

# COMMENTS

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## Unmarried Cohabitants: How the United States Is Still Not Protecting Same-Sex Couples

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## INTRODUCTION

Same-sex couples often face discrimination throughout their daily lives. Although the United States is making efforts to remove that discrimination, many problems still exist and disrupt same-sex couples' lives. For example, when sharing property, the name on the property's legal title of certificate often dictates the owner(s) without considering if, and with whom, they live. Unmarried cohabitants might not be protected under zoning ordinances that only protect "traditional families" connected by blood, marriage, or adoption. Unmarried cohabitants might struggle to bring inheritance claims if his/her partner dies without a will. For tax purposes, unmarried cohabitant couples are often classified as "single," so they are unable to reap marital tax benefits like their married counterparts. These are just a few examples of the legal drawbacks facing unmarried cohabitants.

As societal trends continue to shift away from marriage and toward cohabitation, this Comment seeks to highlight that although individuals may be opposed to entering a marriage, many still desire marital-like benefits to recognize their own union. The purpose of this Comment is to evaluate the legal rights that should attach to unmarried cohabitants through a default scheme that considers property rights, tax benefits, inheritance claims, and other legal benefits that are currently only available to marital relationships. Additionally, this Comment evaluates an opt-in scheme for unmarried cohabitants to enter into that allows them to grant more rights to his/her partner than automatically given in the default scheme.

This Comment is broken into four parts. Part 1 describes important demographic trends regarding family formation: marriage rates are declining while cohabitation rates are increasing, especially for same-sex couples. Part 2 examines two current legal frameworks that support unmarried same-sex cohabitants' claims against each other in the event they break up. Part 3 describes legal frameworks in other countries that regulate unmarried cohabitants' rights during their relationships and at the dissolution of their relationships. This third section begins by

looking at the first countries that implemented legal cohabitation frameworks. Then, the focus turns to other countries' frameworks and identifies the benefits and drawbacks of each system. Part 4 of this Comment proposes the type of legal framework the United States should adopt to protect and enforce unmarried cohabitants' legal rights and obligations.

## I

### CURRENT DEMOGRAPHIC TRENDS IN FAMILY FORMATION

Today, in the United States, overall marriage rates have been declining.<sup>1</sup> A 2010 Pew Research Center poll found “about four-in-ten Americans (39%) said they agree that marriage as an institution is becoming obsolete.”<sup>2</sup> The Pew Research Center's study on love and marriage in 2014 found that marriage rates have declined by 9 percent in the last twenty-five years.<sup>3</sup> Meanwhile, the number of individuals cohabitating with an unmarried partner has increased by 29 percent since 2007.<sup>4</sup> From 2000 to 2010, the percentage of unmarried cohabitants grew by 41 percent in the United States.<sup>5</sup>

In 2017, two years after the United States legalized same-sex marriage, the Pew Research Center conducted a survey of LGBT couples to analyze how many couples took advantage of their newfound legal right to marry.<sup>6</sup> Of the total cohabitating couples, only 61 percent were legally married,<sup>7</sup> although this number grew by 33 percent post-*Obergefell*.<sup>8</sup> This number still highlights that thirty-nine percent of cohabitating same-sex partners are not married.<sup>9</sup>

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<sup>1</sup> Abigail Geiger & Gretchen Livingston, *8 Facts About Love and Marriage in America*, PEW RES. CTR. (Feb. 13, 2018), <http://www.pewresearch.org/fact-tank/2018/02/13/8-facts-about-love-and-marriage/>.

<sup>2</sup> D'Vera Cohn et al., *Barely Half of U.S. Adults Are Married—A Record Low*, PEW RES. CTR. (Dec. 14, 2011), <http://www.pewsocialtrends.org/files/2011/12/Marriage-Divorce.pdf>; see also *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. (Nov. 18, 2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

<sup>3</sup> Geiger & Livingston, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> John Waggoner, *Marital Rights for Unmarried Partners*, 226–27. AM. L. INST.; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 907–43 (LexisNexis ed., 2002).

<sup>6</sup> David Masci et al., *5 Facts About Same-Sex Marriage*, PEW RES. CTR. 1 (June 26, 2017), <http://www.pewresearch.org/fact-tank/2017/06/26/same-sex-marriage/>.

<sup>7</sup> *Id.*

<sup>8</sup> See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>9</sup> Masci, *supra* note 6.

That 39 percent represents the unmarried couples who reside in a category without legally recognized protective rights for their relationships. These couples do not have a legal framework that defines their rights in their relationships regarding taxes, property division, welfare benefits, legal standing to raise claims, and other marital benefits. The United States needs to adopt a default legal framework to give legal recognition to these couples during their relationships. Additionally, this legal framework needs to account for property division, spousal support rights, and custody rights in the event the couples separate.<sup>10</sup> Without these protections, unmarried cohabitants are treated as though their relationships never existed.

## II CURRENT LEGAL REMEDIES

Many couples, particularly many same-sex couples, prefer not to marry and choose to remain as unmarried cohabitants despite the legal protections marriage offers. As Lawrence Waggoner has pointed out, marriage does not just grant a marriage certificate; instead, Waggoner argues:

[M]arriage carries significant psychological, health, and financial benefits. Marriage also creates federal and state rights, obligations, and immunities—including social security, taxation, spousal communication and testimonial privileges, obligation of support, the right to a property settlement and perhaps the possibility of alimony in divorce, a large intestate share for a surviving spouse, and protection against disinheritance.<sup>11</sup>

Unmarried cohabitants currently only have the following two legal means of securing some or all of these rights for themselves: (1) establish that they should have the legal rights of marriage even though they are not ceremonially or common law married; or (2) establish that they have contractual rights against each other.

### *A. Establish a Retroactive Marriage Application Right*

Some same-sex cohabitants have sought to be treated as if they were married even though they did not participate in a ceremonial marriage or enter into a common law marriage. To be successful, a claimant must make two claims: (1) that he or she has standing to sue and (2) that he

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<sup>10</sup> The term “separate” in this Comment does not refer to a legal separation. Instead, it denotes that the cohabitants wish to no longer exist as a couple.

<sup>11</sup> Waggoner, *supra* note 5, at 226–27.

or she “would have been married but for” the legal prohibition against same-sex marriage.<sup>12</sup> This section describes three cases in which a person sought to bring a retroactive marriage application claim.

The first case illustrates the “would have married but for” theory. The second case examines how that theory typically plays out in court, and the third case examines the rare instance when this method is successful.

*Mueller v. Tepler* is a 2014 Connecticut case where a same-sex partner raised a spousal loss of consortium claim upon the death of her partner.<sup>13</sup> The couple had never been married.<sup>14</sup> While the federal government did not legally recognize same-sex marriage in 2014, Connecticut had legally recognized same-sex marriage since 2008.<sup>15</sup> The court held that the same-sex partner could raise a loss of consortium claim but only if the partner alleged that the two would have been married had they legally been allowed to marry.<sup>16</sup> The court decided that unmarried cohabitants have no right to bring a loss of consortium claim when they refuse to marry.<sup>17</sup> Therefore, the surviving partner lost because there was a six-year time period before the death when the couple could have legally married in Connecticut.

Three years later, in 2017, a federal district court in California reached a similar conclusion in *Ferry v. De Longhi Am. Inc.*<sup>18</sup> Mr. Ferry sued for the wrongful death of his partner, claiming that the two “would have been married but for” the legal prohibition against same-sex marriage.<sup>19</sup> However, his claim failed because by 2017, same-sex marriage was legally recognized by the federal government and in all states.<sup>20</sup> In fact, same-sex marriage had been legally recognized in California since 2008.<sup>21</sup> Mr. Ferry’s claim failed because state law did not prevent him from marrying his partner; instead, he chose not to marry his partner.<sup>22</sup>

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<sup>12</sup> *Mueller v. Tepler*, 312 Conn. 631, 633 (2014).

<sup>13</sup> *Id.* at 634.

<sup>14</sup> *Id.*

<sup>15</sup> Robert D. McFadden, *Gay Marriage Is Ruled Legal in Connecticut*, N.Y. TIMES (Oct. 10, 2008), <https://www.nytimes.com/2008/10/11/nyregion/11marriage.html>.

<sup>16</sup> *Mueller*, 312 Conn. 631 at 661.

<sup>17</sup> *Id.*

<sup>18</sup> *Ferry v. De Longhi Am. Inc.*, 275 F. Supp. 3d 940 (N.D. Ca. 2017).

<sup>19</sup> *Id.* at 945.

<sup>20</sup> *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

<sup>21</sup> *In re Marriage Cases*.

<sup>22</sup> *Id.*

In contrast, in 2016, a federal district court in Texas ruled in favor of a similar claim. In *Ranolls v. Dewling*,<sup>23</sup> a lesbian couple had been together for more than eighteen years but had never married.<sup>24</sup> In fact, the couple had separated just before Ms. Ranolls was killed in an automobile accident in 2015.<sup>25</sup> Despite the couple's separation, Ms. Hogan brought a claim against the estate as the surviving spouse on the theory that the two "would have married but for" the prohibition on same-sex marriage.<sup>26</sup>

Unlike Connecticut and California, Texas did not recognize same-sex marriage until the Supreme Court decided *Obergefell v. Hodges* in 2015. Ms. Ranolls was killed in March 2015, several months before *Obergefell* was decided.<sup>27</sup> Therefore, the couple legally could not have married in Texas at the time she died. For this reason, the court found in favor of Ms. Hogan.<sup>28</sup> Because Texas recognizes common law marriage, the court retroactively applied a common law marriage to Hogan and Ranolls based on the eighteen years they spent as unmarried cohabitants.<sup>29</sup> Since there is no common law divorce, the court found the two were still married when Ms. Ranolls died.

Ultimately, the cases described above show how this method of "would have married but for" is ineffective at securing rights for unmarried cohabitants. As more time passes with same-sex marriage legally recognized in the United States, the "would have married but for" theory loses weight because there is no longer a valid "but for." Instead, this theory provides a loophole for courts to continually deny unmarried cohabitants rights under the premise that they could have secured their rights by getting married. The court does so by only legally protecting the brief period of time before *Obergefell* was handed down which changed the law in only a few states that still refused to recognize same-sex marriage legally. Those few states are the only states where same-sex couples could successfully bring a "would have married but for" claim.

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<sup>23</sup> *Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016).

<sup>24</sup> *Id.* at 615.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 625.

<sup>29</sup> *Id.*

### **B. Contract Claims**

Unmarried cohabitants have the power to protect themselves via contract. These contracts, however, often grant unequal shares of property and/or support between the couples due to power dynamic disparities.<sup>30</sup> Often, one partner has more property, which makes him or her the superior partner, making it difficult to separate the property in the event of dissolution.<sup>31</sup>

As Ann Estin stated:

by refusing to assimilate cohabitation to the norms of marriage, the courts define ordinary cohabitation as a relationship in which the parties do not acquire rights or take on obligations to each other. In most states, the sharing norms that apply to property and support claims at the dissolution of a marriage do not apply.<sup>32</sup>

Given the heightened requirements, very few unmarried cohabitants successfully raise contract claims.<sup>33</sup>

In the United States, to bring an enforceable contract claim involving unmarried cohabitants, the plaintiff must plead and prove the following elements: (1) the parties had an agreement giving the plaintiff support and property rights; (2) there was sufficient consideration outside of their sexual relationship; (3) terms of the contract are sufficiently ascertainable to permit relief granted; and (4) plaintiff has suffered an injury due to breach of contract.<sup>34</sup>

Now, the opposing partner can bring the following defenses to negate liability: (1) there was no agreement to give support or property rights; (2) the agreement the two had gave the plaintiff less than plaintiff's alleged claimed interest; or (3) the meretricious nature of the agreement precludes enforcement.<sup>35</sup>

The first case where an unmarried partner sued for property rights at the end of a cohabiting relationship on a contract claim was *Marvin v. Marvin*.<sup>36</sup> The *Marvin* case was brought by a woman who alleged a

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<sup>30</sup> Waggoner, *supra* note 5, at 227.

<sup>31</sup> *Id.*

<sup>32</sup> Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391 (2001).

<sup>33</sup> *Id.* at 1403.

<sup>34</sup> Kristen Tungstol, *Cause of Action by Same-Sex or Heterosexual Unmarried Cohabitant to Enforce Agreement or Understanding Regarding Support or Division of Property on Dissolution of Relationship*, 35 CAUSES OF ACTION 2d 295, § 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Marvin v. Marvin*, 18 Cal. 3d 660 (1976).

contractual claim to the property the couple shared.<sup>37</sup> The alleged couple had lived together for seven years; she stayed at home as the classic homemaker, and he continued to work as an actor who brought in the money.<sup>38</sup> After seven years, he ended the relationship and refused to continue supporting her or sharing the property.<sup>39</sup> She brought a property claim to enforce an implied contract regarding their agreement to share the property equally.<sup>40</sup> The court found that she had stated a contract claim,<sup>41</sup> but on remand, she lost by failing to prove a contract existed for property division.<sup>42</sup>

Even today, alleged contract claims against ex-partners are often unsuccessful, given the type of relationship involved. In 2010, the Illinois Supreme court heard the case of *Blumenthal v. Brewer*.<sup>43</sup> Ms. Blumenthal brought a partition action on the family home she shared with Ms. Brewer in their unmarried cohabitant relationship.<sup>44</sup> The lesbian couple had lived together for years like a married couple, and even raised children together.<sup>45</sup> However, the relationship ended with disastrous property consequences because the two never elected to marry.<sup>46</sup> The Illinois Supreme court stated that “unmarried individuals may make express or implied contracts with one another, and such contracts will be enforceable if they are not based on a relationship indistinguishable from marriage.”<sup>47</sup> Based on that position, the Illinois Supreme Court declined to extend property rights to unmarried cohabitants based on contract claims.<sup>48</sup>

### III

#### LEGAL FRAMEWORKS FOR COHABITATION IN OTHER COUNTRIES

This Part of the Comment examines various legal frameworks, starting with the first countries to adopt a legal protective framework

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<sup>37</sup> *Id.* at 666.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 685.

<sup>42</sup> *Id.*

<sup>43</sup> *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2010).

<sup>44</sup> *Id.* at 839.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 860.

<sup>48</sup> *Id.*



for unmarried cohabitants: the Scandinavian countries<sup>49</sup> and the former Yugoslavian countries.<sup>50</sup> Next, the Comment examines the benefits and drawbacks of some current frameworks, beginning with Australia, then France and Belgium's PACS-based system, and lastly four Canadian provinces.

### *A. Demographic Background*

International cohabitation trends show both sides of the spectrum of those who elect to marry and those who elect not to marry. A 2012 study found that in Asia and the Middle East, unmarried cohabitants made up less than 2 percent of the population.<sup>51</sup> In Europe, unmarried cohabitant rates varied slightly.<sup>52</sup> Poland, Spain, and Italy did not have high rates of cohabitation, whereas France and Sweden had some of the highest cohabitation rates (around 18 percent of the populations).<sup>53</sup> The same study found that Colombia had the highest rate of unmarried cohabitation, with 31 percent of its population engaged in unmarried cohabitant relationships.<sup>54</sup>

The Office for National Statistics' 2017 study analyzed families in the United Kingdom. Of the 19 million families surveyed, 3.3 million were unmarried cohabitants—the second most common family type.<sup>55</sup> Those 3.3 million families do not have the same legal rights as married couples in the United Kingdom. Currently, the United Kingdom is debating the Cohabitation Rights Bill that would grant unmarried cohabitants property rights and support benefits.<sup>56</sup> Until that bill is

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<sup>49</sup> Noack, Bernhardt, Wiik, & Lyngstad, *The Realization of Marriage Plans among Cohabiting Couples in Scandinavia* (2011), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=392FC22C89C48802E2A9C92D95972C55?doi=10.1.1.695.4413&rep=rep1&type=pdf>.

<sup>50</sup> See Petar Sarcevic, *Cohabitation without Marriage: The Yugoslavian Experience*, 29 AM. J. COMP. L. 315 (1981).

<sup>51</sup> W. Bradford Wilcox & Carlos Cavallè, *The Sustainable Demographic Dividend: What Do Marriage & Fertility Have To Do with the Economy?* SOCIAL TRENDS INSTITUTE, 29 (2012), <http://sustaindemographicdividend.org/wp-content/uploads/2012/07/SDD-2011-Final.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> OFF. FOR NAT'L STAT, *Number of Families in the UK Continues to Grow, with Cohabiting Couple Families Growing the Fastest*, in FAMILIES AND HOUSEHOLDS 2017 (Nov. 8, 2017), <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017#number-of-families-in-the-uk-continues-to-grow-with-cohabiting-couple-families-growing-the-fastest>.

<sup>56</sup> *Id.*

passed, unmarried cohabitants in the United Kingdom have no legal marital-like rights.

### *B. The Scandinavian Countries*

The Scandinavian countries were among the first to adopt a legal framework for unmarried cohabitation. These frameworks focused mainly on support rights by granting spousal support and ensuring child protections if a couple separated. Norway and Sweden introduced gender-neutral marriage in 2008 and 2009.<sup>57</sup>

#### *1. Denmark*

The Danish Act on Registered Partnerships governs unmarried cohabitants.<sup>58</sup> To register as partners, both individuals must permanently reside in Denmark.<sup>59</sup> The registration has the same legal effect as a marriage contract.<sup>60</sup> Thus, the Danish provisions governing marriage apply similarly to registered partners.<sup>61</sup> Both residents must be single to enter a partnership.<sup>62</sup> If either resident is not single, each person can be imprisoned.<sup>63</sup>

Registered partnerships are terminated the same way marriages are terminated.<sup>64</sup> The partnerships can be annulled by judicial decree or ended by divorce.<sup>65</sup> To divorce, the spouses must legally separate for at least a year.<sup>66</sup> The only exceptions that can bypass the legal separation period are if one of the partners was violent during the relationship or was a bigamist.<sup>67</sup>

When a partnership ends, maintenance payments may be available, dependent upon the circumstances.<sup>68</sup> Maintenance ends when the

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<sup>57</sup> Ingrid Lund-Andersen, *Registered and Unmarried Partners in Denmark: Recent Legal Developments*, INT'L SURV. FAM. L. 157, 157 (2011).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> The Danish Registered Partnership Act, D/341-H-ML Act No. 372 § 3 (1989), <http://www.qrd.org/qrd/world/europe/denmark/registered.partnership.act.with.amendments>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> The Formation and Dissolution of Marriage Act (Mar. 9, 1999), [http://host.uniroma3.it/progetti/cedir/cedir/Lex-doc/Dk\\_marrig.pdf](http://host.uniroma3.it/progetti/cedir/cedir/Lex-doc/Dk_marrig.pdf).

<sup>65</sup> *Id.* at pt. 3, § 23.

<sup>66</sup> *Id.* at pt. 4, § 31.

<sup>67</sup> *Id.* at pt. 4, § 35.

<sup>68</sup> *Id.* at pt. 5, § 45.

entitled person remarries or if either spouse dies.<sup>69</sup> An ex-partner may also have a right to a spouse's pension.<sup>70</sup> If the partners are unable to agree on how to divide their property, the court may enter its own decree dividing the property as it sees fit.<sup>71</sup>

In 2007, Denmark reformed its Inheritance Act, giving unmarried cohabitants the right to make an "expanded cohabitation will."<sup>72</sup> This development allowed cohabitants to inherit from each other as though they were married.<sup>73</sup> Unmarried cohabitants may inherit through three forms: (1) by intestacy rules; (2) by probate court order; and (3) by will.<sup>74</sup>

Before 2010, this Act prevented same-sex couples from adopting a child together, sharing joint custody, or marrying in a church.<sup>75</sup> In 2010, Denmark repealed the prohibition on joint custody and adoption rights for same-sex couples.<sup>76</sup> Now, registered partners may be approved as adopters if they have lived together for two and a half years.<sup>77</sup>

## 2. Norway

Unmarried cohabitation was illegal until 1972, when the prohibition was abolished.<sup>78</sup> Once the prohibition was lifted, people slowly began cohabitating without marriage.<sup>79</sup> In 1977, unmarried cohabitants totaled 5 percent of the population.<sup>80</sup> By 1996, that total had grown to 24 percent.<sup>81</sup> In 1993, Norway passed the Registered Partnership Act, which allowed for same-sex partnerships.<sup>82</sup> This act was repealed in

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<sup>69</sup> *Id.* at pt. 5, § 49.

<sup>70</sup> *Id.* at pt. 3, § 28.

<sup>71</sup> *Id.* at pt. 5, § 55.

<sup>72</sup> Lund-Andersen, *supra* note 57, at 158.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 162.

<sup>75</sup> *Id.* at 159.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> John Erikson, *Unmarried Cohabitation and Family Policy in Norway*, 11 INT'L REV. SOC. 64, 64 (2001).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 65.

<sup>82</sup> *Marriage and Cohabitation*, MINISTRY OF CHILDREN AND EQUITY, <https://www.regjeringen.no/en/topics/families-and-children/innsiktsartikler/marriage-and-cohabitation1/id670495/> (last updated Jan. 27, 2015).

2008 with the passage of the Marriage Act, leaving only marriage or cohabitation as options for a couple.<sup>83</sup>

A cohabitant relationship is formed when two individuals live together without formal marriage. This union exists for heterosexual and homosexual couples.<sup>84</sup> No regulating contract exists for this relationship.<sup>85</sup> Cohabitants are considered independent individuals for finances and do not have spousal support obligations.<sup>86</sup> Neither partner is liable for the other's debts, and cohabitants generally do not inherit from one another.<sup>87</sup> Although they generally do not retain inheritance rights, such rights can be granted by a mutual will if the cohabitants have joint children or if they have lived together for five years.<sup>88</sup> To protect children, cohabitants are treated as married spouses under the Children Act.<sup>89</sup> This Act enforces parental responsibility by assigning rights and duties to the parents.<sup>90</sup>

If the couple separates, each partner takes his/her separate property unless there is a contract specifying otherwise.<sup>91</sup> Without a contract, the property is divided by legal title.<sup>92</sup> A separation does not relieve either cohabitant from parental obligations or child support.<sup>93</sup>

### 3. Sweden

In 2003, Sweden published updates to the Swedish Cohabitation Act.<sup>94</sup> This Act minimally protects a couple's joint home and joint household goods and only applies to married or registered couples.<sup>95</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Cohabitation*, NEW IN NORWAY, <http://www.nyinorge.no/en/Familiegjenforening/New-in-Norway/Families-and-children-in-Norway-/Families-and-children-in-Norway/Cohabitation/> (last visited June 29, 2018).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *The Children Act: Act of 8 April 1981 No. 7 Relating to Children and Parents*, ch. 2, § 3, MINISTRY OF CHILDREN AND EQUITY (Apr. 6, 2017), <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>.

<sup>90</sup> *Id.* at ch. 3, § 10.

<sup>91</sup> *The Formation and Dissolution of Marriage Act*, *supra* note 64, at pt. 5, § 56.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Act (2003:276) on Cohabitation (Cohabitees Act), in *National Legislation: Sweden*, <http://ceflonline.net/wp-content/uploads/Sweden-IR-Legislation.pdf> (last visited Mar. 30, 2018).

<sup>95</sup> *Id.*

There are three requirements to be cohabitants under Swedish law.<sup>96</sup> First, the couple must permanently live together.<sup>97</sup> Second, they must live together solely because they are a couple.<sup>98</sup> Third, they must share in household maintenance and expenses.<sup>99</sup> Sweden does not discriminate against heterosexual versus same-sex couples but does prohibit married or registered partners from entering into another union.<sup>100</sup>

Sweden's default property rules apply to registered partnerships.<sup>101</sup> The joint home is the couple's permanent dwelling.<sup>102</sup> Any goods purchased during the relationship for home use are legally considered joint household goods.<sup>103</sup> Any outside property is considered each partner's separate property and may not be divided if the couple breaks up.<sup>104</sup>

If the couple separates, only the joint home and household goods may be divided.<sup>105</sup> Neither partner has a right to the other's bank account(s), money investment(s), automobiles, secondary dwellings, or other assets.<sup>106</sup> Neither partner is liable for the other partner's debt.<sup>107</sup> However, the partners can mutually contract to keep the joint home and household goods separate property, and therefore, not subject to property division rules.<sup>108</sup>

There are five methods to legally end a registered partnership.<sup>109</sup> First, the contract ends if either partner marries a different person individually.<sup>110</sup> Second, the contract ends if the couple mutually decides to separate.<sup>111</sup> Third, if either partner dies, the contract ends.<sup>112</sup> Fourth, a partner seeking to end the relationship may apply for

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<sup>96</sup> *Id.*  
<sup>97</sup> *Id.*  
<sup>98</sup> *Id.*  
<sup>99</sup> *Id.*  
<sup>100</sup> *Id.*  
<sup>101</sup> *Id.*  
<sup>102</sup> *Id.*  
<sup>103</sup> *Id.*  
<sup>104</sup> *Id.*  
<sup>105</sup> *Id.*  
<sup>106</sup> *Id.*  
<sup>107</sup> *Id.*  
<sup>108</sup> *Id.*  
<sup>109</sup> *Id.*  
<sup>110</sup> *Id.*  
<sup>111</sup> *Id.*  
<sup>112</sup> *Id.*

termination through an estate administrator and request a property division.<sup>113</sup> Fifth, one partner may initiate a court action for property division.<sup>114</sup>

Upon dissolution, each ex-partner has one year to request a property division.<sup>115</sup> The joint home must have been purchased together to be legally considered the joint home.<sup>116</sup> If one partner purchased the home separately, it will not be eligible for property division,<sup>117</sup> nor will the other partner have a right to recover home maintenance expenses.<sup>118</sup>

Contrasted to the joint home, all joint household goods are available for property division, regardless of who purchased the item(s).<sup>119</sup> If purchased together, the joint home and any mortgage debt will be divisible property.<sup>120</sup> First, the debt is deducted and the remaining home value is divided equally.<sup>121</sup> The default property division is equitable distribution, but this can be modified on a case-by-case basis.<sup>122</sup>

If the dissolution is caused by a partner's death, only the surviving partner may request a property division.<sup>123</sup> The surviving partner must request property division before the estate is finalized.<sup>124</sup>

### *C. Countries from Former Yugoslavia*

#### *1. Soviet Republic of Slovenia*

The former Yugoslavian countries began developing legal unmarried cohabitant frameworks in the 1970s.<sup>125</sup> In 1976, the Soviet Republic of Slovenia passed Article 12 of the Marital and Other Family Relations of 1976, which regulated different-sex cohabitants.<sup>126</sup> After cohabitating for a substantial time, Article 12 would consider the couple legally married so long as the union would not be invalidated

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 5.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See Sarcevic, *supra* note 50, at 315.

<sup>126</sup> *Id.* at 321.

for any reasons.<sup>127</sup> With marital recognition, the legislator equalized inheritance rights for married persons and unmarried cohabitants.<sup>128</sup> No other rights were granted to unmarried cohabitants.<sup>129</sup> Kosovo, in 1974, was the only other former Yugoslavian country that granted inheritance rights to unmarried cohabitants.<sup>130</sup>

## 2. *Croatia*

In 1978, Croatia modified Article 7 in its law on marriage and family relations act by assigning unmarried cohabitants mutual support obligations and property rights.<sup>131</sup> Only heterosexual couples qualified under Article 7 as “unmarried cohabitants.”<sup>132</sup> Any property acquired during their relationship was legally considered joint property.<sup>133</sup>

If a couple separated, their joint property was divided according to the same property division rules that governed divorce (Article 293 II).<sup>134</sup> An unemployable partner who could not support him/herself could bring a support claim within one year of the separation against his/her ex-partner (Articles 248 and 254).<sup>135</sup> If a support claim was filed, the court had discretion to approve or reject the claim on a case-by-case basis.<sup>136</sup> The court also retained the discretion to limit or extend any existing support obligations.<sup>137</sup>

## 3. *Bosnia and Herzegovina*

In 1980, Bosnia and Herzegovina updated Article 14 of the Law on Marriage and Family Relation Act of the Socialist Republic of Bosnia and Herzegovina and granted unmarried cohabitants property rights and mutual support obligations.<sup>138</sup> Upon dissolution, unemployable ex-cohabitants unable to support themselves could file a support claim.<sup>139</sup> Each partner had three years after dissolution to file a support claim

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<sup>127</sup> *Id.*

<sup>128</sup> *See generally id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 323.

<sup>131</sup> *Id.* at 322.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 322–23.

<sup>136</sup> *Id.* at 321 n. 34.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 322.

<sup>139</sup> *Id.* at 322 n. 37.

with the court.<sup>140</sup> The court reserved the discretion to accept or reject each support claim on a case-by-case basis.<sup>141</sup>

#### 4. *Serbia*

Serbia modified its unmarried cohabitation rights in 1980.<sup>142</sup> Although these relationships were still restricted to heterosexual couples, each partner now had a support right upon dissolution.<sup>143</sup> The court retained sole discretion to accept or reject and modify support claims on a case-by-case basis.<sup>144</sup> Joint property was divided according to marital property division rules unless the court modified the division on a case-by-case basis.<sup>145</sup>

Serbia had two additional cohabitant protection rights not found in the other former Yugoslavian countries.<sup>146</sup> First, no designated time frame existed for support claims when the couple had mutual shared children.<sup>147</sup> Second, in case their relationship did not last, unmarried cohabitants could not waive potential support claims in the beginning of their relationship.<sup>148</sup>

#### ***D. Australia***

Australia's implementation of the De Facto Relationship Act of 1996 created a legal framework for unmarried cohabitants.<sup>149</sup> The couple must create a written contract signed by both parties to create a legally recognized cohabitant relationship.<sup>150</sup> In this contract, the parties can stipulate to their preferred property division and financial obligations.<sup>151</sup>

The cohabitant relationship can be terminated by the couple or by the court.<sup>152</sup> For the couple to end the relationship, they must submit a written agreement stating their intent to end the union.<sup>153</sup> By default,

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 324.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 325.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 324.

<sup>149</sup> *De Facto Relationships Act 1996* pt 2 s 5 (Austl.).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at pt 2 s 7.

<sup>153</sup> *Id.*



the court retains the right to revoke the cohabitant contract if it sees fit.<sup>154</sup> The court may act on its own initiative or on the request of one partner who wants out.<sup>155</sup> However, in the original cohabitant contract, the couple may remove the court's ability to end their relationship.<sup>156</sup>

At the end of the relationship, each partner has a property division claim provided three requirements are met.<sup>157</sup> First, the property division request must be brought in the same location where the cohabitation contract was granted.<sup>158</sup> Second, the couple must have resided in that same location for a substantial period of time.<sup>159</sup> The substantial period of time requirement is dependent on the relationship's duration.<sup>160</sup> Third, the relationship must have either existed for at least three years or the couple had a child during their relationship.<sup>161</sup> If the requirements are satisfied, each partner has one year to submit a property division request.<sup>162</sup> However, the court retains the discretion to extend the one year time requirement upon a showing of good cause.<sup>163</sup> Upon application, the court divides the property in an equitable fashion, taking into account each partner's contributions.<sup>164</sup>

### *E. The PACS of France and Belgium*

The next Section focuses on the Pacte Civil de Solidarité (PACS) of France and the legal framework in Belgium. These two countries were concerned with property rights and spousal support rights while extending concern about inheritance and tax rights.

#### *1. France*

In 1999, France enacted legislation that created the PACS in response to the country's gay and lesbian community growing and expressing concerns over their lack of legal rights.<sup>165</sup> The legislation

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at pt 2 s 8(2)(a)-(b).

<sup>156</sup> *Id.* at pt 2 s 8(3).

<sup>157</sup> *Id.* at pt 3 s 9.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Ji Hyun Kim et al., *The Rise of PACS: A New Type of Commitment from the City of Love*, 56 WASHBURN L.J. 69, 71 (2017).

was built on the presumption that PACS would be a happy medium between marriage and dating.<sup>166</sup> The PACS is “an act of will that immediately creates a legal situation and produces judicial consequences rather than a situation of fact to which judicial consequences are attached.”<sup>167</sup> By entering this contract, two individuals create a legal relationship without altering the civil status of either party.<sup>168</sup> Article 515-1 of the French Code Civil states that a PACS is “a contract entered into by two natural persons of age, of different sexes or same sexes, to organize their life in common.”<sup>169</sup>

There are four requirements that must be met to enter into this union.<sup>170</sup> First, each person must be the age of majority (18).<sup>171</sup> Second, each person must have the mental capacity to enter into the union.<sup>172</sup> Third, neither person may be currently married or registered in a PACS to another person.<sup>173</sup> Fourth, the individuals cannot be related by blood or related within three degrees of the other person.<sup>174</sup> If the above requirements are met, the couple declares their union at the local county courthouse where their common household is established.<sup>175</sup> Heterosexual and homosexual couples may register for a PACS relationship.<sup>176</sup> Although Article 515-1 does not require an intimate relationship, the surrounding legislation suggests a relationship *sans l'intimité* would be void.<sup>177</sup>

In a PACS, each partner agrees to mutual and material support obligations and relationship benefits.<sup>178</sup> Each partner is jointly liable for any debts (mortgage debts, credit card debt, etc.) contracted into during their relationship.<sup>179</sup> All real and personal property acquired during the relationship is jointly owned, with no right of

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<sup>166</sup> Daniel Borrillo, *The “Pacte Civil de Solidarité” in France: Midway Between Marriage and Cohabitation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS. A STUDY OF NAT’L, EUR., AND INT’L LAW 475, 475 (Hart Publishing, 2001).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-1 (Fr.).

<sup>170</sup> Borrillo, *supra* note 166, at 485.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-2 (Fr.).

<sup>175</sup> Borrillo, *supra* note 166, at 485; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-3 (Fr.).

<sup>176</sup> Borrillo, *supra* note 166, at 484.

<sup>177</sup> Kim et al., *supra* note 165, at 83.

<sup>178</sup> Borrillo, *supra* note 166, at 485.

<sup>179</sup> *Id.*

survivorship.<sup>180</sup> These property rights can be mutually modified to fit the couple's preferences.<sup>181</sup> Any leases held by either partner will transfer to the surviving partner in the event of death.<sup>182</sup> Health insurance benefits also attach to a PACS partner.<sup>183</sup>

Despite the above benefits, the PACS has monetary and familial drawbacks.<sup>184</sup> For income tax purposes, each partner is taxed as an individual for the first two years of the PACS relationship.<sup>185</sup> Only after the third year of their partnership is the couple taxed jointly for income purposes.<sup>186</sup> Unlike income tax, the couple is immediately taxed jointly on their combined wealth and held jointly and severally liable.<sup>187</sup>

The same two-year wait period is required before the couple can make tax-free transfers during their lifetime to one another.<sup>188</sup> After two years, the couple may transfer up to 375,000 francs tax-free.<sup>189</sup> No automatic inheritance rights attach in a PACS.<sup>190</sup> Additionally, if one of the partners dies before the two-year wait period is up, the surviving partner has no right to an inheritance without a valid will.<sup>191</sup> No social security benefits pass between PACS partners when one dies.<sup>192</sup> Additionally, surviving partners do not have legal standing to raise claims on behalf of their deceased partner in court.<sup>193</sup>

PACS partners are also unable to jointly adopt children.<sup>194</sup> Only married couples can jointly adopt children in France.<sup>195</sup> Same-sex couples are not allowed to have joint parental rights, nor are they allowed access to medically assisted procreation technology.<sup>196</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 486.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 485.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 486.

<sup>193</sup> *Id.* at 487.

<sup>194</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 343 (Fr.).

<sup>195</sup> *Id.*

<sup>196</sup> Borrillo, *supra* note 166, at 487.

Four methods exist to terminate a PACS.<sup>197</sup> First, a PACS will immediately terminate if both partners file a declaration with the Tribunal d'Instance.<sup>198</sup> Second and third, immediate termination occurs if one partner marries or dies.<sup>199</sup> Fourth, either partner can request to end the PACS by giving the Tribunal and his/her partner notice of his/her request.<sup>200</sup> Once notice is given, and after a three month wait period, the PACS is terminated.<sup>201</sup>

Many critics have articulated that PACS only confirms the inequalities of same-sex couple relationships.<sup>202</sup> Daniel Borillo described the PACS as:

a cowardly project, resulting from the difficulty facing gays and lesbians in achieving equal rights, either through the legislature or the courts. But for this difficulty, how can it be explained that people were excited by a law that confines homosexual couples to a form of substandard marriage, while giving the false impression that their union is recognized in the same way as civil marriage?<sup>203</sup>

In an attempt to grant same-sex couples legal protections, France created a union that “confirmed[ed] the inequalit[ies] of same-sex couples.”<sup>204</sup> Today, 90 percent of PACS are registered to heterosexual couples who see a loophole in achieving legal recognition without risking divorce consequences.<sup>205</sup>

## 2. Belgium

Belgium first recognized unmarried cohabitants in 1989.<sup>206</sup> Today, two different legal unions are recognized in Belgium: marriage and legal cohabitation.<sup>207</sup> Two individuals can enter into a cohabitation by signing a written contract.<sup>208</sup> In this contract, the couple can contractually stipulate to property concerns, financial concerns,

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<sup>197</sup> *Id.* at 486.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 486–87.

<sup>202</sup> *Id.* at 488.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Kim et al., *supra* note 165, at 87.

<sup>206</sup> Frederik Swennen & Dimitri Mortelmans, *National Report: Belgium* 1, 6 (Jan. 2015), <http://ceflonline.net/wp-content/uploads/Belgium-IR.pdf>.

<sup>207</sup> *Id.* at 1.

<sup>208</sup> *Id.*

inheritance concerns, and any other relationship concerns the couple may have.<sup>209</sup>

Any two people, age of majority and older, can contractually cohabit as long as neither person is already married or contractually connected to another person.<sup>210</sup> Belgium does not require the couple to have an emotional or sexual connection for a valid contract.<sup>211</sup> Once the requirements are met, the couple submits a legal cohabitation declaration to the registrar with proof of shared residency.<sup>212</sup> The registrar reserves the right to deny the application.<sup>213</sup> Neither person's legal status is affected by a cohabitant contract; each partner remains single according to government regulation.<sup>214</sup>

Once the cohabitation contract has been approved, legal protections for the shared family home attach.<sup>215</sup> Neither partner may alter the shared residence without the other partner's consent.<sup>216</sup>

If the couple moves, both partners must share in the moving expenses.<sup>217</sup> All daily life expenses such as bills, food, house maintenance, *etc.*, must be shared.<sup>218</sup> If the couple has a child, both parents share equally in the educational and daily expenses of raising the child.<sup>219</sup> Both partners are liable for any and all debts contracted mutually or independently, unless they are excessive, which is determined on a case-by-case basis in the court system.<sup>220</sup> The couple is free to determine what inheritance benefits, welfare benefits, and other benefits attach at the outset of their relationship in their cohabitant contract.<sup>221</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *Marriage and Legal Cohabitation in Belgium*, FEDERAL MIGRATION CENTRE 1, 6 (Apr. 2014), [http://www.myria.be/files/Marriage\\_and\\_Legal\\_Cohabitation\\_in\\_Belgium.pdf](http://www.myria.be/files/Marriage_and_Legal_Cohabitation_in_Belgium.pdf).

<sup>211</sup> *Id.* at 5.

<sup>212</sup> *Id.* at 18.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 20.

<sup>215</sup> *Cohabitation Légale*, INFORMATION ET SERVICES OFFICIELS (2018), [https://www.belgium.be/fr/famille/couple/cohabitation/cohabitation\\_legale/](https://www.belgium.be/fr/famille/couple/cohabitation/cohabitation_legale/).

<sup>216</sup> CODE CIVIL [C.CIV.] art. 1477 (Belg.).

<sup>217</sup> *Marriage and Legal Cohabitation in Belgium*, *supra* note 210, at 24.

<sup>218</sup> *Cohabitation Légale*, *supra* note 215, at 24.

<sup>219</sup> Eric Spuryt, *Cohabitation: One Name, Several Situations*, (Nov. 23, 2012) 1, 1 [http://berquinnotarissenbe.webhosting.be/public/pdf/eng/EN\\_Samenwoning\\_ES.pdf](http://berquinnotarissenbe.webhosting.be/public/pdf/eng/EN_Samenwoning_ES.pdf).

<sup>220</sup> *Id.*

<sup>221</sup> *See generally* Swennen, *supra* note 206.

Two methods exist to terminate a cohabitant contract: by consent or by court order.<sup>222</sup> By consent, the couple submits an annulment request to the court.<sup>223</sup> Once approved, each partner retains any parent- or child-based rights, but the previous contractual rights cease to exist.<sup>224</sup> By court order, any justified person, including third parties, or the court prosecutor by consultation can enter a termination application.<sup>225</sup> Third party applications can be submitted if anyone is concerned that the union was founded out of convenience or force.<sup>226</sup>

If the union is found to be convenient or forced, penalties will increase based on the gravity of the situation.<sup>227</sup> General penalties are imposed when the couple has attempted and/or successfully carried out a union of convenience.<sup>228</sup> General penalties impose fines and minimal jail time.<sup>229</sup> The greatest punishment is applied to unions of force or violence and consist of five years in prison and a five-thousand euro fine.<sup>230</sup>

### *F. Canada*

Canada generally defines unmarried cohabitants as persons who live together for more than a year or who have a child together.<sup>231</sup> Each Canadian province treats unmarried cohabitants differently. This next section examines four of the major provinces and their treatments of unmarried cohabitants. As of 2016, unmarried cohabitants made up 21 percent of the population.<sup>232</sup>

#### *1. Alberta*

The Adult Interdependent Relationships Act governs unmarried cohabitants.<sup>233</sup> Alberta does not grant unmarried cohabitants rights

<sup>222</sup> Mettre fin à la cohabitation, INFORMATION ET SERVICES OFFICIELS (2018), [https://www.belgium.be/fr/famille/couple/cohabitation/mettre\\_fin\\_a\\_la\\_cohabitation](https://www.belgium.be/fr/famille/couple/cohabitation/mettre_fin_a_la_cohabitation).

<sup>223</sup> *Id.*

<sup>224</sup> Spuryt, *supra* note 219, at 3.

<sup>225</sup> *Marriage and Legal Cohabitation in Belgium*, *supra* note 210, at 20.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 23.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Andrea Mrozek, *Increasing Cohabitation Is Destabilizing the Canadian Family* (Aug. 23, 2017), <https://ifstudies.org/blog/increasing-cohabitation-is-destabilizing-the-canadian-family>.

<sup>232</sup> *Id.*

<sup>233</sup> Catherine Brown & Kyle T. Gardiner, *The Rights of Unmarried Cohabitants in Canada*, 24 TRUSTS & TRUSTEES 1, 86, 89 (2018).

equal to those of their married counterparts.<sup>234</sup> To qualify as unmarried cohabitants, the couple must live together in a “relationship of interdependence” for three consecutive years or live together with a child.<sup>235</sup> A relationship of interdependence is defined as one that exists outside of marriage where the couple shares their lives together as an economic and domestic unit.<sup>236</sup> A couple can bypass the three-year requirement if they enter into a written Adult Interdependent Relationship contract.<sup>237</sup>

Family law principles govern property rights and support rights in this relationship.<sup>238</sup> For tax purposes, each partner is treated as single according to government regulation.<sup>239</sup> Neither partner may claim the other cohabitant as his/her partner for tax purposes.<sup>240</sup> If the couple separates, courts fall back on family law provisions to govern property distribution and support obligations.<sup>241</sup> The court has the discretion to grant sole possession of the joint home and joint household goods to one partner or equitably divide the property between the two partners.<sup>242</sup> Either partner may bring a claim for spousal support, but there is no guarantee the court will accept the claim.<sup>243</sup> No inheritance rights attach if the couple separates.<sup>244</sup>

If the relationship ends because one partner dies, the surviving partner may submit an inheritance application directly to the court if the partner dies intestate or if his/her will contains inadequate provisions for the surviving partner.<sup>245</sup> If the partner dies intestate with no surviving descendant(s), the entire estate passes to the surviving partner.<sup>246</sup> However, if the partner dies intestate with a surviving descendant(s), the property is divided equally between the surviving descendant(s) and surviving partner.<sup>247</sup>

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 91.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

## 2. *Quebec*

Quebec refers to unmarried cohabitants as *de facto* spouses.<sup>248</sup> Generally, these couples do not share the same legal rights as those who are married or engaged in a civil union.<sup>249</sup> To be considered *de facto* spouses, the couple must have lived together for at least three years or share a child together.<sup>250</sup> The following legal protections do not apply to *de facto* spouses: property division rights, mutual support obligations, inheritance rights, or legal standing to bring surviving partner claims.<sup>251</sup>

In some instances, unmarried cohabitants may qualify as a “spouse” for income tax purposes, though generally they remain “single” according to government policy.<sup>252</sup> When the cohabitants are considered “spouses,” they are taxed like married couples and allowed to transfer property tax-free between each other.<sup>253</sup>

Unmarried cohabitants can sign a contract stipulating to their expectations as a couple.<sup>254</sup> They can designate financial responsibilities, value their separate property, and stipulate to the consequences of dissolution like property division and spousal support rights.<sup>255</sup> Generally, the court may not amend any terms to the contract; however, the court may amend contractual terms regarding children.<sup>256</sup>

Without a cohabitation contract, neither partner is entitled to property rights or support obligations if the couple separates.<sup>257</sup> Additionally, neither partner is entitled to inheritance rights without a contract assigning those benefits.<sup>258</sup> If one partner dies intestate, the entire estate passes to the legally recognized heirs; this does not include the surviving partner.<sup>259</sup>

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<sup>248</sup> *Id.* at 92.

<sup>249</sup> *Id.*

<sup>250</sup> *De Facto Union*, SERVICES QUEBEC (2018), <http://www4.gouv.qc.ca/en/Portail/Citoyens/Evenements/separation-divorce/Pages/union-fait.aspx>.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Brown & Gardiner, *supra* note 233, at 92.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*



### 3. *British Columbia*

In 2013, British Columbia amended the definition of “spouse” to include those couples living in a marriage-like relationship for at least two years or who share a child.<sup>260</sup> If a couple satisfies either requirement, the couple enjoys the same benefits as married partners.<sup>261</sup> The couple is taxed as a married couple and can share in tax-free transfer benefits and spousal support tax deductions.<sup>262</sup>

For these couples, each partner is entitled to half of the property acquired during the relationship.<sup>263</sup> Additionally, each partner is responsible for half of any debt accumulated in the relationship.<sup>264</sup> The divisible property includes any property owned separately or jointly by the partners.<sup>265</sup> The only property not divisible is property acquired by gift, such as inheritance, awards, etc.<sup>266</sup> If any of the excludable property increased in value during the relationship, the ex-partner is entitled to half of that increased value.<sup>267</sup> Each partner is also entitled to spousal support under the same rules as married couples.<sup>268</sup> If the relationship ends because a partner died, the surviving partner has a right to an estate share.<sup>269</sup> Any shared children also have inheritance rights.<sup>270</sup>

### 4. *Ontario*

Article 53 of Ontario’s Family Law Act governs cohabitant rights.<sup>271</sup> Cohabitants are defined as two unmarried persons who contract to cohabit.<sup>272</sup> The couple may be heterosexual or homosexual.<sup>273</sup> Unlike other cohabitant frameworks, if the couple marries, their union is legally redefined as married and does not invalidate their cohabitation

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<sup>260</sup> *Id.* at 88.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Ontario Family Law Act, R.S.O. 1990, c. P.53 (Can.).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

contract.<sup>274</sup> Unmarried couples are considered married for tax purposes.<sup>275</sup> Thus, they can enjoy tax-free transfer benefits and tax deductions for paid support.<sup>276</sup>

When entering a cohabitation contract, the parties stipulate to property division rights and support obligations at the onset.<sup>277</sup> Additionally, the couple can stipulate to educational and lifestyle choices of any shared children.<sup>278</sup> However, the couple may not determine custody rights or support obligations for their children.<sup>279</sup>

By law, unmarried cohabitants are not required to share the same residence.<sup>280</sup> Additionally, a couple's cohabitation contract does not automatically terminate if the couple decides to separate.<sup>281</sup> Instead, the couple can contractually separate and qualify their views on property division, support obligations, and any other legal concerns.<sup>282</sup> Thus, a couple can separate but retain mutual legal rights and obligations.<sup>283</sup>

By default, unmarried cohabitants have spousal support rights when the relationship ends.<sup>284</sup> The spousal support amount is determined at the discretion of the court.<sup>285</sup> No automatic inheritance rights attach to unmarried cohabitants.<sup>286</sup> Without a valid will, a surviving partner receives nothing from the estate.<sup>287</sup>

#### IV LEGAL FRAMEWORKS SUMMARY

The above countries' legal frameworks have advantages and disadvantages; no country has a perfect framework. In particular, the Scandinavian countries vary drastically. Unmarried cohabitants enjoy an advantage in Denmark because they are granted spousal support rights, pension rights, inheritance rights, property division rights, and adoption rights. Meanwhile, in Norway, unmarried cohabitants are at a

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<sup>274</sup> Brown & Gardiner, *supra* note 233, at 92.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> See Ontario Family Law Act, R.S.O. 1990, c. P.54 (Can.).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Brown & Gardiner, *supra* note 233, at 91.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

disadvantage because they do not have support rights or property rights. The only advantage for Norwegian unmarried cohabitants is mandatory child rights and parental responsibilities. Although Sweden has a default equitable property division framework, the only available property is the shared home and shared household goods. Even more limiting, the shared home is only divisible if the partners mutually purchased the home. Most partners mutually own assets that fall outside the above designated scope.

Unmarried cohabitants of the former Yugoslavia had the advantage of property rights and spousal support obligations. However, outside of those legal areas, no other rights were extended to them. Only the Socialist Republic of Slovenia extended inheritance rights.

Australian unmarried cohabitants are well off for property division. The main drawback of the Australian framework is the requirement that couples must wait three years before they qualify as de facto spouses. There is no wait period for marriage, so why should unmarried cohabitants be restricted by a wait period?

The main advantage of France's PACS system's is that it allows for same-sex couples to secure legal property rights, spousal support rights, and health insurance benefits. Yet, the PACS system disadvantages couples by taxing their income as if they were single for the first two years, while immediately taxing them as married for wealth taxes. No inheritance rights attach to either partner, and they are not allowed to adopt children. A couple should not be prevented from adopting children simply because they are not married.

Belgium went further than France and allowed any couple to enter a contract even if they did not have an intimate relationship. Yet, this allowance defeats the purpose of giving unmarried cohabitants legal rights by invalidating their choice to live together in a marriage-like relationship. However, Belgium imposes penalties for sham cohabitations, which leads us to question what is truly a valid cohabitant relationship in Belgium?

The Canadian provinces all restrict unmarried cohabitants from entering a union until after two years (British Columbia) or three years (all other provinces). No time restriction should be applied before a couple can be legally classified as unmarried cohabitants. Only British Columbia and Alberta attach inheritance rights. Quebec taxes the couple as two "single" persons. Quebec does not assign property rights or spousal obligations to the couple.

### CONCLUSION

The United States needs to adopt a legal framework that protects unmarried cohabitants. Two systems need to be adopted. First, the United States needs to adopt a default system that applies to all unmarried cohabitants. Second, the United States needs to adopt an opt-in cohabitant contract that allows the partners to assign additional benefits to each other. To protect these unions, penalties should be imposed on sham cohabitations to help legitimize unmarried cohabitant families.

By default, unmarried cohabitants should be given property rights and support obligations. If the couple had been living in a marriage-like relationship while representing themselves as a couple, they are legally classified as unmarried cohabitants. No time period should be required. The property rights would apply to any property acquired during the relationship. This would include their shared residency and any other assets purchased throughout the duration of their relationship, regardless of whose paycheck was used to make the purchase. The support obligations would apply to the ex-partner and any children. Any child taken into the home and raised as if he or she was the couple's mutual child would be protected under these support rights. Spousal support should be decided on a case-by-case basis using the family law rules of each state.

A surviving partner should have an automatic inheritance right. Whether the partner died intestate or with a will, the surviving partner should have a right to any part of the estate he or she shared with the deceased. The couple should have the option to be taxed jointly, so they can enjoy tax-free property transfers and other marital tax incentives. The surviving partner should also, by default, have legal standing to raise claims in court as the surviving spouse.

The second set of protections would be granted via an opt-in contract. Each couple could contractually obligate themselves to a set of rights. Each couple could designate additional inheritance rights, shared welfare benefits, pension rights, *etc.* This would protect all unmarried couples, specifically same-sex couples, and pave the way to ultimately granting these unions the protections they deserve.

As discussed in the introduction, more than 39 percent of couples in the United States are categorized as "unmarried cohabitants." This percentage represents the number of couples currently legally unprotected without individual action to secured legal rights and support obligations.

Based on past legal precedent, and the current direction of the government, the United States needs lobbyists to fight for unmarried cohabitants. The Legislature needs to write an act solely focused on unmarried cohabitants. In this act, the Legislature needs to ascribe rights to unmarried cohabitants regarding the following: property division, child support, spousal support, inheritance rights, medical rights, tax regulations, and more. Until the United States creates and implements such an act, unmarried cohabitants remain in a legally risky relationship. More specifically, same-sex unmarried cohabitants remain in the riskiest type of relationship—one that has very few legal protections and very little precedent to support future legal claims.

