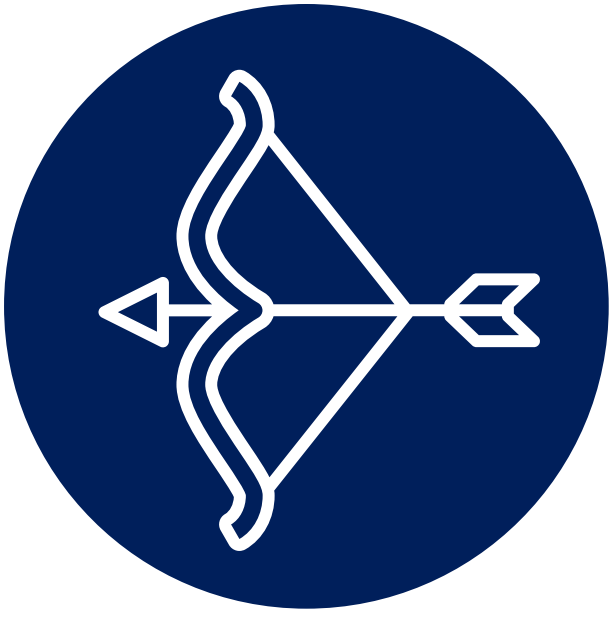
THE RISKY BUSINESS OF LIVING OUTSIDE THE MARRIAGE BOX

How and Why a Growing Number of Cohabitants Are Setting Themselves Up for Legal Uncertainty

Stan Sarkisov and Erin Levine

It's not just your parents—California wants to see you settled down and married. The state's laws incentivize marriage and hundreds of statutes confer protection on married persons: spousal support after separation, community property rights (and other laws that presume property acquired during marriage is a joint asset), tax perks such as the exclusion of gift taxes for transfers between partners, and protection from disinheritance upon death. Thanks to a California case and the recent US Supreme Court decision, San Francisco values have gone mainstream, and now same-sex couples nationwide have similar incentives to formally and legally get married.[1]

As our matrimonial laws continue to expand, fewer and fewer people are stepping up to the altar. By 2014, the share of married Americans dropped to 50 percent, down from 69 percent in 1970.[2] Since 2000, unmarried cohabitating couples have grown by over 40 percent in the United States, and over 40 percent of children are born to unmarried couples. Despite the "diamonds are forever" marketing, the United States has the highest divorce rate in the Western world. The standard marriage model is not user friendly to millennials, almost half of whom support an "opt-out" model involving a two-year trial run—at which point the union is formalized or terminated, without any paperwork.[3]



Americans are not growing afraid of commitment. Instead, millennials understand their relationships are not like their parents'—and they don't have to be. In 1976, the California Supreme Court suggested, "Some couples may wish to avoid the permanent commitment that marriage implies, yet be willing to share equally any property acquired during the relationship."[4] Millennials avoid marriage not to avoid commitment. Instead they are avoiding a multithousand, multiyear *Divorce Inc.* institution. No longer a taboo, the rate of unmarried romantic (and committed) cohabitation has increased 1,000 percent over the past decade. Generations reared by choice and options are "disrupting" how stable relationships are formalized.

Cohabitation comes with dangerously little protection. While married couples unknowingly enter into a complicated economic contract based on legislative algorithms for what's fair, cohabitants face the other extreme. If two people buy dishes, pick out sofas, and commingle their resources—upon separation they are largely treated as familial strangers. There are no duties and presumptions for cohabitants, and there will be no reimbursement for mortgage contributions made toward your ex-*roommate*'s home. California does not have any form of "common law" marriage, so unmarried couples who separate after living together and "acting" married have to be much more creative, and potentially employ financial planners, trusted friends, and mediators to help sort out finances.

The solution: an individually tailored cohabitation agreement. The alternative is walking away with nothing, mediation, or an archaic and expensive civil litigation system that treats unmarried exes as business or real estate partners (at best). In a landmark California Supreme Court case, the judge acknowledged that couples shirking commitment opened the door for romantic cohabitants to seek spousal support and property division in nonmarital breakups. After six years of living together, Ms. Marvin (a Hollywood C-lister) changed her surname, gave up rising fame to be a homemaker (no kids), and thought Mr. Marvin (an Academy Award–winning villain) had orally promised to support and share his earnings. After their breakup got to the state's highest court, Ms. Marvin was unable to prove

the existence of a contract that entitled her to a division of property (that would have been deemed community property had she been married). The privileges of married people were not transferrable to those who chose not to marry. But the court invited future cohabitants to prove the existence of an express or implied contract to get what Ms. Marvin could not.

A cohabitation agreement guards against the unknown—it can solidify expectations, provide protection to a partner who sacrifices a career to tend to children, protect separately owned property, provide scaffolding for jointly owned property, provide for support ("palimony") postseparation, and minimize financial exposure to the higher earner. This clarity (and express confirmation) would have helped Ms. Marvin determine:

- How will income and expenses be allocated in your relationship?
- Will you pool assets and wages?
- Will both parties be responsible for paying bills equally or proportionally?
- Will property acquired during the relationship (think: stock options, cars, loans, retirement contributions, houses, and other assets) become joint or stay separate?
- Will palimony (post-non-marital breakup support) be paid or received?
- If one party sacrifices economic growth to raise children or support the other's career, will that person be entitled to financial assistance or a breakup transition payment to become self-supporting?
- If a house is purchased during the relationship, how will title be held and how will the parties build their respective financial interest in the real property?

As goes California, so goes the nation—but California is not going anywhere.[5] When it comes to cohabitation, California is following along. The state is constitutionally bound to recognize an *out-of-state* common law marriage, but fewer and fewer states are allowing it.[6] Six states recently abolished it (most recently Alabama in 2017). One national outlier is Washington State, where cohabitants have similar property rights as marital partners. In those few states where common law marriages are legal, there is no such thing as a "common law divorce." Couples still have to convince a judge that medical records, sleeping arrangements, and holiday cards sufficiently prove a "marriage" existed and equitable division of property is warranted. Small and intimate details of a couple's life will make their way into the public pleading file. Often, the economically disadvantaged spouse will argue for a marriage, and the higher earner will claim no partnership existed at all (just like our California cohabitation antihero Mr. Marvin).

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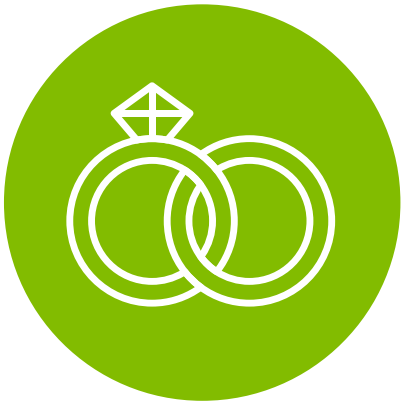
Proving a *Marvin* relationship is an uphill battle because courts like clean rules. Unlike divorces where separating couples must initiate a legal process to disentangle their finances, unmarried cohabitants do not have the benefit of a code specifically tailored to (almost) all issues that come up when dissolving their union or a dedicated forum to resolve them in. Providing your implied contractual intentions (one way to show a *Marvin* relationship) is not the easiest task. Before Alabama got rid of common law marriage, dissenting appellate Judge Terri Willingham Thomas laid it out clear:

> Judicial recognition of common-law marriage has led to unnecessary litigation, perjury, and fraud for too long. Common-law marriage should not be encouraged or tolerated when a bright-line standard for determining marital status is readily available. The legislature, by its silence, should not require the courts of this state to continue to struggle to separate fraudulent claims of marriage from valid ones when requiring parties who wish to enter into a marital relationship to obtain a marriage certificate would decisively solve the problem.[7]

Attempts to innovate the marriage model have not been successful. In 2011 a Mexico City legislator proposed a two-year temporary beta marriage. Religious leaders, battling a simultaneous attack on "traditional values" from marriage equality advocates, protested the proposal. In June 2017, Lord Neuberger, the president of the Supreme Court of the United Kingdom, delivered a keynote speech on the "plight of the unmarried." Across the pond, the UK Supreme Court effectively killed off the possibility of property rights for domestic purposes.



Californians wanting the rights of married people must get married. Or, in the alternative, carefully craft a cohabitation agreement with experienced lawyers not only to memorialize expectations but also to provide for a method of resolution for disputes that arise postseparation.[8] At some point, the family law community will need to look long and hard as to whether it makes sense to expand the Family Code to include more rights and obligations for romantic cohabitants or, at the very least, provide a more streamlined method for resolving implied and express contract disputes.

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Notes

1. *Obergefell v. Hodges* ruled that the fundamental right to marriage is guaranteed to same-sex couples. However, a June 2017 Texas Supreme Court decision, *Pidgeon v. Turner*, ruled that the *Obergefell* decision does not mandate Texas to extend spousal benefits for government employees in same-sex marriages.
2. *Pew Report* 12/14/2011, "Barely Half of U.S. Adults are Married—A Record Low," and *Quartz* article, "Marriage in America is going out of style—unless you're rich."
3. *Time Magazine* 07/17/2014, "Are You Monogamish? A New Survey Says Lots of Couples Are."
4. *Marvin v. Marvin* (1976) 18 Cal. 3d 665.
5. In 1979 the U.S. Supreme Court, in *Hisquierdo v. Hisquierdo*, ruled that because of states' police authority the whole subject of the domestic relations of husband and wife belong to the laws of the state.
6. Common-law marriages are a colonial leftover, when children born out of wedlock were a scandal. Finding a church official was more difficult, and cohabitants need a way to make it legit. Today, common-law marriage is less common because cohabitation is less taboo. For more, see NPR article, "No, You're Not in a Common-Law Marriage After 7 Years Together," by Heidi Gleen (09/04/2016).
7. *McMullins v. McMullins* (2016).
8. Note: Parentage and child custody disputes arising between unmarried cohabitants may be litigated in Family Court. Property and support disputes are resolved in Civil Court.