# WHEN COHABITATION ENDS
## (OR "NON-MARITAL DIVORCE"; OR "PROPERTY AND PALIMONY")

ALBERTINA ANTOGNINI

## Introduction

For a growing number of American families, cohabitation is not just "preliminary to marriage,"[1] but rather an alternative to marriage. Accordingly, non-marital cohabitation has become the subject of an expanding body of legal scholarship. While the bulk of that scholarship assesses how such families fit uneasily into a legal regime that is marriage-centric,[2] this Article takes a slightly different approach. It looks to how the law directly engages with non-marital relationships by focusing on what happens when the relationship ends. In particular, it considers how property and palimony are allocated at the conclusion of the relationship.[3]

Concentrating on legal decisions that address the end of a relationship provides insight into the relationship itself. Just as divorce helps us to better understand the law's construction of marriage, separation helps us to better understand the law's conception of non-marital relationships. This line of inquiry is especially important, given that a couple's separation is one of the few moments legal actors have to participate in the relationship.[4]

One of the challenges of this inquiry is defining the bounds of non-marital cohabitation without imposing a vision of what that relationship ought to look like. To begin with, non-marital couples and couples who cohabit are not always one and the same. For instance, a couple may be in a long-term romantic relationship, but not live together because one of the partners is married to someone else.[5] Even where couples do not cohabit, cohabitation nevertheless plays a significant role in the court's analysis, by its

---

[1] Marvin v. Marvin, 18 Cal. 3d 660, 683 (1976).

[2] *See, e.g.*, Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (identifying the disjuncture between family life and family law and offering ways that family law can change to facilitate effective co-parenting); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014) (revealing the asymmetrical recognition provided non-marital cohabiting relationships, which often bear the burdens but receive none of the benefits of marital relationships, with disproportionate effects on already vulnerable populations).

[3] Death is another event that may occasion legal intervention. This Article focuses only on separation by choice. Other scholarship, including my own, has addressed some of the legal repercussions for a couple when one of the individuals dies. *See, e.g.*, Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (2005); Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1 (2014).

[4] They do so in deciding whether, and how, property should be divided. Custody decisions are another opportunity for courts and legislatures to engage with the relationship. Custody decisions between unmarried parents lies beyond the scope of this Article, but forms the basis of a related project I am working on.

[5] *See, e.g.*, Devaney v. L'Esperance, 949 A.2d 743 (N.J. 2008) (denying palimony in the context of a 20-year long relationship where man was married to another woman for the duration of his non-marital relationship).

absence.[6] Rather than pre-define the relationships that are relevant to this analysis then, the Article examines the relationships that couples themselves assert in seeking a particular property distribution before the court. These relationships typically involve two partners, at least one of whom has asserted property rights on the basis of that relationship. There are, of course, obvious limits to this definition.[7] An important task of this Article is to consider what those limits are, how they are imposed, and assess which relationships are excluded – those that are not sexual in nature, for instance; or those that involve more than two partners.

This Article is structured in three parts. Part I begins by canvassing the various ways that courts allocate property in deciding claims brought by separating couples.[8] The relevant legal responses can be categorized into three general approaches: the traditional response, the statutory response, and the common law response. The first response – which I term the most "traditional" – is to impose a common law marriage on the relationship. This Part includes decisions that refuse to consider property claims between non-marital couples, based on the concern that it would essentially reinstate common law marriage by another name in states that have abolished it. The second approach is statutory. This may take the form of applying divorce rules to a non-marital couple that seeks to separate, or to interpret regulations that specifically address non-marital couples, where they have been enacted. The final approach is to rely on different common law doctrines to deal with non-marital partners. These categories are not exclusive – multiple approaches can exist in any one state at a given time. This Part also addresses, where relevant, the few states that continue to refuse to recognize any property rights in the context of a non-marital relationship.[9]

Part II turns to palimony. Many states deny the award of palimony outright, just as they do with alimony. Importantly, palimony cases provide a perspective outside of the legal responsibilities imposed by marriage to explore the notion of the obligation theory of partnership. It may be that courts prefer most versions of privatized support to a state support alternative. Or, it may be that these cases present a rare instance where marriage

[6] *See id.* (holding that cohabitation is not indispensible to asserting a palimony claim, but denying palimony in the context of the couple who did not cohabit because they did not have a sufficiently "marital-type" relationship).

[7] It does not, for instance, capture the variety of couplings that exist outside of the legal system, such as polyamorous or polygamous relationships. This is an issue related to both the self-selecting sample of couples that decide to bring claims in court and to their desire for success – they must define themselves such that their requests have legal valence as set forth either by statute, or case law.

[8] There has been a proliferation of websites geared towards attempting to clarify the rights and responsibilities that arise from a cohabiting relationship. *See, e.g.*, Unmarried Couples and the Law *available at* http://www.palimony.com, last visited on March 21, 2015 (attempting to "provide a one-stop source of resources and information for unmarried couples (heterosexual or homosexual) who are living together as domestic couples or are considering doing so" and announcing that it was established by the law firm responsible for defending Lee Marvin in *Marvin v. Marvin*); Unmarried Equality *available at* http://www.unmarried.org, last visited on March 21, 2015 (asserting "that marriage is only one of many acceptable family forms, and that society should recognize and support healthy relationships in all their diversity" and providing information for a wide variety of family relationships outside of marriage).

[9] While some states, most notably Illinois, are in the process of revising their laws, those that are least receptive to recognizing property rights arising from cohabiting relationships are: Georgia, Mississippi, Louisiana, Michigan, and Illinois.

is so favored that obligations are shifted to the state. It is, moreover, important to separate discussions of palimony from discussions of real property – scholars have tended to conflate the two, but identifying the different approaches courts take provides a more accurate assessment of the work that cohabitation does in these varying contexts.

Part III unpacks some of the implications of this analysis. Taking the various legal responses to non-marital cohabitation *in toto* reveals a number of deep-seated assumptions about how the law conceives of those relationships, and the distributive consequences such assumptions further. Specifically, this Part discusses the underappreciated perils inherent in cohabitation, and identifies who may be harmed by the decision not to marry. It also addresses how the fact of non-marriage should be treated in deciding the proper distribution of property. Should the law's treatment of non-marital couples be a space where the distinctions between marriage and non-marriage are maintained? Answering this question has consequences for those who make a conscious choice *not* to marry, and for assessing how that choice is best carried out; it also implicates courts and legislatures that perpetuate the distinction between marriage and cohabitation in setting out rules that deal with separation. A final, perhaps surprising repercussion from the foregoing analysis is that courts routinely engage in assessing relationships that involve more than two individuals – married couples who take on lovers, divorced couples who decide to get married again while each cohabit with others. As such, courts routinely address non-dyadic relationships. These discussions may therefore provide a basis for considering how the law is already equipped to confront non-dyadic relationships.

Ultimately, engaging in a more granular analysis of the law surrounding cohabitation helps identify how the legal system constructs who is part of the family and who is excluded from that account. Dealing with the separation of non-marital couples provides the law with an occasion to be expansive in recognizing different types of relationships between consenting adults.[10] These moments can also, however, create spaces where traditional norms of what families ought to look like are uncritically reinforced. Assessing how the law handles decisions regarding property allocation helps to identify the law's construction of adult relationships outside of marriage; it also helps to define the contours of marriage itself. This project aims to contribute to the strand of legal scholarship that considers areas outside of the formal reach of marriage as essential participants in establishing its meaning.[11]

---

[10] *See, e.g.*, *Marvin*, 18 Cal. 3d 660 (recognizing the existence of cohabiting couples in the context of a separation between one such couple).

[11] *See, e.g.*, Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CAL. L. REV. 87, 163-65 (2014) (discussing the dialogic relationship between marriage and nonmarital relationships and identifying "how the construction of nonmarital spaces influenced the changing contours of marriage"); Ariela Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1646-47 (2003) (noting that "understanding the meaning of marriage requires further foray, beyond marriage's margins and into the territory outside of its formal borders"); HENDRIK HARTOG, MAN AND WIFE IN AMERICA 1 (2000) ("It is through separations, through close examination of struggles at the margins of marital life and marginal identities, that we come to a historical understanding of core legal concepts: of wife, of husband, of unity.").

Part I: A Taxonomy

The legal story of non-marital cohabitation begins with a separation.[12] The Supreme Court of California's decision in *Marvin v. Marvin* explicitly recognized the existence of cohabiting couples generally in addressing how to distribute the property of the separating couple before it.[13] *Marvin* continues to be representative of the manifold relationships courts face. The couple at the center of *Marvin* – Lee Marvin and Michelle Triola – lived together for about seven years, which included a period of time where Lee was still married to Betty Marvin.[14] Lee was therefore in a cohabiting and committed relationship with Michelle both while he was married (to someone else) and after he was divorced. The overlap between Lee's cohabitation with Michelle and his marriage to Betty was not addressed by the court in any significant manner, other than to report that Betty's rights would be protected in a separate divorce proceeding.[15] But this layering of legal statuses and relationships is an important one to note. First, it highlights that the decision to cohabit was a choice; the possibility to marry was loud and clear, as evidenced by Lee's decision to have already done so once. Second, it reveals the multiple relationships occasioned in part by the legal invisibility of cohabitation – one could occupy a legally recognized status as husband, or wife, and also cohabit with someone else. Finally, it exposes the language Justice Tobriner used to describe the cohabitation as "preliminary to marriage" as perhaps intentionally naïve. After all, the court was clearly dealing with a couple who had lived together, chose not to marry, and was in the process of separating – without any semblance of being on the path to marriage.

*Marvin* also continues to be representative of courts' responses: to this day, courts resort to a medley of doctrines in order to determine the legal import of cohabitation. This Part digs into those responses in order to more fully understand non-marital couples and the legal arena they inhabit.[16] This assessment is particularly timely because, as we have

[12] *See* Antognini, *Family Unity Revisited*, 66 S.C. L. REV. at 15-16 (noting that the separation of a cohabiting couple precipitated the court to recognize the reality of the underlying union).

[13] *Marvin* is simultaneously understood as a watershed moment in recognizing the rights of non-marital cohabiting couples and criticized for ultimately not doing much to alter the status quo. For many, it did not go far enough in recognizing non-marital couples as an entity separate and distinct from married couples, nor did it produce real change in the way the law considered non-marital couples. *See* Dubler, *In the Shadow of Marriage*, 112 YALE L.J. at 1712-13 (characterizing Justice Tobriner's depiction of cohabitation in *Marvin* "as almost necessarily a premarriage phenomenon, not a form of domestic ordering completely apart from marriage"); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 175-77 (2008) ("Unfortunately, *Marvin v. Marvin* proved to be an end point, rather than the beginning of a more appropriate legal treatment of all families.").

[14] *Marvin*, 18 Cal. 3d at 666-67.

[15] *Id.* at 672-73.

[16] As such, it addresses a particular sector of the population – those who have property to split, and who have the means to bring their claims to court. This tends to leave out couples with lesser socio-economic status, which make up the majority of cohabiting relationships. *See* Huntington, *Postmarital Family Law*, 67 STAN. L. REV. at 168-72 (setting out the statistics regarding non-marital families and highlighting that "[u]nmarried parents generally are younger, are lower income, and have lower levels of educational attainment than married parents"). Race also matters – studies have shown that the decision to not marry has increased among black individuals in particular. *See* Diana B. Elliott, Kristy Krivickas, et al.,

seen, states have begun to eliminate civil unions and other affirmative forms of recognition.[17] But, individuals are still choosing to live together without marriage, and to subsequently separate. The legal system must therefore respond when these couples seek it out.

This Part provides a taxonomy of the legal responses to non-marital relationships, which fall into the following three categories.

*A. The Traditional Response: Common Law Marriage*

Around sixteen states recognize common law marriage to some degree. This section will analyze how common law marriage is imposed in situations where a non-marital couple separates. Cohabitation is typically one of the essential requirements to establish a valid common law marriage.[18] This section helps crystallize the difference between asserting property rights on the basis of a marriage, albeit a common law one, and on the basis of an explicitly non-marital relationship – it identifies how courts distinguish between the two claims and whether there are any practical repercussions.[19] Montana provides a particularly fruitful example, in that it recognizes common law marriage[20] as well as claims by non-marital couples who never intended to marry.[21]

*B. The Statutory Response*

This section will cover instances where statutes control the allocation of property between cohabiting couples. Courts apply these statutes in a variety of ways. At times they apply laws intended for married couples who divorce, to non-marital relationships; other times they apply statutes that directly address non-marital couples to those relationships; they also apply statutes that categorically prevent the consideration of property division in non-marital relationships.

---

*Historical Trends from 1890-2010: A Focus on Race Differences*, SEHSD Working Paper Number 2012-12, *available at* http://www.census.gov/hhes/socdemo/marriage/data/acs/ElliottetalPAA2012paper.pdf (finding that black men and women married in greater proportions than white men and women until 1960 and 1970, respectively, and investigating the reasons for the steep decline in marriage rates in this population). While an important limit to note, it does not necessarily take away from the Article's principal goal, which is to address how the law maps onto non-marital couples and what legal form it grants them in determining how property is distributed.

[17] *See* Aloni, *Deprivative Recognition*, 61 UCLA L. REV. at 1344-45 (asserting that the harm of the pursuit of marriage equality is already here, noting "that in many places, as soon as same-sex marriage was legalized, civil unions were abolished").

[18] In re Marriage of Geertz, 755 P.2d 34, 37 (Mont. 1988) ("In order to establish the existence of a common law marriage, the party asserting the marriage must show (1) the parties are competent . . .; (2) assumption of such a relationship by mutual consent and agreement; and (3) cohabitation and repute.").

[19] This may also be relevant to assessing some courts' reluctance to recognize the rights of non-marital couples based on the notion that they are instituting common law marriage. *See* Glidewell v. Glidewell, 790 S.W.2d 925, 926-27 (Ky. 2005) (overturning trial court's consideration of one party's contribution to the non-marital cohabiting relationship given that "to imply such rights 'would be reinstituting by judicial fiat common law marriage'").

[20] In re Marriage of Swanner-Renner, 209 P.3d 238 (Mont. 2009).

[21] Flood v. Kalinyaprak, 84 P.3d 27 (Mont. 2004) (deciding a case involving property division between parties who never alleged they were married under common law but did cohabit).

Nevada, for example, recognizes the rights of non-marital couples "by analogy" – that is, courts apply the state's community property laws regulating marriage and divorce to parties who are not married but who cohabit.[22] Minnesota, on the other hand, has codified its decision to not recognize any property division between cohabiting couples unless there is a written contract, signed by both parties.[23] Courts in Minnesota have, however, interpreted the statute narrowly, and apply it only where the "sole consideration" for the contract was sexual services.[24]

*C. The Common Law Response*

Courts recognize a variety of claims where no statute controls the decision, or where no statute is interpreted to control the decision. These include claims based on: an express or implied contract; a written or oral contract; unjust enrichment; a resulting or constructive trust; etc. The Supreme Court in *Marvin* established nearly forty years ago that California would recognize implied and express contracts, as well as equitable remedies if necessary to prevent unjust enrichment. Illinois is just now in the process of revisiting a decision that denied the possibility of recovery to non-marital couples, holding that courts are no longer barred from considering property claims arising from a non-marital relationship, thus leaving open which claims could gain traction.[25]

Part II: Palimony

This section will identify and discuss the cases that consider palimony, including those that decline to award it. It will begin by assessing the role cohabitation plays in deciding whether to award palimony. It will follow by considering where cohabitation has been raised by one of the parties after a divorce as a reason to terminate an award of alimony.[26] A comparison between the two contexts provides an opportunity to consider how the notion of support is established and conceptualized post-divorce vis-à-vis post-dissolution.

---

[22] *See* Western States Const., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992) (concluding "that unmarried cohabiting adults may agree to hold property that they acquire as though it were community property" and "the community property law may apply by analogy").

[23] "If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties, and (2) enforcement is sought after termination of the relationship." M.S.A § 513.075 (1980).

[24] *See* In re Estate of Palmen, 588 N.W.2d 493 (Minn. 1999) (holding that statute does not bar claim if couple living together entered into an unwritten agreement supported by consideration other than sexual relations and that seeks to protect an individual's property rights instead of asserting rights in the property of the cohabitant).

[25] Blumenthal v. Brewer, 24 N.E.2d 168 (2014) (involving a lesbian couple who had cohabited for twenty-six years and had three children during the course of their relationship). The case has been appealed, and is currently pending before the Illinois Supreme Court.

[26] *See, e.g.*, Graev v. Graev, 898 N.E.2d 909 (N.Y. 2008) (holding that extrinsic evidence should be considered in interpreting the terms of an agreement that provided for the termination of alimony payments by the ex-husband upon the ex-wife's cohabitation with an unrelated adult).

It is useful to separate this Part from the prior discussion of real property – courts apply different analyses to the two issues and therefore bring to bear a different set of assumptions. In particular, courts appear more comfortable engaging in the analysis of whether the cohabiting relationship was sufficiently "marriage-like" to merit an award of palimony.[27]

Part III: What Follows?

One of the first law review articles on the topic of non-marital relations, written in 1924, concerned the property interests that arise at the end of the relationship.[28] At that time, the article identified two types of non-marital, or "quasi-marital relations": putative marriage and concubinage. While "[a]s a social relation between the sexes, the one is of course altogether from the other," the article asserted that "at common law there was little difference in the consequences."[29] Namely, "[n]either the de facto wife nor the concubine acquired an interest in the property accumulated and standing in the man's name."[30] What has changed?

Further questions to explore: Should the legal system respond differently to cohabiting couples who separate than it does to married couples who divorce? Is this a context, unlike the initial decision to marry, where maintaining such distinctions are less important? How do cohabiting relationships provide a foundation for the legal recognition of non-dyadic family relationships? Are courts' assessments of these cohabiting couples more transformative than previously thought?

[27] Bayne v. Johnson, 957 A.2d 707, 715 (2008) ("A valid cause of action for palimony requires an agreement to pay future support made during a marital-type relationship between two parties.").
[28] Alvin E. Evans, *Property Interests Arising From Quasi-Marital Relations*, 9 CORNELL L.Q. 246 (1924). *See also* Grace Ganz Blumber, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1125 n.3 (1980-1981) (identifying Alvin Evans's article as the only article written on unmarried cohabitation before 1974).
[29] Evans, *Property Interests Arising From Quasi-Marital Relations*, 9 CORNELL L.Q. at 246.
[30] *Id.* Evans noted further disabilities, imposed on the woman in particular: "though the common law said the parties were not husband and wife in either relation, and the reciprocal interests did not arise, yet as to the woman the disadvantages of coverture were largely enforced while the advantages of coverture were denied." *Id.*