



New Beginnings

The Legal Implications of Remarriage versus Cohabitation

BY MOLSHREE A. SHARMA

*Your skin like dawn
Mine like musk
One paints the beginning
of a certain end.
The other, the end of a
sure beginning*
—Maya Angelou

Over the years, one of the most rewarding parts of my career has been to see my clients move on successfully with their lives after going through a divorce. It is indeed exciting to embark on new relationships and have the courage to share the journey ahead with a partner, whether one is in their fifties, sixties, or beyond. These relationships can bring excitement, joy, and companionship, and they greatly enrich individuals' lives. The experience of COVID has amplified the need for connection, family, and each other, practically and emotionally.

Many of these couples question whether it makes sense to go through the formality of marriage. In this article, I will discuss the legal pros and cons of marriage versus cohabitation for people in their middle or later years. Below are some important issues to consider, both for the people contemplating which option works best for them and family law practitioners counseling their clients.

Maintenance

It is not uncommon for one partner to receive maintenance from an ex-spouse. Usually, the longer the marriage, the longer the term of maintenance. In the case of long term, often role-divided marriages, the recipient is awarded indefinite maintenance. Remarriage is a statutory termination event, which means, upon remarriage, the recipient shall no longer receive support from an ex-spouse. Obviously, this is a substantial financial concern.

Of course, if people remarry and one person has an income or large income-yielding assets, then one spouse may be again required to pay maintenance in the future if the marriage terminates. So, recipient spouses should note that remarriage will surely end their maintenance absent an agreement otherwise but that a remarriage ending in divorce may also mean another maintenance obligation for one of the spouses. I have had clients who are paying two maintenance awards concurrently for that exact reason.

When working through a divorce settlement, the parties may negotiate a continuation of maintenance even after the recipient spouse remarries. This may be beneficial to both parties for a variety of reasons. As an example, if the recipient spouse is reluctant to remarry because of a termination, they may be incentivized to do so, knowing the maintenance shall continue for a period of time. This also is beneficial for the payor spouse, where in the absence of a remarriage, they may have to pay

maintenance for a longer period of time and also attempt to terminate maintenance by proving cohabitation per the statute—something that is fact intensive and can be difficult.

Parties should seriously consider prenuptial agreements prior to remarriage to fully understand and formalize terms should there be a dissolution so that they can protect assets and each other.

Terminating Maintenance Due to a New Relationship

States vary to a certain degree on how they handle a maintenance beneficiary entering a new relationship. Some states, like Illinois and California, use cohabitation as a guiding principle that, if proven, can reduce or terminate maintenance. While other states, like Colorado, recognize common law marriage. In these states, entering into a common law marriage, in which one of the factors necessary to establish such a marriage is cohabitation, will also terminate maintenance. One common thread between all states is the consideration of the act of living with a new partner. Similarly, most states consider whether finances have been comingled between the ex-spouse and their new partner. As each state handles these situations differently, it is good practice to ensure your clients are aware of the significance of choosing to cohabit with their partner and the implications that choice could have on their maintenance payments. Similarly, consulting an accountant is always a good idea to avoid accidentally creating a financial appearance of a “de facto marriage” or a common law marriage. Or in the case of California, assistance may be needed to help demonstrate a continuing need for support. Finally, one can negotiate with a new spouse, compensation for giving up maintenance or other support from a prior spouse.

Termination Due to Cohabitation across States

It is important to note that, most often, cohabitation on a continuing, resident, conjugal basis may also terminate maintenance. Where there is a de facto marriage, maintenance can terminate even in the absence of a legal marriage. However, the court must determine after reviewing the facts whether there is, in fact, a de facto marriage (which is a marriage a without license). Proving a de facto marriage is not an easy task and requires an extremely fact-intensive, case-by-case analysis. Some states have either a licensed marriage or a common law marriage. (Kansas, Colorado, Iowa, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia allow for common law marriages.) Some states allow a common law marriage if it existed prior to a certain date. Common law marriage is defined by three elements: capacity, intent to be marriage at the inception and holding oneself out to the public as “married.” This too is a fact-intensive analysis. Common law states do not recognize the “de facto marriage” concept. In common law marriage states, a “de

facto marriage” would merely be a cohabitation arrangement, which may or may not terminate maintenance.

Three elements—residence, continuing, and conjugal—are considered for the court to determine the existence of a de facto marriage in states where no common law marriage exists. A court’s analysis, therefore, consists of determining (1) the length of the relationship, (2) the nature of the activities of the couple, (3) the interrelation of personal affairs (most importantly, finances), (4) vacations taken together, and (5) whether the couple spends significant holidays as a unit. These states may also look to the couple holding themselves out to the public as “married.” The burden is on the party seeking termination of maintenance to prove that the ex-spouse is in a de facto marriage. Unlike the case of a remarriage, where the termination is automatic, in the case of cohabitation, the payor spouse attempting to cease paying maintenance must file an appropriate petition in court and provide evidence at a trial of the resident, continuing, conjugal cohabitation. Often this evidence is hard to come by, especially given the private nature of personal relationships.

In a nationwide trend, courts are now clarifying the five or six key factors they consider determinative, though not exhaustively so, of a cohabitational relationship. Significantly, a different and important factor in determining de facto marriage is the intent to create a permanent, mutual commitment. Further, “conjugal” is established by states such as Illinois (see the 2015 case *In re the Marriage of Miller*), the different factors themselves cannot be weighed equally and the most important factor is essentially the comingling of finances and interrelation of personal affairs. There is also a difference between “significant dating relationship” and a de facto, marriage-like relationship. For example, even when there is a long-term relationship and a plan to get married someday but no set date or even year, and even when a couple may show consistent intimacy and go on vacations or celebrate holidays and travel together, there may be insufficient basis to terminate the maintenance because of the lack of an actual, concrete plan to be together permanently. Each state has its own perspective, so do your research.

Often the most important factors are whether the couple is financially intertwined and has a regular day-to-day living arrangement. If that is not the case, the court’s place is not to make moral judgments and terminate maintenance based on those judgments. Courts tend to terminate maintenance where evidence to support the finding of a de facto marriage, often the most determinative factor being financial comingling of accounts and assets.

Those considering cohabitation must take care to avoid financial comingling or risk entering into a de facto marriage and jeopardizing a maintenance award. Any cohabitation creates a risk that a court might terminate maintenance if the court finds there to be a de facto marriage, but the burden of proof would weigh heavily upon the person seeking termina-

tion and would usually require a fact-intensive trial.

In certain states such as California, the court will terminate maintenance upon a maintenance payee's cohabitation with a new partner. The burden, however, is on the recipient ex-spouse that is living with a new partner. This establishes a rebuttable presumption that a reduction or termination of maintenance, or alimony, is appropriate, a presumption that the payee must disprove.

Further, in certain states, a key distinction between the implications of cohabitation is the fact that cohabitation does not automatically terminate maintenance. Instead, the rebuttable presumption is that there is a change in circumstances that would at least reduce the need for maintenance. The individual facts of each case require the court to consider the totality of the circumstances, guided by the applicable state case law, to decide whether a reduction or termination of maintenance is appropriate.

Common Law Marriage

In some states that recognize common law marriage, different requirements must be met in order for the payor to terminate their maintenance obligations. Most states that have a common law marriage statute have similar requirements, including that there is consent between the parties or an agreement to be "married" and they present themselves as a married couple. The analysis is similar to cohabitation in that the court will look at whether the couple lives together, comingles their finances, owns property together, files joint tax returns, and other considerations that would indicate that a couple intended to effectively be married.

Colorado is one state that has explicitly widened the factors of consideration in order to encompass a broader and less heteronormative definition of marriage. The 2021 Colorado Supreme Court case, *Hogsett v. Neale*, specifically noted that the narrow terms of the previous construction of common law marriage was ill suited for same-sex couples. Because of this bias, the Colorado Supreme Court outlined a multitude of factors to be considered in a common law marriage analysis, a striking contrast to the prior four element evaluation. The new factors include such things as a couple's reputation in the community regarding their relationship status, joint estate planning, emergency contact designations, couple's labels for each other, and a couple's beliefs regarding the institution of marriage. These broader terms for establishing common law marriage also mean that it may be easier to terminate maintenance obligations.

COVID-19

The COVID-19 pandemic further complicated the distinction between cohabitation and marriage, especially on the financial side due to the stimulus payments. The 2020 COVID-19 stimulus payments were distributed based on 2019 tax filings. Because of this, couples whose marital status changed between 2018 and 2020 may have been affected.

Specifically, if a couple filed their 2018 taxes jointly and had not yet filed individual tax returns for 2019, then their stimulus funds would still have been deposited based on their 2018 banking information. Similarly, couples who had separated after filing their 2019 tax returns would have faced the same problem. As such, 2020 saw an increase in couples seeking a court order regarding the division of stimulus funds that had been deposited into formerly joint accounts or accounts that were now held solely by one spouse. These problems also arose in cases of remarriage to a new spouse during that same time. The issues created by the COVID-19 stimulus payments reinforced the importance of promptly updating the IRS regarding changes to marital status. Fortunately, these payments were not affected by whether parties were cohabitating or had remarried as they were based solely on tax filings, either jointly or individually.

Taxes

There are many instances in which married couples pay less in taxes than single individuals. Married couples often do get a break from the IRS, which is something to review with an accountant to determine the extent of the benefit. However, it is not always the case that married couples have less tax liability. Higher-income earners may see their taxes increase after they are married. As an example, an unmarried couple making \$405,000 in a year may pay taxes at 33 percent, which will then increase to 39.6 percent should they marry. Additionally, even middle-income families can lose vital deductions when they marry. A contribution to a retirement account of a single person may result in a substantial deduction, but a higher joint income may result in loss of qualification for the deduction at all. Furthermore, if the new spouse participates in a 401(k) plan, he or she may lose the deduction. Further, marital status affects the ability to use capital losses to offset ordinary income. An unmarried person may take capital losses to offset \$3,000 in income, which means \$6,000 in total for an unmarried couple but only \$3,000 for a married couple.

Debts

Another financial consideration that varies between married and cohabitating couples is debts. While debts are generally divided at dissolution, a remarrying couple may still be liable for debts created during their former marriage. One especially convoluted area of debt is student loans and their repayment. While the division of student loan obligations upon divorce varies by state, an ex-spouse could still enter into a new relationship with student loan obligations from their former spouse. Whether the student loan debit is theirs or their former spouse's, monthly minimum payments could increase upon remarriage or cohabitation due to an increase in the couple's combined income when filing joint tax returns. This is yet another factor that should be considered along with marital benefits of joint filing when couples decide whether to remarry.

Sickness and Health

Health care costs are extremely high. This is especially true for nursing home expenses, which often are not covered by Medicare. Medicaid eligibility depends on a married couple's total assets and, therefore, Medicaid eligibility or benefits can be severely reduced if a married couple's total assets are high. Married couples are responsible for each other's medical debts, and this can be a huge disincentive for older couples, especially, to remarry. It is important to note, however, that unmarried couples do not have the same rights to make medical decisions for their partners as married couples do in most instances. Therefore, it is crucial for unmarried couples to execute a health care power of attorney if they wish their partners to have the ability to make important medical decisions for them should they be unable to make them for themselves. Unmarried couples will also want to execute The Health Insurance Portability and Accountability Act consent forms to be able to obtain their partners' health information and records.

Married couples have fewer challenges in this regard, as their access to health records and ability to make decisions about a spouse's health comes much more easily. So, if health is an issue, marriage may be an easier option. However, it is important to note that prenuptial agreements bind the parties but are not binding on hospitals or medical providers. A hospital could still pursue the debt from the other spouse, even if the prenuptial shifted the responsibility of the debt solely to the party incurring the debt.

Again, the world has changed in a post-pandemic era, and health care is an even more vital concern. Therefore, if a couple decides not to remarry, it is essential that they have made all the provisions necessary.

College Financial Aid

Remarriage can result in the reduction or loss of student aid. If an individual is a custodial parent of a child attending college and is legally married, the stepparent's income must be reported on any Free Application for Federal Student Aid (FASFA) application and will seriously impact student aid awards. There are no exceptions, and, even if the stepparent and custodial parent have entered into a prenuptial agreement providing that the stepparent is not responsible for any college costs, it is not binding on colleges and is a federal matter. Mark Kantrowitz, former senior vice president of Edvisors, stated in a recent interview with the *New York Times* that a single parent with a child in college and an annual income of, for example, \$50,000, may receive \$20,000 in grants. However, if the parent remarries, the student could lose \$3,000 in aid for every \$10,000 of annual income of the stepparent.

Benefits

A divorced person may receive half of an ex-spouse's Social Security income if they were married for a minimum of ten years. However, once they remarry, they may not receive an

ex-spouse's Social Security income. Further, surviving spouses are entitled to a share of their late spouse's benefits as long as they do not remarry prior to age 60. If they do remarry before they turn 60, they lose those benefits. If a person remarries, he or she may be entitled to the new spouse's Social Security benefits, but he or she should be sure before making that decision to take out the Social Security calculator and compare the benefits in either scenario.

For military spouses, remarriage can result in a substantial loss of privileges; such losses include loss of a late spouse's pension, health insurance coverage, and the ability to shop at a military commissary for goods at discounted prices.

Additionally, a non-spouse beneficiary of a retirement plan might be forced to take a lump sum distribution, rather than roll over assets into his or her own IRA. This could reduce the total balance and eliminate the ability to stretch out the account. Conversely, married couples can roll over the entire balance into an IRA that they don't have to tap into until they turn age 70 1/2. One way around this for unmarried couples is for a person to roll over into an IRA the entire balance of a retirement account when leaving a company; his or her partner will not then be required to distribute the balance as a taxable, lump-sum distribution.

Inheritance

It is essential for unmarried couples to have wills and estate plans should they want to leave assets for their partners. This is especially true for older couples with more assets. Even if the parties are not bequeathing other assets, it is particularly important to remember that if the parties reside together in a home owned only by one person and if the intent is that the surviving person stay in the home, that wish should be made clear in a will or an estate plan.

Another factor to consider is estate taxes. Some couples may remain unmarried to protect their estates, but, if they leave assets to their partners, they cannot avail themselves of the estate tax exemption, which only extends to married couples. If a person is married, they can inherit any amount of assets from a spouse without paying federal or state estate taxes and can also gift an unlimited amount to a spouse without filing a gift tax return. For unmarried couples, however, there are caps on the benefit. Some states also have elective share laws requiring that a certain percentage of the estate be left to a surviving spouse, even when the will states otherwise. Some states allow married individuals to waive their spousal share, but other states, such as Florida, where many people retire, have state share laws that trump the will.

Same-Sex Couples Post *Dobbs*

The recent decision in *Dobbs* has rapidly changed the landscape of cohabitation and marriage. In his concurring opinion, Justice Thomas raised the argument that courts should not rely on substantive due process arguments not explicitly stated in the Constitution: "I agree that '[n]othing in [the court's]

opinion should be understood to cast doubt on precedents that do not concern abortion.” He continues, “For that reason, in future cases, we should reconsider all of this court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”—cases in which the court respectively recognized constitutional rights to contraception, same-sex intimacy, and same-sex marriage. Consequently, for same-sex couples, there may be a greater urgency to marry and hope that their marriages are recognized in the future in case the Court finds same-sex marriage to be unconstitutional. Further, there may be challenges to the use of contraception in general and specifically outside of marriage.

Unmarried Fathers

It is important to note that when a child is born of a marriage, the rebuttable presumption is that the child is of the marriage and both parents have the same parental rights. However, in some states, an unmarried father does not have the same rights until a Voluntary Acknowledgement of

Parentage or adjudication of paternity, or another proof of parentage, is formalized. In those cases, should a child be taken to another country by the mother without the father’s consent, the mother may not be required to return the minor child to the United States as the Hague Convention on the Civil Aspects of Child Abduction would not apply because the father would not have custodial rights, as was the case in the 2013 *Redmond v. Redmond* decision. 724 F.3d 729 (7th Cir. 2013) **FA**



MOLSHREE A. SHARMA (m.sharma@bgsafamlaw.com) is a partner at Birnbaum Gelfman Sharma & Arnoux, a family law firm with offices in Chicago. She handles complicated family law matters that require high-level financial experience with assets in real estate, investment accounts, business valuations, tax, and retirement benefits.