

Why Your Client May Need a Cohabitation Agreement

By Bill Fingerett

A significant number of couples, from millennials to baby boomers, are considering cohabitation as the next step in their relationship. Pew Research Center reported on a survey of millennials and why they were afraid to commit to marriage. Responses included that marriage is too permanent, just a piece of paper, and requires too much of a financial obligation.

The absence of a written agreement does not address any of the above concerns. “We don’t want to follow any rules, we just want to live together until we don’t anymore.” When such a relationship terminates, the Family Code does not apply to any post cohabitation issues.

To avoid a civil lawsuit for breach of an oral agreement, implied agreement, quantum meruit or other equitable remedy, it is as advisable for a cohabitating couple to enter into a written cohabitation agreement as it is for a couple contemplating marriage to enter into a prenuptial agreement.

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Your client says, “I don’t need a marriage license or written agreement in order to cohabit with my significant other.”

If the parties are not prepared to marry, they should at least prepare a cohabitation agreement to understand what rules apply to each party’s property. Attorneys can draft agreements on personal financial matters between two unmarried parties that reside together as a couple. Although the parties may enter into oral or implied agreements, a written cohabitation agreement clarifies agreements regarding their personal finances. The written agreement should address jointly owned property, how the property is titled and what and how to dispose of the property if the relationship terminates. This includes joint accounts as well as title to real property. It should also set forth the assets of each party, that property acquired by either party during their relationship will belong to that party and neither party will acquire any interest in the other party’s property or the right to receive support from the other party.

There may be income, estate, gift or Social Security tax implications stemming from marriage that are not present in a nonmarital relationship. Unmarried cohabitants must file separate income tax returns. One example of a tax consequence of marriage not available to cohabitating parties, is transferring property in a dissolution of marriage. Transfers to a non-spouse cohabitant may be taxable whereas transfers to a spouse in a divorce are likely not.

By written, oral or implied agreement by conduct, the parties can agree to be governed by some of the rules applicable to a married couple. Certain rights acquired during marriage, such as the right to sue for loss of consortium or the right to receive survivor benefits, cannot be provided for in an agreement. They are purely statutory rights. Rights of survivorship and estate planning require special planning in a nonmarital (or non-domestic partnership) relationship.

If the parties do not have a written cohabitation agreement, one party may claim an oral agreement or agreement implied by the conduct of the parties. In the California Supreme Court case of *Marvin v. Marvin*, 18 Cal 3rd(d) 660, 134 Cal.Rptr. 815, eq-

uity was introduced into litigation between cohabitating partners. The issue of fault, which is not admissible in family law court, legal separation or nullity proceedings, may be introduced along with unconscionability, unclean hands, estoppel, laches and other types of equity arguments. A quantum meruit remedy is available to a cohabitating partner to plead for reimbursement for services rendered. Compensation for services, discounted by benefits received, puts the cohabitating partner in a different position than a married person. An implied agreement or remedy based upon the principals of quasi-contract may be shown by evidence and enforced in property division between cohabitating parties. Between married persons the only agreements having property or contract validity must be express and in writing. *Marvin* is silent about the duties and responsibilities cohabitating parties have toward each other, such as good faith dealing, mutual support, debt liability, etc.

According to *Marvin*, if there is no express contract, the court may inquire into the conduct of the parties to determine whether the conduct demonstrates an implied contract, agreement of partnership or joint venture or some other understanding between the parties. The typical allegation in an express contract cause of action is that the parties agreed that one party would give up his/her lucrative career to devote his/her full time as a companion, homemaker, housekeeper and cook, and, in return, the other party would provide for all of the plaintiff’s financial support and needs for the rest of his or her life. The allegations in the civil complaint for palimony usually include an allegation that the parties agreed to pool all of the assets they accumulate during the time they cohabit.

To avoid leaving the interpretation of any agreement or understanding to a judge or jury, the parties should discuss financial expectations before moving in together. Each party should retain independent counsel to negotiate and draft an agreement that will be enforceable if the relationship terminates.