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Cause Breaking Up is Hard to Do: The Need for Uniform Enforcement of Cohabitation Agreements in West Virginia

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'CAUSE BREAKING UP IS HARD TO DO: THE NEED FOR UNIFORM ENFORCEMENT OF COHABITATION AGREEMENTS IN WEST VIRGINIA

I. INTRODUCTION

A number of states continue to prohibit unmarried cohabitation. These laws are rarely enforced and would likely be found unconstitutional if challenged.[1] Cohabitation is defined as "mutual assumption of those marital rights,

[1] MARGARET C. JASPER, LIVING TOGETHER: PRACTICAL LEGAL ISSUES 1 (2003).

duties, and obligations usually manifested by married people, including, but not necessarily dependant on, sexual relations."[2] Although frowned upon in years past, this type of lifestyle has become increasingly accepted in today's society, gaining popularity in the 1960s.[3] Though statistics have made this increase clear, cohabitation has become a common theme in today's pop culture as well. For example, the 2010 Golden Globe Award Winner for Best Motion Picture (Comedy), *The Hangover*, features the cohabitation of Stu the dentist and his ultra-controlling fiancée, Melissa. Several other popular films, including *The Break-Up*, *Four Christmases*, and *The Devil Wears Prada* also incorporate couples who have chosen cohabitation, normalizing the once "immoral" way of living.

This Note will examine the ins and outs of cohabitation agreements, the various reasons why couples choose to cohabitate and the reasons why uniform enforcement of such agreements is especially important in West Virginia as it remains among those states which do not provide unmarried couples with the option of a civil union or domestic partnership.

A. Overview

Part II of this Note will provide a definition of a cohabitation agreement while Part III will lay out the various parts of such an agreement, including the format and requisite elements. Part IV will explore the various reasons as to the importance of forming cohabitation agreements among couples choosing to live together either before, or as an alternative to, marriage. In Part V, this Note will examine the classes of people who are most affected by cohabitation laws. Part VI will analyze how the West Virginia courts have dealt with the issue of cohabitation agreements. Part VII of this Note will introduce the issue of "palimony" and its involvement in the law of West Virginia. In Part VIII, this Note will provide a brief overview of other options cohabitants may have, but which are also unavailable in West Virginia. More specifically, this Note will discuss domestic partnerships in Part VIII.A. and civil unions in Part VIII.B. Part IX will lay out the ways in which other states have agreed to recognize claims for palimony. In Part X the various arguments against the use and recognition of both cohabitation agreements as well as palimony are set forth. Finally, suggestions for the future of cohabitation agreements in West Virginia will be discussed in Part XI.

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2 *Id.*

3 *Id.*

B. *History of Families and the Law*

Families have been historically intertwined with the law since as early as the twelfth century, with roots beginning in England.[4] The English laws fell into two categories: secular (common law) and church (ecclesiastical law).[5] The latter was given jurisdiction over matters such as who could marry and how a marriage could end.[6] Additionally, the churches routinely handled matters including incest and adultery as these were deemed "spiritual offenses" rather than "legal" crimes.[7] Churches during this time period considered marriage a private contract, and thus a formal ceremony was unnecessary in order to form a marriage: "'Neither solemnization in church, nor the use of specially prescribed phrases, nor even the presence of witnesses, was essential to an act of marriage.'"[8] The English courts seemed to acknowledge that a family could be formed not through a religious ceremony, but merely through a promise to one another to act as husband and wife, resembling modern-day common-law marriage. However, in time, property disputes arose as to the validity of "private" marriages and they were called into question.[9] Such disputes were resolved in 1753 when Lord Hardwicke mandated that marriages were invalid unless they were solemnized in the Church and a license was obtained.[10] As the American colonies emerged, family laws were adopted, in simpler forms, from the English.[11] However, post-American Revolution, changes in economy brought along changes in the family unit as well.[12] Like the early English, marriages were seen as a contract, with courts recognizing both formal and informal marriages (i.e., common-law marriage).[13] "Despite stipulation of appropriate marriage ceremonies, informal marriage was common and validated among white settlers from the colonial period on."[14] Further, a couple's marriage was validated through the neighbors' awareness of cohabitation between them, as well as reciprocal economic contributions by each of the parties.[15] However, the most es-

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4 LISA MCINTYRE, FAMILIES AND LAW: "LAW AND THE FAMILY IN HISTORICAL PERSPECTIVE: ISSUES AND ANTECEDENTS" 6 (Lisa McIntyre & Marvin B. Sussman eds., 1995).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* (citations omitted).

9 *Id.*

10 MCINTYRE, *supra* note 4, at 6.

11 *Id.* at 10.

12 *Id.* at 16. Most notable was the change in women's roles, who were now seen as separate from their husbands. *Id.*

13 *Id.* at 16–17.

14 DOUGLAS E. ABRAMS ET. AL., CONTEMPORARY FAMILY LAW 161 (2d ed. 2009).

15 *Id.*

sential part of such a marriage was consent between the parties.[16] This recognition existed until the twentieth century, when informal marriages gained disfavor among the states.[17] Now, only a dozen or so jurisdictions recognize common-law marriages.[18]

When it comes to determining what constitutes a "family," courts, particularly West Virginia courts, seem to have narrowed the definition to include only those related by blood, marriage, or adoption.[19] This restrictive definition could account for the hesitance among courts to recognize cohabitation agreements. After all, a common theme between courts that fail to recognize both cohabitation agreements as well as common law marriages is a desire to promote marriage.[20] Canadian commentators, by comparison, have defined "family" in terms of their recognition of the diverse nature of families in today's societies:

> Any combination of two or more persons who are bound together over time by ties of mutual consent, birth and/or adoption placement, and who, together, assume responsibilities for variant combinations of some of the following:
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> physical maintenance and care of group members, addition of new members through procreation or adoption, socialization of children, social control of members, production,

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16 *Id.*

17 MCINTYRE, *supra* note 4, at 17.

18 ABRAMS ET AL., *supra* note 14, at 162. These jurisdictions include Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. *Id. See, e.g.,* Adams v. Boan, 559 So. 2d 1084, 1087 (Ala. 1990) (stating that Alabama recognizes common-law marriages); Conklin v. MacMillan Oil Co., 557 N.W.2d 102 (Iowa Ct. App. 1996) (stating that Iowa recognizes validity of common-law marriage); and DeMelo v. Zompa, 844 A.2d 174 (R.I. 2004) (stating that common-law marriages are recognized in Rhode Island).

Utah and New Hampshire recognize such marriages under limited circumstances. ABRAMS ET AL., *supra* note 14, at 162. Additionally, Georgia, Idaho, and Ohio have repealed their laws and recognize only those marriages entered into before a certain date. Shirelle Phelps & Gale Gengage, "*Cohabitation,*" *Encyclopedia of Everyday Law,* ENOTES.COM. (2006), http://www.enotes.com/everyday-law-encyclopedia/cohabitation.

19 *See, e.g.,* Glen Falls Ins. Co. v. Smith, 617 S.E.2d 760 (W. Va. 2005); *see also* ABRAMS ET AL., *supra* note 14, at 1.

20 "Common-law marriage" requires "a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations." BLACK'S LAW DICTIONARY 277 (6th ed. 1990).

> consumption and distribution of goods and services, affective nurturance, love.[21]

This definition of the family seems to be much more in tune with the reality that many modern families do not define their familial relationship in terms of the existence of a marriage license, or lack thereof. Instead, the term "family" seems to center more on mutual consent between two people, affection, and love.

C. *The Shift to Cohabitation—Why Couples Choose Living Together Over Marriage*

Couples choose cohabitation for many reasons. Some couples choose to cohabitate because, in light of today's divorce rates, they are fearful of the commitments attendant to marriage.[22] Avoiding the legal obstacles of divorce is also an incentive for cohabiters. Other couples merely choose to forego marriage altogether, preferring cohabitation as a more appealing alternative.[23] Still others have no other alternative, i.e., same-sex couples who are not legally permitted to marry in most states.[24] Courts today have dealt with a number of lawsuits involving cohabitation, including suits for palimony[25] and "fraudulent claims of common-law marriage."[26] Couples living together outside the formal bonds of marriage remain unprotected by marriage laws, but still face the same issues as their married counterparts. Thus, cohabitation agreements could act as the unmarried couples' saving grace.[27]

II. COHABITATION AGREEMENTS DEFINED

A cohabitation agreement is an agreement between two people while they are unmarried.[28] Such an agreement, as distinguished from a prenuptial agreement, is not entered into in the contemplation of marriage, although marriage may be the eventual outcome.[29] Rather, the couple has chosen to remain unmarried while living together. A cohabitation agreement, as formally defined,

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21 DORIAN SOLOT & MARSHALL MILLER, UNMARRIED TO EACH OTHER: THE ESSENTIAL GUIDE TO LIVING TOGETHER AS AN UNMARRIED COUPLE 259 (2002), *available at* http://www.unmarriedtoeachother.com/unmarriedchapter11section.pdf.

22 JASPER, *supra* note 1, at 1.

23 ABRAMS ET AL., *supra* note 14, at 255.

24 JASPER, *supra* note 1, at 1.

25 *Id.* "Palimony" is defined as "[a]n award of support which arises out of the dissolution of a nonmarital relationship." *Id.* at 212.

26 *Id.* at 1.

27 *Id.*

28 *Id.* at 17.

29 JASPER, *supra* note 1, at 17.

is "a contract that attempts to define the rights and responsibilities of the parties in the event the relationship is dissolved or one partner dies. Therefore, if the unmarried couple wants to legally establish what they want to occur if the relationship ends, they are advised to put it in writing."[30] It is advised that the language in such an agreement should be plain and clear so that each party is in full understanding of the terms and provisions.[31] An appropriate cohabitation agreement may be either simple or detailed.[32] However, both parties should disclose all information relating to assets and incomes.[33] In addition, the terms should be fair, free of fraud, and each party should be represented by separate counsel.[34] An ideal cohabitation agreement is described in Part III.A. below

III. TOPICS COVERED IN A COHABITATION AGREEMENT

Cohabitating relationships can come to an end in one of two ways: by a break-up or by the death of one of the partners. Thus, planning ahead for either possibility is essential as unmarried cohabitants do not enjoy the same protections as their married counterparts.[35]

A. Relationships Ending by Break-Up

A cohabitation agreement may be as broad or narrow as a couple wishes.[36] Ideally, the agreement should set forth the date, city and state, the names of both partners, and the address where each partner resides.[37] The agreement should state that the parties do not intend to marry and may state that if the parties should choose to marry, the terms of the agreement will amount to a prenuptial agreement and will be given effect.[38] As above mentioned, the agreement should set forth the rights and responsibilities of each partner.[39] For example, the agreement should address how expenses for a home (and other related expenses) should be allocated while the couple resides together and should provide the terms of division in the case of a separation.[40] Other decisions as to possible

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30 *Id.*

31 *Id.* at 18.

32 *Id.*

33 Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 255 (1998).

34 *Id.*

35 WAYNE M. GAZUR & ROBERT M. PHILLIPS, ESTATE PLANNING PRINCIPLES AND PROBLEMS 174 (2d ed. 2008).

36 Margaret W. Hickey, *Estate Planning for Cohabitants*, 22 J. AM. ACAD. MATRIM. LAW 1, 11 (2009).

37 JASPER, *supra* note 1, at 173.

38 *Id.*

39 *Id.*

40 Hickey, *supra* note 36, at 11.

issues after a break-up should also be determined, such as whether one party will support the other, who will have custody of any children, and who will pay support for such children.[41]

All property owned by the parties should be categorized as either separate or partnership property.[42] In doing so, the parties should determine which pieces of property and income are going to be included in the agreement.[43] The following series of questions is important to address in drafting:

> Will the parties keep their assets and debts from prior to the cohabitation separate? If they plan to combine such assets and/or debts, how will they divide such assets or debts when the relationship concludes? Will the division of assets be equal, in proportion to contribution or by some other method? This is particularly important if one party will work while the other provides noneconomic contributions such as raising children or keeping the home.[44]

While it is essential for parties to determine their intentions as to the assignment of debts, simply including the terms in the agreement may not be sufficient.[45] Creditors should also be put on notice of the parties' desires as to the assignments of debts.[46] Unlike a marriage, where creditors may look to a pre- or postnuptial agreement between the couple, the same is not true of a cohabitation agreement and often times such agreements will have little influence.[47] As such, cohabitating parties should be advised to take further action, such as naming each other as beneficiary to a life insurance policy in order to pay debts upon death.[48]

It is important for parties choosing to enter into cohabitating relationships to understand that agreements should provide for consideration.[49] However, this consideration may not be sexual in nature.[50]

The agreement should be set forth in paragraph format. One example of a valid cohabitation agreement covers the following topics:

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41 *Id.* West Virginia does not currently recognize terms for spousal support within a cohabitation agreement, which will be discussed in Part VII. Additionally, agreed upon terms for child custody will not be binding on a court. *Id.* at 12.

42 JASPER, *supra* note 1, at 173.

43 Hickey, *supra* note 36, at 12.

44 *Id.*

45 GAZUR & PHILLIPS, *supra* note 35, at 176.

46 *Id.*

47 *Id.*

48 *Id.*

49 Hickey, *supra* note 36, at 12.

50 *Id.*

> Consideration, Separate Property, Joint Property, Income and Expenses, Support, Testamentary Provisions, Specific Responsibilities, Birth Control, Children, Cessation of Cohabitation, Reconciliation, Waiver of Strict Performance, Binding Effect, Partial Invalidity, Situs (the state law which will be applied), Social Security Numbers, Attorneys, and Entire Agreement (both parties fully understand all of the terms of the agreement).[51]

After these items are set forth, the agreement should be signed and dated by both parties as well as a notary.[52]

B. Relationships Ending in Death

The dissolution of cohabitating relationships comes not only through break-ups, but also through the death of one of the parties. As such, cohabitating couples may choose to assign property or medical decision rights to each other. In this instance, those documents, such as wills and trusts, should also be drafted and included in the agreement.[53] Parties failing to include these portions risk losing certain state law protections afforded married couples at the death of one spouse.[54]

Cohabitants may designate each other as financial and medical powers of attorney in the case that either partner is unable to act on his or her own behalf.[55] Typically, these documents grant power to "handle bank accounts, real estate management, asset and portfolio management, and bill paying . . . ."[56]

A healthcare power of attorney, on the other hand, allows a cohabitant to designate medical and personal decisions to his or her partner.[57] These decisions include, but are not limited to, the giving or withholding of food or medical care, decisions as to a course of action in the case of a principal's comatose or vegetative state, and the admission into nursing homes.[58] Additionally, it is important for cohabitants to consider utilizing the Health Insurance Portability and Accountability Act ("HIPAA") release forms.[59] These forms allow cohabi-

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51 GAZUR & PHILLIPS, *supra* note 35, at 174–76.

52 *Id.*

53 Hickey, *supra* note 36, at 11.

54 *Id.*

55 Hickey, *supra* note 36, at 18–19. It is also important for the document to set forth whether it is currently usable (a surviving power) or whether it becomes available only if the principal becomes incompetent (springing power). *Id.* at 19.

56 *Id.* at 19.

57 *Id.* at 20.

58 *Id.*

59 *Id.* at 21.

tants to authorize healthcare personnel to speak to the designated partner about the health of the principal.[60]

While all people are encouraged to make a will, it is particularly important to do so in the case of cohabitants. As discussed, unmarried couples are not granted the same rights after death as married couples.[61] This is especially true when one partner dies intestate because the surviving partner is not a spouse.[62] Thus, a will should be used to set forth the wishes of each partner as to the disposition of assets after death.[63]

IV. IMPORTANCE OF COHABITATION AGREEMENTS

Couples, married or unmarried, acquire property over time.[64] When a married couple divorces, courts must intervene in order to divide the property either equitably or equally.[65] The same is true when an unmarried couple breaks-up. Property accumulated during the relationship must be divided.[66] In 2000, the U.S. Census Bureau showed that 11 million people lived with an unmarried partner, including both opposite-sex and same-sex couples.[67] Further, studies have shown that over half of all cohabitation relationships end in separation within five years, regardless of whether or not the couple ever married.[68] In addition, in some metropolitan areas, there are more children born to unmarried couples than married ones.[69] One possible solution is a cohabitation agreement, which will set forth the rights and responsibilities of each individual.[70]

One commentator has suggested that there are three legal approaches to cohabitation, relied upon by the California Supreme Court in *Marvin v. Marvin*.[71] There, the Court found that a division of assets may be proper at the dissolution of a non-marital relationship:

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60 Hickey, *supra* note 36, at 21.

61 GAZUR & PHILLIPS, *supra* note 35, at 174.

62 *Id.* at 176.

63 *Id.*

64 JASPER, *supra* note 1, at 17.

65 *Id.*

66 *Id.*

67 *Id.* at 2. According to these statistics, 9.7 million of these unmarried people were opposite-sex couples, while 1.2 million were same-sex partners. *Id.*

68 ABRAMS ET AL., *supra* note 14, at 255. However, only 20% of couples who did not cohabitate before marriage separated within five years. *Id.*

69 Hickey, *supra* note 36, at 1.

70 *Id.* at 2.

71 Monica A. Seff, *Cohabitation and the Law, in* FAMILIES AND THE LAW 153 (Lisa J. McIntyre and Marvin B. Sussman eds., 1995); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

> (1) as a result of an express contract between non marital partners, as long as the contract is not explicitly founded on the consideration of meretricious sexual services; (2) through an implied contract, an agreement of partnership or joint venture, or some other tacit understanding between the parties, entitling a cohabiter to property acquired together; and (3) as a result of the doctrine of quantum meruit which permits courts to use equitable remedies such as constructive trusts when the facts of the case warrant such an action.[72]

Prior to the landmark case of *Marvin v. Marvin*, most states did not recognize or enforce agreements between unmarried cohabitating partners, reasoning that meretricious relationships were invalid.[73] In that case, the unmarried partners had lived together for a period of approximately six years.[74] During this time, the defendant acquired a significant amount of real and personal property.[75] When the relationship came to an end, the plaintiff asked the court to enforce an express agreement to share the parties' earnings.[76] The court ultimately held that unmarried cohabitants could enter into both oral and written express contracts as long as the consideration for such contracts was not based on sexual services.[77]

Traditional contract law requires consideration before an express or implied-in-fact contract will be enforced. In *Devaney v. L'Esperance*, the court defined a marital-type relationship as one,

> in which people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best they are able. And each couple defines its way of life and each partner's expected contribution to it in its own way. Whatever other consideration may be involved, the entry into such a relationship and then conducting oneself in accordance with its unique character is consideration in full measure.[78]

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72 Seff, *supra* note 71, at 153.

73 Gordon, *supra* note 33, at 246.

74 *Marvin*, 557 P.2d at 110.

75 *Id.*

76 *Id.* at 110–11.

77 *Id.* at 122.

78 949 A.2d 743, 749 (N.J. 2008) (quoting *In re* Estate of Roccamonte, 808 A.2d 838 (N.J. 2002)).

Today's society is fraught with couples who have chosen cohabitation as an alternative to marriage. As discussed above, the reasons for choosing this alternative are abundant. As a result of the ever-increasing popularity of cohabitation, laws concerning cohabitation have in turn changed to reflect this trend. Some courts have addressed the issue of property rights and "spousal" support after a cohabitating couple breaks up. Of those courts, many protect these types of awards and agreements providing for the terms in the event of a break-up. However, a number of states, including West Virginia, while recognizing that property may be divided upon dissolution, have refused to award "spousal" support to parties after dissolution.[79]

V. CLASSES OF PEOPLE AFFECTED BY COHABITATION LAWS

Cohabitation laws affect a number of people. This Note has discussed the ways in which such laws affect the property rights and post-relationship support for couples who have chosen to forego marriage. As discussed, some states uniformly enforce cohabitation agreements in the event of a break-up, dividing property and awarding support to one of the parties per the agreement. On the other hand, some states, including West Virginia, have failed to enforce cohabitation agreements in a consistent manner.

The cases which will be illustrated in this Note will focus on traditional, opposite-sex, cohabitating couples and the adverse affects of inconsistently enforced cohabitation agreements. However, it is worth noting that other groups of people are also adversely affected by such inconsistency, including same-sex couples, couples who wish to adopt a child, and even couples involved in child custody disputes. Each of these groups will be discussed in turn.

A. Same-sex Couples

In 1996, Congress passed the Defense of Marriage Act ("DOMA"), which was a major blow to same-sex couples.[80] Thus, in most states, including West Virginia, same-sex marriage is prohibited.[81] As a result, cohabitation for

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[79] Thomas v. LaRosa, 400 S.E.2d 809 (W. Va. 1990). Statistics from 2003 indicate further that West Virginia remains one of eight states that continue to prohibit unmarried cohabitation. JASPER, *supra* note 1, at 39.

[80] Hickey, *supra* note 36, at 1. "DOMA" was passed by Congress in 1996 which made it

> explicit that a marriage is the legal union of a man and a woman, thereby preventing states from having to recognize same-sex couples in other states. The Act defines marriage as: "a legal union between one man and one woman as husband-and-wife" and it defines spouse as "a person of the opposite sex who is a husband or a wife."

Id. The Act also restricts federal benefits to spouses, ERISA benefits, tax benefits, while denying a number of rights and benefits to same sex couples. *Id.*

[81] ABRAMS ET AL., *supra* note 14, at 110. Massachusetts, Connecticut, Iowa, and Vermont are the only states which perform gay marriages. *Id.*

those couples is often the only alternative. In 2005, the U.S. Census Bureau reported 777,000 unmarried same-sex couple households.[82] Same-sex couples face the same issues upon separation (or death) as heterosexual couples and thus should be encouraged to enter into cohabitation agreements. Some states, including California, Maine, and Oregon have enacted domestic partnership agreements which provide protection for unmarried couples, particularly same-sex couples.[83] For example, in 2008, Oregon enacted the Oregon Family Fairness Act, granting same-sex couples who enter domestic partnerships the same rights as married couples.[84] Additionally, Vermont, Connecticut, New Jersey, and New Hampshire have given homosexual couples the option of entering into a civil union, much like that of a domestic partnership.[85] A civil union (offered only in these four states) entitle *only* same-sex couples to the same rights and responsibilities of married couples in those states.[86] Domestic partnerships and civil unions will be further discussed in Part VIII.

The failure to consistently enforce cohabitation agreements is particularly problematic for same-sex couples in West Virginia. West Virginia is one of more than twenty-five states which prevent recognition of out-of-state same-sex marriage licenses.[87] Thus, a same-sex couple, though legally married in one state, is not married in the eyes of the law of West Virginia. As such, the consistency of cohabitation laws becomes especially important for these couples who wish to continue their relationship.

To summarize, the law in West Virginia regarding cohabitation, particularly among same-sex couples, has a number of obstacles which make it both difficult and stressful for such couples to begin a cohabitating relationship. Before discussion of such obstacles, it is worth noting that West Virginia has recently repealed its law criminalizing unmarried cohabitation.[88] The first obstacle that couples choosing to cohabitate in West Virginia face is that no civil unions or domestic partnerships exist in West Virginia, which preclude couples from registering as such in order to be recognized as married.[89] Second, although West Virginia uses Full Faith and Credit to recognize out-of-state common-law marriage, it remains among a minority of states that do not recognize out-of-state same-sex marriages.[90] Third, as will be discussed in Part VI, the

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82 *Id.*

83 *Id.* at 280.

84 Oregon Family Fairness Act, 11 OR. REV. STAT. § 106.305 (2008); *see also* ABRAMS ET AL., *supra* note 14, at 280.

85 *See, e.g.*, N.J. STAT. ANN. § 37:1-28 (West 2007); VT. STAT. ANN. tit. 15, § 1202 (2009).

86 ABRAMS ET AL., *supra* note 14, at 280. The authors of the text attribute this limitation to same-sex couples to the notion that these states wish to encourage couples who are legally able to marry to do so rather than to enter a civil union.

87 W. VA. CODE § 48-2-603 (2001).

88 W. VA. CODE § 61-8-4 (repealed 2010).

89 JASPER, *supra* note 1, at 59.

90 W. VA. CODE § 48-2-603 (2001).

current state of the law with regards to enforcement of cohabitation agreements lacks uniformity and leaves some couples with little or no remedies after the dissolution of a relationship caused by a breakup or by death of one of the parties.[91]

B. *Unmarried Couples Deciding to Have Children*

Failure to enforce, or at least to uniformly enforce, cohabitation agreements also creates problems for unmarried couples who choose to adopt a child or to have children of their own. Fear of the possibility that an agreement between the parties will not be recognized may deincentivize the couple from bringing children into the relationship. Such a possibility creates an unnecessary barrier to the otherwise natural progression of a relationship. Unmarried couples already face enough issues with respect to children, without the added worry of what will happen after the relationship ends. For example, couples choosing to adopt are faced with reluctance from adoption agencies to place a child with an unmarried couple.[92] Agencies are primarily concerned that the couple will offer little stability to a child by reason of their unmarried status.[93] Additionally, when a child is born to an unmarried couple, there is no presumption of paternity.[94] This presumption is available only to married couples.[95] Thus, unmarried couples should be advised to prepare a signed statement which acknowledges the father's paternity.[96]

VI. WEST VIRGINIA CASE LAW

It is clear from the preceding discussion that a number of groups of people are affected by cohabitation laws. Further, these groups of people are not always afforded the same rights as married couples and thus have more obstacles to overcome. At present, West Virginia recognizes the property rights of cohabitating couples in terms of both express and implied contracts. In 1990, the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") was forced to determine the property rights of a couple who had cohabitated for a period of twenty-eight years after the relationship came to an end.

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91 *See generally* Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990); Thomas v. LaRosa, 400 S.E.2d 809 (W. Va. 1990); Porter v. Porter, 575 S.E.2d 292 (W. Va. 2002).

92 JASPER, *supra* note 1, at 29.

93 *Id.* at 29–30.

94 *Id.* The Uniform Parentage Act includes a provision which provides for a presumption of paternity. UNIF. PARENTAGE ACT, 18 U.S.C. § 1204 (amended 2003). The Uniform Parentage Act has been adopted by 19 states. Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L.Q. 365 (2008).

95 JASPER, *supra* note 1, at 30.

96 *Id.* A notary should also sign this document. *Id.*

A. Goode v. Goode[97]

In the following case, the West Virginia Supreme Court based its decision on an implied contract theory when it allowed the distribution of property of a cohabitating couple. In *Goode*, the Court declined recognition of common-law marriages, but permitted a court to order division of property of unmarried cohabitants after dissolution of the relationship.[98] Here, the plaintiff, Martha Goode, filed for divorce for irreconcilable differences as well as mental and physical cruelty.[99] The couple, however, had never formally married, and thus their marriage was found invalid.[100] The couple had lived together for a period of twenty-eight years, during which time Martha had provided homemaker services for the benefit of her partner as well as the children.[101] The Court addressed the question as to "whether an equitable division of property may be awarded to a man or woman who, prior to the termination of their relationship with each other, were unmarried cohabitants."[102] The Court quoted a persuasive argument in favor of recognizing a marital-like relationship for purposes of distributing property after dissolution of the marriage:

> 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 marriage. It is far better to hold that the parties were married.[103]

The Court ultimately held that property distribution would be proper in this instance based on an implied contract, as it would be inequitable to refuse recognition of Martha's role in acquiring property throughout the course of the cohabitation.[104] The issue of spousal support did not arise in this case.

The decision in the *Goode* case follows the same line of reasoning as this Note. The case is a good illustration of the birth of recognition of cohabitation agreements in West Virginia. The Court reasoned that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[105]

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97 349 S.E.2d 430 (W. Va. 1990).

98 Syl. pt. 3, *id.* at 431.

99 *Id.* at 431–32.

100 *Id.* West Virginia continues to deny recognition to common-law marriages. *Id.*

101 *Id.* at 432.

102 *Id.* at 435.

103 *Goode*, 349 S.E.2d at 436 (quoting H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.4, at 121–22 (2d ed. 1987)).

104 *Id.* at 438.

105 *Id.* at 436 (quoting Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976)).

Thus, the Court recognized, and rightly so, that property rights of a cohabitating couple do not mysteriously disappear simply because the couple chose an alternative to marriage. Choosing to forego marriage should not lead to unfairness for either of the parties involved. The Court also noted that other jurisdictions have refused to follow *Marvin*, reasoning that promoting the recognition of property rights between cohabitating couples would have substantial implications on the institution of marriage.[106] However, this argument is unpersuasive in that it fails to recognize the changing mores of people today. While traditional values are important in many cases, they should not impede the development of an ever-changing society.

Only months after deciding *Goode,* the West Virginia Supreme Court was again faced with the issue of determining the enforceability of a cohabitation agreement—only this time, the agreement was in writing. While the *Goode* case seemed to answer that question, the unique facts surrounding the following case of *Thomas v. LaRosa* gave the court occasion to revisit the issue. Although, as noted below, the Court's decision is somewhat perplexing, the overall holding seems to support the thesis of this Note in that it recognizes the enforceability of express cohabitation agreements, albeit not in the specific facts of the case.

B. Thomas v. LaRosa[107]

The following case illustrates how the West Virginia Supreme Court has correctly determined that express cohabitation agreements should be enforced. In *Thomas*, the plaintiff, Karen Thomas, sought to enforce an oral agreement between herself and James LaRosa, in which they agreed to hold themselves out as being married and in which LaRosa agreed to financially support the plaintiff for her lifetime and to educate her children.[108] The couple met in 1980 and thereafter, in the spring of 1981, they decided to hold themselves out as married.[109] The plaintiff further agreed to perform the household duties, including acting as his companion and business aid.[110] Over the course of the relationship, Thomas allegedly assisted LaRosa in his business dealings with the East Point Mall in Bridgeport, West Virginia, providing him with advice and suggestions as to development of the shopping center.[111] After a period of eight years, LaRosa breached the agreement.[112] The Court distinguished the case

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106 *Id.* at 436–37.

107 400 S.E.2d 809 (W. Va. 1990).

108 *Id.* at 810.

109 *Id.*

110 *Id.*

111 *Id.* at 811.

112 *Id.* at 810. Also worth noting is that LaRosa was married at the time he and Thomas met and began their relationship. *Id.*

from the *Goode* case in that the circumstances of the present case were not that of an alleged common-law marriage.[113]

In *Thomas*, the Court essentially held that "living together" contracts were invalid, although as Justice Miller suggests in his concurring opinion, the decision is somewhat convoluted.[114] The Court stated that "[a]greements (express or implied) made between adult, non-marital partners for future support, even when such contracts are not explicitly and inseparably founded on sexual services are not enforceable in this State because they attempt to evade our proscription against common-law marriage . . . ."[115] Confusion arises in Syllabus Point 3 of *Goode* where the Court states the following:

> A court 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. Such order may be based upon principles of contract, express or implied, or upon a constructive trust. Factors to be considered in ordering such a division of property may include: the purpose, duration and stability of the relationship and the expectations of the parties. Provided, 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 division of property.[116]

The language of this syllabus point and the holding of the case support the view that an agreement between cohabiters can be valid, as long as the consideration for the agreement is not meretricious in nature. However, the Court in *Thomas* never states that the certified question[117] would be answered affirmatively if Mr. LaRosa had not been married.[118] Thus, at this point, the law in West Virginia seems to be somewhat unsettled and puzzling. The answer seems obvious in the *Thomas* case, as permitting enforcement of an agreement between cohabiters, when both parties are unmarried.

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113 *Id.* at 811. Although the court did not recognize common-law marriage in *Goode*, it did recognize that "under circumstances that would give rise to a common-law marriage in many states, there is a right in West Virginia to equitable distribution of property acquired during the course of the relationship." Goode v. Goode, 349 S.E.2d at 376.

114 Syl. pt. 2, *Thomas*, 400 S.E.2d at 810 (Miller, J. concurring).

115 *Id.*

116 Syl. pt. 3, *Goode*, 396 S.E.2d at 431.

117 "Are 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 enforceable?" Syl. pt. 2, *Thomas*, 400 S.E.2d at 810.

118 *Id.* at 810.

Like the *Goode* case, *Thomas*, albeit confusingly, supports the central thesis of this Note. The case seems to reiterate that West Virginia does recognize the validity of cohabitation agreements, and it is assumed that the Court would have done so in this specific case had Mr. Thomas not been married. Up until this point, West Virginia law supports the notion that the changing trends of society cannot be ignored, at least in terms of the growing popularity of unmarried cohabitation. However, although the Court has agreed to recognize cohabitation agreements, it has arguably been inconsistently enforcing these agreements as it has refused to allow an action for support for one party upon dissolution of the relationship. This notion is illustrated in the next section of this Note.

VII. PALIMONY

Twelve years after the West Virginia Supreme Court decided *Thomas v. LaRosa*, the court was again faced with a decision involving the rights of cohabitating partners after the dissolution of the relationship.[119] However, the claim was one of palimony rather than property rights.[120]

Palimony is a term often used to describe support awarded to a person after the termination of a non-marital relationship (i.e., one in which the partners cohabitate but are not bound by the formal bonds of marriage).[121] Courts in a number of jurisdictions have held that a partner in a cohabitating relationship may maintain an action for support from a former partner upon the dissolution of the relationship.[122] Thus, palimony may be awarded. However, as mentioned above, West Virginia has refused to recognize a claim for palimony when a cohabitating relationship comes to an end. As a result, one partner may be deprived of support in the same way that a partner in a marital relationship may be deprived after divorce, illustrated below in *Porter v. Porter*.

A. Porter v. Porter[123]

The *Porter* case illustrates how the West Virginia Supreme Court failed to recognize a claim for support after the dissolution of a cohabitating relationship. In *Porter*, the couple had been intertwined in a complicated marital history beginning in March 1975.[124] The marriage lasted for ten years, and ended with a divorce in 1985.[125] Several months later, the couple began cohabitating

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119 Porter v. Porter, 575 S.E.2d 292 (W. Va. 2002).

120 *Id.*

121 William H. Danne, Jr., *"Palimony" Actions for Support Following Termination if Nonmarital Relationships*, 21 A.L.R. 6th 351 (2007).

122 *Id.*

123 575 S.E.2d 292 (W. Va. 2002).

124 *Id.* at 293.

125 *Id.*

with their marital child, again separating ten years later.[126] Shortly thereafter, the couple once again began living together and remarried in 1997.[127]

A family law master recommended that Mrs. Porter be awarded $886 per month in permanent alimony, which was equal to about one-half of Mr. Porter's monthly income.[128] The circuit court found that because the second marriage was so brief, these recommendations amounted to an award of palimony, which is prohibited in West Virginia under West Virginia Code Section 48-7-111.[129] This statute states that "[a] court may not award spousal support or order equitable distribution of property between individuals who are not married to one another in accordance with the provisions of article one of this chapter."[130] The West Virginia Supreme Court, although stating that the palimony statute does in fact apply to unmarried couples, ultimately found that *alimony* was appropriate for the period of time that the parties were married.[131]

Thus, it is clear that West Virginia courts will refuse to recognize a claim for palimony in the event that a cohabitating couple separate. Additionally, cohabitating partners may also be refused equitable distribution of property in the event that the court finds that the couple did not "hold themselves out as married."[132] This seems a most inequitable solution.

VIII. OTHER OPTIONS FOR COHABITANTS NOT AVAILABLE IN WEST VIRGINIA

As discussed, West Virginia has failed to uniformly establish cohabitation agreements in that it has refused to recognize a claim for palimony at the dissolution of a cohabitating relationship. Additionally, West Virginia does not recognize, and fails to give full faith and credit to same-sex marriages. Thus, couples are faced with a number of barriers when choosing to live together as an alternative (or precursor) to marriage. Even more ominous for these couples is West Virginia's refusal to award spousal benefits to cohabitating couples in the form of a domestic partnership or civil union, discussed below.

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126 *Id.*

127 *Id.* at 293–94.

128 *Id.* at 294.

129 *Id.*

130 W. VA. CODE § 48-7-111 (2009).

131 *Porter*, 575 S.E.2d at 296. The family law master recommended also that Mrs. Porter receive one-half of the property acquired by the couple during their second marriage only. *Id.* at 294. The circuit court determined that this would be an inequitable distribution as the parties had cohabitated prior to the second marriage and held themselves out to be married. *Id.* The Supreme Court held that equitable distribution was inappropriate as the evidence before the court did not indicate that the Porters intended to hold themselves out as married during the period of their cohabitation. *Id.* at 296.

132 *See supra* text accompanying note 103.

A. Domestic Partnerships

Domestic partnership laws allow couples, opposite-sex or same-sex, the option to record their intentions to commit to each other outside the bonds of marriage.[133] States which offer this status to couples provide different degrees of protection and benefits for cohabitating couples; some offer limited benefits while others offer more extensive benefits to couples. These benefits often include:

> [E]mployment benefits for the domestic partner such as health insurance on a "family" plan, inclusion in family and medical leave definitions, and other benefits that the employer may offer to an employee's unmarried partner, whether of the same or opposite sex.[134]

Other benefits include the rights to make healthcare decisions, workers' compensation benefits, and state tax deductions.[135]

The term "domestic partnership" has been given a number of different definitions, but the most common includes the following criteria:

> (1) The partners are at least 18 years old; (2) neither partner is related by blood closer than what is permitted by state law for marriage; (3) the partners share a committed, exclusive relationship; and (4) the partners are financially interdependent.[136]

At present, seven states as well as the District of Columbia have offered couples domestic partnership registries: California, Maine, Maryland, New Jersey, Oregon, and Washington.[137] For example, California treats domestic partners in the same manner as spouses for purposes of state law.[138] On the other hand, the District of Columbia, Hawaii, Maine, Maryland, and Washington award only limited benefits to same-sex couples as those offered to married couples.[139]

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133 ABRAMS ET AL., *supra* note 14, at 280.

134 Hickey, *supra* note 36, at 5.

135 ABRAMS ET AL., *supra* note 14, at 280.

136 Hickey, *supra* note 36, at 5.

137 *Id. See also* CAL. FAM. CODE § 297 (2007); ME. REV. STAT. ANN. tit. 22, §2710 (2009); and MD. CODE §6-101 (2008).

138 ABRAMS ET AL., *supra* note 14, at 280. Additionally, Oregon grants domestic partners virtually all of the legal rights and benefits given to married couples. However, these rights are awarded only to same-sex couples, and not to heterosexual couples. *See also* 11 OR. REV. STAT. § 106.310 (2009); 11 OR. REV. STAT. §106.340 (2008).

139 ABRAMS ET AL., *supra* note 14, at 280.

Hawaii, by comparison, enacted a unique reciprocal beneficiary law in which *any* two adults who are legally forbidden from marrying are awarded limited state rights.[140] The couple can be same-sex, relatives, and even friends.[141] Couples under this law are awarded benefits such as: inheritance without a will, health care decisions, loan eligibility, property rights, and ability to sue for wrongful death of the reciprocal beneficiary.[142]

West Virginia still remains among those states which have refused to allow couples to register as domestic partners. As such, couples choosing to live together, particularly same-sex couples, have very few options to protect their rights. Although this Note does not argue in favor of West Virginia adopting a domestic partnership registry, it is worth noting that its failure to do so creates yet another hurdle for couples choosing to cohabitate as they will not be afforded any of the benefits enjoyed by married couples.

B. Civil Unions

Another option afforded cohabitating couples in some states is a civil union. A civil union is a legally recognized union between a couple, similar to marriage.[143] Presently, Vermont, Connecticut, New Jersey, and New Hampshire offer couples this option, which gives them the same rights and responsibilities that each of the states bestow upon married couples.[144] However, civil unions in these states are offered only to same-sex couples.[145]

Once again, West Virginia is not amid the states offering civil unions. Thus it is clear that unmarried partners, same-sex or otherwise, have only the option of protecting their rights through the use of a well-written cohabitation agreement. Because West Virginia refuses to recognize domestic partnerships and civil unions, it should, at the very least, provide for uniform enforcement of cohabitation agreements. Failure to do so not only suggests West Virginia's refusal to acknowledge the reality that is cohabitation, but further, its unwillingness to afford those couples an opportunity to protect their rights should they choose to forego marriage.

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140 HAW. REV. STAT. § 572-2 (1997).

141 *Id.*

142 *See, e.g.*, HAW. REV. STAT. § 323-2 (2006) (extending hospital visitation rights to reciprocal beneficiaries); HAW. REV. STAT. § 171-99 (2006) (extending inheritance rights to reciprocal beneficiaries); and HAW. REV. STAT. § 572C-4 (2005) (extending right to sue for wrongful death of a reciprocal beneficiary). However, rights awarded to married couples by the federal government are not conferred upon domestic partners as a result of "DOMA" and its refusal to federally recognize same-sex marriages or other unions. ABRAMS ET AL., *supra* note 14, at 280. Consequently, federal benefits will be denied to such partners although they may receive benefits from the state, city, or employer. *Id.*

143 ABRAMS ET AL., *supra* note 14, at 281.

144 *See, e.g.*, N.J. STAT. ANN § 37:1-28 (2007); VT. STAT. ANN. tit. 15, § 1202 (2009).

145 *See id.*

IX. OTHER JURISDICTIONS HAVE RECOGNIZED PALIMONY CLAIMS

A number of other states have determined that claims for palimony are enforceable after the dissolution of a cohabitating relationship. New Jersey, for example, has held that a palimony claim is actionable, quoting the *Marvin* case:

> We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware, as we have stated, of the pervasiveness of nonmarital relationships in other situations.
>
> The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.[146]

In *Devaney*, the plaintiff brought a claim for palimony after the culmination of a relationship that began in 1983 when the plaintiff was twenty-three years old and the defendant was fifty-one years old.[147] At the time they met, the defendant was married and the plaintiff was employed by the defendant as a receptionist at his medical office.[148] The relationship between the two gradually grew more intimate, with the defendant promising to end his marriage to be with the plaintiff.[149] Eventually, the defendant began supporting the plaintiff, beginning with his paying her telephone bill and providing her with money for groceries.[150] Shortly thereafter, the defendant began paying half of the plaintiff's rent in her Manhattan apartment.[151] In 1993, the plaintiff moved to Connecticut for a short time due to her frustration that the defendant had not yet secured a divorce.[152] Although she returned to New York, she then moved to Seattle where the defendant visited a number of times and continued to support her.[153] Ultimately, the plaintiff returned to the east coast and the two began trying to have a

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146 Devaney v. L'Esperance, 949 A.2d 743, 744 (N.J. 2008) (quoting Marvin v. Marvin, 557 P.2d 106, 122 (1976)).

147 *Id.* at 744.

148 *Id.*

149 *Id.*

150 Devaney v. L'Esperance, 918 A.2d 684, 685 (N.J. Super. Ct. App. Div. 2007).

151 *Id.*

152 *Id.*

153 *Id.*

child.[154] When this initially failed, the defendant, now over seventy years old, indicated that he wished to end the relationship.[155]

Although the court in *Devaney* ruled that palimony was not an appropriate remedy in this case because of the lack of evidence of a marital-type relationship, the court distinguished this case from other New Jersey cases where palimony was awarded.[156]

X. ARGUMENTS AGAINST COHABITATION AGREEMENTS AND PALIMONY

There are a number of arguments against the use and enforcement of cohabitation agreements which provide for palimony. However, many of these arguments are unpersuasive. Some states provide that rehabilitative support,[157] rather than palimony, may be awarded in the event that a child is born into the relationship and one partner subsequently forgoes employment to care for the child. Thus, support and maintenance are only permitted if the relationship has produced children. This seems to go against public policy because not all relationships will produce children, and in such instances, one partner may effectively be left with nothing. The Uniform Marriage & Divorce Act ("UMDA") provides guidelines for determination of maintenance and support, which does *not* require children to be involved.[158]

Suppose one partner is mentally or physically incapable of seeking or gaining meaningful employment. What would happen to that person in the event of the dissolution of the relationship? Under a traditional marriage dissolution, that spouse would be just as entitled to maintenance and support as one which had children. The same should remain true for cohabitating partners, as one partner may be mentally or physically incapable of gaining employment and supporting himself or herself and had relied on his or her partner until the point that the relationship ended. Also, awarding rehabilitative support only to cohabitating partners with children would pose a problem for unmarried same-sex couples as it would be more likely that no children are involved. In this instance, one of the partners could have taken on the domestic duties, albeit without children, while one was employed. Similarly, one of the partners may be incapable of seeking employment because of physical or mental disabilities, as

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154 *Id.*

155 *Id.*

156 *Devaney*, 949 A.2d at 757. *See also* Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979) (the court determined palimony to be an appropriate remedy where a marital-type relationship exists).

157 Rehabilitative support is a form of temporary spousal support. Raymond C. O'Brien, *Integrating Marital Property Into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 698 (2010). This type of support is awarded for a limited period of time and is intended to provide support for a spouse who seeks additional training or education in order to reenter the workforce. *Id.*

158 UNIF. MARRIAGE & DIVORCE ACT, 42 U.S.C. § 608 (amended 1971 and 1973); ABRAMS ET AL., *supra* note 14, at 546.

above mentioned. In a state which does not allow for same-sex marriages, this statute would be a real problem for such couples.

Many courts also find that allowing cohabitation agreements to take effect or permitting an award of alimony will go against the policy of promoting marriage and the family.[159] However, discouraging cohabitation may actually fail to promote this goal as many couples choose cohabitation as a precursor to marriage and thus may never marry because they were never given the opportunity to live together "legally." According to one commentator, "past efforts to discourage cohabitation have not led to a decrease in its popularity, nor a return to traditional family structures."[160]

As previously discussed, unmarried couples who have demonstrated that they have cohabitated for a significant amount of time and who hold themselves out to be married should be entitled to all the benefits of marriage, both during the marriage, and after dissolution. Thus, consistency is key. Families live under a number of different circumstances, and the way in which they choose to do so should be up to them, not the state. Further, they should be able to set out the terms of their rights and responsibilities in the event of a break-up in the same way that a married couple may do so in a prenuptial agreement.

Another argument against permitting cohabitating partners to receive maintenance is that the two partners went into the relationship as individuals, and should depart from the relationship in the same way.[161] All property which was held between the individual partners before the marriage will be returned to them, and property acquired during the relationship should be split, either by doing so willingly and amicably at the dissolution, or by having signed a so-called cohabitation agreement.[162] Any maintenance for children should be given through traditional child support rather than maintenance to the non-working partner.[163]

Under the principles laid out by the American Law Institute ("ALI"), a couple is determined to have shared a life together if a number of circumstances are considered.[164] These circumstances include promises made to one another or representations made to others about the relationship, the extent to which the couple commingled their finances, the extent to which their relationship fostered the parties' economic interdependence, and the emotional or physical intimacy of the relationship between the parties.[165] Requiring consideration of these fac-

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159 Seff, *supra* note 71, at 154.

160 *Id.*

161 Alicia Brokars Kelly, *The Marital Pretence and Career Assets: The Ascendency of Self Over Marital Community*, 81 B.U. L. REV. 59, 61–63 (2001).

162 Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1274–75, 1282–84 (2005).

163 ABRAMS ET. AL., *supra* note 14, at 527.

164 AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03 (2002).

165 ABRAMS ET AL., *supra* note 14, at 526.

tors would help to better define a cohabitating relationship which would allow for support following dissolution. Without these considerations, *any* two people could cohabitate for reasons other than the intent to form a relationship, i.e., because the two could not afford to live on their own, or because they wish to give their non-marital child a proper home. In effect, the partners may have no real intimate or physical relationship at all, but simply live together in order to "pay the bills." In this instance, maintenance after dissolution would be improper as the parties did not intend to rely on one another or to commingle their property.

XI. THE FUTURE FOR COHABITATION IN WEST VIRGINIA

As discussed in Section V.A., West Virginia recently repealed its statute prohibiting cohabitation,[166] and joined the majority of states which recognize cohabitation. This was a positive step for West Virginia because, as discussed, couples have a number of valid reasons for choosing cohabitation as an alternative to marriage. These reasons range from the birth of a child to inability to legally marry. Others choose to forego marriage purely as a personal choice, viewing the relationship as one more personal in nature, refusing to be influenced by political or religious institutions. As of 2000, *11 million people* lived with an unmarried partner.[167] And the numbers continue to skyrocket. Fortunately, West Virginia no longer remains in the minority of states that still prohibit cohabitation.[168] Although the statute was rarely enforced while it was in place, West Virginia's repealing of the statute indicates its recognition of the cohabitation trend.

Although it has taken a step in the right direction with its recent repeal of Section 61-8-4, West Virginia should further modify its existing law by uniformly enforcing cohabitation agreements that set forth both the terms of property distribution in the event of a break-up as well as terms awarding palimony. As the choice to cohabitate has increased in popularity, West Virginia has in turn agreed to recognize and enforce express as well as implied contracts between two cohabitants.[169] Logically, it follows that West Virginia should also enforce agreements which provide for palimony after the relationship ends.

In *Devaney*, the court recognized that two people, though without having had a formal marriage, may nonetheless demonstrate that they have the same

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166 W. VA. CODE § 61-8-4 (2009) (repealed 2010).

167 JASPER, *supra* note 1, at 2.

168 W. VA. CODE § 61-8-4 (2009) (repealed 2010). Five states continue to criminalize cohabitation between an unmarried man and woman. *Id.* These states include Florida, Michigan, Mississippi, North Carolina, and Virginia. *Id.* However, North Dakota repealed its law in 2007. *See Some Laws Affecting Single People,* UNMARRIED AMERICAN, *available at* http://www.unmarriedamerica.org/laws-affecting.html (last visited March 6, 2011).

169 *See* Goode v. Goode, 396 S.E.2d 431 (W. Va. 1990).

type of relationship as those couples who are formally married.[170] Although the court ultimately rejected the plaintiff's claim for palimony in this case, it did recognize that such relationships exist.[171] Based on a sufficient set of facts pointing to a marital-like relationship, a plaintiff *could* recover palimony in the same way that a husband or wife could collect alimony from his or her partner after divorce.[172] The court also recognized this relationship in *Marvin v. Marvin* (decided 30 years before *Devaney*), where the court stated that "a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary award."[173]

Such recognition is good policy for courts as these types of relationships continue to grow in number. Unmarried couples who have lived with one another for a significant amount of time, holding themselves out as married (i.e., amounting to common-law marriages where such relationships are recognized) should be treated in the same way as married couples upon termination of the relationship.

States recognizing domestic partnerships and civil unions provide that these relationships should be treated as marriages, allowing unmarried couples to be eligible for such benefits as health insurance, inheritance rights, and retirement benefits. As such, it is only logical to extend the "benefits" of marriage to the dissolution of a cohabitating relationship. If the law treats such couples as married, then why should it not allow for "spousal" support after dissolution? In both a marital relationship as well as a marital-like relationship, both parties contribute financially to the household and to the support of any children of the household. Both have presumably made sacrifices for the benefit of the relationship, whether it be to seek employment or to forego employment to care for the children.

Although a formal marriage license may be lacking, cohabitating couples are likely in the same position after the dissolution of their relationship as a married couple would be at the time of divorce. Their property has likely been commingled and if they have a child, it is possible that one of the partners forewent employment to stay home and care for the child or children. Thus, the circumstances, in many cases, will be nearly identical to that of a married couple, as many states have recognized, and should be treated as such, especially at dissolution of the relationship. Men or women who forego employment are in the exact same position that married women would be in at dissolution of a marriage and are in no less need of the ability to get back on their feet. West Virginia should recognize this problem. As discussed above, the West Virginia

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170 Devaney v. L'Esperance, 949 A.2d 743 (N.J. 2008).

171 *Id.*

172 *Id.* at 750–51.

173 557 P.2d 106, 122–23 (1976).

Supreme Court, in *Goode v. Goode,*[174] acknowledged the need for distribution of property at the dissolution of a cohabitating relationship. However, the Court, per *Porter v. Porter,*[175] continues to refuse the award of palimony for cohabitating couples.

The policy underlying alimony is to provide a spouse who lacks sufficient property or means to provide for his or her needs or to provide means to a spouse who has foregone employment to care for the marital children and may need time to seek training and employment in order to provide for oneself. This policy also allows courts to equalize the monetary awards to each spouse upon dissolution of the marriage. Cohabitating partners should be given the same benefits and should be able to plan ahead through the use of cohabitation agreements. The Uniform Marriage & Divorce Act considers one partner's inability to survive financially after the dissolution of a marriage and provides that partner time to seek training and employment.[176] The same should be considered in the case of cohabitating partners.

XII. CONCLUSION

West Virginia no longer remains among the minority of states that still prohibit the act of cohabitation. With the ever-increasing popularity of cohabitating either before marriage or as an alternative to marriage, West Virginia was wise to repeal its statute criminalizing cohabitation. Although it was rarely, if ever, enforced, the statute was much outdated and did nothing to dissuade couples from choosing cohabitation over marriage. However West Virginia should consider uniformly enforcing cohabitation agreements, not only for the distribution of property after a relationship comes to an end, but also for awards of palimony, included within the agreement. Such enforcement would promote fairness and consistency and decrease the number of obstacles faced by cohabitating couples.

Emily E. Diederich[*]

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174 396 S.E.2d 430 (W. Va. 1990).

175 575 S.E.2d 292 (W. Va. 2002).

176 UNIF. MARRIAGE & DIVORCE ACT, 42 U.S.C. § 608 (amended 1971 and 1973); Mary Kay Kisthardt, *Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support, or Maintenance,* 21 J. AM. ACAD. MATRIM. LAW 61, 62, 65–73 (2008).

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