). "[T]he Court refused to follow the rationale of most of the cases from other jurisdictions which predicate the finding of an equitable adoption on the proof of an expressed or implied contract of adoption . . . . [A]n implied
ther than the law of any other state. Although the state did expand the doctrine of equitable adoption, the state has not taken the same initiative with de facto marriage.

C. De Facto Marriage and its Purpose in Domestic Law

Although West Virginia does not recognize common law marriage, West Virginia does recognize a de facto marriage in the context of domestic relations. In 2001, the Legislature set forth a factor test to be applied by the

contract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims.” Id. at 203 (citing Singer, 250 S.E.2d at 374).


49 W. VA. CODE § 48-5-707 provides:

Reduction or termination of spousal support because of de facto marriage

(a)(1) In the discretion of the court, an award of spousal support may be reduced or terminated upon specific written findings by the court that since the granting of a divorce and the award of spousal support a de facto marriage has existed between the spousal support payee and another person.

(2) In determining whether an existing award of spousal support should be reduced or terminated because of an alleged de facto marriage between a payee and another person, the court should elicit the nature and extent of the relationship in question. The court should give consideration, without limitation, to circumstances such as the following in determining the relationship of an ex-spouse to another person:

(A) The extent to which the ex-spouse and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as "my husband" or "my wife", or otherwise conducting themselves in a manner that evidences a stable marriage-like relationship;

(B) The period of time that the ex-spouse has resided with another person not related by consanguinity or affinity in a permanent place of abode;

(C) The duration and circumstances under which the ex-spouse has maintained a continuing conjugal relationship with the other person;

(D) The extent to which the ex-spouse and the other person have pooled their assets or income or otherwise exhibited financial interdependence;

(E) The extent to which the ex-spouse or the other person has supported the other, in whole or in part;

(F) The extent to which the ex-spouse or the other person has performed valuable services for the other;

(G) The extent to which the ex-spouse or the other person has performed valuable services for the other's company or employer;
courts when determining if a de facto marriage exists between two parties.\(^5\)

The statute generally allows for the reduction or termination of spousal support if the court finds that a de facto marriage exists.\(^5\)

There are many theories under which courts award alimony or spousal support. Those theories include fault, need, status, rehabilitation, and contribution.\(^5\)

In West Virginia, "[t]he sole purpose of an award of alimony is to pro-

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(H) Whether the ex-spouse and the other person have worked together to create or enhance anything of value;

(I) Whether the ex-spouse and the other person have jointly contributed to the purchase of any real or personal property;

(J) Evidence in support of a claim that the ex-spouse and the other person have an express agreement regarding property sharing or support; or

(K) Evidence in support of a claim that the ex-spouse and the other person have an implied agreement regarding property sharing or support.

(3) On the issue of whether spousal support should be reduced or terminated under this subsection, the burden is on the payor to prove by a preponderance of the evidence that a de facto marriage exists. If the court finds that the payor has failed to meet burden of proof on the issue, the court may award reasonable attorney's fees to a payee who prevails in an action that sought to reduce or terminate spousal support on the ground that a de facto marriage exists.

(4) The court shall order that a reduction or termination of spousal support is retroactive to the date of service of the petition on the payee, unless the court finds that reimbursement of amounts already paid would cause an undue hardship on the payee.

(5) An award of rehabilitative spousal support shall not be reduced or terminated because of the existence of a de facto marriage between the spousal support payee and another person.

(6) An award of spousal support in gross shall not be reduced or terminated because of the existence of a de facto marriage between the spousal support payee and another person.

(7) An award of spousal support shall not be reduced or terminated under the provisions of this subsection for conduct by a spousal support payee that occurred before the first day of October, one thousand nine hundred ninety-nine.

(b) Nothing in this subsection shall be construed to abrogate the requirement that every marriage in this state be solemnized under a license or construed to recognize a common law marriage as valid.

\(^5\) Id. "In determining whether an existing award of spousal support may be reduced or terminated because of an alleged de facto marriage between a payee and another person, the court should elicit the nature and extent of the relationship in question. The court should give consideration without limitation, to circumstances such as the following in determining the relationship in question." Id. § 48-5-707(2). See infra note 100-105 and the accompanying text.

\(^5\) W. VA. CODE § 48-5-707.

\(^5\) SANFORD N. KATZ, FAMILY LAW IN AMERICA 11 (Oxford University Press 2003).
vide for the support of a former spouse." The de facto marriage statute was not enacted to protect the payee spouse and his or her relationship with the new "spouse." The statute was enacted to protect and provide fairness to the payor spouse. It is apparent from reading the statute that the statute recognizes the payee spouse, for reasons related to the new relationship, no longer needs the support of his or her ex-spouse. The payee spouse could be said to be receiving his or her support from a new individual.

The statute gives discretion to the state courts to reduce or terminate previously awarded spousal support when the court makes a finding that a de facto marriage has in fact existed between the spousal support payee and another person. The court is instructed to "elicit the nature and extent of the relationship in question." The statute lists many factors such as the extent to which the couple holds themselves out to be husband and wife, the period of time the couple has lived together, the duration and circumstances of the conjugal relationship, the extent to which the couple has pooled their assets, the extent to which the parties supported each other, and whether or not the couple has jointly purchased real or personal property.

The West Virginia Supreme Court of Appeals first discussed the existence of de facto marriages in 2003, holding that if a de facto marriage by a spousal support recipient is found, a factual investigation into the financial circumstances is necessary to determine the recipient's continuing need for support. The West Virginia Supreme Court of Appeals first looked at how a de facto marriage is determined under West Virginia Code § 48-5-707 in 2004, and has not since addressed the relationship. While the de facto marriage statute is fairly new in this state, the doctrine of equitable adoption has been recognized since 1978. The application of the doctrine of equitable adoption and its demonstration of the Court's willingness to provide remedy to those left without recourse provides part of the basis for the expansion of de facto marriage.


55 W. VA. CODE § 48-5-707. "In the discretion of the court, an award of spousal support may be reduced or terminated upon specific written findings by the court that since the granting of a divorce and the award of spousal support a de facto marriage has existed between the spousal support payee and another person." W. VA. CODE § 48-5-707(1).

56 Id. § 48-5-707.

57 Id.


III. DISCUSSION

A. The Doctrine of Equitable Adoption and Its Development in the West Virginia Courts

The doctrine of equitable adoption was first incorporated into West Virginia law by the West Virginia Supreme Court of Appeals in Wheeling Dollar Savings and Trust Co. v. Singer.\(^{60}\) Prior to Wheeling Dollar, the Court had only gone so far as to say that an adopted child had the right to be treated as a natural child.\(^{61}\) The question presented to the Court in Wheeling Dollar was "whether [or not] adherence to formal adoption procedures . . . is the exclusive method by which a person may be accorded the protections of adoptive status in West Virginia."\(^{62}\)

In Wheeling Dollar, the plaintiff believed that she had been legally adopted by Lyda Wharton.\(^{63}\) At Wharton’s death, her surviving children would be eligible to take exclusively a certain portion of the trust estate.\(^{64}\) When Wharton died, the plaintiff informed the trustee of the estate, Wheeling Dollar Savings and Trust Co., of her status and claimed her portion of the trust principal.\(^{65}\) At the time of Wharton’s death she had no other surviving "children."\(^{66}\) After a diligent search of records, it was determined that there had been no formal adoption proceeding for the plaintiff.\(^{67}\)

In its opinion, the West Virginia Supreme Court of Appeals held that the doctrine of equitable adoption should be a "viable theory for relief from injustice in West Virginia."\(^{68}\) The Court further listed factors to be considered that tend to show the existence of an equitable adoption.\(^{69}\) Those factors listed by the court include:

- the benefits of love and affection accruing to the adopting party;
- the performances of services by the child; the surrender of ties

\(^{60}\) 250 S.E.2d 369, 373 (W. Va. 1978).
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Singer, 250 S.E.2d at 371.
\(^{64}\) Id. In 1923, Amelia Welshans died and in her will directed that her residual estate be divided among certain persons. Id. Two-thirds of that amount was to go in equal one-half portions to her niece Lyda Wharton and Olga Welshan. The will provided that at the death of both the children of each taking the parents share per stirpes and if both die without children it should be distributed to Amelia's heirs at law. Id.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id. The circuit court held that because the plaintiff was not the natural or legally adopted child of Ms. Wharton she was not entitled to the principal of the estate. Id.
\(^{68}\) Id. at 372.
\(^{69}\) Id. at 373.
by the natural parent; the society, companionship and filial obedience of the child; an invalid or ineffectual adoption proceeding; reliance by the adopted person upon the existence of his adoptive status; the representation to all the world that the child is a natural or adopted child; and rearing of the child from an age of tender years by the adopting parents.\(^70\)

The test presented by the Court is a factor test where each individual factor should be weighed when considering whether or not the individual has met the requirements for equitable adoption by clear and convincing evidence.\(^71\) This test is unlike the test in most other states in that it does not require an agreement to adopt the child.\(^72\) The test is flexible, and it does not require all factors to be met in order for the child to be considered equitably adopted.\(^73\)

\(^{70}\) *Id.* at 374 (internal citations omitted). These factors were taken from case law from many jurisdictions. See Benefiel v. Faulkner, 29 So.2d 1 (Ala. 1947); In re Lamfrom's Estate, 368 P.2d 318 (Ariz. 1962); Oles v. Wilson, 141 P. 489 (Colo. 1914); Foster v. Cheek, 96 S.E.2d 545 (Ga. 1957); Chehak v. Battles, 110 N.W. 330 (Iowa 1907); Lynn v. Hockaday, 61 S.W. 885 (Mo. 1901); Adler v. Noran, 549 S.W.2d 760 (Tex. Civ. App. 1977). The Court also notes that the equitable adoption can be negated through evidence showing misconduct on the part of the child, abandonment of the adoptive parents, or failure of the child to perform the duties of an adopted child. Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369, 374 (W. Va. 1978). However, mere mischief on the part of the child is not enough to negate the equitable adoption. *Id.*

\(^{71}\) *Singer*, 250 S.E.2d at 374.

\(^{72}\) *Id.*

\(^{73}\) The majority of states that have adopted the doctrine of equitable adoption require that there be an agreement to adopt the child. See J.N.H. v. N.T.H., 705 So.2d 448, 452 (Ala. 1997) ("Equitable adoption is rarely recognized in Alabama and generally requires a finding of intent to adopt."); Lamfrom v. Lockard, 368 P.2d 318, 321 (Ariz. 1993) (The Court listed the elements of equitable adoption as ") (1) promisor must promise in writing or orally to adopt the child; (2) the consideration flowing to the promisor must be twofold: (a) the promisee parents must turn the child over to the promisor, and (b) the child must give filial affection, devotion, association and obedience to the promisor during the latter’s lifetime; (3) when upon the death of the promisor the child has not been made the legally adopted child of the promisor, equity will decree that to be done which was intended to be done and specifically enforce the contract to adopt; (4) the child will be entitled to inherit that portion of the promisor’s estate which he would have inherited had the adoption been formal."); Estate of Ford v. Ford, 8 Cal. Rptr. 3d 541, 545 ("Equitable adoption requires some form of agreement to adopt, coupled with subsequent objective conduct indicating mutual recognition of an adoptive parent and child relationship to such extent that in equity and good conscience an adoption should be deemed to have taken place."); Estate of Jenkins v. Taylor, 904 P.2d 1316, 1318 (Colo. 1995) (Equitable adoption refers to situation involving oral contract to adopt a child, fully performed except there was no statutory adoption, and in which rule is applied for benefit of child in determination of heirship upon death of person contracting to adopt."); Williams v. Estate of Pender, 738 So.2d 453, 456 (Fla. 1999) (The requirements of equitable adoption are ") (1) an agreement to adopt between adoptive and natural parents; (2) performance on the part of the natural parents in giving up custody; (3) performance by the child in living in the home of the alleged adopted parents; (4) partial performance by the alleged adoptive parents in taking the child into their home and treating the child as their own child; and (5) intestacy of adoptive parents."); Davis v. Bennett, 438 S.E.2d 73, 74 (Ga. 1994) ( "To sustain a verdict finding of virtual or equitable adoption, evidence must establish existence of definite and specific contract to
In its opinion, the Court also pointed out the significant difference between a formally adopted child and an equitably adopted child.\(^{74}\) To guarantee treatment as an adopted child, a formally adopted individual is only required to show his adoption papers.\(^{75}\) The equitably adopted child, on the other hand, "must prove by clear, cogent, and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to a formally adopted child."\(^{76}\)

As previously mentioned, West Virginia has gone even further than other states when implementing the doctrine of equitable adoption. In *First National Bank v. Phillips*, the West Virginia Supreme Court of Appeals extended the doctrine of equitable adoption to allow an equitably adopted child to inherit, not only through his adoptive parents, but also through his adoptive siblings as well.\(^{77}\) In *First National*, the decedent died intestate and was survived only by five first cousins.\(^{78}\) One individual, Betty Shamblin, claimed that in addition to being the first cousin of the deceased, she had also been equitably adopted by the deceased’s parents and therefore, was the adopted sister of the deceased.\(^{79}\) She claimed that, as an adopted sibling, she was entitled to be the sole beneficiary of the estate.\(^{80}\) The other first cousins claimed that even if she had been effectively equitably adopted, this adoption only operated between child and parent and not as between other individuals.\(^{81}\) The Circuit Court of Marion County certified this question to the West Virginia Supreme Court of Appeals.\(^{82}\) The Court found "if an equitable adoption was established by clear, cogent and convincing evidence, the equitably adopted child would inherit from another child of the adoptive parent . . . ."\(^{83}\) By expanding the doctrine of equitable adoption to allow the adopted child to inherit through his adoptive siblings, West Virginia has moved beyond any other state in their application of the doc-

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75 Id.
76 Id.
78 Id. at 202.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id. at 205.
trine. Because the Court has been very active in providing a mode of relief to those subjected to the intestacy statutes who would otherwise be left without remedy, it would seemingly follow that the Court should be willing to provide remedy to those in the position of a de facto marriage.

B. Wachter v. Wachter: West Virginia's First Look in the Determination of a De Facto Marriage

The court examined whether a de facto marriage existed for the first time in the 2004 case of Wachter v. Wachter. In Wachter, a former husband sought to reduce the amount that he was required to pay his ex-wife in alimony. The husband argued that the lower court had erred in finding that a de facto marriage did not exist between his ex-wife and her paramour. When the Wachters divorced, the lower court ordered Mr. Wachter to pay $150 per week to Ms. Wachter in permanent alimony. Approximately two years after the divorce, Ms. Wachter began cohabitating with her paramour in the former marital home. Subsequently, Mr. Wachter filed this action for a determination of a de facto marriage in order to reduce or terminate the amount of spousal support that he was required to pay. The family court found that although the couple had maintained a conjugal relationship

84 See Board of Educ. v. Browning, 635 A.2d 373, 379 (Md. 1994) (The Court stated “[i]t is therefore clear that a majority of jurisdictions do not permit equitably adopted children to inherit from the kindred of their adoptive parents. Even the one jurisdiction that permitted an equitably adopted child to inherit through her adoptive parents, namely West Virginia, specifically limited the breadth of its holding. Moreover, in the area of equitable adoption, we have said that Maryland is surely not prepared to go as far as West Virginia has gone.”) (citing McGarvey v. State, 533 A.2d 690, 693 (Md. 1987)); See also Holt v. Burlington N. R. Co., 685 S.W.2d 851, 853 (Mo. Ct. App. 1984) (“The reach of the decree of equitable adoption is limited to allowing the equitably adopted child to inherit from the adoptive parent but not to inherit through the collateral kin. The rights of the equitably adopted are limited in this fashion based on the theory that the court is enforcing a contract and only the parties to the agreement and those in privity are bound; the adoptive parent is a party but the collateral kin are not parties and are not in privity with the parent.”); In re Frazier’s Estate, 180 Ore. 232, 255 (Or. 1947) (brother was not entitled to inherit because adoption only links parent and child, not other relatives).

85 607 S.E.2d 818 (W. Va. 2004). The West Virginia Supreme Court of Appeals first discussed the de facto marriage statute in Lucas v. Lucas, but this decision focused on the amount in which an ex-spouse’s support payments should be reduced and not on the actual determination of a de facto marriage. 592 S.E.2d 646 (W. Va. 2003). The West Virginia Supreme Court of Appeals has only discussed de facto marriage on one other occasion. In Clifford K v. Paul S., the dissent stated “[t]o the extent that legal fictions creating de facto relationships should be created, the Legislature has shown that it will do so when it desires to do so.” 619 S.E.2d 138, 164 (W. Va. 2005).


87 Id.

88 Id. at 821

89 Id. The family court findings showed that the Ms. Wachter and her paramour had maintained a conjugal relationship for several years. Id.

90 Id. Mr. Wachter relied on W. Va. Code § 48-5-707. Id.
they have not held themselves out as married, they own no real estate or personal property together, they are financially independent from each other and have no joint bank accounts or credit cards, they share very little in the way of expenses and have only jointly made nominal improvements to Ms. Wachter’s dwelling. 91

The family court held that the couple’s activities did not rise to the level of a de facto marriage, and the circuit court upheld this ruling. 92 Mr. Wachter appealed the decision, arguing that the lower court, in its determination, had misconstrued W. Va. Code § 48-5-707. 93

The West Virginia Supreme Court of Appeals began its analysis by looking at the language of the statute and the legislative intent. 94 The Court stated that the legislative intent behind the statute was to provide guidance for the determination of whether the nature and extent of a relationship is such that the relationship amounts to a de facto marriage. 95 Following this stated purpose, the factors listed for consideration by the statute were not intended to be an exhaustive list. 96 Moreover, the Court found that there was no requirement that all, or even most, of the factors be present in order to establish a de facto marriage. 97 When determining if a relationship amounts to a de facto marriage, the courts must look at each case individually to determine whether the evidence preponderates toward a finding of a de facto marriage. 98 The burden of proof is on the individual seeking the benefit of the statute to prove, by a preponderance of the evidence, that a de facto marriage exists. 99

The Court reiterated the statute and stated that when making a determination of the existence of a de facto marriage, courts should give consideration, without limitation, to circumstances in determining the relationship of the ex-spouse to another person. 100 Those considerations include the extent to which the ex-spouse and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mail-

91 Id.
92 Id. The Circuit Court of Marion County held that the family court judge did not abuse his discretion and therefore denied the petition for appeal. Id.
93 Id. at 822-23.
94 Id. at 824.
95 Id. See W. VA. CODE § 48-5-707.
96 Wachter, 607 S.E.2d at 824. See W. VA. CODE § 48-5-707.
97 Wachter, 607 S.E.2d at 825.
98 Id.
99 Id. at 826.
100 Id. at 825. Lower courts should use the enumerated factors within the code as a guide, and should also consider any other evidence presented by the parties that is relevant to establishing the existence or non-existence of a de facto marriage. Id.
ing address, referring to each other in terms such as "my husband" or "my wife," or otherwise conducting themselves in a manner that evidences a stable marriage-like relationship.\footnote{Wachter, 607 S.E.2d at 823-24. In its decision, the Court also stated how looking into analogous relationships such as common law marriages for guidance could be helpful. \textit{Id.}}

The Court found that the strongest evidence of a de facto marriage was the duration of the continuing conjugal relationship between the parties.\footnote{\textit{Id.} at 826.} "Absent the presence of other persuasive factors, however, . . . courts have not relied upon the duration of a relationship alone to find a de facto marriage or other non-traditional marital relationship."\footnote{\textit{Id.} See Rose v. Csapo, 818 A.2d 340, 344 (N.J. 2002) ("'Cohabitation is not defined or measured solely or even essentially by "sex" . . . [but] involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in "the couple’s social and family circle."" (citations omitted)).} Ultimately, the Court held that a de facto marriage did not exist.\footnote{\textit{Id.} Wachter, 607 S.E.2d at 826.} This finding of the Court demonstrates that the statute cannot be satisfied by parties merely living together. The Court requires other persuasive factors be present.\footnote{\textit{Id.}} This requirement should ease the minds of those who fear that this statute, if expanded by the Legislature to apply in probate, would give undeserving individuals a right to inherit from someone whom they are merely cohabiting.

\section*{C. The Laws of Contracts and Their Place With Regards to Unmarried Cohabitants}

One argument that has been made by those who oppose common-law marriage is that these unions debase conventional marriage.\footnote{"[Some commentators assert that common law marriage] encourages fraud and vice, [and] that it debases conventional marriage. But this depends on the position from which one looks at common law marriage." Ellen Kandoian, \textit{Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life} 75 GEO. L.J. 1829, 1851 (1987); See also Kathryn S. Vaughn, \textit{The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?} 28 HOUS. L. REV. 1131, 1137 (1991) (citing H. Clark, \textit{The Law of Domestic Relations in the United States} 58 (1968)).} Common-law marriage supporters argue that this will not be the effect "so long as the traditional evidence of the relationship is required."\footnote{Goode v. Goode, 396 S.E.2d 430, 436 (W. Va. 1990) (citing 1 H. Clark, \textit{The Law of Domestic Relations in the United States} § 2.4, at 122-22 (2d ed. 1987)) (emphasis supplied) (footnote omitted).} At least, in a de facto marriage, the traditional evidence is still present.\footnote{See W. VA. CODE § 45-5-707.} Those individuals supporting common law marriages argue that "[i]n fact we debase the institution of mar-
riage when we place conclusive significance on the occurrence of a ceremony. 109 In the past twenty years, there has been a rapid increase in the number of unmarried couples living together in different types of relationships resembling marriage. 110 This rapid increase has been “accompanied by greater judicial recognition and protection of contract rights and obligations arising out of cohabitation.” 111

1. Marvin v. Marvin 112

The landmark case regarding the division of property acquired by individuals that cohabitate without marriage is Marvin v. Marvin. 113 Marvin was decided by the Supreme Court of California in 1976. 114 In Marvin, a woman who had previously lived with a man for seven years brought an action against him, claiming that he breached the oral agreement previously made by the parties pertaining to the property acquired during their time together. 115 During the time the couple lived together, all property acquired was taken in the man’s name. 116 The lower court ruled in favor of Mr. Marvin. 117 The Supreme Court of California disagreed with this ruling stating that “courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.” 118 “In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.” 119 One of the more startling aspects of Marvin is that California, a state that previously did not recognize common law marriage,

109 Goode v. Goode, 396 S.E.2d 430, 436 (W. Va. 1990) (citing 1 H. Clark, The Law of Domestic Relations in the United States § 2.4, at 122-22 (2d ed. 1987)) (emphasis supplied) (footnote omitted). “When a woman has performed the obligations of a wife for thirty-five years and then is brutally deprived of all the financial benefits of marriage on the sole ground that the relationship was not signalized by some sort of a ceremony, this debases marriages. It is far better in such cases to hold that the parties were married.” Id.
110 Id.
111 Id.
113 Id.
114 Id.
115 Id. at 110.
116 Id.
117 Id. at 111. The lower court granted judgment on the pleadings for the defendant and did not allow the plaintiff to recover. Id.
118 Id. at 110.
119 Id.
“gave its judicial imprimatur on the legality of two persons living together in what appeared to be an informal marriage.”  

2.  Goode v. Goode

The West Virginia Supreme Court of Appeals looked to the California decision of Marvin in its 1990 decision of Goode v. Goode. In Goode, the Court answered two certified questions regarding the validity of a common law marriage and the ability of the court to order equitable distribution of property. In its decision, the Court stated that "[c]ourt may order a division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife." This order may be based on express or implied contract principles or upon constructive trusts.

In Goode, the parties orally agreed to be married in 1961 and had lived together for 28 years. As part of their agreement, the parties decided to "pool their resources and share equally in the marital property, and to provide lifelong mutual financial and emotional support to each other." Over this time period, the parties held themselves out to be married and were regarded as husband and wife in their community. In addition, the parties jointly purchased property on three separate occasions. When Mr. Goode moved out of the parties' home, the plaintiff filed for divorce.

This divorce action led the Circuit Court of Lincoln County to certify the following question to the West Virginia Supreme Court of Appeals: "Whether or not a common-law marriage can arise by operation of law in the State of West Virginia." The Supreme Court answered this question in the negative, pointing out language of the West Virginia statute regarding marriage which states, "[e]very marriage in this State shall be solemnized under a license...

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120 SANFORD N. KATZ, FAMILY LAW IN AMERICA 11 (Oxford University Press 2003). "In fact, by recognizing legal rights in the Marvin relationship, the California court was willing to move beyond traditional restrictions on common law marriage by recognizing a relationship that began meretriciously, that is, while Mr. Marvin was already married to another woman." Id.
122 Id. at 432.
123 Id. at 438.
124 Id.
125 Id. at 431.
126 Id.
127 Id.
128 Id. at 432.
129 Id.
130 Id.
as provided in this article." The plaintiff’s argument stressed that if the court did not recognize the validity of the parties’ "common-law marriage," she would not be entitled to an equitable distribution of the property. The plaintiff argued that this would be an unjust result because for almost thirty years, she performed traditional homemaker services for Mr. Goode and the parties’ children. These services included cooking, purchasing supplies for the home, caring for the children, maintaining the family budget, and caring for Mr. Goode when he was sick or disabled. The West Virginia Supreme Court of Appeals stated that while it “[was] not unaware of the financial difficulties that may be experienced by persons in situations similar to that of the plaintiff, we are not willing to abandon the statutory requirements of marriage in this state.”

The Court stated it would not impose an alternative view and recognize this common-law marriage because of the statutory provision. The Court decided to leave this task to the Legislature, should it choose to abolish the solemnization requirements of the code section. In Goode, the plaintiff also suggested that the Court follow the approach it used in Wheeling Dollar Savings & Trust Co. Without precedent, the Court was unwilling to take the same approach as it did in Wheeling Dollar Savings & Trust Co. v. Singer. "In light of the mandatory language of W. Va. Code, 48-1-5 [1969], as set forth in this opinion, we are not willing to extend our theory of ‘equitable adoption’ to recognition of the validity of common-law marriage.”

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131 Id. (referring to W. VA. CODE § 48-1-5). The Court further points to case law in which the West Virginia Supreme Court of Appeals has expressly held that W. VA. CODE § 48-1-5 is mandatory and not merely directory. Id.

132 Id. at 434-35.

133 Id. at 435.

134 Id.

135 Id.

136 Id. The Court further noted that "if the law were to be changed to permit a valid marriage to be effectuated ‘by the mere private contract of the magistrate or minister,’ that should properly be ‘a matter for legislative, and not judicial[,]’ consideration." Id. (citing Pierce v. Sec’y of United States Dept. of Health, Educ. & Welfare, 254 A.2d 46, 48 (Me. 1969) (quoting Commonwealth v. Munson, 127 Mass. 459, 470 (1879))).

137 Id. The Court notes that in Wheeling Dollar Savings and Trust Co. it “incorporated into law the doctrine of ‘equitable adoption,’ thus, holding that the formal adoption procedures provided by former W. Va. Code, 48-4-1 to 48-4-9, as amended, were not ‘the exclusive method by which a person may be accorded the protections of adoptive status[.]’” Id.

138 Id. The Court noted that the plaintiff has not stated any precedents when an “equitable adoption” theory was used to support the theory of “equitable adoption.” Id.

139 Id. at 435 n.7. This Note is attempting to ask the court to recognize the validity of a common-law marriage. This Note is asking that either the legislature broaden the de-facto marriage statute to apply in probate or that the court extend its analysis in Goode v. Goode to allow for the equitable distribution of property.
While the Court refused to recognize the validity of the parties' "marriage", the Court did not leave the plaintiff without means of recovery. The Circuit Court of Lincoln County also posed the question "whether an equitable division of the property may be awarded to a man or woman who, prior to the termination of their relationship with each other, were unmarried cohabitants." The Court answered this question in the positive, holding that the property may be equitably divided. When deciding this issue, the Court looked to many cases from other jurisdictions.

In Hewitt, the Supreme Court of Illinois analyzed "whether it is appropriate . . . to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State." The Illinois Court "rejected the notion that unmarried couples are entitled to property rights based upon their cohabiting," and refused to follow the approach of Marvin. Other courts have accepted the analysis of the court in Marvin. The Nevada Supreme Court recognized "that the state has a strong public policy interest in encouraging legal marriage." The Court further stated that "[w]e do not, however believe that policy is well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions." Other courts have used general equity theories when distributing the property acquired by the joint efforts of unmarried cohabitants.

The West Virginia Supreme Court of Appeals felt that this issue was not as "cut and dried" as the opinions of other jurisdictions would cause it to appear. The West Virginia Court generally agreed with the Supreme Court of Nevada's findings.

In Goode, while the Court recognized a strong public policy interest in legal, valid marriages, it noted "this policy must not defeat a person's equitable interests, nor a person's rights based upon a valid agreement, express or im-

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140 Id. at 438.
141 Id. at 435.
142 Id. at 438.
144 Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979). The Illinois Court was concerned with the societal effect of nonmarital cohabitation and not with the individual effect. Id.
145 Id. at 1207.
147 Id.
149 Id.
150 Id.
plied." The Court found that if the plaintiff proved she provided the services she alleged, "it would be inequitable to not recognize her role in the acquisition of property with the defendant during the period of their cohabitation." The Court held that courts may order a division of the property acquired by unmarried cohabitants who have considered themselves and held themselves out to be husband and wife. When making this decision, the courts may consider certain factors when making the distribution of property such as "the purpose, duration, and stability of the relationship and the expectations of the parties."  

Goode demonstrates the West Virginia Supreme Court of Appeals’ desire not to leave unmarried cohabitants without remedy when the issue arises of dividing that property between the parties in the event of a "divorce." Because the Court has shown this willingness to provide remedy when the couple splits up voluntarily, it should also provide remedy when one of the parties dies, provided that the criteria stated in Goode has been met.

3. Thomas v. LaRosa

In 1990, the West Virginia Supreme Court of Appeals decided Thomas v. LaRosa. In this case, the Circuit Court of Harrison County certified a question to the Court. The Circuit Court posed the question "[a]re agreements (express or implied) which are made between adult non-marital partners for future support and which are not explicitly and inseparably founded on sexual services unenforceable?" After looking at the facts, the Court restated the

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151 Id. at 438. West Virginia recognized the doctrine of equitable distribution in LaRue v. LaRue, 304 S.E.2d 312 (W. Va. 1983). In LaRue, the Court adopted the doctrine of equitable distribution and applied it in the marital context. Id. The Court stated the "doctrine of equitable distribution, which permits a spouse, who has made a material economic contribution toward the acquisition of property which is titled in the name of or under the control of the other spouse, to claim an equitable interest in such property." Id. "That is, a wife should be entitled to a trust in property to the extent that the husband is unjustly enriched by her contribution." Id.

152 Id.

153 Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990). This order may be based on either express or implied principles of contract or upon constructive trust. Id.

154 Id. In Goode, the parties lived together for an extended period of time, considered themselves to be husband and wife, and, in fact, pooled their resources to include taking property under joint deeds. Id. Here, the Court stated that the "equities are more easily determined than in a relationship between two parties which was for a shorter duration, or where the parties did not consider themselves to be husband and wife, or where the parties did not pool their resources." Id. Other jurisdictions have recognized that "[e]ach case should be assessed on its own merits with consideration given to the purpose, duration, and stability or the relationship and expectations of the parties." Id. (citing Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984)). See also Omer v. Omer, 523 P.2d 957, 961 (Wash. Ct. App. 1974).

155 Thomas v. LaRosa, 400 S.E.2d 809 (W. Va. 1990).

156 Id.

157 Id. at 810.

158 Id.
question presented as “whether moral standards have changed sufficiently in the last thirty years that a man can now be married to two women at the same time.”\textsuperscript{159} The Court’s answer to this question was no.\textsuperscript{160}

In this case, the plaintiff, Karen Thomas asked the court to enforce an oral agreement that she alleged was made between herself and the defendant, James LaRosa. The parties at no time were legally married to each other; however, Ms. Thomas alleges that the parties agreed to “hold themselves out and act as husband and wife” and that LaRosa would “provide financial security for [Thomas] for her lifetime and to educate her children.”\textsuperscript{161} At the time the parties allegedly entered into the agreement, Ms. Thomas knew that Mr. LaRosa was already legally married to another woman.\textsuperscript{162} The Court distinguished this case from\textit{Goode} reiterating that while\textit{Goode} allowed the “division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife . . . ,” the Court limited the application. The Court did so by stating “[p]rovided, however, that if either the man or woman is validly married to another person during the period of cohabitation, the property rights of the spouse and support rights of the children of such man or woman shall not in any way be adversely affected by such a division of property.”\textsuperscript{163}

In answering the certified question in the negative, the Court noted that “[t]o enforce such a contract when one party is already married would amount to the condonation of bigamy and such enforcement would inevitably run afoul of the last proviso in syl. pt. 3 of\textit{Goode}, where we unequivocally denied the enforcement of living together contracts if the rights of either a lawful spouse or children would be prejudiced.”\textsuperscript{164} The Court further stressed the sanctity of marriage and the public policy in support protecting this relationship. “Because of the intricate property relationships that marriage implies, this State has an orderly way for allocating property rights accrued by virtue of marriage at the time the marriage is dissolved.”\textsuperscript{165} In West Virginia, a formal divorce “is a condition precedent to the taking of a second wife or husband.”\textsuperscript{166}

\textit{LaRosa} demonstrates that the Court is not willing to extend the holding of\textit{Goode v. Goode} when the result would be against strong public policy. However, the extension of\textit{Goode} to provide remedy in probate to individuals who hold themselves out to be married while satisfying the other requirements

\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 811.
\textsuperscript{163} \textit{Id.} at 812 (quoting Syl. Pt. 3, \textit{Goode v. Goode}, 396 S.E.2d 430 (W. Va. 1990)).
\textsuperscript{164} \textit{Id.} at 814.
\textsuperscript{165} \textit{Id.} at 815.
\textsuperscript{166} \textit{Id.} at 815.
listed by the Court is not against a strong public policy. The extension would in fact be furthering the policy used by the Court in *Goode*.

IV. **West Virginia Should Allow Those Individuals Who Meet the Criteria for a De Facto Marriage to Inherit From Their Deceased “Spouse”**

Over the years, West Virginia has been a very progressive state with regards to its descent and distribution statutes. West Virginia has amended these statutes to provide for society’s changing desires. The State has also been very liberal with its treatment of the equitable adoption and its interplay with the descent and distribution statutes showing its willingness to provide remedy to a deserving individual.  

West Virginia has developed a flexible test for equitable adoption that does not require each factor to be met, while the majority of states use a more rigid test that requires each factor to be met, including an agreement to adopt. In addition, West Virginia is also the only state that allows an equitably adopted child to inherit through his or her adoptive siblings. This progressive attitude toward providing for those for whom the deceased intended should also be applied with regard to those who meet the requirements for a de facto marriage.

A. **The Legislature Should Broaden the De Facto Marriage Statute, Making it Applicable in Probate**

In *Goode*, the Court stated that because of the mandatory language in the statute requiring solemnization of a marriage, it would not impose an alternative view, stating, “that task is better left to the Legislature, should it so choose to abolish the solemnization requirements of W. Va. Code, 48-1-5 (1969).” The West Virginia Legislature did in fact act on a similar issue in the years following *Goode*.

In 2001, the Legislature enacted the statute which created the relationship of a de facto marriage. While the statute itself applies to reductions in

\[\text{See supra notes 38, 62, and 73 (describing other states and their treatment of equitable adoption).}\]

\[\text{See supra note 38 (discussing West Virginia's decision to not make a contract for adoption a requirement for equitable adoption) and note 62 (discussing other states requirements for equitable adoption).}\]

\[\text{First Nat'l Bank v. Phillips, 344 S.E.2d 201 (W. Va. 1986). See supra note 73 (discussing other states and the allowance of equitable adoption and the right to inherit from those other than the adoptive parents).}\]

\[\text{Goode v. Goode, 396 S.E.2d 430, 435 (W. Va. 1990). It is important to note that although the Court refused to allow common-law marriages, it still provided recovery for the plaintiff. Id.}\]

\[\text{See W. VA. CODE § 48-5-707 (2006).}\]

\[\text{W. VA. CODE § 48-5-707.}\]
alimony payments, the Legislature did create a factor test to determine if a couple was de facto married.\textsuperscript{173} Given this action by the Legislature and the cases subsequently decided by the West Virginia Supreme Court of Appeals, it could be stated that, at least in some circumstances, the Court and Legislature are willing to find a "marriage" where one was not actually solemnized.\textsuperscript{174} While the argument can be made that the purpose of the statute is not to offer protection of the payee and that the Legislature is simply trying to provide relief to the payor of the alimony, the purpose of the original court ordered alimony was to protect the payee spouse.\textsuperscript{175} The Legislature is, in essence, stating that because of the new relationship, the payee spouse is no longer in need of support from the payor spouse. Following this line of thought, because of Mary's new relationship with John, she no longer needs support from Dave. It logically follows that Mary is no longer in need of this support in the view of the Legislature and Court because Dave is now providing for her. The Legislature, through the de facto marriage statute, is creating a relationship between the parties.

The relationship being created by the courts is a "marriage" between two individuals who have not had their union legally recognized. In order to reduce or terminate the alimony payments, the courts are looking at a new relationship held by one of the parties to a previous court order. This court order is terminable upon the occurrence of certain factors, one of which is typically remarriage. According to the statute, for purposes of alimony payments, Mary and John can be viewed by the court as "married" and as a result, if the court orders, Dave is no longer required to provide support. The court recognizes that John, a party to the new relationship created by the Legislature and recognized by the court, is now supporting Mary. If the reason for relieving Dave of his obligation is that Mary is now being supported by John, then why would the Legislature not provide her remedy if John dies intestate?

The next logical step for the Legislature would be to expand the de facto marriage statute to ensure that it applies in probate as well as in family court. This expansion would allow those who are de facto married according to the statute to inherit from their de facto spouse. If the statute were not expanded to allow the inheritance, the Legislature would be stating that on one occasion it endorses a court holding that an individual is de facto married to his or her "spouse" to reduce his or her alimony payments. However, the Legislature is also endorsing that on the very next day, that same court or jurisdiction could hold that he or she is not the spouse of the deceased, and therefore, that individ-

\textsuperscript{173} \textit{Id.} "To the extent that legal fictions creating \textit{de facto} relationships should be created, the Legislature has shown that it will do so when it desires to do so." Clifford K. v. Paul S., 217 W. Va. 625, 651 (W. Va. 2005).


\textsuperscript{175} "The sole purpose of an award of alimony is to provide for the support of a former spouse." Clay v. Clay, 388 S.E.2d 288, 296 (W. Va. 1989).
ual would not be allowed to inherit from the through the descent and distribution statutes.

If the Legislature is not willing to expand the de facto marriage statute, making it applicable to the intestacy statutes, the Court should look toward the other remedies that have been offered to unmarried cohabitants in West Virginia.

B. The Court Should Expand its Previous Holding in Goode to Allow Unmarried Cohabitants to Inherit from Each Other

West Virginia has previously provided remedy to unmarried cohabitants. The West Virginia Supreme Court of Appeals has previously held that the courts have the ability to order the division of property acquired by a woman and a man who are unmarried cohabitants, but who have considered themselves and held themselves out to be married. In Goode, while the Court did not recognize a common law marriage between the parties, the Court still presented the plaintiff an avenue of recovery based on the principles of express or implied contract or constructive trust.

The Court stated that it should consider certain factors when making the distribution of property such as “the purpose, duration, and stability of the relationship and the expectations of the parties.” Those factors listed by the Court are substantially similar to those factors required for a finding of a de facto marriage. Therefore, it would be likely that one who meets the requirements for a de facto marriage would also meet the requirements set forth by the Court for distribution of property.

Through the case law regarding division of property acquired by unmarried cohabitants, the West Virginia Supreme Court of Appeals has shown a strong desire not to leave an individual without recovery. In Goode, the Court stated that it would be “inequitable to not recognize [the plaintiff’s] role in the acquisition of property with the defendant during the period of their cohabitation.”

If the Court is willing to provide protection to an individual who is an unmarried cohabitant, why then not provide the same protection to the individual who is in the same situation, only the other cohabitant or “de facto spouse” dies prior to the “divorce”? The courts have been willing to recognize a right to equitable distribution of property based on contractual rights between the parties when the parties “break-up” or separate. Would it not follow that if the relation-

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177 Id. at 430.
178 Id. at 438.
179 Goode was decided in 1990, eleven years before the de facto marriage statute was enacted. If the facts in Goode were applied to de facto marriage statute, it appears that the Court would likely find that the parties met the requirements set forth in the statute.
180 See id. at 436.
181 Id. at 438.
ship between the parties "ends" by death of one of the individuals that court 
should recognize the right in that instance as well? The equity provided by the 
courts should extend to the property acquired by unmarried cohabitants who 
hold themselves out to be married, when one of those individuals dies intestate. 
The Court could provide this remedy by expanding the holding in 
Goode v. Goode to apply in these instances. Some may argue that Thomas v. 
LaRosa stands in the way of the natural expansion of Goode; however, the public 
policy in this situation is not as insurmountable. To begin, in Thomas v. 
LaRosa, Mr. LaRosa was married to another individual at the time he entered 
into his "contract" with Ms. Thomas. Enforcing this contract would require the 
court to endorse bigamy, a practice that is clearly against public policy in West 
Virginia. While common law marriage may be argued to be against public policy in West Virginia, the expansion of Goode does not impose on that policy. In 
Goode, the parties were unmarried cohabitants and the West Virginia Supreme 
Court of Appeals answered the following certified question in the affirmative, 
"[i]f a common law marriage is not recognized by West Virginia law, or if recog-
nized and not found in fact to exist between the parties by the trial court in 
this case, whether a Court may award support and/or order equitable distribution 
of property between a man and a woman who have lived together as husband and 
wife but lack the ceremonial and licensing formalities of legal marriage?" 182 
While the state does not recognize common law marriage, the Court found it 
proper to equitably divide the property of "two unmarried cohabitants who live 
together as man and wife" while both parties were still living and voluntarily 
chose to separate. 183 In fact, the court stated that "[t]his Court . . . recognizes 
that the state has a strong public policy interest in encouraging legally valid 
marriages. However, we . . . also recognize that this policy must not defeat a 
person's equitable interest, nor a person's rights based upon a valid agreement, 
express or implied." 184 If Goode were expanded to apply to the death of one of 
the cohabitants, as suggested at the beginning of this Note, any public policy 
concerns that might arise would have been addressed by the Court in Goode. If 
the public policy of encouraging valid legal marriages prevented the expansion 
of Goode to the situation at issue, then the public policy would be defeating an 
individual's equitable interest. 

Individuals, such as John and Mary, should not be left without remedy. 
First, the history and progression of the laws of this state support either the 
broadening of the de facto marriage statute or the expansion of the holding in 
Goode. The Court has previously shown its desire to provide for those who are 
left without remedy by the intestacy statutes. Second, the Court has demonstr-
ated its desire to not leave an unmarried cohabitant without recovery when it 
comes to the division of property. While the Court recognized a strong public 

182 Id. at 432. 
183 Id. at 438. 
184 Id.
policy interest in solemnized marriages, it stated that the “policy must not defeat a person’s equitable interests, nor a person’s rights based upon a valid agreement, express or implied.”\(^{185}\) Lastly, the Legislature and the Court have previously recognized the relationship of a de facto marriage in other contexts and the test has already been developed and approved by the Legislature. Therefore, the Legislature should broaden the de facto marriage statute, making it applicable to the descent and distribution statutes. If the Legislature is not willing to do so, the Court should extend its holding in Goode, allowing those who meet the criteria to inherit, thus providing relief for those individuals who would otherwise be left with an inequitable result.

V. OPPOSITION TO THE EXPANSION OF THE USE OF DE FACTO MARRIAGE

One could easily make the argument that by allowing this form of inheritance, the West Virginia Court would be recognizing common-law marriage. Those opposing this form of inheritance may argue that the West Virginia Supreme Court of Appeals, on more than one occasion, has stated that it will not recognize such marriages.\(^ {186}\) In Goode, the West Virginia Supreme Court of Appeals explicitly stated that common-law marriages could not arise by operation of law in West Virginia.\(^ {187}\) Those in opposition may also point to the footnote in Goode, where the Court noted “[i]n light of the mandatory language of W. Va. Code 48-1-5 [1969], as set forth in this opinion, we are not willing to extend out theory of ‘equitable adoption’ to recognition of the validity of common-law marriage.”\(^ {188}\) However, the Court in Goode did provide relief for the plaintiff. Also, in its decision, the Court stated that the task of abolishing the solemnization requirement would be one for the Legislature.\(^ {189}\) The Legislature has taken a step to at least recognize a marriage in some instances where a marriage license does not exist.

While it might appear that the recognition of a de facto spouse as a possible heir might have some similarities to the state’s recognition of common-law marriage, a de facto marriage is not equivalent to a common-law marriage. While inheritance is a benefit of a legally solemnized marriage, there are many other benefits such as social security, insurance, and tax benefits that would not be extended to those who are found to be de facto spouses.

Allowing the de facto spouse to inherit is preventing unjust enrichment or an inequitable distribution of the property acquired and enjoyed by the parties while both were living. Unlike insurance, tax benefits, and social security, which could be regarded as societal benefits of being married, the property ac-

\(^{185}\) Id.
\(^{186}\) Id. at 436.
\(^{187}\) Id.
\(^{188}\) Id. at 437.
\(^{189}\) Id. at 435.
quired by the parties while living together is likely a result of the work and effort of both parties as opposed to being a government benefit offered to the couple after marriage. The ability of a de facto spouse to inherit would not be the same as recognizing a common-law marriage because the property distribution would not be in the same category as the other benefits awarded to a married couple.

Another argument that would likely be used by those individuals who would stand in opposition to the de facto spouses inheritance would be that those individuals had the ability to legally marry, and through that marriage enjoy the benefits of the descent and distribution statutes. This argument is substantially weaker than it would have been many years ago. In today’s society, many individuals are choosing to live together prior to marriage, and many of those individuals choose to never marry.190 “Couples may live together as a temporary and flexible arrangement allowing for the preservation of individual interests, as a prelude to marriage, as a trial marriage, or they may live together permanently either informally or with a formal agreement.”191 Also, in today’s society, the emphasis on marriage is not as strong as it was ten or even twenty years ago.192 The descent and distribution statutes were revised over ten years ago to better demonstrate the believed desires of those individuals who die intestate. Therefore, as society is still changing, and the emphasis on an actual solemnized marriage is decreasing,193 the State should look again at those laws and revise them to meet the needs of today’s society.

Lastly, those in opposition could argue that all these individuals need to do is write a will disposing of their property as they wish. If the individual had prepared a will stating that he or she desired his or her property to go to his or her de facto spouse, then the descent and distribution laws would never come into play. Again, this argument is flawed. If all individuals did, in fact, prepare their wills in anticipation of death, the Court would rarely find a need for those

190 Sanford N. Katz, Family Law in America 11 (Oxford University Press 2003). “Critical to an assessment of the centrality of marriage is the extent to which Americans are involved in non-marital unions, perhaps in lieu of marriage or remarriage. A dramatic rise in the prevalence of cohabitation over the past twenty-five years makes it clear that non-marital unions have become an increasingly acceptable: 1. alternative to marriage; 2. step in the progress toward first marriage (by giving couples the opportunity to size each other up as potential spouses); as well as 3. a substitute for marriage after separation and divorce.” Id. at 11 n.1.

191 Id.

192 Id. “The widespread acceptance of cohabitation, in turn, diminishes the ‘imperative’ of marriage.” Lynn Casper and her colleagues at the United States Census Bureau estimate a steep and nearly linear increase in unrelated couple households from 1 million in 1977, to more than 4 million in 1997, a figure that is even higher when other data sets are used for the estimates. Thus, despite a significant postponement in marriage, the prevalence of cohabitation makes the contemporary young adults nearly as likely to be sharing a household with a partner as those in previous decades.” Id.

193 Id. “The rise in cohabitation is of course, facilitated by the . . . loosening social mores about non-marital sex, contraception, and abortion, and changes in the importance placed on the institution of marriage.” Id.
VI. CONCLUSION

Over the years, the West Virginia Legislature and the West Virginia Supreme Court of Appeals have laid the groundwork that would appear to allow an individual who either meets the criteria listed in the de facto marriage statute or found in Goode v. Goode to inherit from their deceased "spouse." The West Virginia Legislature has previously enacted a statute which lists the factors to be considered when determining if a de facto marriage exists. This legislation and subsequent case law demonstrates that the Legislature and the Court are willing to recognize this relationship in at least one area of the law. The test presented by the Legislature resembles closely both the test for finding the relationship of equitable adoption and also the test presented by the Court when determining whether or not to divide the property of unmarried cohabitants while both are still alive. The decisions of the West Virginia Supreme Court of Appeals also support the theory that the courts have the ability to distribute the property acquired by unmarried cohabitants. Therefore, the Legislature should broaden the application of the de facto marriage statute to apply in the realm of probate, as well as for alimony purposes. If the Legislature is not willing to take this step, the Court should take the initiative and expand the holding in Goode v. Goode to apply to those individuals who hold themselves out to be married and remain together until the death of one of those individuals.

Lisa M. Gunno*

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194 Id. If individuals died testate, the only time in which these statutes would come into play would be when a will would be for some reason deemed invalid. Id.
195 Goode, 396 S.E.2d at 438.

* Senior Managing Editor, Volume 109 of the West Virginia Law Review; J.D. Candidate, West Virginia University College of Law, 2007; Bachelor of Arts in Financial Economics, Bethany College, 2004. The author would like to thank Dean John W. Fisher for his helpful suggestions and comments throughout the writing process. The author would also like to thank her parents, Randy and Beverly Gunno, and Gary Lucas for their constant encouragement, love, understanding and support.