Contracting for a Breakup: The Importance of Cohabitation Agreements That Include an Alternative Dispute Resolution Clause

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I. INTRODUCTION

Popular movies and songs about the difficulty of breaking up are becoming more numerous, and the difficult aspects of breaking up are becoming more complicated as cohabitation becomes more popular each year. Cohabitation is becoming the new type of fairytale. Two people meet, fall in love, and move in together. Marriage does not come until later, if at all. In this revised fairytale, life seems perfect—the couple is in love and the thought of breaking up never arises. No one wants, or usually even thinks, to create an agreement discussing the logistics of a potential future break up or even death. Planning a breakup may seem like a ridiculous concept, but such planning is unfortunately necessary.

Living together requires the merging of two peoples’ possessions and may include buying a house or other property together. Additionally, the couple has to decide how they are going to pay rent, utilities, and other expenses. Ultimately, many unknowns exist when a couple in love moves in together, and these unknowns include more than who is going to cook, clean the toilet, and do the dishes.

1 See e.g., FORGETTING SARAH MARSHALL (Universal Studios 2008) (after five years of dating, Sarah broke up with Peter leaving him completely devastated as he attempted to move on with his life); THE BREAK-UP (Universal Studios 2006) (Gary and Brooke were in a long term relationship and made the decision to purchase a luxury condominium together. The couple broke up and a competition ensued as they fought over the division of their assets, especially concerning who got to keep the condominium. The breakup gets more contentious as time passes. This breakup would have been much more effectively handled if Gary and Brooke had a cohabitation agreement. This agreement would have outlined the division of assets, including how a breakup would affect the parties’ rights to the condominium.); REVEREND HORTON HEAT, Galaxy 500, on LUCKY 7 (Artemis 2002) (This is a song about the separation of assets that occurs when a couple breaks up after having lived with one another. A verse of the song includes: “You take the fish/I'll take the bowl/You take the dishes/While you're at it take my soul.”); 2GETHER, The Hardest Part of Breaking Up (Is Getting Back Your Stuff), on 2GETHER AGAIN (The Orchard 2000) (This breakup song discusses the difficulties of splitting up possessions when a relationship dissolves. The refrain of the song discusses this process: “Breaking up is hard enough (oh oh oh oh)/Say you had nothing but I called your bluff/You got my sweaters, my hat/I can't find my cat! Meow/The hardest part of breaking up is getting back your stuff.).

2 Rose M. Kreider, Increase in Opposite-Sex Cohabitating Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) (U.S. Bureau of Census 2010), available at http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf (this working paper provides statistical analysis based on data accumulated by the Census Bureau showing that there has been a 13% rise in the cohabitation of non-married couples between 2009 and 2010).

3 See generally RALPH WARNER, TONI IHIARA & FREDERICK HERTZ, LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES (14th ed. 2008) (throughout this guide the authors explain the importance of the creation of a living together agreement for couples who choose to cohabitate with one another without getting married since no legal rights attach to protect the individuals who choose this type of arrangement); Helen W. Gunnarsson, What to Do When There’s No “I Do,” 94 ILL. B.J. 292, 295 (2006) (“Once you start acting like a partnership, you need to talk about a cohabitation agreement. Under no circumstances should you buy property together without an agreement.”).
As a result, when a couple decides to move in together, the creation of a cohabitation agreement is necessary; this agreement must include an alternative dispute resolution clause so that issues and disputes can be appropriately handled outside of court. Upon dissolution, those couples without a cohabitation agreement, and who also cannot settle the dispute through ADR methods, are left with litigation as the only remaining venue left to resolve the disputes. Furthermore, the absence of cohabitation agreements amongst cohabiting couples results in litigation in nearly every instance where the couple owns property.

A cohabitation agreement sets forth the rights and responsibilities of the parties if the relationship dissolves. Cohabitation agreements allow the parties to ensure that their interests remain protected based on their own terms if a breakup occurs, giving the parties piece of mind should the relationship dissolve.

The inclusion of an alternative dispute resolution (ADR) clause serves multiple purposes in the context of cohabitation. First, ADR provides reason in a situation that is otherwise emotionally charged. Additionally, ADR will ensure that the dispute is not made public if that is the parties' intent because ADR allows for requirements of privacy and confidentiality. Adjudication cannot guarantee the same privacy and confidentiality. ADR will eliminate much of the uncertainty associated with an uncertain situation. Also, there is a lack of case law on the division of property and assets resulting from cohabitation and, therefore, a lack of precedent in this area of the law, causing uncertainty. Since this is an emerging area of the law, courts may decide to proceed with caution, making it difficult to predict how the courts would rule on

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4 WARNER, supra note 3, at 14 (a cohabitation agreement serves as a contract between the cohabiting couple and without it, the rights of the parties are not protected based on their intentions).
5 See id., at 22 (Without an alternative dispute resolution clause, if a dispute arises upon the dissolution of the relationship, the parties are forced to handle the dispute in court and will thus have to rely on the court to determine the outcome. Litigation becomes a last resort for many couples who will not agree to have an alternative dispute resolution clause in their agreement, or who will not agree to use such methods to settle their disputes. This tends to occur when parties have money, or when one of the parties has more at stake.).
6 Id. at 187.
7 Frederic C. Hertz, When Legal Protections are Few . . . Breaking Up is Hard to Do, 20 FAM. ADVOC. 12, 17 (1997).
8 See Wendy S. Goffe, Preparing Effective Cohabitation Agreements for Unmarried Couples, 34 EST. PLAN. 7 (2007) (a cohabitation agreement “contains a roadmap for cohabitants who plan to live and share their lives together”).
9 See generally Vincent Di Lorenzo & Clifford R. Ennico, Cohabitation Agreements, Basic Legal Transactions, § 42A:2 (2008) (“a ‘cohabitation agreement’ may be the only legal means to clarify their rights and responsibilities in the relationship”); Gunnarsson, supra note 3, at 294–95 (An unmarried couple lacks rights under the law but the formation of a cohabitation agreement is a valid contract that entitles the couple to the rights and responsibilities specified in the agreement. Without a cohabitation agreement, it is difficult to establish the existence of rights arising out of the relationship.).
10 WARNER, supra note 3, at 184–87 (There are a variety of different alternative dispute resolution techniques that cohabiting couples may use), depending on the circumstances. Such techniques include informal negotiation with a third party, mediation, and arbitration.).
12 See generally PREMARRITAL AND MARITAL CONTRACTS: A LAWYER’S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS (Edward L. Winer & Lewis Becker eds., 1993).
14 WARNER, supra note 3, at 11.
cohabitation disputes. Ultimately, ADR is preferential to litigation in circumstances where a cohabiting couple breakup.

ADR, rather than divorce law, is the proper approach to handling cohabitation disputes. Although divorce law and the dissolution of the cohabitation relationship share some similarities, their differences show that cohabitation cannot be handled appropriately in the divorce law framework. A cohabitation agreement containing an ADR clause provides the best dispute resolution method to the cohabiting couple when dealing with the end of their relationship.

II. BRIEF HISTORY OF COHABITATION AGREEMENTS

Cohabitation and cohabitation agreements have not always been legal. In 1976, the California Supreme Court took a new approach in Marvin v. Marvin. The effect of this decision eventually rippled throughout the United States.

A. The Impact of Marvin v. Marvin

Until 1970, unmarried couples were not legally able to formulate an enforceable cohabitation agreement. Traditionally, upon breakup, if ownership was challenged in court, the court divided property according to who actually earned it and what the parties brought with them into the relationship. Property was distributed in this manner even if an agreement detailing a preferred method of distribution was in place because courts at this time would not enforce cohabitation contracts. Such contracts were not enforced because they were determined to be based on “meretricious consideration” meaning that they essentially involved prostitution or the exchange of sexual acts. Similar laws were in place in every state until the California Supreme Court took a different approach in 1976 in Marvin.

This California case involved a man and woman, Mr. and Mrs. Marvin, who were living together as a couple for seven years. Mrs. Marvin claims that during this time the parties made an oral agreement stipulating that she was entitled to half of the property and support payments from Mr. Marvin. She stated that this agreement required the parties to share income and property; in return, she would quit her successful singing and entertaining career to care for the house, provide companionship, and cook for Mr. Marvin. Mr. Marvin later forced her out of the relationship.
house, and she was not given any financial compensation or the right to any of the property.\textsuperscript{28} She brought suit claiming that she had property rights.\textsuperscript{29} The California Supreme Court held that despite the lack of laws governing the dissolution of cohabiting couples, courts should enforce contracts formed by the couple expressing the rights and obligations of the parties, so long as nothing in the contract included sexual services.\textsuperscript{30} The Court also held that if no express contract is in place that courts can look to see if an implied contract exists between the parties; if found, equitable remedies can be utilized by the courts.\textsuperscript{31} Courts began to recognize cohabitation agreements as legally enforceable contracts.\textsuperscript{32} Cohabitation agreements became a legally recognized method of protecting the interests of unmarried, cohabiting couples.\textsuperscript{33}

\textbf{B. Cohabitation and Agreements After Marvin v. Marvin}

As the legality of the cohabitation of unmarried couples spread throughout the United States, cohabitation agreements slowly trailed behind.\textsuperscript{34} Other states followed the same approach as California, and unmarried couples could begin to rely on the enforceability of contracting with one another to jointly own property or provide services for one another.\textsuperscript{35} Various courts in thirty-three other states have cited Marvin, taking the same approach.\textsuperscript{36} Another group of states have chosen to incorporate Marvin in part.\textsuperscript{37} States in this group have chosen to enforce express contracts, but refuse to enforce implied contracts.\textsuperscript{38} Lastly, in Illinois, courts are reluctant to enforce express and implied cohabitation agreements based on public policy grounds.\textsuperscript{39}

After the Marvin decision, which signified the shift in California courts’ view of cohabitation agreements as enforceable, the use of such agreements did not immediately skyrocket.\textsuperscript{40} The reason for this lack of increase was the result of public policy considerations.\textsuperscript{41} Cohabitation agreements were viewed as a method of diminishing the likelihood of marriage.

\begin{itemize}
\item \textsuperscript{28}Id. at 110–11.
\item \textsuperscript{29}Id.
\item \textsuperscript{30}Id. at 110.
\item \textsuperscript{31}Marvin, 557 P.2d at 110.
\item \textsuperscript{32}WARNER, supra note 3, at 11.
\item \textsuperscript{33}Id. at 12.
\item \textsuperscript{34}Id. at 11 (although there are no statistics indicating how many cohabitation agreements exist, lawyers believe that the number of couples entering into these agreements is on the rise based on their legality and support in the courts).
\item \textsuperscript{35}Id.; Craig A. Bowen & Blake M. Cornish, Comment, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164, 1173 n.44 (1992).
\item \textsuperscript{36}Bowen, supra note 35, at 1173 n.44 (states following this approach include Connecticut and Minnesota).
\item \textsuperscript{37}Id. (states in this group include Michigan, New York, and New Hampshire).
\item \textsuperscript{38}Id.
\item \textsuperscript{39}Id. (these public policy grounds are set forth in Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979)); WARNER, supra note 3, at 13–14 (therefore it is important to understand state contract law and it is always more beneficial to reduce the cohabitation agreement to writing to ensure its enforceability regardless of the state in which the agreement was entered).
\item \textsuperscript{40}WENDY GOFFE, 2008 FAMILY LAW UPDATE 35, 50 (Ronald L. Brown & Laura W. Morgan eds., 2008) (Couples were still weary to enter into cohabitation agreements because public policy promoted marriage as opposed to cohabiting with a partner and in many ways such agreements were a novel concept. The idea of planning for the destruction of a relationship was not widely accepted.).
\item \textsuperscript{41}Id. at 35; Garrison, supra note 11, at 311 (“In 1958, cohabitation outside of marriage was widely viewed as shameful, and middle-class Americans thus cohabited rarely.” In the 1960s views slowly began to shift and cohabitation slowly became more common and more acceptable.).
\end{itemize}
and, therefore, deemed contrary to public policy.\textsuperscript{42} Furthermore, many cohabiting individuals were not willing to formulate such agreements with their partners since the formulation process is not easy.\textsuperscript{43} Creating the agreement requires the couple to think about ending their relationship or the possible death of one of the partners.\textsuperscript{44} Only when some couples began to recognize the value of cohabitation agreements and the process of creating such an agreement did the use of these agreements begin to increase.\textsuperscript{45}

III. THE IMPORTANCE OF COHABITATION AGREEMENTS

Cohabitation agreements serve many important functions when a couple decides to move in together.\textsuperscript{46} This agreement will set forth the facts and circumstances outlining the intentions of the parties so that any future disputes will be alleviated more easily.\textsuperscript{47} The purpose of the agreement is to eliminate factual discrepancies based on the intentions of the parties, as established in the agreement.\textsuperscript{48} As a result, the agreement should be written down to maintain its importance and validity.\textsuperscript{49} If the couple buys or owns property together, creating a cohabitation agreement is even more important so that upon breakup, the property is distributed per the prior arrangement.\textsuperscript{50} An agreement would protect the interests of the parties based on the agreement’s manifestation of the parties’ intentions.\textsuperscript{51} The agreement provides the parties with peace of mind because the parties know that they set forth their expectations and came to an agreement on the important issues.\textsuperscript{52}

A. Self-Protection

One reason why couples enter into a cohabitation agreement when deciding to move in together is because the individuals want to ensure that their individual assets are protected.\textsuperscript{53}

\textsuperscript{42} Goffe, supra note 40, at 35 (“Historically, public policy was also against the idea of cohabitation agreements, because it was thought that they would discourage marriage. Public policy is still an important consideration.”); Twila L. Perry, Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future, 24 Fam. L.Q. 77, 92 (1990) (cohabitation is seen as contrary to public policy based on an underlying assumption that states have “an interest in encouraging marriage”); 24 Am. Jur. 2d Divorce and Separation § 476 (2010) (similarly, recognizing the rights of unmarried cohabitants would “violate the policy of the state to strengthen and preserve the integrity of marriage, as demonstrated by its abolition of common-law marriage”).

\textsuperscript{43} Goffe, supra note 40, at 50 (It was, and still is difficult to convince a couple who does not know what a cohabitation agreement entails to enter into one. The process requires the couple to recognize and appreciate the fact that the relationship might not last forever despite the possibility that that is their intention.).

\textsuperscript{44} Id.

\textsuperscript{45} Id. (as more couples decide to cohabit and realize that living with one another does not mean that the relationship will ultimately be successful, couples are choosing to enter into cohabitation agreements to try to put themselves on a more level playing field with married couples, whose rights are protected under the law).

\textsuperscript{46} See generally Warner, supra note 3.

\textsuperscript{47} Goffe, supra note 40, at 40; Gunnarsson, supra note 3, at 295.

\textsuperscript{48} Goffe, supra note 40, at 40.

\textsuperscript{49} Id.

\textsuperscript{50} Gunnarsson, supra note 3, at 295.

\textsuperscript{51} Warner, supra note 3, at 11.

\textsuperscript{52} Id.

\textsuperscript{53} Warner, supra note 3, at 11; Perry, supra note 42, at 86 (Cohabitation agreements protect the partners financial interests. These agreements also protect parties from potential legal obligations because it establishes a dissolution plan.).
They want self-protection in the event that the relationship is unsuccessful and later dissolves.\textsuperscript{54} Self-protection is especially relevant when one partner makes some type of sacrifice for the benefit of the other partner or the relationship.\textsuperscript{55}

For example, if one partner leaves a career to tend to the house, he needs to ensure that a cohabitation agreement is formed protecting his interests or else he could be left with nothing.\textsuperscript{56} He likely gave up a career and his earning capacity, and therefore, he needs to protect himself. Similarly, if one partner moves from out of town in order to be with her partner, she needs a cohabitation agreement to protect her interests if the relationship were to subsequently dissolve.\textsuperscript{57} The partner who moved likely gave up her home, her job, and possibly a support system of family and friends.\textsuperscript{58} She put her faith in the relationship and needs to protect herself if the relationship dissolves because the dissolution would leave her virtually stranded in a new town.\textsuperscript{59} Although the parties are in love and may never imagine a future breakup, couples have to protect themselves before it is too late.

B. Peace of Mind

In addition to self-protection, couples also enter into cohabitation agreements in order to provide themselves with peace of mind.\textsuperscript{60} These agreements and the process of formulating and entering into the agreement give couples the opportunity to set forth their needs in a legally enforceable manner.\textsuperscript{61} Couples can use this experience to make their expectations clear.\textsuperscript{62} Both partners are able to set forth their thoughts, feelings, and goals about living with each other and they can begin to come to a more thorough understanding based on the interests of each partner.\textsuperscript{63}

Therefore, establishing these agreements serves as a means for couples to open the lines of communication, which can provide the couple with peace of mind.\textsuperscript{64} When the agreement is executed, both parties will know exactly what they are entering into when they decide to live with one another.\textsuperscript{65} Some of the anxiety and apprehension that will be felt if the couples’ relationship later dissolves will be reduced by the agreement.

\textsuperscript{54} \textsc{Warner}, supra note 3, at 14.
\textsuperscript{55} \textit{See id.} at 42 (Suggesting the importance of agreements for people who are in school and one partner supports the other and/or contributes to the other partner’s educational expenses during this time. Also discusses the importance of cohabitation agreements to protect a partner who moves or gives up a career in order to be with his or her partner.).
\textsuperscript{56} \textit{Id.} at 11 (When a couple is in a relationship in which one member is providing support to the other member, the dependent party needs to ensure that he or she is protected. Therefore, an agreement needs to be in place specifying the terms of the arrangement, including support and compensation. If an agreement is not formulated by the couple and the relationship is dissolved, the dependent party might walk away empty handed.).
\textsuperscript{57} \textit{Id.} at 42.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 11.
\textsuperscript{61} \textit{Id.} at 11–14.
\textsuperscript{62} \textit{See generally Goffe, supra note 8.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{See Warner, supra note 3, at 11 (The process that couples engage in when entering into a cohabitation agreements involves communication between the parties. This communication allows the parties the opportunity to set forth their individual rights as well as their expectations. This gives the parties peace of mind.).}
\textsuperscript{65} \textit{See id.}
IV. PROVISIONS OF A COHABITATION AGREEMENT

There are a wide variety of different ways to write cohabitation agreements. There is also a variety of different clauses, provisions, and types of information that a cohabiting couple may choose to include in their agreement. Some such provisions include those pertaining to the nature of the relationship, the parties’ contributions, the rights and duties of the partners, and dispute resolution and dissolution of the relationship. An example of one cohabitation agreement:

**Cohabitation Agreement**

This cohabitation agreement is made ____________ [date], between ____________ [name of male], an adult, of ____________ [address], ____________ [city], ____________ County, ____________ [state], and ____________ [name of female], an adult, of ____________ [address], ____________ [city], ____________ County, ____________ [state].

**RECITALS**

A. The parties to this agreement have been living together since ____________ [date], at ____________ [address], ____________ [city], ____________ County, ____________ [state], and it is their intent to continue such living arrangement.

B. Each of the parties is an unmarried person and a resident of ____________ [state].

C. ____________ [Male] is ____________ [a or an] ____________ [occupation]. ____________ [Female] is ____________ [a or an] ____________ [occupation]. Each of the parties intends to continue in his or her present occupation.

D. The parties intend by this agreement to define their property rights with one another. This agreement shall supersede any ____________ [and statutory] law of ____________ [state] defining the rights and duties of persons living together in an unmarried state.

E. ____________ [If agreement to be governed by law of state in which common-law marriage is recognized, and, if applicable, state: The parties do not intend that any informal or common-law marriage shall arise by virtue of the parties cohabiting with one another.]

In consideration of the matters described above, and of the mutual benefits and obligations set forth in this agreement, the parties agree as follows:

**SECTION ONE. CONSIDERATION**

The consideration for this agreement consists of the mutual promises of each party to act as a companion and homemaker to the other, in addition to the other promises contained in this agreement. The furnishing of sexual services forms no part of the consideration for this agreement.

The parties agree that any services which either party may provide to the other or for the benefit of the other are fully compensated by this agreement.

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68 Nonmarital Agreement-Between Parties Living Together Remaining Unmarried, 9B AM. JUR. LEGAL FORMS 2d § 139:141 (2010) (please note, that although this example agreement is gender specific, these agreements can be written in gender neutral terms to be used for same-sex couples).
SECTION TWO. EARNINGS AS SEPARATE PROPERTY

The earnings of each party, while living together, shall remain their separate property and shall not be subject to division on termination of the parties' relationship.

SECTION THREE. PAYMENT OF LIVING EXPENSES

The parties agree that ____________[male] shall pay ______% and ____________[female] shall pay ______% of their living expenses while they are living together. ____________[Male] shall deposit $____________ monthly and ____________[female] shall deposit $____________ monthly into a joint checking account on which either party may draw. Any property purchased from that account and any balance in the account shall be owned in the same percentages as contributions to the account.

SECTION FOUR. ASSETS AND LIABILITIES AS SEPARATE PROPERTY

Each of the parties agrees that property owned or acquired by either party shall remain the separate property of each party. This property shall include, but not be limited to, all property, whether real or personal, owned by either party at the effective date of this agreement; all property acquired by the other party out of the proceeds or income from property owned at the effective date of this agreement or attributable to appreciation in value of such property, whether the enhancement is due to market conditions or to the services, skills, or efforts of its owners; and all property subsequently acquired by either party by gift, bequest, devise, or inheritance, or income from such property, or attributable to the appreciation in value of such property, whether the enhancement is due to market conditions or to the services, skills, or efforts of its owner.

Neither party shall be liable for the individual and separate debts incurred by the other party.

SECTION FIVE. PRESENT FINANCIAL CONDITION OF EACH PARTY

A balance sheet of each party has been attached to this agreement as Exhibits ____________ and ____________. Neither party represents his or her respective balance sheet to be an exact computation of his or her assets and liabilities, but the balance sheet constitutes a reasonable approximation of each party's assets and liabilities. Each party represents to the other that he or she has fully disclosed to the other his or her financial situation by the representations contained in the balance sheet, subject only to the warning that the balance sheet was prepared informally and not by professional accountants.

SECTION SIX. DISPOSITIONS OF PROPERTY

Either party to this agreement may, by appropriate written instrument, transfer, convey, devise, or bequeath any property to the other. Neither party intends to limit or restrict in any way the right to receive any such transfer, conveyance, devise, or bequest from the other, except as expressly stated in this agreement.

SECTION SEVEN. CHANGE IN STATUS OF PROPERTY

Except as otherwise provided for in this agreement, the property or interests in property now owned or later acquired by either party, which by the terms of this agreement is classified as the separate property of one party, can only become the separate property of the other party or the joint property of both by a written instrument executed by the party whose separate property is to be reclassified.

SECTION EIGHT. FIDUCIARY RELATIONSHIP

Each of the parties promises to act in good faith and to deal fairly toward the other in the management of their joint property and in living under the terms of this agreement.
SECTION NINE. USE OF SURNAMES

[Female] may use the name [male's surname name], either alone or in hyphenated form with her surname, and may hold herself out to be the spouse of [male]. [Male] may similarly use the name [female's name], either alone or in hyphenated form with his surname, and may hold himself out to be the spouse of [female]. The provisions of this section shall not affect the rights of the parties as set forth in this agreement as a whole. Any applications for joint credit shall not affect any financial arrangement set forth in this agreement.

SECTION TEN. GOVERNING LAW

The law of [state] shall apply in the interpretation of this agreement and the ownership of the property of the parties except to the extent the parties have expressly agreed otherwise in this agreement.

SECTION ELEVEN. COMPLETE AGREEMENT

This agreement sets forth the entire agreement between the parties with regard to the subject matter. All agreements, covenants, representations, and warranties, either express or implied, oral or written, of the parties with regard to their financial relationship, either past, present, or future, commencing as of the date they began living together and terminating if and when they separate, are contained in this agreement.

No other agreements, covenants, representations, or warranties, either express or implied, oral or written, have been made by either party to the other with respect to the subject matter of this agreement. All prior and contemporaneous oral conversations, negotiations, possible and alleged agreements and representations, covenants and warranties with respect to the subject matter are waived, merged into, and superseded by this agreement.

SECTION TWELVE. ATTORNEY FEES

Should either party retain counsel for the purpose of the enforcement or the prevention of the breach of any provision of this agreement, including, but not limited to, the institution of any action or proceeding to enforce any provision of it, for damages by reason of any alleged breach of any provision, or for a declaration of the party's rights or obligations under this agreement, or for any other judicial remedy, the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred by the same, including, but not limited to, costs and reasonable attorney fees for the services rendered to the prevailing party.

SECTION THIRTEEN. COSTS AND EXPENSES

Each party shall bear his or her respective costs and expenses incurred in connection with this agreement, including the negotiation, preparation, and consummation of the agreement.

SECTION FOURTEEN. SEVERABILITY OF PROVISIONS

If any of the provisions of this agreement are deemed to be invalid or unenforceable, such provisions shall be deemed severable from the remainder of this agreement and shall not cause the invalidity or unenforceability of the remainder of this agreement. If any provision shall be deemed invalid due to its scope, this provision shall be deemed valid to the extent of the scope permitted by law.

SECTION FIFTEEN. CONSULTATION WITH ATTORNEY

The parties acknowledge that, prior to the signing of this agreement, each party consulted with an
attorney of his or her choice and the terms and legal significance of this agreement and the effect which it has upon any interest which each party might obtain in the property of the other was fully explained to each. Each party acknowledges that he or she fully understands the significance of this agreement and its legal effect and that he or she shall sign the same freely and voluntarily and that neither has any reason to believe that the other party did not understand fully the terms and effects of this agreement or that he or she did not freely and voluntarily execute this agreement.

SECTION SIXTEEN. EFFECT OF DEATH

Each of the parties waives the right to be supported by the other after their separation or after the death of either party.

SECTION SEVENTEEN. BINDING EFFECT

This agreement shall be binding on and inure to the benefit of both parties and their respective heirs, administrators, personal representatives, successors, and assigns.

SECTION EIGHTEEN. AMENDMENT

This agreement can only be amended by a written agreement signed by both parties.

SECTION NINETEEN. EFFECTIVE DATE

This agreement shall be effective as of __________ [date], and shall continue until either the separation of the parties or the death of either party. Separation shall be as defined under the law of __________ [state] relating to marital separation. This agreement shall continue in full force and effect in the event the parties marry each other, with the exception of the provisions of Section Sixteen regarding support, which shall be deleted from this agreement as of the date of the marriage of the parties. The parties have executed this agreement at __________ [designate place of execution] the day and year first above written.

[Signatures]
[Acknowledgments]

Attorney's Certification

I, __________ [name of attorney], certify that I am a licensed attorney, admitted to practice law in __________ [state]. I further certify that I have consulted with __________ [name], a party to the foregoing agreement, and have fully advised __________ [him or her] of __________ [his or her] property rights and the legal significance of the foregoing agreement. __________ [Name of party] has acknowledged __________ [his or her] full and complete understanding of the legal consequences of the foregoing agreement, and has freely and voluntarily executed the agreement in my presence.

Dated: __________

[Signature of attorney]
[Repeat certification for other party, if desired]
[Attach exhibits]**

An alternative dispute resolution provision should be included also. The following section will set forth the reasons why such a provision is necessary.

**Id.
V. THE NECESSITY AND VALUE OF ALTERNATIVE DISPUTE RESOLUTION CLAUSES IN COHABITATION AGREEMENTS

When couples create a cohabitation agreement, the agreement should include a dispute resolution provision specifying that if a dispute arises, the dispute will be handled outside of court. 70 Alternative dispute resolution provides the opportunity for volatile or emotional disputes to be handled more reasonably. 71 ADR also provides a means of keeping the dispute both private and confidential. 72 ADR techniques alleviate uncertainty in what is likely to be a highly uncertain situation. 73

Typically, mediation is the appropriate technique to utilize first in an attempt to resolve the dispute. 74 Mediation provides the opportunity for the parties to formulate and agree to their own settlement terms. 75 Although mediation is a great option in these circumstances, the problem with mediation is that if the parties are unable to come to an agreement concerning their dispute, the mediator cannot mandate an agreement. 76 It is solely up to the parties to reach an agreement amongst themselves. 77 Therefore, the responsibility to formulate a solution and come to an agreement is on the parties. 78

In the event that mediation does not produce a settlement agreement, the couple should utilize arbitration. 79 Arbitration will result in a guaranteed resolution to the dispute. 80 In arbitration, the arbitrator takes the information provided by both parties and ultimately decides the outcome, providing the decision to the parties. 81 There is no opportunity for compromise and negotiation between the parties since the arbitrator is the decisionmaker. 82 Arbitration results in finality and allows for procedural flexibility, with the parties determining the procedure and law that applies. 83

A. ADR Techniques Provide Reason in an Emotionally Charged Situation

When a relationship ends, emotions typically run high. The parties may even begin to act unreasonably, and such behavior may cause difficulty when the couple lives together. Despite these strong emotions, the couple still needs to finish handling their joint affairs. Additionally,
falling back on the legal system can be emotionally debilitating; ADR helps to alleviate some of this emotional tension.84

ADR techniques provide appropriate venues for these emotionally charged issues to be efficiently and effectively resolved.85 Furthermore, ADR is appropriate in these circumstances because these techniques are beneficial in situations where the parties are unable to negotiate amongst themselves.86 Since the parties are likely to have strong emotions related to the breakup, the parties will likely struggle to negotiate without the help of an outsider. Therefore, mediation and other ADR techniques are beneficial in these circumstances.87

One of the best cases for using mediation is when the dispute involves emotionally charged issues.88 Therefore, the breakup of a cohabiting couple is a best case situation for utilizing mediation since emotions are strong. More specifically, mediation requires collaboration between the parties.89 Through this collaborative process, the parties must work together with the assistance of a neutral third party—the mediator.90 The mediator’s role includes promoting productive communication between the parties.

In the context of the breakup of a cohabiting couple, the couple is put in a situation where the mediator can assist the couple—despite the existence of strong emotions.92 The mediator can use those emotions to promote communication between the parties.93 The mediator can also use the parties’ emotions as a means of challenging their assumptions by questioning the parties’ viewpoints and desires, providing pushback on the parties to assist in the negotiation process.94 Mediation thus utilizes the emotions that coincide with a breakup and can better handle these emotionally-charged situations than adversarial litigation.

Additionally, since this is an emotional situation, mediation is beneficial because it would be able to commence much quicker than litigation.95 The resolution is likely to be reached much more quickly than if the case went to trial and was determined by a judge or jury.96 Therefore, if the couple chooses mediation over adversarial litigation, the parties are not forced to live with these strong emotions and be around each other for as long a period.

Thus, ADR techniques will inject reason into this emotionally charged situation. ADR techniques, especially mediation, do not involve the same type of adversarial process utilized by the courts.97 Therefore, the emotion that permeates through litigation is greatly reduced when alternative approaches, such as mediation, are utilized. The processes involved in both mediation and arbitration do not involve as much emotion as is present in a courtroom, and therefore, the

85 Jerry Custis, Steering Cases Toward Early Resolution, LITIG. MGMT. HANDBOOK § 9:18 (2010). See also supra note 84 and accompanying text.
86 Id.
87 Id.
88 Judith P. Meyer, Course of Study Alternative Dispute Resolution: How to Use it to Your Advantage! The Pros and Cons of Mediation, 41 ALI-ABA CONTINUING LEGAL EDUC. 335 (1996).
89 Wells, supra note 77, at 652.
90 Id.
91 Id.
92 Id.; Main, supra note 84, at 330.
93 Wells, supra note 77, at 652.
94 Id.
96 Id.
97 WARNER, supra note 3, at 185, 187 (mediation involves a non-adversarial process whereas litigation is an adversarial process).
parties may handle their dispute in a calmer, more rational fashion so long as the mediator, or arbitrator, is able to remain in control and portray a calm approach to the proceedings.98 “Sometimes the healing can occur without a long expensive journey.”99

B. Keeping the Dispute Out of the Public Eye

Based on the circumstances of the dissolution of the relationship, the couple may want to keep the dispute private.100 Similarly, there are instances when the couple may want to ensure that the terms of the agreement and the settlement of the dispute are kept confidential.101 The use of alternative methods of resolving the dispute, such as mediation or arbitration, allows the couple to maintain privacy while handling the dispute.102 Both arbitration and mediation may take place in private.103

When couples choose mediation as their alternative dispute resolution technique, couples are not forced to agree to anything. The discussions that occur between the parties and the mediator are private.104 Additionally, although the procedure in mediation is informal, a number of rules exist in order to ensure confidentiality throughout the process.105 If mediation leads to an agreement between the parties, then this agreement will be private if the parties so decide.106

Additionally, if mediation is the alternative technique chosen by the parties, there are legal privacy protections engrained in its use.107 Mediation allows the parties to control their own destiny.108 The parties determine the outcome of the dispute and make decisions along the way.109 Since these family-like issues are extremely personal, party participation makes mediation an important dispute resolution technique in these situations.110 Therefore, mediation is a better technique to utilize than litigation when the issue involves a private dispute.111 If an agreement is reached between the parties in mediation, that agreement is to remain confidential.112 Additionally, any information shared during discussions occurring throughout the course of the mediation is also confidential.113

Similar to mediation, arbitration allows the couple to keep the dispute private.114 The parties set the terms of the arbitration procedure, which can include who is allowed to be present

98 Paulik, supra note 83, at 863.
99 Id. at 864.
100 PETER LOVENHEIM & LISA GUERIN, MEDIATE, DON’T LITIGATE 2/12 (2004).
101 Id. at 1/17.
102 HIARA, supra note 13, at 5/20–21.
103 Id.
104 Id. at 5/20.
105 LOVENHEIM, supra note 100, at 2/2 (mediation may contain rules initiated with the purpose of maintaining confidentiality of the parties).
109 Id.
110 Id.
112 Phillips, supra note 95, at 64.
113 Id.
114 HIARA, supra note 13, at 5/20–21.
at the arbitration proceeding.\textsuperscript{115} In arbitration, the parties can make the decision to keep their arbitration and award private.\textsuperscript{116} This privacy is established in a confidentiality agreement.\textsuperscript{117} The confidentiality agreement sets forth the terms of the arrangement to keep portions of, or the entire arbitration proceeding private.\textsuperscript{118} This furthers the ability of the parties to keep the dispute private.

Keeping ADR proceedings private is a crucial procedural advantage compared to formal adjudication.\textsuperscript{119} Confidentiality and the elimination of publicity in these personal disputes make ADR techniques an important option in these circumstances\textsuperscript{120} because court decisions are made in public and are published.\textsuperscript{121} Mediation and arbitration are not required to be made public nor are decisions published in the same manner.\textsuperscript{122}

If the couple did not choose to include an alternative dispute resolution clause in the cohabitation agreement, then the dispute will likely take place in court. In court, the ability to keep the dispute and the terms of the dispute private is much less likely since the briefs, court documents, and decisions are public.\textsuperscript{123} Trials are also open to the public.\textsuperscript{124} Additionally, because of the internet, information concerning trials and the underlying disputes are becoming much more freely available to the public.\textsuperscript{125} Copies of court documents and decisions are available on a variety of databases.\textsuperscript{126} Therefore, the parties cannot keep the dispute private based on the public nature of the judiciary in the United States.\textsuperscript{127}

\textbf{C. Eliminating Uncertainty in a Highly Uncertain Situation}

ADR techniques infuse certainty in the uncertain situation that surrounds the dissolution of the couples’ relationship. Conversely, litigation requires the parties to give up some control that they could otherwise use to their benefit.\textsuperscript{128} The scarce precedent in this area of the law also makes ADR a better option than litigation.\textsuperscript{129}

Not only do cohabitation agreements provide the couple with peace of mind, having an ADR clause in that agreement also provides increased certainty.\textsuperscript{130} Mediation and arbitration give the parties control over their dispute.\textsuperscript{131} This control is lost if the parties litigate the dispute.\textsuperscript{132} Litigation requires ceding control to the judge or jury; in doing so, the result cannot be accurately predicted\textsuperscript{133} and thereby causing uncertainty.\textsuperscript{134} With ADR, the parties maintain control over their personal dispute rather than having to put it in the hands of a judge or jury.
which is like rolling the dice and taking a chance since the parties lose the element of control.\textsuperscript{135} In mediation, the parties can ensure that their needs are met prior to the resolution of the dispute, or else they are not required to agree.\textsuperscript{136} Much of the uncertainty results from an inability to predict how the judge or jury will resolve the case.\textsuperscript{137} Mediation gives the parties the ability to control the outcome, thus making the outcome certain.\textsuperscript{138}

Additionally, courts must adhere to precedent, following the substantive law as set forth in prior decisions.\textsuperscript{139} ADR does not abide by the same principles of law.\textsuperscript{140} Rather, when utilizing ADR, the parties can determine what substantive law is appropriate, if any.\textsuperscript{141} On the other hand, the parties can choose to base the outcome of the decision on concepts of fairness and equity, without using specific substantive law principles.\textsuperscript{142} This choice gives the parties control over the outcome of the dispute. Relying on the courts to utilize precedent results in inherent uncertainty since precedent is lacking in this area of the law.\textsuperscript{143}

When the parties agree to arbitration, they control who will determine the outcome of the dispute because the parties select their arbitrator.\textsuperscript{144} The parties control the process of the arbitration.\textsuperscript{145} Therefore, the parties can limit the available remedies if they so choose.\textsuperscript{146} Similarly, the parties can decide what rules are going to apply to the arbitration, if any.\textsuperscript{147} The parties can make these decisions based on the concepts of fairness and equity.\textsuperscript{148} The expectation is that arbitrators, based on their professional background and expertise, will set forth better decisions than uninformed jurors who are unfamiliar with the laws and issues at hand.\textsuperscript{149}

When drafting an alternative dispute resolution clause, the couple can set forth rules and procedures to be used throughout the process, especially in arbitration.\textsuperscript{150} The parties can thus include the laws of the state that are will serve as the basis for the decision if the couple arbitrates the dispute\textsuperscript{151} or could choose to utilize concepts of fairness and equity as opposed to substantive law.\textsuperscript{152} Based on the variance of law amongst the states, by setting forth the applicable law, the couple will not have to deal with the potential for variation in the law since the law is set forth in advance in the alternative dispute resolution clause of the cohabitation agreement.\textsuperscript{153}

Not only does the law vary from state-to-state concerning the legality and enforceability of cohabitation agreements, the law continues to progress, making this area of law continuously

\textsuperscript{135} Shields, supra note 108.
\textsuperscript{136} Carper, supra note 107, at 53.
\textsuperscript{137} Valentine-Rutledge, supra note 111, § 3.
\textsuperscript{138} Id.
\textsuperscript{139} Id, supra note 84, at 366.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 54.
\textsuperscript{152} Id. at 55.
\textsuperscript{153} Id. at 57.
\textsuperscript{154} Id.
\textsuperscript{155} LOVENHEIM, supra note 100, at 1/17.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
As a result, there is a lack of significant case law on the division of property and assets in the context of unmarried, cohabiting couples. Courts therefore are proceeding cautiously when faced with issues resulting from disputes between unmarried, cohabiting couples. Despite California’s change in approach when it decided to enforce contractual agreements established by unmarried, cohabiting couples, case law remains sparse. Therefore, even if some cases in this area of the law are handled in trial level courts, there is limited appellate review of such cases. As a result, this shift in approach has not resulted in an influx of case law. Cohabiting couples therefore should not rely on the legal system to handle disputes that arise during the dissolution of a relationship because there are likely to be limited, if any, cases on point to serve as precedent.

D. Benefits as Compared to Adjudication

In addition to the previously discussed reasons why ADR is superior to litigation in this type of dispute, alternative dispute resolution techniques are more beneficial for other reasons. First, ADR is less costly than adjudication. Additionally, ADR provides an avenue for disputes to be handled more quickly than going to court. Therefore, couples choosing to use alternative dispute resolution techniques, such as mediation and arbitration, are likely going to be saving not only money but also time by avoiding long delays that are common in the judicial system. One reason why parties choose to eventually mediate or arbitrate a dispute is because of the frustration resulting from the delay involved in the judicial process. Delays in the courts can stretch over many years.

Furthermore, as briefly mentioned, the parties are able to exert more direct control over the process, including the rules that are used, especially concerning arbitration. Therefore, ADR techniques provide a much more efficient means of handling disputes that arise between unmarried, cohabiting partners.

Many people prefer to handle their dispute outside of court. One reason for this preference is that ADR provides a forum for parties to express themselves openly and with less risk than litigation. Another reason for this preference is that ADR techniques result in

154 Garrison, supra note 11, at 309.
155 Id.
156 Garrison, supra note 11, at 321.
157 Id.
158 Id.
159 Id. at 321–22.
160 IHARA, supra note 13, at 5/20.
161 Id. at 5/20–21.
162 WARNER, supra note 3, at 185.
163 Paulk, supra note 83, at 861.
164 Meyer, supra note 88, at 335.
165 IHARA, supra note 13, at 5/20 (in the cohabitation agreement’s dispute resolution clause, the parties can specify precisely how the alternative technique will be implemented and what rules will be controlling throughout the dispute resolution process).
166 Id.
167 Id. at 5/19–20 (“Today, most people (and even some lawyers) prefer alternatives to court, especially mediation and arbitration.”).
168 Paulk, supra note 83, at 864.
Lastly, the focus in ADR is individualistic and is on the equitable resolution of the dispute. Formal adjudication cannot provide the same benefits. An arbitral approach is not the same approach that will be taken if the parties litigate their dispute since the judge makes the final determination based on the facts and arguments presented, not based on the parties’ needs or wants. By including an alternative dispute resolution clause in a cohabitation agreement, the couple can guarantee that their dispute will be handled in the manner preferred by most people.

ADR techniques also provide the parties with flexibility. The parties can determine the substantive law, procedure, and remedies that will apply when they make the choice to utilize ADR. In these ways, ADR provides the couple with an adaptable means of resolving their dispute and allows the parties to utilize these processes in a manner tailored to their needs. Conversely, litigation is a much more structured process and the range of remedies is much more limited. Ultimately, when parties are involved in a dispute, they do not go into it with the attitude that they want the process to be expensive, public, risky, and uncertain. Therefore, ADR provides an appropriate alternative.

VI. Divorce Versus the Dissolution of a Cohabitation Relationship

The suggestion has been made that precedents can be drawn from divorce law when dealing with cohabitation disputes. To evaluate the potential of this suggestion, one must determine how divorce proceedings take place, and how mediation and arbitration fit into the divorce process to determine if similar procedures should be implemented in cohabitation disputes.

A. Divorce Proceedings Generally

Divorce proceedings take place according to state law. Therefore, no standard divorce proceeding is applicable in all states. For example, some states require that every issue be resolved, either through agreement or through trial, prior to the judge granting the divorce. Therefore, divorce comes at the end of the process. Other states do not require that all issues

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169 Id.
170 Main, supra note 84, at 362.
171 Id.
172 Shields, supra note 108, at 5.
173 IHARA, supra note 13, at 5/19–20
174 Main, supra note 84, at 330.
175 Id.
176 Id. at 363.
177 Id. at 356.
178 Id.
179 Paulk, supra note 83, at 864.
180 Id.
181 See generally, Hunter, supra note 17, § 24:10.
182 Ludwig, supra note 67, at 161.
183 Mark E. Sullivan, Understanding Your Divorce: The People, the Processes, the Possibilities, 27 FAM. ADVOC. 4 (2004).
184 Sullivan, supra note 183, at 4.
185 Id.
be resolved prior to granting a divorce; therefore, a judge can grant a divorce before any of the other issues are addressed by the couple. The couple can then address these issues later, either in court or through some other means of dispute resolution. Even if the couple has reached an independent agreement, that agreement will need judicial approval. Most states utilize a system involving family court judges who make decisions for divorcing couples if the couple has not come to an independent agreement. As with court proceedings generally, the judge must adhere to the required formalities and abide by the relevant substantive law.

In addition to handling the dispute in court through the litigation process, a divorcing couple has other available options, such as mediation and arbitration. The divorce process lends itself well to ADR. Divorce typically takes place in an adverse and traumatic environment; mediation and arbitration will help decrease these challenging characteristics of traditional adversarial divorce proceedings. ADR techniques provide a less confrontational setting than divorce litigation and provide parties with the opportunity to take control of the process and make important decisions related to their divorce. ADR also provides the parties with a more flexible option than litigation. Additionally, state courts are oftentimes overwhelmed with petitions filed by couples seeking divorce. Backlogs in state courts result in significant delays in the judicial system; ADR allows the couple to reach an outcome more expeditiously. As a result of these positive characteristics of ADR, some courts mandate the use of mediation or arbitration in divorce proceedings.

B. Divorce Mediation

Divorce mediation is a process that gives the divorcing couple the ability to negotiate their divorce in a cooperative and nonadversarial environment. Mediation focuses on cooperative communication between the parties while formulating a settlement that meets the needs of both. Each state establishes its own criteria and standards for mediation. Some states require that the parties mediate their disputes prior to litigation, some states simply provide court-sponsored mediation programs, and in the majority of states, divorce mediation is a

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186 Id. at 4–5.
187 Id.
188 Id.
189 Id.
189 MARILYN S. MCKNIGHT & STEPHEN K. ERICKSON, MEDIATING DIVORCE: A CLIENT’S WORKBOOK 13 (1999);
191 Imbrogno, supra note 190, at 438.
192 Daniel J. Guttman, Note, For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation, 12 OHIO ST. J. ON DISP. RESOL. 175, 176 (1996).
193 Imbrogno, supra note 190, at 437.
194 Guttman, supra note 192, at 176.
195 Id.
196 Id.
197 Id. at 175.
198 Id.
199 Sullivan, supra note 183, at 4.
202 Id.
voluntary process. Even if a state does not mandate mediation for the parties, the parties can still choose to hire a mediator and negotiate a settlement on their own through the mediation process. The mediation process will ultimately result in a legally binding agreement based on the communication and negotiation between the parties and the settlement they agree to with the assistance of the mediator.

Divorce mediation is similar to mediation in general, but the process does differ in some respects. Divorce mediation can span over a period of days or stretch out over several months. Several sessions may be needed. In a typical first session, the mediator will set forth the process while explaining how he or she is going to assist the parties in reaching an agreement. The focus should be on the future as opposed to dwelling on past issues and problems. The mediator should then go into a discussion on an area that the mediator feels confident that the couple can reach an agreement. A discussion on a resolvable issue will help to break the ice, which will help the couple to open up to cooperating and negotiating with the other party. In future sessions of the mediation process, the parties, with the assistance of the mediator, will continue to tackle the more difficult and complex issues that exist between the parties.

The mediation process results in an agreement sometimes referred to as a Memorandum of Agreement; a Memorandum of Agreement records the decision as agreed upon by the parties. The mediator provides this memorandum to both parties who should take it to their individual attorneys to review. The attorneys then prepare any required legal documents based on the decision as set forth in the memorandum. The attorneys then submit the legal documents to the court so that the court can issue a final decree of divorce.

Divorce mediation provides the parties with control over their personal and private issues. Based on the intimate and personal nature of family problems and concerns, divorce law is an area of the law where it is critical that the parties participate in the settlement process. Settlement processes help to reduce conflict between the parties. Reducing conflict is psychologically beneficial for the parties because the best interests of the parties are at the forefront of the negotiation, decisionmaking, and settlement process. Since the parties control

203 Sullivan, supra note 183, at 9; Guttman, supra note 192, at 180.
204 Sullivan, supra note 183, at 9.
205 BUTLER, supra note 200, at 4.
207 MCKNIGHT, supra note 189, at 13.
208 Id.
209 Id.
210 Id.
211 Id.
212 Id.
213 Id.
214 MCKNIGHT, supra note 189, at 14.
215 Id.
216 Id.
217 Id.
219 Shields, supra note 108, at 5.
220 Id.
221 Cottone, supra note 218, at 9, 11.
the outcome of the mediation, they maintain autonomy over the process and the result. Based on the goals of this process, the divorce mediation should result in an equitable, legally sound, and mutually acceptable settlement without the cost, hostility, and formal structure that the parties would have to contend with if the dispute was litigated.

C. Divorce Arbitration

In addition to mediation, arbitration is another alternative to traditional divorce litigation. In arbitration, a neutral third party makes a determination based on the issues presented. Arbitration is an adjudicative process, like litigation, but is much more flexible. The parties can decide the law, rules, and procedures that will govern the arbitration process. Additionally, arbitration occurs in a more private setting than traditional divorce litigation.

Public policy also favors the use of arbitration. Case law on the use of arbitration in family disputes is unclear based on the various issues involved in such matters, including child support, spousal support, custody, visitation, division of assets and property, and the division of debts. Therefore, courts tend to take a mixed approach to the use of arbitration depending on the issues in dispute. This varied approach has resulted in courts that are not willing to enforce arbitration agreements for child custody and visitation issues, but the same courts may otherwise be willing to uphold agreements to arbitrate spousal support issues.

Despite unclear case law, many commentators still propose arbitration as an alternative to traditional divorce. Arbitration helps to eliminate the overload of cases in the court system, decreases the psychological difficulties that arise in the adversarial divorce litigation process, and may be less expensive and more efficient than traditional adversarial divorce. In addition to commentators’ support of arbitration, the American Arbitration Association has recognized the availability of this option and has created a framework that can be used as a model for divorce disputes that are submitted to arbitration.

The arbitration process begins based on an agreement between the parties to arbitrate their dispute or based upon a court order to arbitrate the dispute depending on the standards set forth by the particular state. Based on the flexibility of this process as compared to traditional litigation, the parties must determine the rules and procedures that will set the foundation for the

222 Thomas D. Vu, Note, Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution With Their Clients, 47 FAM. CT. REV. 586, 590 (2009).
223 Guttman, supra note 192, at 181.
224 Shields, supra note 108, at 5.
225 Sullivan, supra note 183, at 9.
226 Imbrogno, supra note 190, at 415.
227 Id.
228 Shields, supra note 108, at 5.
229 Id.
230 Id., at 425.
231 Id.
232 Id.
233 Guttman, supra note 192, at 182.
234 Id.
235 Id. at 184.
236 Shields, supra note 108, at 5.
arbitration. 237 The parties can set forth the laws and rules that will be utilized by the arbitrator, which means that substantive law and the rules of evidence are not requirements for arbitration. 238 The parties also must choose an arbitrator 239 and present their evidence to the arbitrator. 240 The arbitrator will take that evidence and review it. 241 He or she will then come to a conclusion and formulate a decision. 242 Based on the request of the parties, the decision can come in one of many ways: it can simply be a ruling that resolves the dispute, or it can be a written decision that sets forth the reasoning behind the arbitrator’s decision. 243

Once the arbitrator renders a decision, the parties can respond to the decision in a couple of ways. 244 First, the parties can simply comply with the decision as set forth by the arbitrator. 245 The arbitrator’s decision will then be introduced in the divorce action so that it can be approved by the judge and incorporated into the divorce decree. 246 Conversely, a party can choose to oppose the arbitrator’s decision. 247 In order to take this approach, the opposing party would oppose the arbitrator’s award before the court. 248 Either response requires the court to address the arbitrator’s award to make the ultimate determination.

D. Potential for the Application of Divorce Principles to Cohabitation

Through the insight provided on cohabitation and cohabitation agreements, and that of divorce, differences between these two processes are evident despite their similarities. In terms of the similarities between these two situations, both the dissolution of a cohabiting couples’ relationship and divorce involve deeply emotional and personal issues. 249 These two situations mirror one another in this respect. Additionally, both of these relationships likely involved the intermingling of assets and finances. Lastly, the use of ADR can play an important role in both divorce and dissolution. 250 These situations do share a number of similarities, but practically and legally there are also many differences.

First, divorce involves the application of state law. 251 The protections of state divorce laws do not extend to protect unmarried cohabitants. 252 Therefore, divorcing couples have the option to fall back on divorce law as a means of protecting their interests. 253 A divorcing couple can ultimately choose to rely upon the traditional manner of resolving the breakup of their marriage, adversarial litigation. 254 Cohabiting couples lack this same option. 255 They lack any

237 Imbrogno, supra note 190, at 415.
238 Id.
239 Guttman, supra note 192, at 183.
240 Id.
241 Id.
242 Id.
243 Id.
244 Guttman, supra note 192, at 183.
245 Id.
246 Id.
247 Id.
248 See generally id.
249 See Cottone, supra note 218, at 7; Shields, supra note 108, at 5; see generally Garrison, supra note 11, at 309.
250 Custis, supra note 85, § 9:18; Main, supra note 84, at 330.
251 Butler, supra note 200, at 164.
252 Id.
253 Guttman, supra note 192, at 185.
254 Id.
such opportunity because there is no option for these couples that would allow them to put their trust in the adversarial system; usually, there are no cohabitation laws like there are state laws covering divorce.\textsuperscript{257}

For a cohabiting couple to achieve the same result as state divorce laws provide to married couples, the cohabiting couple needs to establish an agreement that includes a provision specifying that the dispute will be resolved through alternative methods.\textsuperscript{258} Despite the limited legal rights and protections associated with cohabitation, alternative dispute resolution techniques provide the couple with the same ability to establish a result similar, if not identical, to the result reached in divorce proceedings.\textsuperscript{259} Therefore, in the context of divorce, alternative dispute resolution techniques represent a choice that the couple can make to assist them in solving the dispute, whereas cohabiting couples do not have a similar fall back option.\textsuperscript{260} Rather, cohabiting couples have to be proactive, establishing the kind of protection that divorcing couples are guaranteed statutorily.\textsuperscript{261} For example, mediation will provide the cohabiting couple with the ability to negotiate the same terms as divorce provides for a married couple.\textsuperscript{262} These terms simply do not apply otherwise.\textsuperscript{263} Ultimately, the relationship established by the cohabiting couple is contractual while the relationship established through marriage is governed by state statutes.\textsuperscript{264}

In addition to these significant differences, the cohabiting couple has made the conscious choice not to get married. By enforcing divorce law precedents, the court would be imposing requirements on the couple based on a standard that they made the conscious decision to avoid.\textsuperscript{265} Additionally, most states abolished the concept of common law marriage and using divorce law in this capacity essentially would revive the concept of common law marriage.\textsuperscript{266}

Moreover, the problem with trying to fit the dissolution of a cohabitation relationship into the divorce law framework is that divorce law is statutory.\textsuperscript{267} States would have to revise their statutes in order to bring cohabitation into established divorce laws. Revision on such a large scale would be a difficult and expensive burden, making it unlikely that states are going to take on this challenge. Although the public’s view of cohabitation is continuing to become more accepting, public policy arguments against cohabitation still exist.\textsuperscript{268} Furthermore, based on the impact of the large number of divorce filings in already overburdened courts, adding cohabitation under the same framework would further complicate the court system. Therefore, treating cohabitation like divorce will not resolve the problems and issues that arise when a cohabiting couples’ relationship dissolves. As a result, putting an ADR clause in a cohabitation agreement is the most effective way to protect the couple.

\textbf{VII. Conclusion}

\textsuperscript{256} Guttman, supra note 192, at 185.
\textsuperscript{257} BUTLER, supra note 200, at 164, 167.
\textsuperscript{258} Id. at 167.
\textsuperscript{259} Id.
\textsuperscript{260} Id. at 165, 167.
\textsuperscript{261} Id. at 167.
\textsuperscript{262} Id.
\textsuperscript{263} BUTLER, supra note 200, at 167.
\textsuperscript{264} See Ludwig, supra note 67, at 159–60.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} See BUTLER, supra note 200, at 164.
\textsuperscript{268} GOFFE, supra note 40, at 50.
Making the decision to move in with someone you love is the glamorous part of the love story. Sitting down with that person and planning for a breakup or death is the furthest thing from glamorous, but it is necessary. Unmarried couples who decide to live with one another must have a cohabitation agreement. This agreement will protect the individual parties in the event of a breakup or the death of one party. The agreement will also ensure that the parties are aware of exactly what their arrangement entails.

In addition to having a cohabitation agreement, the agreement must have an alternative dispute resolution clause. This clause ensures that a reasonable outcome results from the dispute occurring between the couple. ADR provides the couple with the opportunity to keep their dispute private and confidential. Alternative dispute resolution techniques will also present the parties with more certainty than is guaranteed if the dispute is adjudicated. Cohabitation is an emerging area of the law, and therefore, little precedent is available—furthering the uncertainty of the outcomes of cases and making it difficult to predict the outcome if the dispute is handled in court. Furthermore, divorce law is not an appropriate alternative to a cohabitation agreement containing a dispute resolution clause. Divorce is a creature of statutory law, and cohabitation does not fit into this framework based on the differences between divorce and the dissolution of the cohabitating couples’ relationship. Ultimately, in a world full of uncertainty, love does not always conquer, so cohabiting couples must conquer uncertainty with a cohabitation agreement containing an alternative dispute resolution clause.

269 WARNER, supra note 3, at 14.
270 Id.
271 See generally Winer, supra note 12.
272 See generally Danne, supra note 15; Gordon, supra note 15; Garrison, supra note 11.