

# COHABITATION AGREEMENTS

*The ties that bind*

By Scott N. Friedman & Heather R. Gall

In a time when many couples are choosing to live together rather than marry, it is likely that we will all be faced with a client who wishes to protect his or her interests in the event the cohabitation arrangement ends. A spouse acquires certain legal rights – such as the right to own a portion of the property that is acquired during the marriage and the right to inherit property from a deceased spouse – simply by entering into a marriage contract. However, for the couple who simply lives together regardless of the length of time of their cohabitation and or how the cohabitation ends – be it by separating or the death of one partner – neither partner is automatically granted rights in the property of the couple or as

a result of being part of the couple. How then, can we legally protect a client's interests when the client lives with someone without entering into a marriage contract, either because he or she simply does not want to marry or because he or she is legally prohibited from marrying?

Increasing in popularity as an instrument that is effective in protecting the interests of a cohabiting individual is the cohabitation agreement. Often likened to a prenuptial agreement, a cohabitation agreement is entered into by cohabiting partners. The agreement is a contract between cohabiting individuals that sets forth the rights of each partner in the event that the cohabitation arrangement ends.

Although some states have laws that protect the interests of cohabiting partners, most states including Ohio do not.<sup>1</sup> In fact, Ohio has explicitly declined to afford such protections. "There is no precedent in Ohio for dividing assets or property based on mere cohabitation without marriage and we think it advisable not to start or follow a trend to the contrary."<sup>2</sup> Although Ohio courts have refused to confer rights upon individuals based simply on their cohabitation, case law suggests that a written contract between cohabiting individuals could be enforced in the general division of the common pleas court.<sup>3</sup> "A contract between persons living together, so long as predicated upon valid, legal consideration, has been held to be enforceable."<sup>4</sup>

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Thus, since the courts have refused to find that an implied contract exists between cohabiting partners, it is imperative that a cohabitation agreement be in writing to ensure that it will be enforced.<sup>5</sup> Further, the agreement should be clearly written and as unambiguous as is possible, including definitions of important terms whenever possible. The clarity of the agreement will lessen the possibility of conflicts over the intent and meaning of the agreement. Or, if there is a conflict and it becomes necessary to file an action to enforce or interpret the agreement, the clarity of the agreement will make it easier for the court to interpret and enforce.

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In addition to making sure that the agreement is unambiguous, there are several provisions that should always be included in a cohabitation agreement. First, establish property rights, including the differences between separate property and joint property. Like a prenuptial agreement, the cohabitation agreement should include an attached financial statement that outlines the property owned by each party prior to the execution of the agreement. A detailed definition of joint property should be included that specifies assets including real property, bank accounts, other financial accounts, and tangible personal property. Recognition of the primary residence of the parties and any allocation of equity upon separation of the parties must be included. A provision establishing the general process for support and payment of joint expenses while residing together is recommended. If either party owns a business, the agreement should reference the ownership of the business and address any rights to ownership by the non-owner party in the event of a separation. A provision addressing claims to both parties' estates is necessary; however, you should also advise your client to have detailed estate planning documents prepared that are consistent with the terms of the cohabitation agreement. A provision addressing taxes as it relates to deductions for certain jointly titled assets and liabilities is necessary, if applicable.

Refer to termination events that would trigger the termination of the agreement. Some examples of termination events may include the death of either party, the separation of the parties (defining separation), a signed written acknowledgement to terminate the cohabitation agreement, and the parties' marriage to each other. Remedies for breach of the agreement should be addressed, including a specific definition of breach. It is extremely important to specifically spell out the manner in which the parties' joint property is to be divided in the event of a termination of the cohabitation agreement.

One final area to consider addressing is rights to the children of the parties. If the couple has children together, the intent of the parties as to how to raise the children and certain visitation rights may be included. Keep in mind that children's issues would not be enforceable in the general common pleas court; rather, jurisdiction of children's issues between unmarried parents would fall to the juvenile court.

Again, the preparation and execution of a cohabitation agreement is important for couples who choose to live together but cannot or are not going to legally be married. Like any other important legal document, each party should be represented by counsel in its preparation and should execute the document only after fully understanding the terms and provisions it contains.

<sup>1</sup> See, e.g., [www.equalityinmarriage.org](http://www.equalityinmarriage.org)

<sup>2</sup> *Lauper v. Harold* (1985, 12<sup>th</sup> Dist.), 23 Ohio App. 3d 168, 170.

<sup>3</sup> See, e.g. *Seward v. Mentrup* (1993, 12<sup>th</sup> Dist.), 87 Ohio App. 3d 601.

<sup>4</sup> *Levy v. Levy* (1978, 10<sup>th</sup> Dist.), 1978 Ohio App. LEXIS 10537, unreported, citing *King v. King* (1900), 63 Ohio St. 363.

<sup>5</sup> See, e.g. *Tarry v. Stewart* (1994, 9<sup>th</sup> Dist.), 98 Ohio App. 3d 533, 542.



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