

INTERNATIONAL ASSOCIATION OF JUDGES

2006

SECOND STUDY COMMISSION

UNITED STATES RESPONSE

**LEGAL RULES REGARDING PATRIMONIAL INTERESTS, SUCCESSION
AND DUTIES OF COUPLES LIVING TOGETHER BUT NOT BEING MARRIED**

[A] CONTRACTUAL ARRANGEMENTS

1. **Does your system of law allow (i) heterosexual couples and (ii) same sex couples who are living together to enter into a contract governing their cohabitation, particularly as respects:-**
 - **obligations of support or maintenance**
 - **ownership of property during cohabitation**
 - **financial claims on the cessation of the cohabitation?**

Contract law is generally state law. Accordingly, each state decides on its own whether it will allow cohabitation agreements between either heterosexual or homosexual couples. At least 25 states have indicated that they will recognize and enforce cohabitation agreements. Only 2 states have indicated they would not. In California, so long as adults voluntarily live and have sexual relations together, they are free to contract in respect to their earnings and property rights. See Whorton v. Dillingham, 202 Cal. App. 3d 447 (App. Div. Cal. 1988); Lindey and Parley on Separation Agreements and Antenuptial Contracts (2d ed. 2005).

2. **If such contractual arrangements are permitted, is it common for cohabiting couples to conclude a cohabitation contract?**

*From 1992 to 2000, the number of cohabiting couples has jumped 72% to about 5.5 million households. One in nine of those households are same-sex cohabiting couples. See Kathy Chu, *supra*. Creating cohabitation agreements is becoming more common in the United States. But again, approximately only half the states have recognized and enforced them, including New Jersey, Connecticut, and California. See Lindey, *supra*.*

3. **Are there any formal requirements (e.g., signature before witnesses, involvement of a notary) which require to be satisfied before a cohabitation contract is valid?**

*No formal requirements are necessary as this is treated as a regular contract and not as a marriage substitute. However, it is recommended in the United States that any written agreement should recite its reasons for its making, i.e., financial exchanges, cohabitation, etc. See Lindey, *supra*.*

[B] HETEROSEXUAL COUPLES: NON CONTRACTUAL RULES

This section of the questionnaire is concerned with the rules governing or affecting the relationship between a man and woman who are living together, unmarried, without having concluded any cohabitation contract as in [A].

- 1. Where a couple are cohabiting does your legal system recognize any mutual duty of aliment or maintenance during the period of cohabitation?**

*Without a marriage or cohabitation agreement, nothing inherent in a cohabitation relationship creates any support obligations between the cohabitators. Any obligation must arise from a cohabitation agreement. See Lindey, *supra*.*

- 2. Are there any particular rules regarding ownership of moveable property such as, for example, household furniture acquired during the time in which the couple are cohabiting?**

*No specific rules exist. However, when a cohabitant is claiming an interest in property not clearly titled in his or her name or is claiming an interest that appears to be more than might appear on the face of the title, courts determine the extent and existence of the claimed interest based on either an express agreement or where no agreement exists, on the nature of the relationship. Standard partnership terms and laws may provide the basis for creating joint interests in certain property. Courts prefer damage awards rather than assigning an interest in a property. But courts do not base the split of property interests solely on cohabitation and domestic services. See Lindey, *supra*.*

- 3. If the relationship breaks down and the parties separate, does your legal system enable one of the cohabitants to claim from the other (a) payment of maintenance or (b) payment of a capital sum? If so, are such claims determined on the same principles as would apply were the couple married or do different rules apply?**

*Again, without a cohabitation agreement, our legal system does not recognize a separate duty for maintenance or a payment of capital sum. Marriage principles do not apply even if the couple were living together and holding themselves out as married. Even if parties contract for maintenance after the cohabitation ends, courts do not treat such contractual obligation as a continuing duty; instead, courts dole out lump sums as in any other contract recovery. See Lindey, *supra*.*

- 4. Where the house in which the parties live together is either owned or tenanted by one of the parties, does your legal system give the other party any right to continue to occupy the house when the relationship breaks down?**

Absent an agreement, NO.

5. **Where the cohabitation comes to an end by reason of the death of one of the cohabitants, what rights, if any, in the estate of the deceased cohabitant does your legal system give to the surviving cohabitant?**

The cohabitation relationship per se does not give a party any interest in any portion of the estate of a deceased partner. The courts have, however, recognize claims made by surviving cohabitants when the claim is based on other grounds, i.e., where a partnership existed. A state's probate procedures may also affect a cohabitant's legal rights. In most jurisdictions, a cohabitant would have to file claims as a creditor, followed by an appropriate appeal or collateral suit upon rejection of the claim. This is for interests in property and compensation. However, when a cohabitant claims a pre-existing interest in property and seeks to prevent that interest from being included in the decedent's estate, a cohabitant need not proceed as a creditor and no cohabitation agreement is necessary. See Lindey, supra.

6. **Does a cohabitant have any title to sue for damages in the event that his or her partner is killed through the fault or negligence of a third party?**

Wrongful death claims are part of tort law, and state law governs. State statutes govern wrongful death claims and who may bring such claims. Some states, like California, Vermont, and Hawaii, have granted domestic partners the right to bring wrongful death claims for the death of their partners. See 2001 Cal. Stat. 893; Vt. Stat. Ann. Tit. 15 1204 (2001); Haw. Rev. Stat. 663-3 (Supp. 1997). New York and Virginia, however, do not allow unmarried partners to bring wrongful death claims. See Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (App. Div. 2005); Va. Code Ann. 8.01-52, 53 (Michie 2002).

7. **In so far as your legal system does give rights to a cohabitant, does it also define what is necessary for the relationship to be treated as a "cohabitation"? Are different definitions of "cohabitation" used, depending on the right which is claimed? What factors are taken into account in the definition(s)?**

Cohabitation has been defined as a "dwelling together of man and woman in the same place in the manner of husband and wife." Wolk v. Wolk, 191 Conn. 328, 464 A.2d 780 (1983). However, case law has extended this to include homosexual cohabitation.

[C] HOMOSEXUAL COUPLES: NON CONTRACTUAL RULES

This section of the questionnaire is concerned with the rules governing or affecting the relationship between two people of the same sex who are cohabiting without having concluded a cohabitation contract as in [A].

1. **In your country are couples of the same sex able to enter into a relationship which, following registration or some other public ceremony, will be legally recognized by the State?**

Only the State of Massachusetts recognizes same-sex marriages. See Lindey, supra. Vermont, California, and Hawaii have statewide registration systems that provide legal benefits to same sex partners. Only about six states, including New York, recognize same-sex partnerships for

limited purposes like distribution of 9/11 funds. The federal government, however, does not recognize such protections. See Kathy Chu, Unwed Pairs Need Legal Protection; Inheritance, Medical Decision Papers Vital, USA Today, May 12, 2006, at 3B; Steven Clark, Perspectives: Federal Jurisprudence, State Autonomy: Progressive Federalism? A Gay Liberationist Perspective, 66 Alb. L. Rev. 719, 734-35 (2003).

- 2. If so, what are the principal ways in which the rules governing the patrimonial aspects of that relationship differ from those applying in (heterosexual) marriage?**

I am not sure exactly what this question is asking (patrimonial when looked in the dictionary refers to estates passed on by father), but again, only three states have recognized same-sex unions and have provided to same-sex partners all the same legal rights as heterosexual married couples. Other states may recognize such unions but limit the rights people in such unions may exercise.

- 3. In the event that a same sex couple either cannot enter into a legally recognized relationship or have chosen not to do so, does their cohabitation give rise to the same rights and obligations which would result from cohabitation of a man and a woman? If not, what are the principal differences?**

Both same sex and heterosexual couples are essentially treated the same absent a legally recognized union. If a same-sex couple cohabited and entered into a cohabitation agreement, their rights pursuant to the agreement would be enforced and recognized by a court of law just as the contractual rights of a heterosexual couple. However, absent a cohabitation agreement, the parties are not duty-bound to each other nor will the courts recognize any rights arising solely from their cohabitation.

[D] MISCELLANEOUS

- 1. Are there any proposals for reform of the law relating to cohabiting couples (homosexual and heterosexual)?**

*A national debate currently exists as to whether the Constitution should be amended to ban same sex marriage by defining marriage as solely between a man and a woman. See Today's Events in Washington, Frontrunner, May 25, 2006. However, because of the number of households that are cohabiting couples (about 5.5 million), more people are pushing for laws that protect domestic partners - homosexual or heterosexual. See Kathy Chu, *infra*.*

- 2. What points would you wish to discuss in greater detail?**

- 3. What subject do you suggest for the next meeting?**