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## The Law and Living Together

By Jeanne M. Hannah

*A cohabitation agreement is essential protection for unmarried couples*

Many couples in the United States cohabit without the benefit of marriage. As a direct result, in the event of illness, death, or dissolution of the relationship, cohabitants are deprived of many of the rights and financial safeguards accorded to legally wed spouses.

Consequently, unmarried partners who have not been protected by a written agreement that specifically spells out property and support rights upon death or separation from a partner face grave risk of financial harm.

Since the early 1970s, some states have protected rights arising from the relationships of cohabitating adults through various legal theories, such as implied contract, express contract, unjust enrichment, equitable estoppel, joint venture, constructive trust, and/or equitable partnership. The few states that have legalized same-sex marriage or civil unions also provide some protection to couples. However, many states have refused to grant such relief to people living in what, in some jurisdictions, is called a “meretricious relationship.”

Statistics from the U.S. Department of Census make clear that cohabitation is definitely on the uptick. Between 1960 and 2000, U.S. Census data confirms that cohabitation by unmarried couples has increased 1,247%. Tavia Simmons and Martin O’Connell, *Married-Couple and Unmarried-Partner Households: 2000*, Census 2000 Special Reports, CENSR-5 U.S. Census Bureau, Washington, D.C. (Feb. 2003), p. 1. Archived at: <http://www.census.gov/prod/2003pubs/censr-5.pdf> (last accessed Oct 4, 2009).

Approximately 5.5 million U.S. couples (both heterosexual and same sex) were living together as unmarried partners in 2000. That’s up from 3.2 million in 1990. The number is believed to be underreported. *Id.* See also Martin O’Connell and Gretchen Gooding, [Editing Unmarried Couples in Census Bureau Data: 2007, Census 2000 Housing and Household Economic Statistics Division Working Paper](#), Washington, D.C. (July 2007) (last accessed Sept. 16, 2009).

Approximately 9.2 million U.S. men and women live in 4.6 million unmarried-partner households. Jason Fields, *America’s Families and Living Arrangements: 2003*, Current Population Reports, P20-553. U.S. Census Bureau, Washington, D.C. (2004), p. 17. Archived at <http://www.census.gov/prod/2004pubs/p20-553.pdf> (last accessed Sept. 16, 2009).

While same-sex couples have the right to marry in some jurisdictions, that does not mean they always will. Individuals may not always be able to protect themselves by a written contract if their prospective partner refuses to enter into a contract. Such individuals will need to reflect upon whether entering into a partnership is a good idea.

Cohabiting adults should operate under a written contract that states with specificity each party's rights and responsibilities upon death or separation and at breakup of the relationship. A relationship may well be made more stable and secure when a contract triggers a frank discussion of unmarried partners' commitment and if incentives are incorporated into the agreement acknowledging each partner's rights and responsibilities. This is particularly true where one party has more education or greater earning capacity, owns property at the inception of the relationship, or is responsible for improvement or appreciation of property acquired prior to or during the relationship. This also is true where partners do not share equally in all duties and expenses.

Statutes also govern the distribution of property of adults who die intestate. Especially in same-sex relationships, many partners wish to ensure that their life partner will be taken care of if one partner dies without a will or if family members challenge the conveyance of assets to a partner through a will or trust.

### What issues should be included?

**1. Purpose.** A cohabitation agreement should state (a) the purpose of the agreement, (b) that it is intended to be legally binding on each partner and his or her heirs and assigns. A choice-of-law provision will ensure that the contract remains binding in the event of relocation and, if the partners should move to another state, that the laws of the state in which their contract was formed will govern.

**2. Identity of parties.** State each party's full name, address, age, financial position, and current health.

**3. Disclosure of assets and liabilities.** Attach separate schedules showing each partner's full disclosure of assets and liabilities.

**4. Duration.** State how long the parties intend the agreement to last. Many people build incentives into such agreements to increase the commitment to the partnership. For example, consider a "sunset clause" that provides for a partner to be treated like a surviving spouse after 15 to 20 years. Other agreements provide for a "liquidated damages" clause that discourages switching to "a newer model" by imposing substantial support obligations upon the breaching or terminating party. Other agreements may tie financial incentives to major life events, such as the birth of a child.

**5. Property rights.** State whether the partners waive property rights in favor of natural heirs. If not, state exactly how such interests will be handled. (See Inheritance and wills below).

- **Real estate.** State how the parties will deal with any property owned before the relationship or acquired during it. State how title will be held during cohabitation and after a death or dissolution of the relationship. If the parties' intent is to protect both partners' interests upon death (a frequent goal of same-sex couples), the easiest way to defeat claims of potential "natural heirs" is to create the title as "joint tenants." A joint tenancy will automatically become vested in the surviving tenant upon death of a co-tenant. Note that a joint tenancy is sufficient. In Michigan and some other states, if a deed provides that title is held as "joint tenants with full rights of survivorship" this will open a can of worms preventing partition to divide the property upon separation. (For more information on this, contact the author.)
- **Restitution for contribution to the estate of the other.** (See also income/expenses/debts) If one partner owns the house, state how financial restitution will be made to the other partner for monies expended if the partnership is later terminated and the title-holder has accrued equity and enjoyed tax benefits to the detriment of the other partner.
- **Buy-outs of property interests.** If the partners acquire real estate jointly, state how the equity will be liquidated and/or divided upon breakup of the relationship.
- **Termination of the partnership and moving out.** State how the parties will deal with removal from the home, including the specific period for notice prior to an obligation to leave when the ousting party owns the house.

- **Accrual of savings, pensions, annuities, and other retirement interests.** State who will be named as beneficiary or co-owners of such interests, including retirement interests, savings, pensions, and annuity policies. Provide for division of such interests in the event of separation or restitution to achieve an equitable division. Some couples may elect to hold these assets separately. If a beneficial interest is created for the partner, state a time limit within which, at separation, a waiver of such interest must be executed and delivered.
- **Income/expenses/debts.** State how each party's income is to be managed, such as pooling each partner's income into a joint account or keeping such accounts separate. State how the partners' regular monthly expenses will be allocated, i.e., equally or as a pro rata share, based on income. State how each partner will help pay for such things as vacations and home furnishings. State when a partner who gave up career advancement to be a homemaker is entitled to rehabilitative support upon separation. State whether one party has an obligation to support a party who sacrifices career opportunities to remain at home as caregiver for children. State how debts will be allocated upon dissolution.
- **Personal property.** Vehicles—In states such as Michigan, owner liability statutes make it imperative that cars be titled in the name of the principal driver to avoid imposing liability on joint assets in the event that a driver is underinsured and incurs liability arising out of an accident. Household goods—State how personal property acquired during the partnership will be divided upon separation or death. It is preferable that a party who holds credit card debt takes the personal property for which that debt was created.

**6. Children.** Note that United States courts generally have been unreceptive to parental claims to custody or parenting time by a partner who is not a birth parent after a relationship breaks up. This is particularly troublesome in states where two-parent adoptions are not legal. Courts retain the statutory obligation to adjudicate each case based on the children's best interests. Courts have generally rejected the concept of contract applied to decisions about the future best interest of children, thus an agreement that incorporates intentions about custody or parenting time after a breakup will generally not be enforceable, and the genetic or biological parent will prevail in such disputes. A few progressive courts have, however, allowed coparents to form contracts about future coparenting upon dissolution of the relationship. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa B.*, 133 P.3d 690 (Cal. 2005); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

State any commitments to have children and planning details, such as who will be the birth mother and how such children will be educated. One creative way to deal with this problem is to make sure that the child has genetic material from each parent or that the genetic material is from one parent with the other partner being "the host." Today, it is entirely possible to create a child or children through in vitro fertilization (IVF), and for partners to share children who are genetically related to both partners.

**7. Inheritance and wills.** State what each partner plans to leave to the other. Great care should be taken to avoid a will contest where a party is disinheriting natural heirs in favor of a partner. If the partners are subsequently able to marry, a new will is required.

**8. Modifications.** State the method by which changes can be made to the contract. To avoid unintended results if partners reside in a state where property rights may arise by implication or other equitable remedies, make sure that changes are in writing, signed by both parties, and that a choice of law provision is included. This will ensure portability, i.e., that an agreement that is enforceable where entered is not later invalidated because cohabitants have moved to a state in which the law would invalidate such an agreement.

**9. Acknowledgments.** At the end of the agreement, together with the usual boilerplate, provide for acknowledgment by each partner that this agreement has been entered into willingly and without coercion or duress. A videotaped execution is a good way to document lack of coercion or duress.

#### **Are all cohabitation agreements enforceable?**

Since the early 1970s, courts have increasingly been willing to recognize and enforce contracts made by spouses—either antenuptial (prenuptial) agreements or postnuptial agreements. Cohabitation agreements will generally be enforced in the same manner as a prenup or postnup is enforced in the state where the agreement is executed. However,

note that in some states, prenuptial agreements are treated differently than postnuptial agreements.

### **To ensure enforceability**

What is the best way to ensure enforceability of a cohabitation agreement?

Enforceability and validity vary from state to state. Observe the following formalities to increase the likelihood of enforceability of an agreement.

- **Consideration.** A cohabitation agreement that has, as its primary purpose, the intent to engage in a sexual (meretricious) relationship will be held as void against public policy in many states. It clearly is important to state that each partner promises the other something of value in exchange for promises made in the agreement.
- **Construction.** Write the agreement in clear, unambiguous language.
- **Property and debts.** Describe specifically the rights and obligations each party has in any property and debts acquired during the relationship by one or both parties.
- **Time for reflection.** The agreement should be in writing and signed by both parties, at least one month prior to the cohabitation. Avoid hurried execution that could render the agreement unenforceable.
- **Legal counsel.** Both parties should have separate legal counsel of his or her choosing.
- **Fairness.** The agreement should be entered into voluntarily and should not be so one-sided and oppressive that no person of sound mind would sign it without duress, coercion, or fraud. Consider videotaping the execution of the document to demonstrate that the parties were under no duress or coercion at the time of execution.
- **Disclosures.** Each party should provide specific disclosure of his or her financial information. Disclosure should be in writing, attached to the agreement, and incorporated by reference within the agreement. Some courts will enforce a prenuptial agreement if the parties have expressly waived that disclosure.

### **Conclusion**

Couples that continue to cohabit without the benefit of marriage should do so only with a cohabitation agreement. Practitioners must consider each client's special circumstances, needs, and expectations. Drafting must specifically address the division of assets and liabilities, taxation, and specific issues pertaining to the parties, while taking into consideration the law of the particular jurisdiction. Remember, too, to counsel the client on pitfalls that may be faced if the couple relocates or laws change.

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